

PRACTICE ADVISORIES

AN IN-DEPTH ANALYSIS OF SUBSTANTIVE
AND PROCEDURAL ISSUES IN
IMMIGRATION LAW

November, 2013

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<u>Judicial Review Provisions of The REAL ID Act</u> (June 7, 2005)	659-664

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<u>Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court</u> (April 20, 2005)	665-678

This practice advisory addresses situations in which a court might excuse a late-filed petition for review and discusses other administrative and federal court options for remediating the failure to timely file a petition for review. The advisory also provides an overview of 28 U.S.C. § 1631, which authorizes courts to transfer a case to cure a lack of jurisdiction when an action is filed in the wrong federal court.

<u>Special Immigrant Religious Workers: How to Demonstrate that an Immigrant Seeks Employment in a “Religious Occupation”</u> (September 29, 2004)	679-687

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<u>Failure to Appeal to the AAO: Does It Bar all Federal Court Review of the Case?</u> (July 22, 2004).....	688-697

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<u>ICE’s Detention After Removal Hearing (DAHR) Program: Practical Suggestions and Legal Analysis for Potential Challenges</u> (April 9, 2004)	698-707

This practice advisory provides suggestions for lawyers with clients subject to the ICE’s Detention After Removal Hearing Program (DARH), outlines statutes and regulations governing the detention of respondents subject to DARH, and sets out potential legal challenges.

<u>Objecting to Video Merits Hearings</u> (December 12, 2003)	708-714

This practice advisory discusses the problems arising from the use of video hearings in immigration cases, particularly those in which the respondent’s credibility is at issue. The advisory highlights ways to protect the respondent’s rights and move for in-person hearings where that strategy is beneficial.

PRACTICE ADVISORY¹

November 13, 2013

**MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS:
FIGHTING BACK AGAINST UNLAWFUL CONDUCT
BY U.S. CUSTOMS AND BORDER PROTECTION**

By The Legal Action Center²

Since 9/11, Congressional appropriations for border security have skyrocketed.³ This influx of resources to U.S. Customs and Border Protection (CBP) has corresponded with increased reports of pretextual arrests, racial profiling, excessive use of force, and coercive tactics to aid immigration enforcement along both borders.⁴ Although these enforcement practices often violate the constitutional, statutory or regulatory framework governing the conduct of CBP officers, they are rarely challenged in immigration court.

This practice advisory discusses some of the factual scenarios that may give rise to successful motions to suppress evidence obtained unlawfully by CBP officers, including CBP inspectors stationed at ports of entry and Border Patrol agents, who operate between ports of entry. It also addresses some of the legal issues specific to motions to suppress evidence obtained at and near the border. If successful, a motion to suppress can prevent the government from using unlawfully obtained evidence to prove alienage, which may result in the termination of removal proceedings.

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² The principal authors of this Practice Advisory were Melissa Crow, Director, Legal Action Center, and David Antón Armendáriz, a partner with De Mott, McChesney, Curtright & Armendariz, LLP in San Antonio, Texas. The authors gratefully acknowledge the research assistance of Kirk Cooper, Warren Craig, Celia Figlewski-Hicks, Kristin Macleod-Ball, Ben Winograd, and the New York Civil Liberties Union. Special thanks also go to Jorge Baron, Kate Desormeau, Mo Goldman, James Lyall, Robert Pauw, Chris Rickerd, and Jennifer Rosenbaum, who shared valuable insights and experience during the drafting process.

³ DHS, *Budget in Brief*, Fiscal Year 2005 through Fiscal Year 2014, available at <https://www.dhs.gov/dhs-budget> (noting that CBP's budget grew from \$5.9 billion in FY 2003 to \$11.9 billion in FY 2013).

⁴ See *infra*, note 73.

This advisory supplements a prior LAC practice advisory on [Motions to Suppress in Removal Proceedings: A General Overview](#), which provides a more detailed discussion of the basic principles underlying motions to suppress, as well as information about how to file a motion to suppress. For that reason, those issues are not addressed in detail in this advisory, and practitioners are advised to read this advisory in conjunction with the more general one. For the sake of convenience, the relevant legal standards are summarized below:

- Evidence obtained by CBP may be suppressed if it was obtained through conduct that constitutes an “egregious” or “widespread” violation of the Fourth Amendment, or through conduct that would render use of the evidence “fundamentally unfair” and in violation of an individual’s due process rights under the Fifth Amendment.⁵
- Evidence may also be suppressed if it was obtained in violation of a federal regulation that “serves a purpose of benefit to the alien” and “the violation prejudiced interests of the alien which were protected by the regulation.”⁶
- The law is unsettled regarding whether motions to suppress can be based solely on violations of the Immigration and Nationality Act (INA), but evidence of such violations can be used to bolster arguments that CBP officers have exceeded the scope of their enforcement authority.

Wherever possible, you should allege constitutional, statutory and regulatory violations in a motion to suppress.

I. Legal Framework Governing CBP’s Immigration Enforcement Activities

For purposes of immigration enforcement, CBP has a three-tiered strategy that includes surveillance on the border, traffic checkpoints on highways leading away from the border, and roving patrols within a reasonable distance of the border.⁷ In each of these contexts, CBP’s

⁵ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (plurality op.). See also *Oliva-Ramos v. Attorney General*, 694 F.3d 259, 272, 275 (3d Cir. 2012). For a more comprehensive discussion of these standards, see Legal Action Center, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 6-13

⁶ *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 325 (BIA 1980). See also *United States v. Matter of Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979). Prejudice may be presumed where compliance with a regulation is mandated by the Constitution or where an agency fails to comply with a procedural framework designed to ensure fair processing. *Matter of Garcia-Flores*, 17 I. & N. Dec. at 328-29. For a more comprehensive discussion of this standard, see Legal Action Center, *Motions to Suppress in Removal Proceedings*, at 12-13.

⁷ U.S. CUSTOMS AND BORDER PROTECTION, CBP FISCAL YEAR 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, at 17 (Apr. 2013), available at http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/perform_account_rpt_2013.ctt/perform_account_rpt_2013.pdf.

authority is circumscribed by applicable provisions of the INA and corresponding regulations.⁸ For purposes of motions to suppress in immigration court, the most relevant provisions are:

- INA § 236(a), providing for the arrest and detention with a warrant of any noncitizen subject to removal;
- INA § 287(a), permitting questioning of individuals believed to be noncitizens about their immigration status, warrantless arrests of noncitizens under certain circumstances,⁹ vehicle searches within a reasonable distance of the border, and searches of private lands (excluding dwellings) within twenty-five miles of the border;
- 8 C.F.R. § 287.5, specifying the scope of immigration officers' authority to interrogate and administer oaths, patrol the border, make arrests, conduct searches, execute warrants, and carry firearms; and
- 8 C.F.R. § 287.8, setting forth standards for the use of force, questioning and detention not amounting to arrest, arrests, transportation, vehicular pursuit, and site inspections.

As discussed below, these provisions must be construed in accordance with applicable constitutional protections,¹⁰ which impact CBP's enforcement authority differently depending on the circumstances of a particular encounter.

II. Common Scenarios Involving CBP Enforcement Activity and Potential Fourth Amendment Violations

A. Roving Border Patrols

1. CBP's Authority

"Roving patrols" include vehicle stops and other types of encounters with Border Patrol agents beyond the border and its functional equivalent. For example, Border Patrol agents often question people who have pulled over to the side of the road or stopped at convenience stores, gas stations and other public places. Alleged misconduct by Border Patrol officers during such encounters is the most common basis for motions to suppress involving CBP.

⁸ *United States v. Juvenile Female*, 566 F.3d 943, 948-50 (9th Cir. 2009).

⁹ Three categories of noncitizens are subject to warrantless arrests — those in the act of entering illegally, those who an immigration officer has "reason to believe" are unlawfully present in the United States and likely to escape before arrest warrants can be obtained, and those who are reasonably believed to have committed a felony. INA § 287(a)(1), (3).

¹⁰ *United States v. Brignoni-Ponce*, 422 U.S. 873, 877-78 (1975) (noting that, because "no Act of Congress can authorize a violation of the Constitution," the Fourth Amendment can restrict immigration agents' statutory authority) (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)).

Normally, any vehicle stop constitutes a “seizure” of both the driver and any passengers, whose rights are subject to Fourth Amendment protections.¹¹ However, INA § 287(a)(1), which permits warrantless questioning of any “person believed to be an alien” about his or her immigration status, and INA § 287(a)(3), which, as interpreted by 8 C.F.R. § 287.1(a)(2), permits warrantless vehicle searches within “a reasonable distance,” defined by regulation as 100 air miles,¹² of a U.S. border to prevent illegal entries, arguably give CBP officers greater latitude than the Fourth Amendment in this context. The Supreme Court reconciled this apparent conflict in *U.S. v. Brignoni-Ponce*, which held that, in the context of roving patrols, brief vehicle stops for immigration enforcement purposes must be based on “reasonable suspicion” that an individual is unlawfully present in the United States.¹³ This requirement is codified in 8 C.F.R. 287.8(b)(2), which clarifies that a vehicle stop also may be justified based on reasonable suspicion of involvement in criminal activity:

If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

With respect to roving patrols that do not involve vehicle stops, Border Patrol agents’ authority varies depending on the nature of the encounter. Importantly, admissions during a consensual encounter may not be suppressed.¹⁴ An encounter is consensual if a reasonable person would not feel obligated to comply with the officer’s requests.¹⁵ During a consensual encounter, a law enforcement officer may, without reasonable suspicion, make inquiries about immigration status and other matters,¹⁶ ask to examine an individual’s identification documents,¹⁷ and request consent to search his or her luggage.¹⁸

¹¹ *Brendlin v. California*, 551 U.S. 249, 251 (2007); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

¹² 8 C.F.R. § 287.1(a)(2).

¹³ 422 U.S. at 884. Outside the immigration enforcement context, brief vehicle stops may be justified if a law enforcement officer has reasonable suspicion to believe that “criminal activity may be afoot.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968). See also *United States v. Cortez*, 449 U.S. 411, 417 (1981).

¹⁴ *United States v. Mendenhall*, 446 U.S. 544, 559-60 (1980).

¹⁵ *Brendlin*, 551 U.S. at 255; *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Mendenhall*, 446 U.S. at 553-54.

¹⁶ *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion); *INS v. Delgado*, 466 U.S. 210, 216 (1984); *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1987). See also INA § 287 (a)(1); 8 C.F.R. § 287.8(b)(1).

¹⁷ *Royer*, 460 U.S. at 501; *Delgado*, 466 U.S. at 216; *United States v. Mendenhall*, 446 U.S. at 557-58; *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 n.2 (2d Cir. 2006) (noting that “a simple request for identification may not, without more, constitute a seizure”) (internal citation omitted).

¹⁸ *Royer*, 460 U.S. at 501. For further discussion of “consensual” encounters, see Legal Action Center, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 17-19.

Brief investigatory detentions during which an individual is not free to leave—frequently called “Terry” stops—constitute seizures subject to the Fourth Amendment’s reasonableness requirements.¹⁹ Based on reasonable suspicion of unlawful presence, a Border Patrol agent may briefly detain an individual for questioning.²⁰ Information obtained through such questioning may provide a basis for more prolonged detention, a vehicle search, or the subsequent arrest of a noncitizen, all of which normally require consent or probable cause.²¹ However, an individual’s refusal to respond to questions during a Terry stop does not provide probable cause to arrest.²²

An initially consensual encounter may ripen into an investigative Terry stop requiring reasonable suspicion if a Border Patrol agent, by means of physical force or another display of authority, restrains an individual’s liberty.²³ Examples of conduct indicative of a Terry stop include: the threatening presence of several law enforcement officers, the display of a weapon, physical touching, the prolonged retention of identification or personal belongings, a request to accompany an officer to a separate room, or the use of language or a tone of voice indicating that compliance with a law enforcement officer’s request might be compulsory.²⁴ None of these factors is dispositive, and other evidence demonstrating that an officer has restrained an individual’s liberty also may be relevant.

2. Reasonable suspicion

Reasonable suspicion determinations in the context of roving border patrol stops are highly fact-driven.²⁵ Indeed, the Supreme Court has cautioned that “because the mosaic which is analyzed for a reasonable-suspicion or probable cause inquiry is multi-faceted, one determination will

¹⁹ See *Terry*, 392 U.S. at 16-20. Even a brief intrusion to determine identity is a seizure if a person’s freedom is restrained. *Id.* at 16 (“whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”); cf. *United States v. Drayton*, 536 U.S. 194, 200 (2002) (a police officer’s request for identification is not a seizure if “a reasonable person would feel free to terminate the encounter”).

²⁰ *Brignoni-Ponce*, 422 U.S. at 881-82. See also *United States v. Sugrim*, 732 F.2d 25, 30 (2d Cir. 1984). With respect to the permissible length of such detentions, the Supreme Court’s holding in *Brignoni-Ponce* was based on the government’s assurance that a roving border patrol stop usually lasts “no more than a minute.” 422 U.S. at 880.

²¹ *Brignoni-Ponce*, 422 U.S. at 882; *Almeida-Sanchez*, 413 U.S. 266, 269-70 (1973). See also *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971) (noting that for purposes of arrests under INA § 287(a), “reason to believe” is analogous to probable cause); *U.S. v. Sanchez*, 635 F.2d 47, 63 n.13 (2d Cir. 1980).

²² *Royer*, 460 U.S. at 498. For further discussion of Terry stops, see Legal Action Center, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 19-20.

²³ *Delgado*, 466 U.S. at 215.

²⁴ *Mendenhall*, 446 U.S. at 554. See also *Benitez-Mendez v. INS*, 760 F.2d 907, 908-09 (9th Cir. 1983).

²⁵ See, e.g., *United States v. Lopez-Martinez*, 25 F.3d 1481 (10th Cir. 1994); *United States v. Gutierrez-Orozco*, 191 F.3d 578 (5th Cir. 1999); *United States v. Espinoza*, 490 F.3d 41 (1st Cir. 2007).

seldom be useful precedent for another.”²⁶ In a recent unpublished decision, the BIA found that Border Patrol agents lacked reasonable suspicion when they stopped a car solely because they “‘smelled’ undocumented aliens.”²⁷ However, such determinations are rarely so clear-cut.

In making a reasonable suspicion inquiry, a court “must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.”²⁸ Under *Brignoni-Ponce*, relevant factors include the characteristics of the area, its proximity to the border, usual traffic patterns on the road, previous law enforcement experience with noncitizen traffic in the area, recent information about nearby illegal border crossings, the driver’s behavior, appearance of the vehicle, the number of passengers, or such aspects of their appearance as dress and haircut.²⁹ Officers are permitted to draw conclusions based on their experience and specialized training, which may lead them to analyze information differently than an untrained observer.³⁰ An occupant’s apparent race or ethnicity cannot be the sole basis for a stop and in some places cannot even be considered as a factor.³¹

3. Egregious Violations of the Fourth Amendment

In the decades since *Brignoni-Ponce* was decided, a significant body of case law has addressed the question of when a Border Patrol agent on roving patrol has sufficient reasonable suspicion to justify a vehicle stop without committing an egregious violation of the Fourth Amendment.³²

²⁶ *Ornelas v. United States*, 517 U.S. 690, 698 (1996) (internal quotation marks and citations omitted).

²⁷ *In re Enrique Soto-Garcia*, No. A087 534 842, 2013 WL 2610074, at *2-4 (BIA May 7, 2013) (unpublished).

²⁸ *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted).

²⁹ *Brignoni-Ponce*, 422 U.S. at 884-85.

³⁰ *Arvizu*, 534 U.S. at 273. See also *United States v. Quintana-Garcia*, 343 F.3d 1266, 1270 (10th Cir. 2003) (noting that determination whether an investigatory stop is supported by reasonable suspicion is “made from the perspective of the reasonable *officer*, not the reasonable *person*”).

³¹ *Brignoni-Ponce*, 422 U.S. at 885-86. See also *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) (rejecting Hispanic appearance as a relevant factor in assessing reasonable suspicion given the large number of people who share this characteristic); *United States v. Manzo-Jurado*, 457 F.3d 928, 940 (9th Cir. 2006) (Border Patrol agents had no reasonable suspicion to question “a group of Hispanic-looking men, who appeared to be in a work crew, calmly conversing in Spanish to each other” in a parking lot of a football stadium near the Canadian border). For further discussion of the types of conduct that can give rise to reasonable suspicion of unlawful activity, see Legal Action Center, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 16-17.

³² See, e.g., *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236-37 (2d Cir. 2006) (finding convenience store parking lot seizure by Border Patrol agent in violation of Fourth Amendment but denying motion to suppress in removal case because respondent offered no evidence that stop was race-based); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451-52 (9th Cir. 1994) (finding a

Motions to suppress often allege that race or ethnicity were the sole basis for such stops. Typically, Border Patrol agents downplay their reliance on race and instead justify vehicle stops principally on the basis of the appearance and comportment of the driver and passengers. However, many courts have discounted such explanations in assessing reasonable suspicion for suppression purposes.³³ Courts tend to accord greater deference to agents' explanations and greater evidentiary weight to their claimed experience for stops that are closer to the border.

A motion to suppress based on unlawful conduct in the context of a roving patrol also may allege a violation of 8 C.F.R. § 287.8(c)(2)(i). This regulation provides that an arrest may be made "only when the designated immigration officer has reason to believe that the person arrested has committed an offense against the United States or is an alien illegally in the United States." To succeed on a motion to suppress based on a violation of a regulation (such as this one), the individual must prove that the regulation was intended to protect noncitizens and that his or her interests were prejudiced as a result.³⁴

4. Border Patrol and Traffic Stops

Border Patrol agents lack authority to stop drivers for perceived violations of state traffic laws. As the Supreme Court acknowledged in *Brignoni-Ponce*:

Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways.³⁵

vehicle stop solely on the basis of race to be an egregious Fourth Amendment violation that warranted suppression).

³³ See, e.g., *United States v. Hernandez-Mandujano*, 721 F.3d 345, 349-50 (5th Cir. 2013) (finding no reasonable suspicion for stop by experienced Border Patrol agent on "a major corridor for illegal alien-smuggling" where driver's posture was not relaxed; driver slowed down, stopped talking and failed to make eye contact when passing Border Patrol; vehicle was an SUV; and stop occurred 450 miles from the border); *United States v. Rangel-Portillo*, 586 F.3d 376, 381 (5th Cir. 2009) (finding no meaningful weight should be given, within the reasonable suspicion analysis, to whether passengers wore seatbelts, sat rigidly, or refrained from conversing with one another as they exited a Wal-Mart parking lot); *Gonzalez-Rivera*, 22 F.3d at 1446-47 (rejecting Border Patrol agent's assertion that he had reasonable suspicion of unlawful presence based on driver's failure to make eye contact, dry mouth, and Hispanic appearance); *United States v. Rodriguez*, 976 F.2d 592, 594-95 (9th Cir. 1992) (no reasonable suspicion where driver, a Hispanic male, failed to acknowledge Border Patrol agents' vehicle but looked at them several times in his rear view mirror, vehicle appeared to be heavily loaded, and highway was a common smuggling route); *United States v. Peters*, 10 F.3d 1517, 1522 (10th Cir. 1993) (INS agent's assertion that driver "was visibly nervous" based on his "gripping the wheel tightly and looking straight ahead at the road" does not establish reasonable suspicion).

³⁴ See *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 328-29 (BIA 1980). For further discussion of motions to suppress based on violations of federal regulations, see Legal Action Center, [*Motions to Suppress in Removal Proceedings: A General Overview*](#), at 12-13.

³⁵ 422 U.S. at 883 n.8.

Therefore, state traffic law violations cannot alone justify a CBP roving patrol stop.³⁶ However, some courts have found that erratic driving in an evasive manner may support a reasonable suspicion of an immigration law violation and thereby justify a traffic stop.³⁷

B. Bus and Train Sweeps

Bus and train sweeps beyond the immediate vicinity of the border are often considered to be consensual encounters, and thus not seizures subject to Fourth Amendment protections, even though they involve questioning by law enforcement officers in a confined space.³⁸ Even in situations where an individual's freedom of movement is restricted by a factor independent of the conduct of law enforcement officers — such as being on a bus or train—the relevant inquiry is “whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter.”³⁹ Officers are not obligated to inform passengers of their rights, and their failure to do so does not transform a bus sweep into an unlawful seizure.⁴⁰

If questioning by Border Patrol agents during a bus or train sweep involves coercion, the encounter may be construed as a seizure subject to Fourth Amendment protections. However,

³⁶ See, e.g., *United States v. Rodriguez-Rivas*, 151 F.3d 377, 381 (5th Cir. 1998) (holding that a traffic infraction did not give a Border Patrol agent reasonable suspicion to stop a vehicle); *United States v. Valdes-Vega*, 685 F.3d 1138, 1145 & n.6 (9th Cir. 2012) (noting that Border Patrol agents have no authority to enforce California traffic laws and holding that erratic driving did not give rise to reasonable suspicion of smuggling). But see *United States v. Sealed Juvenile 1*, 255 F.3d 213, 219 (5th Cir. 2001) (Customs agent authorized under Texas' citizen's arrest statute to stop a vehicle for traffic violations that rise to the level of breaching the peace, but cannot detain someone for a mere violation of traffic law).

³⁷ See, e.g., *Brignoni-Ponce*, 422 U.S. at 885 (“The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion.”); *United States v. Bautista-Silva*, 567 F.3d 1266, 1274 (11th Cir. 2009) (driver's erratic driving supported a Border Patrol agent's reasonable suspicion that the vehicle contained unlawfully present noncitizens); *United States v. Diaz-Juarez*, 299 F.3d 1138, 1142-43 (9th Cir. 2002) (upholding stop in part due to driver's unusual driving behavior).

³⁸ *Bostick*, 501 U.S. at 435-440 (striking down a Florida Supreme Court ruling that all warrantless bus sweeps constituted impermissible seizures). See also *United States v. Angulo-Guerrero*, 328 F.3d 449, 451 (8th Cir. 2003) (affirming denial of motion to suppress noncitizen's statement that he was unlawfully present and finding there had been no seizure for the purposes of the Fourth Amendment when there was “simply no evidence that passengers would be detained if they refused to answer [the agent's] questions”); cf. *United States v. Barbera*, 514 F.2d 294, 296 (2d Cir. 1975) (affirming grant of motion to suppress by Italian citizen taken off bus after he failed to respond to Border Patrol agent's questions regarding his citizenship at location not qualifying as functional equivalent of border).

³⁹ *Bostick*, 501 U.S. at 436. See also *Mendenhall*, 446 U.S. 544.

⁴⁰ *United States v. Drayton*, 536 U.S. 194, 207 (2002) (holding that a police officer is not required to inform bus passengers of their right to refuse a search).

the evidentiary threshold required to establish that a seizure occurred is quite high. Courts have found that the following situations do not constitute seizures:

- Border Patrol agent questions a seated passenger from the aisle of a bus, even where two different agents ask the same question.⁴¹
- Agent orders person to disembark from a bus and claim luggage, under the guise of being a Greyhound employee, as long as the officer does not “demand, intimidate, threaten, or use force against” passengers.⁴²
- Border Patrol agent’s holstered gun is not likely to transform an encounter into a seizure unless he draws it, on the theory that the public knows that most law enforcement officers are armed.⁴³

Given the broad latitude accorded to Border Patrol agents during bus and train sweeps, only explicitly threatening language or conduct likely will render an interaction nonconsensual. If an interaction involved a show of force, inappropriate physical touching, or prolonged detention, it might be sufficiently egregious to warrant suppression in removal proceedings.

A motion to suppress also might succeed if a seizure during a bus sweep was prompted by bare racial animus. However, the line between impermissible racial profiling and permissible mixed-motive suspicion is unclear and at times hypertechnical.⁴⁴

C. Encounters with Pedestrians

As previously discussed, admissions made during a consensual encounter with a Border Patrol agent cannot be suppressed.⁴⁵ However, you may be able to establish a Fourth Amendment violation if a Border Patrol agent restrained your client’s freedom to walk away or took other action that would make a reasonable person feel obligated to stay and respond. In this case, the stop would constitute an investigative detention requiring reasonable suspicion of unlawful presence or criminal activity.⁴⁶ The *Brignoni-Ponce* factors apply, and reasonable suspicion

⁴¹ *United States v. Mendieta-Garza*, 254 Fed. App’x 307, 313 (5th Cir. 2007) (unpublished) (noting that the fact that a second officer “‘took another run’ at [the defendant] makes this a close case” (citation omitted)).

⁴² *United States v. Ojeda-Ramos*, 455 F.3d 1178, 1183-84 (10th Cir. 2006).

⁴³ *Drayton*, 536 U.S. at 204-05. *See also Bostick*, 501 U.S. at 432.

⁴⁴ *See, e.g., Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131-32 (2d Cir. 2008) (denying motion to suppress based on immigration officers’ questioning at JFK airport of domestic passengers with a “Mestizo physical appearance” on the basis that the encounters were consensual).

⁴⁵ *See supra*, notes 14-18.

⁴⁶ *See supra*, notes 19-24.

cannot be based exclusively on race or ethnicity.⁴⁷ Moreover, if an officer observes a pedestrian entering a home, the officer must generally obtain a warrant or consent to enter the home.⁴⁸

Remember that a Fourth Amendment violation must be “egregious” or “widespread” to warrant the exclusion of evidence in removal proceedings. Courts’ definitions of egregiousness vary, with some requiring aggravating circumstances⁴⁹ and others requiring only conduct that a reasonable officer would have known to be lawful.⁵⁰

You should also consider arguing that a pedestrian encounter violated 8 C.F.R. § 287.8(b), which limits interrogations and seizures not amounting to arrest. As noted above, regulatory violations need not be egregious to warrant suppression, but you must show that the regulation was promulgated to benefit noncitizens and that the violation actually prejudiced interests protected by the regulation.

D. At the Border

CBP officers have broad authority at the border, which makes motions to suppress evidence obtained there very difficult. Routine stops and searches of persons and vehicles seeking entry to the United States are considered reasonable *per se* under the Fourth Amendment.⁵¹ Thus, CBP officers need not obtain a warrant or have reason to suspect a traveler is involved in illegal activity before conducting a routine stop or search at the border, which may include questioning about alienage and an individual’s right to enter the United States.⁵² However, border searches conducted in a particularly offensive manner — such as intrusive body cavity searches or strip searches — may still be subject to challenge under the Fourth Amendment,⁵³ and reasonable

⁴⁷ See *supra*, notes 28-31.

⁴⁸ See Legal Action Center, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 21-23; cf. *U.S. v. Perea-Rey*, 680 F.3d 1179, 1185-87 (9th Cir. 2012); *U.S. v. Troop*, 514 F.3d 405, 409 (5th Cir. 2008).

⁴⁹ *Almeida-Amaral*, 461 F.3d at 235-36; *Carcamo v. Holder*, 713 F.3d 916, 922-24 (8th Cir. 2013).

⁵⁰ *Gonzalez-Rivera*, 22 F.3d at 1449.

⁵¹ *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (“Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (“Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . .”).

⁵² *Ramsey*, 431 U.S. at 619. The border search exception to the Fourth Amendment is grounded in the government’s recognized right to control who and what may enter the United States. *Id.* at 620.

⁵³ *Ramsey*, 431 U.S. at 618 n.13; *Montoya de Hernandez*, 473 U.S. at 540 n.3. See also *United States v. Irving*, 452 F.3d 110, 123 (2d Cir. 2006) (stating that reasonable suspicion would be necessary for a more invasive search, such as a strip search); *United States v. Whitted*, 541 F.3d 480, 485-86 (3d Cir. 2008) (contrasting “routine” “patdowns, frisks, luggage searches, and

suspicion is required to detain a traveler at the border beyond the scope of a routine stop or search.⁵⁴ There is no clear authority on how long a person can be detained before being arrested or released.⁵⁵

Similar rules apply at the “functional equivalent” of the border, which includes fixed checkpoints near the border, intersections of two or more roads leading directly from the border, and international airports.⁵⁶ To justify searches at checkpoints or other locations considered the functional equivalent of the border, the government must show with “reasonable certainty” that the traffic in that area is primarily international and intercepts no more than a negligible number of domestic travelers.⁵⁷

E. Checkpoints

CBP is authorized to operate checkpoints on roads leading away from the border to stem the flow of undocumented immigrants.⁵⁸ Even without individualized reasonable suspicion or a warrant, Border Patrol agents may conduct brief vehicle stops at fixed checkpoints to question the driver or passengers about their immigration status, request documents, or conduct a visual inspection of a car.⁵⁹ They may also selectively refer individuals for secondary inspection, including on the basis of apparent Mexican ancestry.⁶⁰

automobile searches” with “non-routine” “body cavity searches, strip searches, and x-ray examinations” that require reasonable suspicion).

⁵⁴ *Montoya de Hernandez*, 473 U.S. at 541-42 (requiring a “particularized and objective basis for suspecting the particular person” of illegal activity) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

⁵⁵ *Id.* at 543 (noting that the Court has “consistently rejected hard-and-fast time limits,” on length of detention and instead held that “common sense and ordinary human experience must govern over rigid criteria.”) (quoting *U.S. v. Sharpe*, 470 U.S. 675, 685 (1985)).

⁵⁶ *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). See also CBP INSPECTOR’S FIELD MANUAL (2006), § 18.6(c) (defining the functional equivalent of the border to exclude a location with “a mixture of domestic traffic with . . . international traffic”).

⁵⁷ *United States v. Jackson*, 825 F.2d 853, 860 (5th Cir. 1987) (en banc). See also *United States v. Santiago*, 837 F.2d 1545, 1548 (11th Cir. 1988) (requiring “reasonable certainty that the border was crossed” when determining whether a search took place at the functional equivalent of the border).

⁵⁸ *United States v. Martinez-Fuerte*, 428 U.S. 543, 545, 558-59 (1976) (noting that courts have deemed seizures at fixed checkpoints to be less intrusive than roving patrols because travelers are less likely to be taken by surprise). See also *United States v. Payan*, 905 F.2d 1376, 1378 (10th Cir. 1990) (applying the same constitutional standard to temporary checkpoints on the theory that “permanence of the physical structure is not required”) (internal quotation marks omitted).

⁵⁹ *Martinez-Fuerte*, 428 U.S. at 562-63, 566. See also *Melnitsenko v. Mukasey*, 517 F.3d 42, 47-48 (2d Cir. 2010) (finding no egregious violation where petitioner was stopped at a Border Patrol checkpoint and questioned for approximately three hours, although not deciding whether the seizure was a Fourth Amendment violation); *United States v. Garcia*, 616 F.2d 210, 211-12 (5th Cir. 1980) (“It is clear that, at permanent checkpoints, stopping and questioning and referral of motorists to a secondary inspection area are permissible under the Fourth Amendment, even in

As in the context of roving border patrols, CBP officers cannot prolong a stop beyond brief questioning or conduct a warrantless vehicle search without consent or probable cause to believe that a car contains unlawfully present immigrants or contraband.⁶¹ Factors that may be considered in deciding whether there is probable cause to search a particular vehicle include the number of occupants, their appearance and behavior, their ability to speak English, their responses to a CBP officer's questions, the type of vehicle, and "indications that it may be heavily loaded."⁶² The government has the burden of proof that consent was given freely and voluntarily.⁶³ If the government fails to sustain its burden of proof, you can establish a threshold Fourth Amendment violation. However, aggravating circumstances may be necessary to convince a court to grant a motion to suppress based on an egregious Fourth Amendment violation.

F. Beyond the 100-Mile Limit

CBP's statutory authority to conduct searches of vehicles, vessels, railway cars, aircraft, and other conveyances must be carried out within a reasonable distance of the border. A "reasonable distance" is defined by regulation to mean "within 100 air miles from any external boundary of the United States."⁶⁴

As the Supreme Court has recognized, even roads that are proximate to the border "carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well."⁶⁵ Thus, proximity to the border, while significant, is one of many factors to be evaluated in determining whether a stop was based on reasonable suspicion.⁶⁶ In cases where the stop

the absence of any individualized suspicion, much less probable cause."); *United States v. Rascon-Ortiz*, 994 F.2d 749, 753-55 (10th Cir. 1993) (noting that a Border Patrol agent may ask a few additional questions during the course of a routine inspection where "suspicious circumstances" exist).

⁶⁰ *Martinez-Fuerte*, 428 U.S. at 563-64.

⁶¹ *United States v. Ortiz*, 422 U.S. 891, 896-97 (1975); *Martinez-Fuerte*, 428 U.S. at 567.

⁶² *Ortiz*, 422 U.S. at 897.

⁶³ See, e.g., *Royer*, 460 U.S. at 497 (noting that government must show more than "mere submission to a claim of lawful authority"); cf. *United States v. Bews*, 715 F. Supp. 1206, 1212 (W.D.N.Y. 1989) (holding that consent was not freely given where agents held defendant's identification, defendant was unfamiliar with U.S. law, and defendant was unlawfully detained at the time of consent).

⁶⁴ See 8 C.F.R. § 287.1(a)(2) (interpreting the "reasonable distance" requirement in INA § 287(a)(3)).

⁶⁵ *Brignoni-Ponce*, 422 U.S. at 882.

⁶⁶ See, e.g., *United States v. Gutierrez-Orozco*, 191 F.3d 578, 581-83 (5th Cir. 1999) (finding that the *Brignoni-Ponce* factors apply beyond the 100-mile limit and that a stop more than 200 miles from the border was based on reasonable suspicion); *United States v. Olivares-Pacheco*, 633 F.3d 399, 402-05, 409 (5th Cir. 2011) (reversing denial of suppression motion because, considering all *Brignoni-Ponce* factors, Border Patrol agent did not have reasonable suspicion for a stop over 200 miles from the border); *United States v. Valdes-Vega*, 685 F.3d 1138, 1147-

occurred far enough from the border to preclude an inference that the trip originated outside the country, the Fifth Circuit views other factors with heightened scrutiny.⁶⁷ Proximity to the border is of limited value where the border is itself in close proximity to a metropolitan area, or even smaller but densely populated cities.⁶⁸

The only other explicit geographical limitation on CBP's immigration enforcement authority is that an immigration officer may, within twenty-five miles of the border, have warrantless "access to private lands, but not dwellings" to prevent unlawful entries.⁶⁹ Under the Fourth Amendment, however, law enforcement officers must have consent or a warrant not only to enter a home, but also to enter the immediately surrounding area, which is known as "curtilage."⁷⁰ Thus, unauthorized CBP activity within a home or its curtilage may provide a viable basis for a motion to suppress.

III. Widespread Fourth Amendment Violations

The Supreme Court has suggested that the Court's conclusions about the application of the exclusionary rule in civil immigration proceedings might change if Fourth Amendment violations by immigration officers became "widespread."⁷¹ Recently, the Third Circuit addressed the possibility of excluding evidence based on widespread violations in *Oliva-Ramos v. Attorney General*. The court remanded to enable the Petitioners to present additional evidence of such violations, suggesting that, if substantiated, their allegations could warrant suppression of evidence based on egregious and widespread violations.⁷² However, *Oliva-Ramos* is, as of yet, a unique decision, and we caution against moving to suppress evidence solely on this basis. Although both CBP and ICE have committed such violations with increasing frequency in recent

48 (9th Cir. 2012) (finding that a driver of a pickup truck with a Mexican license plate who committed a traffic infraction 70 miles north of U.S.-Mexico border and failed to look a Border Patrol agent in the eyes did not fit a category narrow enough to justify reasonable suspicion of smuggling).

⁶⁷ *United States v. Rico-Soto*, 690 F.3d 376, 380 (5th Cir. 2012) (examining other *Brignoni-Ponce* factors "charily" when stop occurred more than fifty miles from the border).

⁶⁸ *United States v. Sigmond-Ballesteros*, 285 F.3d at 1125-26 (9th Cir. 2002); *United States v. Venzor-Castillo*, 991 F.2d 634, 639-40 (10th Cir. 1993).

⁶⁹ INA § 287(a)(3).

⁷⁰ This is memorialized by regulation, see 8 C.F.R. § 287.8(f)(2), and reflected in case law. See *United States v. Romero-Bustamente*, 337 F.3d 1104, 1108-09 (9th Cir. 2003) (rejecting as absurd a reading of INA § 287(a)(3) that granted CBP unlimited warrantless search authority because Congress could not have intended to provide "agents the unchecked ability to enter every backyard in metropolitan San Diego, Detroit, Buffalo, and El Paso, all of which are well within twenty-five miles of external borders of the United States"); *United States v. Castellanos*, 518 F.3d 965, 971-72 (8th Cir. 2008).

⁷¹ *Lopez-Mendoza*, 468 U.S. at 1050. See also *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006) (recognizing the exception for widespread violations).

⁷² *Oliva-Ramos v. Attorney General*, 694 F.3d 259, 279-82 (3d Cir. 2012).

years,⁷³ the authors are not aware of any decisions granting motions to suppress on this basis alone.

Nonetheless, we encourage attorneys to make arguments based on the prevalence of Fourth Amendment violations at the local, regional or national level. In the context of roving border patrols, for example, some attorneys have sought to establish a widespread pattern of investigatory stops and detentions of individuals without the requisite “reasonable suspicion” under the Fourth Amendment. Such allegations should be thoroughly documented with reports, declarations from other individuals subjected to similar treatment, or other evidence.⁷⁴

IV. Suppression of Evidence Under the Fifth Amendment

An immigration judge may suppress evidence under the Fifth Amendment if the manner of seizing the evidence was “so egregious that to rely on it would offend the [F]ifth [A]mendment’s due process requirement of fundamental fairness.”⁷⁵ Even where CBP conduct is not egregious,

⁷³ See THE CENTER FOR LATIN AMERICAN STUDIES, UNIVERSITY OF ARIZONA, IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY 23-27 (2013), available at http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013print.pdf; KINO BORDER INITIATIVE, DOCUMENTED FAILURES: THE CONSEQUENCES OF IMMIGRATION POLICY ON THE U.S.-MEXICO BORDER (February 2013), available at http://www.jesuit.org/jesuits/wp-content/uploads/Kino_FULL-REPORT_web.pdf; AMNESTY INT’L, IN HOSTILE TERRAIN: HUMAN RIGHTS VIOLATIONS IN IMMIGRATION ENFORCEMENT IN THE U.S. SOUTHWEST 34–41 (2012), available at <http://www.amnesty.org/en/library/asset/AMR51/018/2012/en/4905b8cd-8d5b-41b9-a301-3121fca2e1cd/amr510182012en.pdf>. NO MORE DEATHS, A CULTURE OF CRUELTY: ABUSE AND IMPUNITY IN SHORT-TERM U.S. BORDER PATROL CUSTODY 42–46 (2011), available at <http://www.nomoredeaths.org/Download-document/173-A-Culture-of-Cruelty-English.html>; ONEAMERICA, THE GROWING HUMAN RIGHTS CRISIS ALONG WASHINGTON’S NORTHERN BORDER 11–13 (Apr. 2012), available at https://www.weareoneamerica.org/sites/weareoneamerica.org/files/REPORT_northernborder-FINAL.pdf; NEW YORK CIVIL LIBERTIES UNION, JUSTICE DERAILED: WHAT RAIDS ON NEW YORK’S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL’S INTERIOR ENFORCEMENT PRACTICES 18–20 (Nov. 2011), available at http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf. *supra* note 4; see also Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wisc. L. J. 1109 (2009), available at http://hosted.law.wisc.edu/lawreview/issues/2008_6/2_-_elias.pdf.

⁷⁴ For further discussion of motions to suppress based on widespread Fourth Amendment violations, see Legal Action Center, [*Motions to Suppress in Removal Proceedings: A General Overview*](#), at 11-12.

⁷⁵ *Matter of Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980).

the Fifth Amendment may require suppression of evidence if officers' actions "undermined the reliability of evidence in dispute."⁷⁶

The Due Process Clause of the Fifth Amendment applies to interrogations in primary and secondary inspection, among other contexts. Motions to suppress under the Fifth Amendment often focus on whether confessions were involuntary or coerced, which would preclude their use in subsequent removal proceedings.⁷⁷

An involuntary or coerced confession could also give rise to a separate argument for suppression based on a violation 8 C.F.R. § 287.8(c)(2)(vii), which prohibits the use of threats, coercion, or physical abuse to induce an individual to waive rights or make a statement. As discussed previously, suppression will be granted only if the regulatory violation prejudiced the rights of a noncitizen that the regulation was intended to protect.⁷⁸

The BIA has not issued any published decisions granting motions to suppress based on alleged Fifth Amendment or related regulatory violations by CBP. However, in a set of unpublished decisions, the BIA found that suppression of coerced confessions made to CBP was appropriate under the Fifth Amendment, where minors were detained, prevented from contacting their parents or attorneys, then interrogated and threatened with deportation for nine hours.⁷⁹

⁷⁶ *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009) (quoting *Almeida-Amaral*, 461 F.3d at 235). For further discussion of motions to suppress based on violations of the Fifth Amendment, see Legal Action Center, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 24-27.

⁷⁷ See *Singh*, 553 F.3d at 215-16 (finding that statements made to CBP were unreliable and should have been suppressed where officers held an individual in custody in an area with armed, uniformed guards for at least four hours in the middle of the night and pressured him with threats of imprisonment, among other factors); *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (respondent made prima facie showing that admissions were given involuntarily and the government presented no contrary evidence; proceedings terminated). See also *Navia-Duran v. INS*, 568 F.2d 803, 810 (1st Cir. 1977) (quoting *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960) ("Expulsion cannot turn upon utterances cudged from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.")). But see *Gonzaga-Ortega v. Holder*, 694 F.3d 1069, 1072, 1076 (9th Cir. 2012), *amended and superseded by* 2013 WL 5198549 (9th Cir. 2013) (affirming denial of motion to suppress based on alleged Fifth Amendment violation where respondent was detained in secondary inspection for approximately 28 hours, fed only twice, prevented from contacting anyone outside the facility, and not informed of right to retain counsel or that his statements could be used against him in subsequent proceedings).

⁷⁸ For further discussion of motions to suppress based on regulatory violations, see Legal Action Center, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 24-27.

⁷⁹ See *Oscar J. Corona*, A095-422-301, 2006 Immig. Rptr. LEXIS 7854, *3-*5 (BIA Nov. 29, 2006); *Jaime H. Damian*, A095-422-307, 2006 Immig. Rptr. LEXIS 7890, *3-*5 (BIA Nov. 29, 2006); *Yuliana Huicochea*, A095-422-308, 2006 Immig. Rptr. LEXIS 8420, *3-*5 (BIA Nov. 29, 2006); *Luis Miguel Nava*, A095-422-302, 2006 Immig. Rptr. LEXIS 8918, *3-*5 (BIA Nov. 29, 2006).

Under current case law, immigration courts are unlikely to suppress statements even if individuals were not informed of their right to counsel, the reasons for their arrest, or that their statements can be used against them. Unlike in criminal cases, the failure to provide *Miranda* warnings prior to interrogations does not render subsequent statements inadmissible in removal proceedings.⁸⁰ 8 C.F.R. § 287.3(c) does require immigration officers to provide similar advisals, but the BIA has held that they need not be provided until after a Notice to Appear has been filed with the immigration court.⁸¹ The Ninth Circuit has reached the same conclusion.⁸² Notwithstanding these decisions, an argument exists that the advisals in 8 C.F.R. § 287.3(c) must be given *prior to* questioning suspects arrested without a warrant,⁸³ and attorneys may therefore wish to preserve this objection for future appellate challenges.⁸⁴ However, claims for clients at the border are complicated by 8 C.F.R. § 292.5(b), which excludes applicants for admission in primary or secondary inspection from the right to counsel in immigration examinations, unless they have become the focus of a criminal investigation and are in custody.⁸⁵

⁸⁰ *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975); *Matter of Rojas*, 15 I. & N. Dec. 722, 724 (BIA 1976).

⁸¹ *Matter of E-R-M-F-*, 25 I. & N. Dec. 580, 584-85 (BIA 2011).

⁸² *Samayoa-Martinez v. Holder*, 558 F.3d 897, 901–02 (9th Cir. 2009).

⁸³ See also 8 C.F.R. § 287.8(c) (iii) (requiring that, at the time of arrest, an immigration officer must “[s]tate that the person is under arrest and the reason for the arrest”).

⁸⁴ For further discussion of 8 C.F.R. § 287.3(c), see Legal Action Center, *Challenging Matter of E-R-M-F- & A-S-M-: Warrantless Arrests and the Timing of Right to Counsel Advisals*.

⁸⁵ See *id.* at 6-7.

PRACTICE ADVISORY⁸⁶
Updated November 13, 2013

**MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS:
A GENERAL OVERVIEW**

By The Legal Action Center⁸⁷

“Every INS agent knows, therefore, that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding.”

INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984)

This practice advisory discusses issues, strategies, and procedures relating to the filing of motions to suppress in removal proceedings. Long used in criminal trials, motions to suppress seek to exclude evidence obtained in violation of an individual’s constitutional or other legal rights. Though federal immigration officers often disregard the rights of noncitizens, legal and practical obstacles prevent many respondents in removal proceedings from challenging the manner in which they were arrested. More frequent use of motions to suppress will help protect the rights of noncitizens, promote greater accountability by law enforcement officers, and result in the termination of proceedings in some cases.

Part I of this practice advisory discusses basic principles underlying motions to suppress. Part II addresses motions to suppress evidence obtained in violation of the Fourth Amendment and related provisions of federal law. Part III discusses motions to suppress evidence obtained in violation of the Due Process Clause of the Fifth Amendment and related provisions of federal law. Finally, Part IV discusses the procedures for filing motions to suppress.

This practice advisory focuses on misconduct by federal immigration officers. It does not discuss unique issues relating to misconduct committed by, or resulting from cooperation with,

⁸⁶ Copyright (c) 2011 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. The cases cited herein are examples only and do not constitute an exhaustive search of relevant case law in all jurisdictions.

⁸⁷ The Legal Action Center thanks Matthew Price, Jenner & Block LLP, Celia Figlewski Hicks, and David Antón Armendáriz for their assistance in updating this practice advisory. Ben Winograd was the principal author of the original version, which Mary Kenney and Melissa Crow assisted in drafting. Rex Chen, Matthew Guadagno, Dan Kesselbrenner, and Michael Wishnie provided helpful comments during the writing process. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

state and local law enforcement officers.⁸⁸ Nor does it discuss misconduct by U.S. Customs and Border Protection (CBP) officers, which will be addressed in a forthcoming LAC practice advisory.

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⁸⁸ See Legal Action Center, *Motions to Suppress in Removal Proceedings: Cracking Down on Fourth Amendment Violations by State and Local Law Enforcement Officers* (August 2013).

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Part I: Basic Principles of a Motion to Suppress

Q: What is a motion to suppress?

A: A motion to suppress seeks to prohibit the use of evidence unlawfully obtained by the government, a remedy available under a principle known as the “exclusionary rule.” Motions to suppress attack the methods the government uses to *obtain* evidence. They are distinct from objections to the manner in which a party *presents* evidence, such as asking a leading question on direct examination. The purpose of a motion to suppress is to prevent the government from meeting its burden of proof. If successful, it may result in the termination of removal proceedings.

Because removal proceedings are civil in nature, motions to suppress are not always available to the same extent as in criminal proceedings. However, the Supreme Court, Board of Immigration Appeals, and numerous federal circuit courts have recognized many contexts in which the “exclusionary rule” applies in immigration court.

Q: What legal provisions govern the collection of evidence by immigration officers?

A: Federal agents do not have *carte blanche* to make arrests however they wish. Instead, they must heed limits on their authority imposed by the Constitution, statutes, and regulations. Overstepping these limits can make the resultant evidence a valid target of a motion to suppress.

Courts have recognized two constitutional provisions that may serve as the basis for a motion to suppress: (1) the Fourth Amendment and (2) the Due Process Clause of the Fifth Amendment. Both *limit* the authority granted to immigration officers under the Immigration and Nationality Act (INA) to investigate and arrest noncitizens for purposes of initiating removal proceedings. They are discussed in detail in Parts II and III of this Practice Advisory.

Immigration officers’ authority is also constrained by various provisions of the Immigration and Nationality Act (INA). INA § 287 sets the conditions under which immigration officers may investigate, search for, and arrest individuals believed to be in the country illegally. Immigration officers may not violate these provisions while exercising their authority, even where the statute imposes additional restraints not required by the Constitution. For example, INA § 287(a)(2) provides that immigration officers cannot arrest a person believed to be in the country illegally if time exists to obtain an arrest warrant,⁸⁹ a requirement that the Constitution does not impose.⁹⁰

Finally, immigration officers’ conduct is governed by federal regulations codified at 8 C.F.R. Part 287. These regulations impose additional limitations on federal agents beyond those mandated by the Constitution and the INA. Immigration officers may also be bound by “subregulations” contained in Operating Instructions and other internal guidance.

Q: What type of evidence can be the subject of a motion to suppress?

⁸⁹ The only exception to this requirement is for noncitizens who attempt to illegally enter the United States in the “presence or view” of an immigration officer. INA § 287(a)(2).

⁹⁰ See, e.g., *United States v. Watson*, 423 U.S. 411, 417 (1976) (finding that the Fourth Amendment requires only probable cause); *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (permitting warrantless arrests under Fourth Amendment for misdemeanors and other minor crimes committed in an officer’s presence).

A: A motion to suppress may target any evidence the government attempts to introduce, whether physical, documentary, or testimonial. By filing a motion to suppress, respondents charged with being in the United States without being admitted or paroled can seek to exclude the government's evidence of *alienage* on the basis that it was illegally obtained. Because the government has the burden of proof with regard to this threshold issue,⁹¹ a removal proceeding cannot go forward without such evidence. In most cases, the government establishes alienage through the introduction of Form I-213, in which the examining officer summarizes the respondent's arrest and interview. In other cases, the government seeks to establish alienage through the testimony of an immigration officer, documents obtained from the respondent's country of origin, or other information provided by the respondent.

A motion to suppress must seek to exclude actual pieces of evidence. It cannot contest a court's jurisdiction over the respondent or prevent a hearing from going forward, even if the individual was discovered as a result of unlawful conduct. This rule was confirmed in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984). The case involved two respondents, one of whom "objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him."⁹² The Court summarily denied his suppression motion because "the 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest."⁹³ By contrast, the Court found that the other respondent filed a proper motion to suppress because he objected "to evidence offered at that proceeding."⁹⁴

Tip: If your client may have grounds to file a motion to suppress, it is crucial that you deny the charges and the relevant allegations in the Notice to Appear (NTA) and that neither you nor your client concede alienage at any point of the case. If you file a Freedom of Information Act (FOIA) request or an application for an Employment Authorization Document (EAD), be careful not to include any information bearing on alienage. If the agency requires your client's country of origin to process the application, note that the country provided is that alleged in the NTA.

Q: Can identity-related evidence be the subject of a motion to suppress?

A: The government sometimes argues that respondents cannot suppress "identity-related" evidence, such as a passport, fingerprints, birth certificate, or other documents establishing who they are. In making this argument, the government relies on the Supreme Court's statement that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest. . . ." *Lopez-Mendoza*, 468 U.S. at 1039.

Courts are divided on how to understand this statement from *Lopez-Mendoza*. Four circuits have interpreted the phrase to mean only that an unconstitutional search or seizure cannot deprive a court of the ability to exercise personal jurisdiction over the body of a defendant.⁹⁵

⁹¹ 8 C.F.R. § 1240.8(c).

⁹² *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984) .

⁹³ *Lopez-Mendoza*, 468 U.S. at 1039.

⁹⁴ *Lopez-Mendoza*, 468 U.S. at 1040.

⁹⁵ See *Pretzantzin v. Holder*, 2013 WL 3927587, *26 (2d Cir. 2013); *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007); *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001); *United States v.*

Four other circuits have interpreted *Lopez-Mendoza* as holding that evidence establishing the identity of a defendant or respondent, such as evidence concerning the defendant or respondent's name, cannot be suppressed under any circumstances.⁹⁶ The Eleventh Circuit has independently reached the latter conclusion, without relying on the statement from *Lopez-Mendoza*.⁹⁷ Several courts, including the Ninth Circuit, have distinguished between evidence procured for the purpose of investigating a crime such as unlawful reentry, which is suppressible, and evidence obtained solely for identification purposes, which is not.⁹⁸

For cases arising in circuits where this issue is undecided, there are several reasons why the Supreme Court's statement in *Lopez-Mendoza* should be read narrowly to concern a court's personal jurisdiction over a defendant, and not to preclude the suppression of evidence related to identity. First, *Lopez-Mendoza* concerned two separate deportation cases – Mr. Lopez-Mendoza's case and Mr. Sandoval-Sanchez's case – each of which followed an unlawful arrest. Mr. Lopez-Mendoza objected to his deportation on the ground that, because of the unlawful arrest, the court lacked personal jurisdiction over him. Mr. Sandoval-Sanchez, by contrast, “objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding.” 468 U.S. at 1040. The Supreme Court considered each objection separately, and made its statement concerning the identity of the defendant in the portion of the opinion addressing Mr. Lopez-Mendoza's jurisdictional argument. Second, the Supreme Court supported its statement with citations to cases involving what is known as the “*Ker-Frisbie*” doctrine – the rule that illegal police activity affects only the admissibility of evidence and not the jurisdiction of the court over the defendant.⁹⁹ The Supreme Court also cited cases concerning the rule in forfeiture proceedings that the mere fact of an illegal seizure does not immunize the goods from forfeiture. This rule, too, is jurisdictional. Third, Mr. Sandoval-Sanchez objected to the admissibility of statements memorialized in an I-213 Form, which certainly included identity-related statements. Yet, in addressing Mr. Sandoval-Sanchez's objection, the Supreme Court did not distinguish between identity-related statements and other statements. Instead, it merely recited the “general rule” concerning the exclusion of “statements and other evidence” in criminal proceedings. *Lopez-Mendoza*, 468 U.S. at 1040-41. Finally, the Supreme Court has specifically held that the exclusionary rule requires the suppression of illegally obtained

Olivares-Rangel, 458 F.3d 1104, 1111 (10th Cir. 2006); *see also* W. LaFave, 1 Search & Seizure § 1.9(b) (4th ed. 2011).

⁹⁶ *See Navarro-Diaz*, 420 F.3d 581, 584-85 (6th Cir. 2005); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *United States v. Bowley*, 435 F.3d 426, 430-31 (3rd Cir. 2006). Note, however, that *Navarro-Diaz* and *Bowley* were both careful to state that they did not involve an “egregious” Fourth Amendment violation. The concept of “egregiousness” is discussed below.

⁹⁷ *United States v. Farias-Gonzalez*, 556 F.3d 1181 (11th Cir. 2009).

⁹⁸ *See, e.g., United States v. Garcia-Beltran*, 389 F.3d 864, 867-68 (9th Cir. 2004); *United States v. Del Toro Gudino*, 376 F.3d 997, 1000-01 (9th Cir. 2004); *United States v. Guevara-Martinez*, 262 F.3d at 756; *United States v. Olivares-Rangel*, at 1114-16; *United States v. Oscar-Torres*, 507 F.3d at 231 (indicating that fingerprints “intended for use in an administrative process—like deportation—may escape suppression”). However, this distinction may have little practical significance. *See United States v. Ortiz-Hernandez*, 427 F.3d 567, 577-78 (9th Cir. 2005) (affirming suppression of a criminal defendant's fingerprints based on a prior unlawful arrest, but reversing denial of government's motion to compel a second set of fingerprints based on identity and other information obtained through initial fingerprints).

⁹⁹ For example, the Court cited *Frisbie v. Collins*, 342 U.S. 519 (1952); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); and *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923).

fingerprint evidence, which is a kind of identity evidence, in criminal proceedings.¹⁰⁰ Although the Court reached that holding a year after *Lopez-Mendoza*, it made no reference to any kind of general rule precluding suppression of identity evidence.

Q: When is evidence considered the “fruit of the poisonous tree”?

A: Even where federal immigration officers engage in unlawful behavior, not all subsequently discovered evidence will be considered the “fruit of the poisonous tree.” If the evidence was discovered by “exploitation” of the underlying misconduct, it is subject to possible suppression; by contrast, where the evidence came to the authorities’ attention by means “sufficiently distinguishable to be purged of the primary taint,” it will not be excludable.¹⁰¹

In some cases, the causal nexus between the unlawful conduct and the resulting evidence is clear. For example, if immigration agents illegally entered a home without a warrant and questioned a resident about his immigration status, a concession of unlawful alienage might be subject to suppression.¹⁰² However, intervening events could destroy the causal link. If the same resident refused to answer questions in her home but voluntarily accompanied the agents to an immigration office, the government could argue that a resulting confession was sufficiently distinguishable from the initial warrantless entry to permit its introduction as evidence.¹⁰³

The government sometimes argues that the fruit-of-the-poisonous-tree rule does not apply to any evidence obtained through knowledge of a noncitizen’s name – even when the name was obtained through a constitutional violation. For example, the government has argued that, having learned the name of a noncitizen in an illegal raid, it could then use that name to procure a birth certificate from the noncitizen’s home country to establish alienage. Or, to take another example, the government has argued that, having learned the name of a noncitizen and her child in an illegal raid, the government may obtain the birth certificate for the U.S. citizen child, which lists the parent’s foreign place of birth, and use that birth certificate as evidence of alienage.

Some courts have accepted arguments such as these.¹⁰⁴ In circuits where this issue is undecided, a strong argument can be advanced against the government’s position. The purpose of the fruit-of-the-poisonous-tree doctrine is to deter illegal police conduct by preventing the government from benefiting from the constitutional violation. Thus, the rule requires the exclusion of evidence obtained as a direct consequence of the constitutional violation. Even if a noncitizen’s name cannot be suppressed, there is no justification for allowing the admission of *other* evidence (for example, evidence of alienage) that is obtained as a consequence of the constitutional violation.

¹⁰⁰ *Hayes v. Florida*, 470 U.S. 811, 814-16 (1985).

¹⁰¹ *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

¹⁰² *Wong Sun*, 371 U.S. at 485-86; *but see Carcamo v. Holder*, 713 F.2d 916, 923 (8th Cir. 2013) (noting that an unreasonable home search is not necessarily “egregious”).

¹⁰³ *Wong Sun*, 371 U.S. at 491.

¹⁰⁴ *See, e.g., Pretzantzin v. Holder*, 2013 WL 3927587, *22-*23 (2d Cir. 2013); *Farias-Gonzalez*, 556 F.3d at 1186 (11th Cir.); *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994); *Roque-Villanueva*, 175 F.3d at 346 (5th Cir.).

Q: Is it possible to suppress evidence that the government had in its possession prior to the illegal misconduct?

A: Courts are divided on this important question, which can arise in challenges to the introduction of fingerprint samples, records of prior admissions, or other pre-existing information in government databases that might establish a respondent's alienage.¹⁰⁵ As previously noted, some courts take the position that government records can be excluded like any other object or statement introduced for an evidentiary purpose.¹⁰⁶ Other courts take the position that pre-existing governmental records are not suppressible, either because they are "identity-related";¹⁰⁷ because they were obtained by the government independently of any constitutional violation;¹⁰⁸ or because a noncitizen lacks a reasonable expectation of privacy in his or her immigration file and thus lacks standing to challenge its admissibility.¹⁰⁹

For cases arising in circuits in which this issue is undecided, there are strong arguments why courts should exclude pre-existing government files when the government is led to search those files only after committing a constitutional violation that enabled it to learn a non-citizen's identity. As the Tenth Circuit has explained, even though an immigration file is "not developed as the result of any illegal activity, but rather was compiled prior to, and independently of, the illegal seizure [of a noncitizen], the [government] did not effectively have [the noncitizen's] A-file in their grasp. Instead, the practicality of the situation is that they obtained [the alien's] A-file only by first" obtaining the noncitizen's identity through a constitutional violation. *Olivares-Rangel*, 458 F.3d at 1119-21. Suppressing the immigration file as "fruit of the poisonous tree" makes sense in those circumstances. Suppression prevents the government from benefiting from the illegal conduct and deters investigative techniques prohibited under the Fourth Amendment, such as taking suspects "downtown" for questioning, random identity checks and vehicle stops, and pretextual arrests.

As for the argument that a noncitizen lacks standing to challenge the admission of his or her immigration file, that position misunderstands the rules governing Fourth Amendment standing. So long as an individual experiences a Fourth Amendment violation, he or she has standing to challenge the admission of any evidence obtained through that violation – even evidence in which he or she has no reasonable expectation of privacy. Thus, if the government was led to search the immigration file as a direct result of a Fourth Amendment violation, the noncitizen would have standing to challenge the admission of that immigration file as the fruit of the illegal conduct.

¹⁰⁵ In 2010, the Supreme Court agreed to resolve the split in a non-immigration related criminal case, but ultimately dismissed the petition without rendering a decision. *Tolentino v. New York*, 131 S. Ct. 1387 (2011) (dismissing writ of certiorari as improvidently granted).

¹⁰⁶ *United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-1112 (10th Cir. 2006); *United States v. Guevara-Martinez*, 262 F.3d 751, 753-55 (8th Cir. 2001); *United States v. Garcia-Beltran*, 389 F.3d 864, 865 (9th Cir. 2004).

¹⁰⁷ *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009); *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *Navarro-Diaz*, 420 F.3d 581, 584-85 (6th Cir. 2005); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004).

¹⁰⁸ *Pretzantzin v. Holder*, 2013 WL 3927587, *23-*25 (2d Cir. 2013); *Reyes-Basurto v. Holder*, 2012 WL 1449648 (2d Cir. April 22, 2012) (unpub.); *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978).

¹⁰⁹ *U.S. v. Pineda-Chinchilla*, 712 F.2d 942, 944 (5th Cir. 1983); *Bowley*, 435 F.3d at 430-31.

Part II: Motions to Suppress For Fourth Amendment and Related Violations of Federal Law

The Fourth Amendment prohibits government agents from making “unreasonable searches and seizures.” For suppression purposes, it applies to all conduct by immigration officers up through the point an individual is *lawfully* arrested.¹¹⁰ The Fourth Amendment, INA, and federal regulations place limits upon immigration officers’ ability to search for individuals suspected to be unlawfully present; interrogate individuals about their immigration status; and arrest individuals for placement in removal proceedings. Before addressing the substantive bases for filing a motion to suppress, Section A, below, will explain the obstacles facing attorneys seeking to exclude evidence on Fourth Amendment grounds in removal proceedings.

A. Limits on the Exclusionary Rule in Removal Proceedings

Q: Why is the exclusionary rule not always available for Fourth Amendment violations?

A: The “exclusionary rule” is a judicially created remedy to prevent the introduction of evidence obtained as a result of a Fourth Amendment violation. Its purpose is not to provide relief to the victim but to deter government officers from purposely engaging in similar misconduct in the future.¹¹¹ Consequently, for the exclusionary rule to apply, a court must weigh the cost of excluding evidence against the benefit of deterring future government misconduct.¹¹²

In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court held that the exclusionary rule generally does not apply in removal proceedings to evidence obtained in violation of the Fourth Amendment. In a 5-4 decision, the Justices found that application of the exclusionary rule was unlikely to deter future misconduct by immigration officers, and that the costs of suppressing evidence outweighed its benefits.

With regard to the exclusionary rule’s potential deterrent effect, the Court cited (now outdated) statistics showing that nearly 98 percent of individuals arrested by immigration officers agreed to voluntary return without a deportation hearing, and therefore lacked any opportunity to suppress evidence related to their apprehension.¹¹³ The Court also noted that legacy INS developed a comprehensive scheme of federal regulations meant to deter constitutional violations, and implied that recourse to the exclusionary rule was unnecessary because immigration officers would presumably comply with the existing regulatory framework.¹¹⁴ Finally, the Court cited the existence of alternative remedies for redressing constitutional violations, such as seeking declaratory relief against unlawful agency practices.¹¹⁵

The Court also found the costs of applying the rule to be “unusual and significant.”¹¹⁶ Citing *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979), the Justices noted that failing to remove

¹¹⁰ See Part III for a discussion of suppression motions challenging post-arrest conduct under the Fifth Amendment.

¹¹¹ *Elkins v. United States*, 364 U.S. 206, 217 (1960).

¹¹² *Illinois v. Krull*, 480 U.S. 340, 352-353 (1987) (internal quotation marks omitted).

¹¹³ Today, by contrast, more than 40% of deported noncitizens leave pursuant to a final order of removal. See Department of Homeland Security, 2009 Yearbook of Immigration Statistics at 95 (Table 36), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

¹¹⁴ *Lopez-Mendoza*, 468 U.S. at 1044-45.

¹¹⁵ *Lopez-Mendoza*, 468 U.S. at 1045.

¹¹⁶ *Lopez-Mendoza*, 468 U.S. at 1046.

otherwise unlawfully present respondents would effectively sanction ongoing violations of federal immigration law; could “complicate” the streamlined nature of removal hearings; and would require immigration officers to document the precise circumstances of each arrest, which could preclude the use of large scale operations to detect undocumented immigrants.¹¹⁷

However, as discussed below, the Justices recognized an important exception for “egregious” Fourth Amendment violations. Today, this exception provides the basis for many motions to suppress in immigration cases.

Q: Did the Supreme Court’s opinion in *Lopez-Mendoza* contain any exceptions?

A: Yes. In the final section of Justice O’Connor’s majority opinion, she and three other Justices noted that no violation of legacy INS’s internal regulations had been alleged, and stated that their conclusions about the value of the exclusionary rule might change if confronted with evidence that Fourth Amendment violations by immigration officers were “widespread.”¹¹⁸ Additionally, Justice O’Connor wrote:

“[W]e do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”¹¹⁹

Meanwhile, four dissenting Justices argued that the exclusionary rule *always* should be available in removal proceedings for Fourth Amendment violations,¹²⁰ thus endorsing the view of Justice O’Connor that the rule may apply for egregious violations. It is this “egregious violation” exception that lower courts and the BIA have applied in removal proceedings to suppress evidence obtained in violation of the Fourth Amendment.

Q: Are the exceptions from *Lopez-Mendoza* binding on immigration judges?

A: As numerous circuit courts have recognized, eight of nine Justices believed that the exclusionary rule should remain available for “egregious” violations at a minimum, which arguably makes the exception binding.¹²¹ Four circuits have adopted the exception as the law within their jurisdiction, and four circuits have acknowledged the possibility that it may exist. By contrast, no circuit has explicitly rejected the exception. However, in a troubling shift from its previous acknowledgment of the egregious exception under *Lopez-Mendoza*,¹²² the BIA recently declined to review a claim for exclusion of evidence based on egregious violations of the Fourth Amendment. Though the decision was reversed on appeal to the Third Circuit, the

¹¹⁷ *Lopez-Mendoza*, 468 U.S. at 1048-50. Note that the Court incorrectly stated that unlawful presence “without more, constitutes a crime,” and that granting the respondent’s motion would immediately “subject him to criminal penalties.” *Lopez-Mendoza*, 1032 U.S. at 1047. See *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976).

¹¹⁸ *Lopez-Mendoza*, 468 U.S. at 1050 (Opinion of O’Connor, J.).

¹¹⁹ *Lopez-Mendoza*, 468 U.S. at 1050-51 (Opinion of O’Connor, J.).

¹²⁰ *Lopez-Mendoza*, 468 U.S. at 1051-1061 (Brennan, J., dissenting) (White, J., dissenting) (Stevens, J., dissenting) (Marshall, J. dissenting).

¹²¹ See, e.g., *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 n.2 (8th Cir. 2010); *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.2 (9th Cir. 1994); *Oliva-Ramos v. Attorney General*, 694 F.3d 259, 271-72 (3d Cir. 2012).

¹²² See *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996).

BIA's assertion that the exception in *Lopez-Mendoza* constitutes non-binding dicta¹²³ is concerning.

Q: Which federal appellate courts have adopted the “egregious” exception?

A: The Second, Third, Eighth, and Ninth Circuits have adopted the exception for egregious Fourth Amendment violations as the law of the circuit. However, only the Ninth Circuit has found facts sufficiently egregious to require suppression.

In *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2006), the **Second Circuit** suggested that a Fourth Amendment violation generally must be accompanied by additional aggravating factors to result in suppression. As a result, the court upheld the denial of the respondent's suppression motion despite finding that an immigration officer ascertained his alienage during an unconstitutional investigatory stop. The court stated that to merit suppression, an improper stop would, among other things, also have to be based upon race or some other “grossly improper” consideration; be “particularly lengthy”; or involve a “show or use of force.”¹²⁴ Applying this standard in a subsequent case, the Second Circuit found no egregious violation where the Border Patrol detained a nonimmigrant overstay at a checkpoint for several hours.¹²⁵ More recently, in *Cotzjay v. Holder*, 2013 WL 3927605 (2d Cir. 2013), the Second Circuit held that a nighttime, warrantless home entry by government officials, without consent and in the absence of exigent circumstances, may constitute an egregious Fourth Amendment violation regardless of whether government agents physically threaten or harm residents.¹²⁶ The court remanded the case to give the government an opportunity to prove that its officers had obtained consent.¹²⁷

In *Oliva-Ramos v. Attorney General*, 694 F.3d 259 (3d Cir. 2012), the **Third Circuit** adopted the exception in *Lopez-Mendoza*.¹²⁸ The court remanded the case for a determination of whether ICE agents had violated Oliva-Ramos's Fourth Amendment rights, and whether those violations were widespread or egregious.¹²⁹ The Third Circuit laid out its standard for egregiousness, concluding that “evidence will be the result of an egregious violation within the meaning of *Lopez-Mendoza*, if the record evidence establishe[s] either (a) that a constitutional violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its unfairness—undermined the reliability of the evidence in dispute.”¹³⁰ The court provided an illustrative list of factors bearing on egregiousness, including whether the violation was intentional; whether the seizure was “gross or unreasonable” and without a plausible legal ground; whether the encounter involved “threats, coercion[,], physical abuse” or “unreasonable shows of force”; and whether the seizure or arrest was based on race or ethnicity.¹³¹

¹²³ See *Oliva-Ramos*, 694 F.3d 259, 266 (3d Cir. 2012).

¹²⁴ *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-37 (2d Cir. 2006).

¹²⁵ *Melnitsenko v. Mukasey*, 517 F.3d 42, 48 (2d Cir. 2008).

¹²⁶ *Cotzjay*, 2013 WL 3927605, *27.

¹²⁷ *Id.* at *29.

¹²⁸ *Oliva-Ramos*, 694 F.3d at 272, 275.

¹²⁹ *Id.* at 275.

¹³⁰ *Id.* at 278.

¹³¹ *Id.* at 279.

In ***Puc-Ruiz v. Holder***, 629 F.3d 771 (8th Cir. 2010), the **Eighth Circuit** provided valuable guidance about the egregious violation exception, although it denied the respondent’s suppression motion. The court stated that egregious violations were “not limited to those of physical brutality,” and listed a number of factors that could make a Fourth Amendment violation egregious: (1) if law enforcement officers “employ[] an unreasonable show or use of force in arresting and detaining” an individual; (2) if the decision to detain or arrest was “based on ... race or appearance”; or (3) if government officers “invade[] private property and detain[] individuals with *no* articulable suspicion whatsoever.”¹³² The court emphasized this list was *not* exhaustive, but stressed that technical Fourth Amendment violations would not merit suppression. More recently, in ***Carcamo v. Holder***, 713 F.3d 916 (8th Cir. 2013), the Eighth Circuit denied a petition for review on the basis that the ICE officers’ warrantless home entry without the residents’ consent was not sufficiently egregious to warrant the exclusion of evidence.¹³³

The **Ninth Circuit** holds that the exclusionary rule should remain available in removal proceedings for—at a minimum—all evidence obtained from “bad faith” constitutional violations.¹³⁴ It defines “bad faith” violations as those involving (1) “deliberate” violations of the Fourth Amendment or (2) “conduct a *reasonable officer should have known* is in violation of the Constitution.”¹³⁵ The first test—for deliberate violations—is a subjective one, dependent on the officer’s intent. The second test is an objective one, dependent on the state of the law at the time the alleged violation took place.¹³⁶ Notably, numerous Ninth Circuit opinions have relied upon the extensive Fourth Amendment training that immigration officers receive to conclude that the offending agent should have known his conduct violated the Constitution.¹³⁷

The Ninth Circuit is the only federal appellate court to order the suppression of evidence for a Fourth Amendment violation. In ***Arguelles-Vasquez v. INS***, 786 F.2d 1433 (9th Cir. 1986) (subsequently vacated as moot) and ***Gonzalez-Rivera v. INS***, 22 F.3d 1441 (9th Cir. 1994), the court ordered evidence excluded where Border Patrol officers pulled over a vehicle solely on account of the occupants’ ethnic appearance. In ***Orhorhaghe v. INS***, 38 F.3d 488 (9th Cir. 1994), the court ordered exclusion where immigration officers initiated an investigation based upon the petitioner’s presumed national origin. And in ***Lopez-Rodriguez v. Mukasey***, 536 F.3d 1012 (9th Cir. 2008), the court found an egregious violation where immigration officers entered the petitioner’s home without consent or a judicially issued warrant.¹³⁸

Generally speaking, the Ninth Circuit’s “bad faith” test for egregiousness is more favorable than the standard employed by the Second, Third and Eighth Circuits,¹³⁹ insofar as it does not

¹³² *Puc-Ruiz*, 629 F.3d at 778-779.

¹³³ *Carcamo*, 713 F.3d at 922-24.

¹³⁴ *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (1994) (“We emphasize that [we do not] hold that *only* bad faith violations are egregious, but rather that *all* bad faith constitutional violations are egregious.”) (emphasis in original).

¹³⁵ *Gonzalez-Rivera*, 22 F.3d at 1449 (emphasis in original).

¹³⁶ See, e.g., *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018-1019 (9th Cir. 2008).

¹³⁷ See, e.g., *Lopez-Rodriguez*, 536 F.3d at 1018-19.

¹³⁸ See also *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996) (recognizing the validity of the egregious violation exception in cases arising in the Ninth Circuit).

¹³⁹ The Eighth Circuit has explicitly rejected the Ninth Circuit’s “bad faith” standard. *Carcamo v. Holder*, 713 F.3d at 923.

require respondents to demonstrate “aggravating” factors beyond the constitutional violation. However, attorneys should be aware of a recent Ninth Circuit opinion that could make it more difficult to satisfy the standard in cases where the law may be subject to some ambiguity. In *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011), the court declined even to consider whether a sheriff’s deputy violated the Fourth Amendment by detaining individuals who conceded unlawful presence because of the “lack of clarity” in the law over state officers’ authority to make arrests for civil violations of the INA.¹⁴⁰ The court reasoned that it need not determine whether a Fourth Amendment violation had occurred because a reasonable officer could not have been expected to know that his conduct was unconstitutional. This approach departed from, but did not overrule, the court’s longstanding practice of determining whether the Fourth Amendment was violated *before* determining whether the violation was egregious.¹⁴¹

Q: How have other federal appellate courts treated the exception for “egregious” violations?

A: While no other circuit court has rejected the egregious violation exception, few have provided meaningful guidance as to its scope. The First Circuit¹⁴² has acknowledged the exception but has not expounded upon its meaning. The Fifth Circuit has acknowledged in an unpublished opinion that the Supreme Court left open the possibility of an exception for egregious violations.¹⁴³ The Sixth Circuit has acknowledged the exception and stated in *dicta* it might apply where a noncitizen is “accosted by the police in a random attempt to determine whether he was an illegal alien.”¹⁴⁴ The Seventh Circuit, while not officially adopting the exception, has repeatedly noted that the Supreme Court left open the question.¹⁴⁵ The Tenth Circuit has not decided a case involving a respondent seeking to invoke the exception, but referred to it with approval in a criminal reentry case.¹⁴⁶ The validity of the exception remains an open question in the Fourth and Eleventh Circuits.¹⁴⁷

Q: To be egregious, must a violation “transgress notions of fundamental fairness” and “undermine the probative value of the evidenced obtained”?

A: Citing language from the final phrase of the exception in *Lopez-Mendoza*, the government may argue that a Fourth Amendment violation cannot be considered “egregious” unless it both (a) transgresses notions of fundamental fairness, and (b) undermines the probative value of the evidence obtained. However, every circuit that has considered this argument has rejected it. For example, in *Gonzalez-Rivera*, the Ninth Circuit held that “a fundamentally unfair Fourth

¹⁴⁰ *Id.* at 1035.

¹⁴¹ *Orhorhaghe*, 38 F.3d at 493 n.5 (citing *Gonzalez-Rivera*, 22 F.3d at 1445-52).

¹⁴² *Westover v. Reno*, 202 F.3d 475, 479 (1st Cir. 2000); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22-23 (1st Cir. 2004); *Kandamar v. Gonzales*, 464 F.3d 65, 66 (1st Cir. 2006).

¹⁴³ *Santos v. Holder*, 2013 U.S. App. LEXIS 367, *3 (5th Cir. Jan. 4, 2013) (unpublished per curiam decision).

¹⁴⁴ *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005).

¹⁴⁵ *Wroblewska v. Holder*, 656 F.3d 473, 478 (7th Cir. 2011). *Gutierrez-Berdin v. Holder*, 618 F.3d 647, 652 (7th Cir. 2010); *Krasilych v. Holder*, 583 F.3d 962, 967 (7th Cir. 2009); *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002).

¹⁴⁶ *United States v. Olivares-Rangel*, 458 F.3d 1104, 1116 n. 9 (10th Cir. 2006).

¹⁴⁷ *United States v. Oscar-Torres*, 507 F.3d 224, 227-28 n.1 (4th Cir. 2007); *Ghysels-Reals v Att’y Gen.*, No. 10-12666, 2011 U.S. App. LEXIS 6154 at *4 (11th Cir. Mar. 24, 2011).

Amendment violation is considered egregious regardless of the probative value of the evidence obtained.”¹⁴⁸

Q: What is the relationship between “egregious” Fourth Amendment violations and the Due Process Clause of the Fifth Amendment?

A: Much confusion exists over the relevance of the Due Process Clause to an “egregious” Fourth Amendment violation. Some immigration judges have suggested that evidence discovered through an egregious Fourth Amendment violation is suppressible because its introduction would undermine the “fair” hearing requirement of the Due Process Clause.¹⁴⁹

While this approach may have been analytically correct at one time, Supreme Court cases decided after *Lopez-Mendoza* indicate that claims cognizable under the Fourth Amendment should not be analyzed under the Due Process Clause.¹⁵⁰ Indeed, the Court has indicated that ***Rochin v. California***, 342 U.S. 165 (1952)—the principal case cited in *Lopez-Mendoza* in support of the “egregious” violation exception—would today be analyzed under the Fourth Amendment rather than the Due Process Clause.¹⁵¹ Notably, no federal circuit court to consider the question has linked egregious Fourth Amendment violations to the Due Process Clause.

Note, however, that the Due Process Clause provides an independent basis for excluding evidence in some circumstances, including coerced confessions, which are discussed in Part III.

Q: Can respondents exclude evidence due to “widespread” Fourth Amendment violations?

A: Justice O’Connor also stated in the final section of *Lopez-Mendoza* that the Court’s conclusions about the value of the exclusionary rule might change if Fourth Amendment violations by immigration officers became “widespread.”¹⁵² Lamentably, but perhaps not surprisingly, much evidence exists that such violations have occurred with growing frequency, particularly within the last decade.¹⁵³ In *Oliva-Ramos*, the **Third Circuit** addressed the possibility of excluding evidence based on “widespread” violations, noting that this exception was “as much of a part of the *Lopez-Mendoza* discussion as ‘egregious’ violations.”¹⁵⁴ The court

¹⁴⁸ *Gonzalez-Rivera*, 22 F.3d at 1451; see also *Puc-Ruiz*, 629 F.3d at 778; *Singh v. Mukasey*, 553 F.3d 207, 217 (2d Cir. 2009); *Almeida-Amaral*, 461 F.3d at 234; *Oliva-Ramos*, 694 F.3d at 277-78 (3d Cir. 2012).

¹⁴⁹ See, e.g., Matter of [Redacted], Order of Williams, J., Aug. 5, 2010, at 15, 17, available at www.law.umaryland.edu/programs/clinic/initiatives/immigration/documents/suppression-decision.pdf.

¹⁵⁰ *Graham v. Connor*, 490 U.S. 386, 395 and n.10 (1989); *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).

¹⁵¹ *County of Sacramento*, 523 U.S. at 849 n.9 (1998).

¹⁵² *Lopez-Mendoza*, 468 U.S. at 1050 (opinion of O’Connor, J.).

¹⁵³ See, e.g., Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 Wisc. L. J. 1109 (2009), available at http://hosted.law.wisc.edu/lawreview/issues/2008_6/2_-_elias.pdf; Jennifer Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010). See also Brief of Amici Curiae LatinoJustice PRLDEF, No. 10-1479, *Argueta, et al. v. ICE, et al.* (3d Cir. Dec. 10, 2010), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Argueta-amicus-brief.pdf>; Brief of Amici Curiae LatinoJustice PRLDEF, No. 10-3849, *Oliva-Ramos v. Att’y Gen.* (3d Cir. Mar 11, 2011), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Oliva-Ramos-amicus-brief-redacted.pdf>; Cardozo Immigration Justice Clinic, *Constitution on ICE* (2009), available at <http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf>.

¹⁵⁴ *Oliva-Ramos*, 694 F.3d at 279-80.

remanded to enable the Petitioner to present additional evidence, but suggested that, if substantiated, the allegations of a “consistent pattern” of conducting home raids during “unreasonable hours” might warrant suppression of evidence based on Fourth Amendment violations that were both egregious and widespread.¹⁵⁵ To date, we are not aware of any court that has excluded evidence on this ground.¹⁵⁶ While we encourage attorneys to alert immigration judges to the nationwide prevalence of Fourth Amendment violations, and to develop a record in support of this contention when filing motions to suppress, we caution against relying solely on this argument.

Q: Is the “egregious” violation test also applied to suppression motions based upon violations of the INA and federal regulations?

A: The Supreme Court’s decision in *Lopez-Mendoza* only addressed the applicability of the exclusionary rule for violations of the Fourth Amendment. Justice O’Connor specifically noted that no challenge was raised under federal regulations,¹⁵⁷ and the Court’s decision did not disturb prior Board precedent establishing a separate test for suppression for regulatory violations. In addition, while the Justices did not discuss the exclusionary rule in the context of statutory violations, circuit courts and the BIA regularly entertained motions to suppress stemming from violations of INA prior to the Supreme Court’s decision in *Lopez-Mendoza*.¹⁵⁸

Statutory violations

In the criminal context, the Supreme Court has suppressed evidence obtained in violation of statutes that “implicate important Fourth and Fifth Amendment interests” and are “connected to the gathering of evidence.”¹⁵⁹ The Court also has suggested that suppression may be particularly warranted if, among other factors, the violation gives the police a “practical advantage” and suppression is the “only means” of vindicating the rights protected by the statute.¹⁶⁰ Section 287 of the INA contains numerous provisions relating to the collection of evidence that implicate important Fourth and Fifth Amendment interests. However, the extent to which the rule for suppression in the criminal context carries over to the civil immigration context remains unsettled.

As discussed, *Lopez-Mendoza*, which addressed a Fourth Amendment violation, arguably does not apply to statutory violations—meaning the heightened “egregious violation” requirement is inapplicable. Instead, attorneys may argue that the suppression standard for statutory violations is similar to that applied to regulatory violations. Attorneys with potential

¹⁵⁵ *Id.* at 281. For a more comprehensive discussion of the implications of the Third Circuit’s decision in *Oliva-Ramos*, see NYU Immigrant Rights Clinic, Practice Advisory: *Understanding Oliva-Ramos v. Attorney General and the Applicability of the Exclusionary Rule in Immigration Proceedings* (November 30, 2012), available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_074309.pdf.

¹⁵⁶ In *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008), the Second Circuit declined to consider whether the nationwide prevalence of constitutional violations mandated reconsideration of *Lopez-Mendoza* because the petitioner had not raised the claim before the agency.

¹⁵⁷ *INS v. Lopez-Mendoza*, 468 U.S. at 1051 (Opinion of O’Connor, J.).

¹⁵⁸ See, e.g., *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975); *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979); *Shu Fuk Cheung v. INS*, 476 F.2d 1180 (8th Cir. 1973); *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980); *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971); *Matter of Cachiguango & Torres*, 16 I&N Dec. 205 (BIA 1977).

¹⁵⁹ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348-49 (2006) (discussing cases).

¹⁶⁰ *Sanchez-Llamas*, 548 U.S. at 348-350.

suppression cases arising from statutory violations should contact the Legal Action Center at clearinghouse@immcouncil.org for guidance.

Regulatory violations

In *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980), the Board held that evidence obtained in violation of federal regulations could be suppressed if (1) the violated regulation was promulgated to serve “a purpose of benefit to the alien,” and (2) the violation “prejudiced interests of the alien which were protected by the regulation.”¹⁶¹ Generally, the respondent has the burden of demonstrating prejudice as a result of a regulatory violation. Such prejudice should be presumed in two circumstances, however: (a) when compliance with the regulation is *mandated* by the Constitution or federal law, or (b) where “an entire procedural framework, designed to insure [sic] the fair processing of an action affecting an individual is created but then not followed by an agency.”¹⁶²

B. Fourth Amendment and Related Limitations on Immigration Officers

1. Basic Fourth Amendment Principles

Q: What does the Fourth Amendment prohibit?

A: The full text of the Fourth Amendment reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A “search” or a “seizure” is a prerequisite for a Fourth Amendment violation. Assuming that a search or seizure transpired, its legality always hinges on whether it was *reasonable*.¹⁶³ The answer, in turn, will depend on the circumstances surrounding the particular conduct.

Two considerations should be kept in mind when thinking about the reasonableness of a search or seizure. First, the *only* searches or seizures afforded a presumption of reasonableness are those carried out pursuant to a warrant issued by a neutral magistrate (e.g. judicial officer).¹⁶⁴ Without such a warrant, a search or seizure must fall under an exception to the warrant requirement to be considered “reasonable.” Second, the test for determining reasonableness is objective, not subjective.¹⁶⁵ That is, the misconduct is judged against how the officer acted in light of the objective facts available to him, not his subjective intentions with regard to the victim. Similarly, when asking whether an officer *should* have known his conduct was unconstitutional, the question is whether a *reasonable officer* would have known he was violating the Fourth Amendment.

¹⁶¹ *Matter of Garcia-Flores*, 17 I&N Dec. at 328-29 (citing *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979)). See also *Martinez-Camargo v. INS*, 282 F.3d 487, 491 (7th Cir. 2002); *Puc-Ruiz*, 629 F.3d at 780.

¹⁶² *Matter of Garcia-Flores*, 17 I&N Dec. at 329.

¹⁶³ *Michigan v. Fisher*, 130 S. Ct. 546 (2009).

¹⁶⁴ *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

¹⁶⁵ *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

Q: What constitutes a “search” or “seizure”?

A: Searches

Katz v. United States, 389 U.S. 347 (1967), defined a “search” as any government action that violates an individual’s *reasonable expectation of privacy*. To meet this standard, a movant must establish (1) that he personally believed his privacy was violated, and (2) that this expectation of privacy was objectively reasonable.¹⁶⁶ Thus, the Court has held that government agents conduct a “search” by entering a home or wiretapping a phone conversation, but not by rummaging through garbage left on the curb or conducting aerial surveillance of a backyard.

In the immigration context, the constitutionality of a “search” will generally arise only if government agents enter a home or non-public area of a commercial premises, or physically retrieve evidence from a person’s body or belongings. The boarding of a train or bus by immigration agents does not constitute a search, since people have no reasonable expectation of privacy in a public conveyance.

Seizures

The Court has held that a “seizure” occurs whenever a government agent intentionally “terminates or restrains [a person’s] freedom of movement.”¹⁶⁷ A seizure clearly occurs any time law enforcement agents arrest someone or pull over a vehicle. A seizure also takes place when government agents act in such a manner that a “reasonable person” would not feel free to leave or end the encounter.¹⁶⁸ In *Almeida-Amaral*, for example, the Second Circuit found a seizure occurred when a Border Patrol officer commanded the respondent to stop, even though no physical contact took place.¹⁶⁹ Note, however, that government agents are not required to inform individuals of their constitutional right to walk away or ignore questioning.¹⁷⁰

In determining whether a reasonable person would have felt free to end an encounter, courts presuppose an innocent person and employ a “totality of the circumstances” approach.¹⁷¹ Thus, a seizure may result from, among other things, “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the [person], or the use of language or a tone of voice indicating that compliance with the officer’s request might be compelled.”¹⁷² In contrast to searches, the individual’s personal view of whether a seizure occurred is not determinative; similarly, whether the officer intended to “seize” the individual is irrelevant.

¹⁶⁶ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

¹⁶⁷ *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal citations omitted).

¹⁶⁸ *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (Opinion of Stewart, J.); *Florida v. Bostick*, 501 U.S. 429, 534-35 (1991).

¹⁶⁹ *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 232 (2d Cir. 2006).

¹⁷⁰ *United States v. Drayton*, 536 U.S. 194, 206-07 (2002).

¹⁷¹ *Bostick*, 501 U.S. at 438-39.

¹⁷² *Benitez-Mendez v. INS*, 760 F.2d 907, 908-09 (9th Cir. 1985) (citation omitted); see also *Santos v. Frederick County Board of Commissioners*, ___ F.3d ___, 2013 U.S. App. LEXIS 16335, *13-*14 (4th Cir. Aug. 17, 2013).

Tip: The Supreme Court requires seizures made in the absence of a warrant to be supported by “reasonable suspicion” that the particular person is engaged in unlawful activity, or “probable cause” to believe the particular person violated the law. An appendix to this practice advisory lists the relevant limits on seizures under the Constitution, INA, and federal regulations.

Q: What are the “exceptions” to the Fourth Amendment’s warrant requirement?

A: Searches and seizures are presumptively reasonable *only* if authorized by a warrant issued by a neutral judicial officer.¹⁷³ By the same token, the absence of a warrant makes any resulting search or seizure presumptively *unreasonable*. To rebut the presumption, the government must demonstrate the existence of an exception to the warrant requirement. These exceptions are:

- “Terry” *stops and frisks*. When an officer possesses “reasonable suspicion” that an individual is or will soon be engaged in illegal activity, he may briefly stop the person to ascertain his intentions and, if the officer further suspects the person to be armed and dangerous, frisk him for weapons. These exceptions are discussed on pages 19-20.
- *Arrests in public places*. Officers may arrest individuals in public whom they have “probable cause” to believe have violated the law. This exception is discussed on page 21.
- *Searches based upon consent*. Any search made after receiving valid consent is considered “reasonable.” This exception is discussed on pages 22-23.
- “*Exigent*” *circumstances*. Officers may enter a home without a warrant when the “exigencies of the situation” require immediate intervention, such as apprehending a fleeing felon, preventing the destruction of evidence, or assisting persons with serious injuries.¹⁷⁴
- *Searches incident to a lawful arrest*. When an individual is *lawfully* arrested, officers may search his person and the immediately surrounding area for weapons or evidence.¹⁷⁵
- *Automobile searches*. When an officer has “probable cause” to believe an automobile contains evidence of a crime, he may search the car.¹⁷⁶
- *Plain view*. Officers may seize criminal contraband if it is in “plain view” in an area where they have a right to be.¹⁷⁷
- “*Special needs*” or *administrative searches*. Officers may conduct warrantless searches in numerous contexts divorced from normal law enforcement needs, such as at the border.¹⁷⁸

¹⁷³ *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

¹⁷⁴ *Brigham City v. Stuart*, 547 U.S. 398 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978)).

¹⁷⁵ *Chimel v. California*, 395 U.S. 752 (1969).

¹⁷⁶ *Carroll v. United States*, 267 U.S. 132 (1925).

¹⁷⁷ *Washington v. Chrisman*, 455 U.S. 1 (1982).

¹⁷⁸ *United States v. Ramsey*, 431 U.S. 606 (1977).

Q: What is the difference between “probable cause” and “reasonable suspicion”?

A: When a government agent thinks a particular individual has broken the law, his suspicion can range from a mere hunch (perhaps based on a stereotype) to absolute certainty (based on witnessing the crime first hand). Along this spectrum, the Supreme Court has established two points at which an officer may take action on his belief without obtaining a warrant. These points are known as “probable cause” and “reasonable suspicion.”

“Probable cause” is the more demanding requirement. It generally requires a combination of facts sufficient to create a reasonable *belief* that a violation of law has occurred.¹⁷⁹ Probable cause is always required for a government officer to obtain a search warrant or arrest someone. On review, courts examine the facts known to the officer at the time the search or arrest occurred.¹⁸⁰ As will be discussed on page 21, probable cause is also sometimes referred to as “reason to believe.”

“Reasonable suspicion” is less demanding. It represents a middle ground where officers have reason to suspect illegal activity but lack sufficient evidence to establish probable cause. Reasonable suspicion must be supported by objective “articulable” facts rather than a mere “hunch.”¹⁸¹ However, courts need not weigh the sufficiency of each individual factor but instead consider the “totality of the circumstances.”¹⁸² Reasonable suspicion is always required before a government agent conducts an investigative “*Terry*” stop. In the immigration context, courts permit such detentions where officers possess reasonable suspicion that an individual is illegally in the United States. See pages 19-20.

Q: What behavior can create “reasonable suspicion” of unlawful alienage?

A: “Reasonable suspicion” can arise from virtually any set of circumstances creating plausible grounds to suspect that a person is in the country illegally. Though they require more than a “hunch,” determinations of reasonable suspicion may “be based on commonsense judgments and inferences about human behavior.”¹⁸³ Moreover, because courts look to the “totality of the circumstances,” it may not matter that each factor taken into account is susceptible to innocent explanation.¹⁸⁴

Race, ethnicity, or nationality

In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court held that apparent Mexican ancestry alone cannot provide “reasonable suspicion” of alienage, much less unlawful status. Subsequently, numerous circuit courts have concluded that reliance on race or ethnicity *alone* constitutes an “egregious” violation of the Fourth Amendment.¹⁸⁵ Moreover, the

¹⁷⁹ *Wong Sun*, 371 U.S. at 480 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

¹⁸⁰ *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

¹⁸¹ *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968).

¹⁸² *United States v. Arvizu*, 534 U.S. 266, 274 (2002); *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

¹⁸³ *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

¹⁸⁴ *Arvizu*, 534 U.S. at 274.

¹⁸⁵ *Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006); *Orhorhaghe v. INS*, 38 F.3d 488, 492 (9th Cir. 1994).

Ninth Circuit has given foreign appearance little weight as a factor supporting reasonable suspicion in areas with high concentrations of racial or ethnic minorities.¹⁸⁶

At the same time, the Court in *Brignoni-Ponce* credited the government's assertion that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."¹⁸⁷ As a consequence, immigration officers may claim to have relied on ostensibly "neutral" factors in developing reasonable suspicion even if skin color was their primary motivation. Attorneys can try to undermine such claims by challenging officers' assumptions about physical appearance on cross-examination.

Nervousness

"Nervous, evasive behavior" may serve as a relevant factor in establishing reasonable suspicion,¹⁸⁸ and immigration officers frequently cite it as a basis for suspecting that an individual is here illegally. Because perceived nervousness is so subjective, attorneys should insist that the officer testify about the respondent's allegedly nervous behavior and attempt to demonstrate on cross that the officer's conduct was based on a subjective hunch rather than an articulable "fact." For example, a court disregarded an agent's contention that the respondent appeared nervous because he had a "dry mouth," reasoning that the government had not introduced evidence linking the dryness of an individual's mouth to his or her level of nervousness.¹⁸⁹

Flight from immigration officers

The Supreme Court has held that flight from law enforcement officers, standing alone, provides reasonable suspicion of illegal activity,¹⁹⁰ and courts have long held that attempts to evade immigration officers provide justification to temporarily detain them for questioning.¹⁹¹

Failure to acknowledge immigration officers

Immigration officers may also cite an individual's deliberate *failure* to acknowledge their presence as a factor justifying reasonable suspicion. While the Ninth Circuit categorically rejected such conduct as a factor to be considered in a reasonable suspicion analysis,¹⁹² the Supreme Court subsequently held its relevance depends on the context in which it arose.¹⁹³

Q: Who has "standing" to challenge Fourth Amendment violations?

A: Only individuals who have a reasonable expectation of privacy over the area searched, or who were themselves seized, can challenge the validity of a search or seizure. One need not personally own a residence or commercial property to have a reasonable expectation of privacy. For example, invited overnight guests always have a reasonable expectation of privacy in the

¹⁸⁶ *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 n.21-22 (9th Cir. 2000).

¹⁸⁷ *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

¹⁸⁸ *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

¹⁸⁹ *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1447 (9th Cir. 1994).

¹⁹⁰ *Wardlow*, 528 U.S. at 124-125.

¹⁹¹ *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630 (BIA 1974).

¹⁹² *Gonzalez-Rivera*, 22 F.3d at 1446-1447.

¹⁹³ *Arvizu*, 534 U.S. at 275-76 (a "failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona)").

home where they sleep.¹⁹⁴ While employees have no expectation of privacy in public areas of their worksites,¹⁹⁵ they can challenge searches in nonpublic areas.¹⁹⁶ And while car passengers ordinarily lack standing to challenge *searches* of vehicles they neither own nor lease,¹⁹⁷ if law enforcement agents stop or obstruct a car, both the driver and passenger have been seized.¹⁹⁸

2. ENCOUNTERS IN PUBLIC PLACES

Q: When can officers engage in “consensual” questioning about immigration status?

A: Fourth Amendment

Under the Fourth Amendment, law enforcement agents—including immigration officers—may *always* pose questions to persons they encounter in locations where the officers have a right to be.¹⁹⁹ However, persons approached for questioning have no corresponding obligation to answer and may simply walk away.²⁰⁰ As previously discussed, a consensual encounter can become a “seizure” if an officer restrains an individual’s freedom of movement in such a way that a reasonable person would *not* feel free to leave or otherwise end the encounter. In ***INS v. Delgado***, 466 U.S. 210, 218 (1983), immigration agents carried out a factory raid to search for undocumented workers. Some agents questioned employees about their immigration status while others positioned themselves near the building exits. The Supreme Court found that no seizure had occurred because the agents neither prevented the workers from moving about the factory nor created an impression that they would be detained if they sought to leave.

INA

Most courts have held that the INA places independent limits on immigration officers’ authority to ask questions about immigration status. Under INA § 287(a)(1), immigration officers may “interrogate any alien or *person believed to be an alien* as to his right to be or to remain in the United States.”²⁰¹ As one court has stated, “[a] plain reading of this statute requires the government to show that immigration officials *believed* a person was an alien before questioning him.”²⁰² Likewise, in ***Matter of King and Yang***, 16 I&N Dec. 502, 504-05 (BIA 1978), the Board confirmed that INA § 287(a)(1) requires immigration officers to have a “reasonable suspicion of alienage” before questioning individuals about their immigration status, even where “no detention [i]s involved.” Neither the INA nor federal regulations describe what factors may create a “reasonable suspicion of alienage.” While an individual’s ethnic appearance

¹⁹⁴ *Minnesota v. Olson*, 495 U.S. 91 (1990).

¹⁹⁵ *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 315 (1978).

¹⁹⁶ *Mancusi v. DeForte*, 392 U.S. 364 (1968).

¹⁹⁷ *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹⁹⁸ *Brendlin v. California*, 551 U.S. 249 (2007).

¹⁹⁹ *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185 (2003) (“[I]nterrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.”); *Davis v. Mississippi*, 394 U.S. 721, 727 n. 6 (1969).

²⁰⁰ *Brown v. Texas*, 443 U.S. 47 (1979).

²⁰¹ INA § 287(a)(1) (emphasis added).

²⁰² *United States v. Flores-Sandoval*, 422 F.3d 711, 714 (8th Cir. 2005). See also *United States v. Garcia*, 942 F.2d 873, 877 (5th Cir. 1991); *United States v. Alvarez-Sanchez*, 774 F.2d 1036, 1041 (11th Cir. 1985); *Lee v. INS*, 590 F.2d 497, 501 (3d Cir. 1979); *Ill. Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (en banc); *Au Yi Lau*, 445 F.2d at 222; *Yam Sang Kwai v. INS*, 411 F.2d 683, 686-87 (D.C. Cir. 1969); *La Duke v. Nelson*, 762 F.2d 1318, 1327 (9th Cir. 1985).

alone is not sufficient to create reasonable suspicion that a person is a noncitizen,²⁰³ it may, in combination with other factors, provide justification for an officer to question an individual about his immigration status.²⁰⁴

Attorneys considering a motion to suppress under INA § 287(a)(1) are encouraged to contact the Legal Action Center at clearinghouse@immcouncil.org.

Q: When can immigration officers ask an individual for documentation?

A: Fourth Amendment

A request for identification does not, by itself, constitute a seizure.²⁰⁵ Nor does the voluntary production of identification transform the encounter into a seizure.²⁰⁶ Again, however, such an encounter can *become* a seizure if the officer retains the identification in a manner that would make a reasonable person not feel free to request its return and depart the area.²⁰⁷ For example, if an officer retains the identification while running the person's name through a government database, a seizure may have occurred because a reasonable person would not feel free to leave without his ID.

INA

Under INA § 264(e), it is a misdemeanor for any adult noncitizen “issued” an alien registration certificate or receipt card to fail to have it in his “personal possession” at all times. This requirement applies solely to “lawfully admitted aliens,”²⁰⁸ for the text of the law imposes no obligation on noncitizens never issued documents in the first place. However, courts have found that claiming to possess lawful immigration status, combined with a failure to produce documentary proof of such status, provides probable cause to arrest under § 264(e).²⁰⁹

To date, the law is less developed regarding what, if any, justification immigration officers must have to request immigration papers in the first place. Because such requests concern an individual's “right to be or remain in the United States,” it is arguable that § 287(a)(1) requires officers to have a “reasonable suspicion of alienage” before asking for documents. See previous discussion on pages 15-16.

Q: Under what circumstances may immigration officers make investigative (*Terry*) stops?

A: Fourth Amendment

In ***Terry v. Ohio***, 392 U.S. 1 (1968), the Supreme Court held that police under certain circumstances could forcibly (but temporarily) detain individuals for limited questioning. While

²⁰³ *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).

²⁰⁴ *Matter of King and Yang*, 16 I&N Dec. at 504-05.

²⁰⁵ *Delgado*, 466 U.S. at 216.

²⁰⁶ *Florida v. Royer*, 460 U.S. 491 (1983).

²⁰⁷ *Royer*, 460 U.S. at 504 n.9 (Opinion of White, J.).

²⁰⁸ *Katris v. INS*, 562 F.2d 866, 869 (1st Cir. 1977).

²⁰⁹ *Benitez-Mendez v. INS*, 760 F.2d 907, 909 n.2 (9th Cir. 1985); *United States v. Wright*, 706 F.Supp. 1268, 1274 (N.D. Tex. 1989). For a creative argument that arrests based on § 264(e) are no longer proper due to the lack of a comprehensive registration scheme, see Families for Freedom and New York University School of Law Immigrant Rights Clinic, *Uncovering USBP: Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals* (January 2013), at 24-26.

a “*Terry* stop” qualifies as a seizure under the Fourth Amendment,²¹⁰ it is less intrusive than a full-blown arrest and may thus be supported by “reasonable suspicion” rather than “probable cause.”²¹¹ As previously discussed, lower federal courts and the BIA have held that immigration officers may temporarily detain individuals whom they reasonably suspect are in the country illegally.²¹² The Supreme Court has also extended this rationale to permit brief traffic stops near the border where officers have reasonable suspicion to believe a vehicle contains noncitizens who are illegally in the country, or individuals who are otherwise engaged in unlawful activity.²¹³

INA and CFR

Federal courts and the BIA have uniformly held that INA § 287(a)(1) authorizes immigration officers to make brief investigative stops of individuals reasonably suspected of being in the country illegally.²¹⁴ Federal regulations likewise authorize immigration officers to briefly detain individuals for questioning whom they have reasonable suspicion to believe are in the country illegally.²¹⁵

Q: For how long may an individual be detained during an investigative (*Terry*) stop?

A: The Fourth Amendment limits the period of permissible detention during a valid *Terry* stop.²¹⁶ During such a stop, the seizing agents must diligently pursue a means of investigation that is likely to quickly confirm or dispel their suspicions.²¹⁷ If an investigative detention is excessively lengthy, it will be considered a *de facto* arrest and found unconstitutional unless supported by probable cause. In the immigration context, the Second Circuit has recognized that an unfounded investigative stop may be considered egregious if it is “particularly lengthy.”²¹⁸

The Supreme Court has not specified any rigid time limitations on investigative detentions but repeatedly has said they should be “temporary” or “brief.”²¹⁹ In *Brignoni-Ponce*, the Court emphasized that inquiries into immigration status ordinarily last no longer than one minute.²²⁰ In a subsequent case, the Court noted that it had never approved a stop lasting ninety minutes.²²¹

Q: May immigration officers “frisk” an individual during an investigative (*Terry*) stop?

²¹⁰ *Terry*, 392 U.S. at 16.

²¹¹ *Brown*, 443 U.S. at 51.

²¹² *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630, 632-33 (BIA 1974).

²¹³ *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Arvizu*, 534 U.S. 266 (2002).

²¹⁴ *Ojeda-Vinales v. INS*, 523 F.2d 286, 287 (2d Cir. 1975); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630, 632-33 (BIA 1974).

²¹⁵ 8 C.F.R. § 287.8(b)(2).

²¹⁶ *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185-86 (2003).

²¹⁷ *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

²¹⁸ *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2006).

²¹⁹ *Hiibel*, 542 U.S. at 185-86; *Dunaway v. New York*, 442 U.S. 200, 212 (1979); *Brignoni-Ponce*, 422 U.S. at 881-82; *Adams v. Williams*, 407 U.S. 143, 146 (1972).

²²⁰ *Brignoni-Ponce*, 422 U.S. at 880; *cf. Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) (clarifying that the Fourth Amendment does not allow state and local police to detain a person, or prolong a detention, solely to verify immigration status).

²²¹ *United States v. Place*, 462 U.S. 696, 709-710 (1983).

A: Officers conducting an investigative stop may frisk or pat down a suspect's outer clothing only if they have independent "reasonable suspicion" that the person is armed and dangerous.²²² "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue the investigation without fear of violence."²²³ Officers may seize other items encountered during a frisk, but *only* if the "plain feel" of the item makes it immediately recognizable as illegal contraband.²²⁴ If the frisking officer exceeds these limitations, any fruits of the search are obtained in violation of the Fourth Amendment.²²⁵

Arguably, officers cannot seize immigration documents—such as a foreign passport or other identification establishing alienage—during a pat down under this test because such documents are neither weapons nor illegal contraband. The only time an immigration officer may confiscate such documents without a warrant is if there is *probable cause* to believe the suspect is in the United States illegally, in which case the officer may conduct a full search incident to arrest, one of the aforementioned exceptions to the warrant requirement.²²⁶

Q: When is an individual considered under "arrest"?

A: No bright-line test exists to determine when an individual is considered under "arrest." However, the Supreme Court has made clear that a person need not be handcuffed, booked, or put in jail for an arrest to take place. For example, involuntarily transporting an individual to a police station for questioning has been found to be an arrest,²²⁷ as has placing a person in a confined area, even for a limited period.²²⁸ A *Terry* stop or brief detention—which is justified by reasonable suspicion—can become an arrest if the detention is sufficiently prolonged and officers do not develop the probable cause required to place a person under arrest.

Q: Do immigration agents need a warrant to make an arrest in public?

A: Fourth Amendment

Under the Fourth Amendment, government agents may arrest individuals in public without a warrant if probable cause exists to believe the person has violated the law.²²⁹ Thus, committing or confessing to a violation of law in an officer's presence provides probable cause to arrest, no matter how minor the offense.²³⁰

INA and CFR

Under INA § 287(a)(2), immigration officers may make warrantless arrests only if they have "reason to believe" the person is (1) present in violation of law *and* (2) "likely to escape before a warrant can be obtained for his arrest." Courts construe "reason to believe" as equivalent to probable cause,²³¹ and regulations state that immigration officers must possess the requisite level

²²² *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

²²³ *Adams v. Williams*, 407 U.S. 143, 146 (1972).

²²⁴ *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

²²⁵ *Dickerson*, 508 U.S. at 373.

²²⁶ *Chimel v. California*, 395 U.S. 752 (1969).

²²⁷ *Dunaway v. New York*, 442 U.S. 200 (1979).

²²⁸ *Florida v. Royer*, 460 U.S. 491 (1983).

²²⁹ *United States v. Watson*, 423 U.S. 411, 417 (1976).

²³⁰ *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001).

²³¹ *United States v. Sanchez*, 635 F.2d 47, 63 n.13 (2d Cir. 1980); *Au Yi Lau*, 445 F.2d at 222.

of suspicion as to both the unlawfulness of a noncitizen's presence *and* the likelihood of his escape.²³²

Where either factor is absent, the admissibility of evidence obtained as a result of a warrantless arrest may be subject to challenge.²³³ While the Sixth Circuit has found that suppression is not an appropriate remedy for violations of INA § 287(a)(2),²³⁴ the court did not consider the Fourth Amendment interests protected by the statute, which the Supreme Court has indicated is an important consideration. See page 12. Attorneys considering motions to suppress under INA § 287(a)(2) are encouraged to contact us at clearinghouse@immcouncil.org.

3. ENCOUNTERS ON PRIVATE PROPERTY

Q: May immigration agents enter a home to execute an administrative arrest warrant without the consent of the occupants?

A: ***Payton v. New York***, 445 U.S. 573 (1980), held that government agents must, in the absence of exigent circumstances, possess a judicially issued search or arrest warrant before entering a private residence without the consent of the occupant(s). However, immigration warrants are issued by DHS²³⁵ rather than judicial officers. Thus, even if they possess an administrative immigration arrest warrant, federal immigration officers arguably may not enter a residence without receiving valid consent from the occupant(s).²³⁶

Q: When is consent considered valid?

A: Fourth Amendment

Without valid consent, any warrantless entry into a private residence (or other area in which a person possesses a reasonable expectation of privacy) is presumptively unreasonable.²³⁷ The government bears the burden of showing valid consent.²³⁸ A claim of valid consent may be defeated if consent was (a) not given, (b) given involuntarily, (c) not given by an authorized party, or (d) limited in scope.

Consent not given

The most obvious defense to a consent search is that consent was not given. In *Lopez-Rodriguez*, the Ninth Circuit cautioned that consent could be inferred in very few circumstances, and held that the government “may not show consent to enter from the defendant’s failure to

²³² 8 C.F.R. § 287.8(c)(2)(i)-(ii); see also *Matter of Chen*, 12 I&N Dec. 603, 605-07 (BIA 1968).

²³³ *United States v. Quintana*, 623 F.3d 1237, 1241 (8th Cir. 2010); *Martinez-Angosto v. Mason*, 344 F.2d 673, 680 (2d Cir. 1965).

²³⁴ *United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006).

²³⁵ INA § 236(a); see also Letter from former DHS Secretary Michael Chertoff to Sen. Christopher J. Dodd at 2 (June 14, 2007), available at <http://www.yaledailynews.com/documents/2009/sep/28/letter-from-former-secretary-of-homeland-security-/> (acknowledging that a “warrant of removal is administrative in nature and does not grant the same authority to enter dwellings as a judicially approved search or arrest warrant”).

²³⁶ See *Cotzjay v. Holder*, 2013 WL 3927605, *27-*29 (2d Cir. 2013) (remanding for additional fact-finding to determine whether residents had consented to a nighttime warrantless home entry by government officials).

²³⁷ *Payton v. New York*, 445 U.S. 573, 586 (1980).

²³⁸ *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

object to the entry.”²³⁹ The court found that a warrantless search without consent constitutes an egregious Fourth Amendment violation.

Consent given involuntarily

Consent must be given “freely and voluntarily” and not be “the result of duress or coercion, express or implied.”²⁴⁰ Courts look to the totality of the circumstances in making this inquiry, considering such factors as the coerciveness of the questioning; the vulnerability of the person who consented; and whether the individual understood his or her right to refuse consent.²⁴¹ Consent may be deemed involuntary where agents falsely claim to possess a warrant or authority to search.²⁴²

Consent given by unauthorized party

Consent must be given by an authorized party. Generally, third parties may provide valid consent if police reasonably believe them to possess “common authority” over the property.²⁴³ Both landlords²⁴⁴ and hotel clerks²⁴⁵ have been found to lack authority to consent. In all cases, the government bears the burden of establishing the third party’s common authority over the property.²⁴⁶ Importantly, if the movant was himself present and refused consent, the search generally would be found unreasonable, even if another party provided consent.²⁴⁷

Consent limited in scope

Suspects may limit the scope of a search to which they consent, and it is unreasonable for officers to exceed such scope.²⁴⁸ When the scope of consent is ambiguous, courts ask what a “typical reasonable person would have understood by the exchange between the officer and the suspect.”²⁴⁹ Courts have similarly found that suspects may withdraw consent after a search has begun, and the Ninth Circuit explained that preventing suspects from withdrawing consent—by, for example, prohibiting them from witnessing the search—could violate the Fourth Amendment.²⁵⁰

INA and CFR

The INA and federal regulations impose more specific limits on consensual searches than the Fourth Amendment. Under INA § 287(e), immigration officers cannot enter farms or other outdoor agricultural operations to interrogate an individual about his immigration status without “the consent of the owner (or agent thereof).” Likewise, 8 C.F.R. § 287.8(f)(2) requires officers to obtain consent from “the owner or other person *in control*” of a site. The regulation further states that the immigration officer must note on his or her report that consent was given and, if

²³⁹ *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th Cir. 2008) (quotations omitted).

²⁴⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (quotations omitted).

²⁴¹ *Id.* at 228, 232-33.

²⁴² *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

²⁴³ *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Matlock*, 415 U.S. 164, 169-170 (1974).

²⁴⁴ *Chapman v. United States*, 365 U.S. 610 (1961).

²⁴⁵ *Stoner v. California*, 376 U.S. 483 (1964).

²⁴⁶ *Rodriguez*, 497 U.S. at 181.

²⁴⁷ *Georgia v. Randolph*, 547 U.S. 103 (2006).

²⁴⁸ *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

²⁴⁹ *Id.* at 251.

²⁵⁰ *United States v. McWeeney*, 454 F.3d 1030, 1034-37 (9th Cir. 2006).

possible, by whom consent was given. Under 8 C.F.R. § 287.8(f)(4), immigration officers may enter “open fields” or areas of a business accessible to the public without a warrant or consent, a provision consistent with the Fourth Amendment.

Q: If officers receive consent to enter a home, may they automatically detain the occupants for questioning?

A: No. Generally, the same standards for a seizure on the street also apply inside a home. Permitting officers to enter a home does not authorize them to “round up” the occupants and/or detain them for questioning. To restrict a person’s freedom of movement, immigration officers must, at a minimum, possess reasonable suspicion that the individual is illegally in the United States.

Absent reasonable suspicion, the only instance in which the Supreme Court has allowed officers to automatically detain the occupants of a home is during the execution of a search warrant for *criminal contraband*. However, even then, the Court stated that temporary detentions may *not* be “exploited ... to gain more information,”²⁵¹ and that any questioning which prolongs the period of detention must have independent support under the Fourth Amendment.²⁵²

²⁵¹ *Michigan v. Summers*, 452 U.S. 692, 701 (1981).

²⁵² *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

Part III: Motions to Suppress for Due Process and Related Violations

Unlike the Fourth Amendment, which ceases to apply for suppression purposes after a lawful arrest, the Due Process Clause of the Fifth Amendment can form the basis of a suppression motion for misconduct occurring before or after an arrest. However, because violations of the Due Process Clause are difficult to establish, attorneys are encouraged to also make suppression arguments based on regulatory violations when the allegations permit.

Q: What does the Due Process Clause prohibit?

A: The Due Process Clause of the Fifth Amendment states, in relevant part:

“No person shall be ... deprived of life, liberty, or property, without due process of law.”

Unlike the Fourth Amendment, which hinges upon reasonableness, the Due Process Clause requires *fairness*. Specifically, it entitles noncitizens to “fair” removal proceedings²⁵³ and mandates that evidence be used in a “fundamentally fair” manner.²⁵⁴ Among other limitations, the Due Process Clause prohibits the government from introducing statements made by individuals under coercion or duress. The Supreme Court requires “exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable.”²⁵⁵ In numerous cases, the Board and federal circuit courts have ordered the exclusion of statements obtained in violation of the Due Process Clause.²⁵⁶

Q: What makes a statement “involuntary” or “coerced”?

A: Fifth Amendment

To establish a statement was made involuntarily, a movant must demonstrate that it was the product of affirmative duress or coercion by government agents. The seminal immigration case for the suppression of involuntarily obtained statements is ***Matter of Garcia***, 17 I&N Dec. 319, 320 (BIA 1980), in which the respondent conceded alienage after arresting officers physically prevented him from giving his attorney’s phone number to his employer; failed to advise him of his rights under 8 C.F.R. § 287.3(c); and refused his requests to contact counsel. The Board reversed the deportation order, finding that the respondent’s admission was involuntary. In a subsequent case, the Board identified other factors that would demonstrate coercion: physical abuse, lengthy interrogation, denial of food or drink, threats or promises, or interference with a respondent’s attempts to exercise his rights.²⁵⁷ More recently, in ***Singh v. Mukasey***, 553 F.3d 207 (2d Cir. 2009), the Second Circuit excluded the confession of a noncitizen who was

²⁵³ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *United States ex rel. Vajtauer v. Comm’r*, 273 U.S. 103, 106 (1927) (“Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process.”).

²⁵⁴ *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980).

²⁵⁵ *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006).

²⁵⁶ *Matter of Sandoval*, 17 I&N Dec. 70, 83 n.23 (BIA 1979) (citing *Tashnizi v. INS*, 585 F.2d 781 (5th Cir. 1978)); *Valeros v. INS*, 387 F.2d 921 (7th Cir. 1967); *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977); *Bong Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960)).

²⁵⁷ *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

interrogated for four hours in the middle of the night; repeatedly threatened him with imprisonment; and denied the opportunity to read the statement before signing it.²⁵⁸

CFR

Federal regulations prohibit immigration officers from using threats, coercion, or physical abuse to induce a suspect to waive his or her rights or to make a statement.²⁵⁹ Arguably, this regulation imposes the same limitations on immigration officers as the Due Process Clause. Thus, attorneys may also cite this regulation when filing motions to suppress on due process grounds.

Q: What warnings must immigration officers provide to noncitizens following arrest?

A: Fifth Amendment

In contrast to criminal cases, the failure to provide *Miranda* warnings prior to interrogating a suspect in custody does not necessarily render subsequent statements inadmissible in removal proceedings.²⁶⁰ However, an immigration officer's failure to provide similar advisals listed under 8 C.F.R. § 287.3(c) may be considered in determining whether, under the Due Process Clause, a statement is voluntary.²⁶¹

INA

The INA states that all persons arrested without a warrant be taken for "examination" before a qualified immigration officer,²⁶² but does not require the provision of any warnings prior to examination.

CFR

Under 8 C.F.R. § 287.3(c), noncitizens arrested without a warrant are entitled to receive certain *Miranda*-like advisals following their arrest. The regulation currently reads in relevant part:

(c) *Notifications and information.* ... [A]n alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services ... The examining officer shall note on [the Notice To Appear] that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

In ***Matter of E-R-M-F & A-S-M-, 25 I&N Dec. 580 (BIA 2011)***, the Board held that noncitizens arrested without a warrant need not receive these advisals until *after* removal proceedings have been initiated by the filing of a Notice To Appear (NTA). The Board therefore

²⁵⁸ *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009); see also *Bong Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960); *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977).

²⁵⁹ 8 C.F.R. § 287.8(c)(2)(vii).

²⁶⁰ *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975); *Matter of Rojas*, 15 I&N Dec. 722, 724 (BIA 1976).

²⁶¹ *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980).

²⁶² INA § 287(a)(2).

concluded that “any statements made prior to the initiation of formal proceedings are not obtained in violation of 8 C.F.R. § 287.3(c), and the fact that no advisals were given at that time does not render the documents containing those statements inadmissible in removal proceedings.”²⁶³ The Board reasoned that the phrases “arrested without warrant” and “placed in formal proceedings” describe the subset of arrestees to whom the advisals must be given, making the filing of a NTA “a necessary precondition to the mandatory issuance of the advisals.”²⁶⁴ The Board also noted that the Ninth Circuit previously reached the same conclusion in *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009).²⁶⁵

Notwithstanding the Board’s decision, a strong argument exists that the advisals in 8 C.F.R. § 287.3(c) must be given *prior to* questioning suspects arrested without a warrant, and attorneys may therefore wish to preserve this objection for future appellate challenges. First, it would be illogical to wait until after noncitizens are placed in removal proceedings to inform them of the reason(s) for their arrest, because the charges in the NTA may ultimately differ from the reason(s) for which they were initially arrested. Second, if arrestees do not receive the list of free legal service providers until *after* the NTA is filed, examining officers cannot honestly attest on the NTA that such a list was provided to the arrestee, as the regulation requires. And third, the Board’s opinion renders the advisal regarding the use of statements in subsequent proceedings both inaccurate, because the initiation of removal proceedings renders them no longer “subsequent,”²⁶⁶ and virtually meaningless, because the government typically has no need to obtain further statements from an arrestee after the NTA has been filed.

From a policy standpoint, in cases where the advisals are not provided prior to interrogation, it will be more difficult for immigration judges to evaluate claims under the Due Process Clause that statements were obtained involuntarily. In addition, waiting to provide the advisals may mislead immigration officers into believing that arrestees do not, in fact, have the right to remain silent or to have counsel present during interrogation. Finally, the Board’s construction of the regulation creates no guarantee that the advisals will, in fact, be provided—particularly in cases where arrestees are transferred far from the location of their initial interrogation.

Attorneys considering filing a motion to suppress for violations of 8 C.F.R. § 287.3(c) are encouraged to contact the Legal Action Center at clearinghouse@immcouncil.org.

Q: May noncitizens have an attorney present during post-arrest examination?

A: Fifth Amendment

In *Matter of Garcia*, 17 I&N Dec. 319 (BIA 1980), the Board suppressed evidence obtained from a respondent who was repeatedly prevented from contacting his attorney following his arrest. The Board concluded that preventing the respondent from contacting his attorney

²⁶³ *Matter of E-R-M-F*, 25 I&N Dec. at 588.

²⁶⁴ *Id.* at 583.

²⁶⁵ Unlike the Ninth Circuit, the Second and Eighth Circuits have assumed, without directly deciding, that the advisals must be provided *prior to* examination. *Puc-Ruiz v. Holder*, 629 F.3d 771, 780-81 (8th Cir. 2010); *Singh v. Mukasey*, 553 F.3d 207, 215-16 (2d Cir. 2009).

²⁶⁶ See, e.g., 8 C.F.R. § 1239.1(a) (“Every removal proceeding conducted under section 240 of the Act (8 U.S.C. § 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court.”).

rendered his subsequent statements involuntary and therefore subject to suppression under the Due Process Clause.²⁶⁷

INA and CFR

INA § 292 gives persons the privilege of being represented by counsel (at no expense to the government) during all proceedings before immigration judges and the BIA. Importantly, 8 C.F.R. § 292.5(b) expands this right by entitling noncitizens to the presence of counsel during any “examination” by immigration officers. Both the INA and federal regulations characterize questioning that follows a warrantless arrest as an “examination.”²⁶⁸ If a noncitizen is precluded from having counsel present during such an examination, any resulting statements could therefore merit suppression under 8 C.F.R. § 292.5(b).²⁶⁹ Attorneys considering motions to suppress under 8 C.F.R. § 292.5(b) are encouraged to contact the Legal Action Center at clearinghouse@immcouncil.org.

²⁶⁷ *Matter of Garcia*, 17 I&N Dec. at 321 (citing *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir.1977); *Bong Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960)).

²⁶⁸ INA § 287(a)(2); 8 C.F.R. § 287.3(c).

²⁶⁹ See, e.g., *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006) (stating that 8 C.F.R. § 292.5(b) protects the “right to be represented by counsel at examinations by immigration officers”).

Part IV: How to File a Motion to Suppress

Q: What facts do I need to determine whether to file a motion to suppress?

A: Establishing the circumstances of your client's interactions with immigration officers (and, in some cases, other law enforcement officials) encountered prior to the initiation of removal proceedings is critical to assessing the viability of a motion to suppress. During your initial interview, you should question your client about his or her encounter(s) with ICE, CBP and/or other law enforcement officials, the nature of any questioning, your client's response, any documents provided or received by your client, any restraints imposed on your client, whether your client received any warnings, whether there was a warrant for your client's arrest, and the sequence of developments that led to the issuance of a Notice to Appear. If possible, you should try to elicit this information while the facts are still fresh in your client's mind.

Q: Who bears the burden of proof of removability?

A: When a respondent is charged with being present in the United States without being admitted or paroled, the government need only prove the respondent's identity and alienage, at which point the burden shifts to the respondent to establish the time, place, and manner of entry.²⁷⁰ A motion to suppress must seek to prevent the government from establishing alienage.

Q: Who bears the burden of establishing that evidence was unlawfully obtained?

A: When a motion to suppress is filed, the respondent bears the burden of showing that evidence used to establish removability was unlawfully obtained.²⁷¹ Before the government can be called upon to justify how it obtained the evidence, a respondent must make a *prima facie* case that it was obtained unlawfully.²⁷² A *prima facie* case is one that, on the facts alleged, is sufficient to create a rebuttable presumption that a violation occurred. Because a search or seizure conducted without a warrant is presumptively unreasonable, alleging that an unjustified warrantless search or seizure took place may be sufficient to shift the burden to the government to demonstrate an exception to the warrant requirement. To establish a *prima facie* case, the motion must (a) be specific and detailed, (b) contain allegations based on the respondent's personal knowledge, and (c) list the evidence to be suppressed.²⁷³

Q: At what point in proceedings should attorneys file a motion to suppress?

A: Before filing a motion to suppress, attorneys should deny the allegations (including alienage) in the NTA at the first master calendar hearing. Subsequently, after the government offers a Form I-213 or other evidence of the respondent's alienage, attorneys should disclose their intention to file a motion to suppress and, if needed, request time to file the motion.

²⁷⁰ 8 C.F.R. § 1240.8(c); *Matter of Cervantes-Torres*, 21 I&N 351, 354 (BIA 1996).

²⁷¹ *Matter of Tsang*, 14 I&N Dec. 294, 295 (BIA 1973).

²⁷² *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971).

²⁷³ *Id.* at 822.

Q: What should be filed with a motion to suppress?

A: Affidavit(s)

Respondents must submit evidence in support of their suppression claims. Typically, though not exclusively, attorneys submit affidavits from the respondent and any witnesses detailing the factual basis for the motion.²⁷⁴ Though couched in non-legal language, supporting affidavits should address all legal elements of the suppression motion—for example, that valid consent for a search was not obtained, or that the respondent was engaged in no activity that could create a reasonable suspicion of illegal alienage. Where necessary, include a certificate of interpretation as required under Chapter 3.3(a) of the Immigration Court Practice Manual.

Motion to terminate

Attorneys should also file a motion to terminate proceedings along with a motion to suppress. If suppression is granted and the government presents no untainted evidence of alienage, the immigration judge can grant the motion to terminate and dismiss the charges against the respondent.²⁷⁵

Q: Are respondents entitled to a separate hearing on a motion to suppress?

A: ***Matter of Benitez***, 19 I&N Dec. 173 (BIA 1984), held that respondents are not entitled to a separate hearing on a motion to suppress. However, ***Matter of Barcenas***, 19 I&N Dec. 609, 611 (BIA 1988), held that when a movant submits evidence that “could” provide a basis for excluding the evidence in question, the claims “must” be supported by testimony. Arguably, immigration judges must therefore allow respondents to testify in support of a motion to suppress, even if a separate suppression hearing is not required.

Tip: Before a client testifies, attorneys may wish to file a motion in limine seeking to prohibit questioning regarding alienage or removability, or the use of such testimony as part of the government’s case-in-chief.²⁷⁶ If such a motion is denied, attorneys should prepare their clients to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment.

Q: Do respondents have a right to remain silent in removal proceedings?

A: Yes. Even in civil removal proceedings, respondents cannot be required to answer questions that could subject them to criminal liability.²⁷⁷ Thus, a respondent charged with being present without being admitted or paroled cannot be required to respond to questions that might establish alienage, because the answer could result in prosecution for criminal violations of the INA, such

²⁷⁴ *Id.* Note that such evidence may not need to be presented in a sworn statement. *Id.* at 821 n.1.

²⁷⁵ *Matter of Garcia*, 17 I&N Dec. at 321.

²⁷⁶ For an example of a decision granting such a motion, visit <http://www.legalactioncenter.org/sites/default/files/docs/lac/IJ-Marks-order-8-25-11.pdf>.

²⁷⁷ *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (holding that the privilege against self-incrimination may be “asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”).

as illegal entry.²⁷⁸ By contrast, the privilege against self-incrimination may not be invoked against questions relating to a visa overstay, because only civil consequences attach to such a violation.²⁷⁹

In general, the respondent must assert the privilege against self-incrimination on a question-by-question basis.²⁸⁰ However, some immigration judges allow attorneys to assert the privilege on the client's behalf. The privilege may be asserted for both questions directly related to the respondent's alienage and for questions that could elicit a "link in the chain of evidence" needed to convict the individual of a crime.²⁸¹ Importantly, a witness cannot be compelled to state why an answer might tend to incriminate him;²⁸² nor can an immigration judge or trial attorney validly offer immunity to respondents to prevent them from invoking the privilege.²⁸³ If asked a question to which the answer could help prove citizenship of a foreign country, clients should say, "I decline to answer under the Fifth Amendment."

Q: Can immigration judges draw an adverse inference from a respondent's refusal to testify?

A: Yes. A respondent's silence may lead to adverse inferences regarding alienage.²⁸⁴ However, until the government presents evidence of alienage, such silence is not alone sufficient to establish removability.²⁸⁵ Thus, if the government's only evidence of alienage is excluded pursuant to a motion to suppress, and if the respondent does not concede alienage, the government will have failed to meet its burden and a motion to terminate proceedings should be granted.

Q: What happens if the respondent concedes alienage?

A: Such an admission would constitute untainted evidence on which the government can base a finding of removability.²⁸⁶ Absent highly unusual circumstances, a formal admission by a respondent's attorney—such as during the pleading stage or in a motion to change venue—is binding upon the respondent in removal proceedings.²⁸⁷ If your client is considering a motion to suppress, it is crucial that you deny the charges and the relevant allegations in the NTA and that neither you nor your client concede alienage at any point of the case.

Q: Can the government use a respondent's application for relief to establish alienage?

A: No. Federal regulations state that an application for relief made during a hearing "shall not be held to constitute a concession of alienage or deportability in any case in which the

²⁷⁸ See, e.g., INA § 275; *Matter of Velasquez*, 19 I&N Dec. 377, 379 (BIA 1986) ("Since it is a crime to enter the United States without inspection, the immigration judge found the respondent had properly invoked the privilege.").

²⁷⁹ *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976); *Matter of Santos*, 19 I&N Dec. 105, 109-110 n.2 (BIA 1984).

²⁸⁰ *Matter of R-*, 4 I&N Dec. 720, 721 (BIA 1952).

²⁸¹ *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 191 (2003).

²⁸² *Matter of R-*, 4 I&N Dec. at 721.

²⁸³ *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979).

²⁸⁴ *Lopez-Mendoza*, 468 U.S. at 1043-44.

²⁸⁵ *Matter of Guevara*, 20 I&N Dec. 238, 244 (1991).

²⁸⁶ *Matter of Carrillo*, 17 I&N Dec. at 32.

²⁸⁷ *Matter of Velasquez*, 19 I&N 377, 382 (BIA 1986).

respondent does not admit his or her alienage or deportability.”²⁸⁸ However, the regulation does not bar the government from relying on applications submitted prior to the initiation of proceedings.

Q: Can respondents compel arresting or examining officers to testify?

A: Generally not. However, if the government offers a Form I-213 to establish alienage, attorneys may ask the immigration judge to subpoena or order a deposition of the agent who prepared the form so that he may be cross-examined.²⁸⁹ A party applying for a subpoena must state what he or she expects to prove and show “diligent” but unsuccessful efforts to produce the same.²⁹⁰

While respondents generally are not entitled to cross-examine the preparers of Form I-213, an exception exists if information on the form “is manifestly incorrect or was obtained by duress,”²⁹¹ or if other circumstances indicate lack of trustworthiness.²⁹² In many suppression cases, the alleged misconduct itself may provide a basis to question the reliability of the Form I-213—for example, whether or not immigration officers obtained consent before entering a home.

Q: If removal proceedings are terminated following the suppression of unlawfully obtained evidence, may the government reinitiate proceedings based upon untainted evidence?

A: Yes. *Matter of Perez-Lopez*, 14 I&N Dec. 79 (BIA 1972), held that the government may commence new removal proceedings following the termination of an earlier case if it has new, untainted evidence of removability. However, the government must establish “that it gained or could have gained the knowledge it relies upon from a source independent of its wrongful act.”²⁹³

²⁸⁸ 8 C.F.R. § 1240.11(e).

²⁸⁹ 8 C.F.R. § 1003.35(a)-(b) (granting immigration judges power to order depositions and issue subpoenas).

²⁹⁰ 8 C.F.R. § 1003.35(b)(2).

²⁹¹ *Barradas v. Holder*, 582 F.3d 754, 763 (7th Cir. 2009).

²⁹² *Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995) (quoting Fed. R. Evid. 803(8)(C)).

²⁹³ *Matter of Perez-Lopez*, 14 I&N Dec. at 80 (citing *Wong Sun v. United States*, 371 U.S. 471, 485 (1963)).

Part V: Strategic Considerations

Q: Are there advantages to seeking damages or other relief in federal court while pursuing a motion to suppress?

A: The events that give rise to a motion to suppress also may provide the basis for your client to sue the government for damages in federal court. Such damages actions are typically brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), § 2671 *et seq.*, or against individual law enforcement officers under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Before filing an FTCA lawsuit, a claimant must exhaust administrative remedies by filing an administrative claim with the relevant agency.²⁹⁴

Although damages lawsuits do not generally result in large monetary awards, there may be other reasons to sue. Through federal court discovery, you may be able to obtain evidence—for example, information regarding the basis for an unlawful stop—that strengthens your motion to suppress. Moreover, filing a well-founded administrative claim or federal lawsuit may provide a basis for a respondent to seek prosecutorial discretion under existing ICE policy.²⁹⁵ The government may also have a greater incentive to terminate a removal case as part of a global settlement of pending federal court litigation.

Q: What are the pros and cons of filing a motion to suppress before requesting prosecutorial discretion?

A: If you file a motion to suppress, you are indicating to the government that you intend to take a litigious approach that will require them to invest more resources than usual. This will not endear you to the Office of Chief Counsel and may adversely affect how DHS trial attorneys think of you and treat you, which in turn may make them less inclined to grant your client's request for prosecutorial discretion. If you intend to seek prosecutorial discretion on your client's behalf, we recommend that you consider filing your request before your motion to suppress. You should, of course, avoid submitting any supporting materials with your request that implicate alienage or could lead to the discovery of evidence of alienage. On the other hand, filing a motion to suppress may give DHS a greater incentive to grant prosecutorial discretion to avoid unnecessary litigation.

Before deciding whether to file either a motion to suppress or a request for prosecutorial discretion and how to sequence these tactics, you should consider a number of factors. For

²⁹⁴ 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2. For general information about filing FTCA claims, see National Immigration Project of the National Lawyers Guild, *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys* (January 24, 2013), available at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_FTCA_FAQ.pdf.

²⁹⁵ See John Morton, Director, ICE, Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs (June 17, 2011). In addition, respondents should consider filing an administrative complaint with the DHS Office of Civil Rights and Civil Liberties (OCRCL), which may also provide a basis for seeking prosecutorial discretion. *Id.* More information about the OCRCL complaint process is available at <http://www.dhs.gov/file-civil-rights-complaint>.

purposes of the motion to suppress, the most important variables are the egregiousness of the conduct at issue, the government's access to independent evidence of alienage, the applicable law in your circuit, and the resources available to undertake prolonged litigation. For purposes of prosecutorial discretion, you should determine whether your client fulfills the criteria set forth in either of two memoranda issued by ICE Director John Morton, entitled [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens](#) (June 17, 2011) and [Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs](#) (June 17, 2011), or DHS's more recent guidance on [Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children](#) (June 15, 2012).²⁹⁶ Your strategy ultimately should be determined based on the relative strength of each of these claims.

²⁹⁶ For further discussion of these memoranda, see Legal Action Center, [Prosecutorial Discretion: How to Advocate for Your Client](#) (updated June 24, 2011), and Legal Action Center, [Deferred Action for Childhood Arrivals](#) (updated April 22, 2013).

APPENDIX

Questioning, Stops, and Arrests: Three Types of Encounters with Law Enforcement Officers

	Fourth Amendment	INA § 287	8 C.F.R. 287
“Consensual” questioning	<i>Not a seizure.</i> No individual suspicion required. Officers may always pose questions to people in public places. However, for questioning to be “consensual,” reasonable person must feel free to decline and/or leave.	INA 287(a)(1). Permits immigration officers to “interrogate” any “alien” or “person believed to be alien” as to “his right to be or remain in the United States.” BIA and most courts construe statute to require “reasonable suspicion of alienage” to justify questioning about immigration status. Statute thus more protective of individuals than Fourth Amendment.	8 C.F.R. § 287.8(b)(1). Permits immigration officers, “like any other person,” to ask questions of “anyone” as long as the officer “does not restrain the freedom of an individual, not under arrest, to walk away.” Same standard as Fourth Amendment. Regulation arguably violates INA 287(a)(1) if construed to permit questioning about immigration status without reasonable suspicion of alienage.
Investigative (Terry) stop	<i>Seizure.</i> Individualized suspicion required. Brief forcible detention permitted if officer possesses “reasonable suspicion” based on articulable facts that illegal activity is afoot (including violation of civil immigration laws).	INA 287(a)(1). Has been construed to authorize investigative detentions upon reasonable suspicion of <i>unlawful</i> alienage. Same standard as Fourth Amendment.	8 C.F.R. § 287.8(b)(2). Permits immigration officers to “briefly detain [a] person for questioning” if officer has “reasonable suspicion” based on “specific articulable facts” that the suspect is, or is attempting to be “engaged in an offense against the United States” or is “an alien illegally in the United States.” Same standard as Fourth Amendment.
Arrest	<i>Seizure.</i> Individualized suspicion required. Arrests permitted in dwellings if officer obtains warrant. Arrests permitted in public places if officer possesses “probable cause” to believe arrestee committed violation of law. Seriousness of crime not relevant. Whether time existed to get a warrant not relevant.	INA 287(a)(2). Warrantless arrests permitted if immigration officer has “reason to believe” (e.g. probable cause) arrestee is an “alien in the United States in violation of law”—but only if “likely to escape” before warrant can be obtained. More protective than Fourth Amendment.	8 C.F.R. § 287.8(c)(2)(i). Warrantless arrest permissible if officer has “reason to believe” (e.g. probable cause) arrestee “is an alien illegally in the United States.” Same standard as Fourth Amendment. 8 C.F.R. § 287.8(c)(2)(ii). Arrest warrant “shall” be obtained except if officer has “reason to believe” suspect is “likely to escape” before warrant issued. More protective than Fourth Amendment.

PRACTICE ADVISORY²⁹⁷
Updated October 23, 2013

**HOW TO GET JUDICIAL RELIEF UNDER 8 U.S.C. § 1447(b) FOR A
STALLED NATURALIZATION APPLICATION**

By the Legal Action Center

Section 336(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1447(b), specifically provides for direct judicial review of delays in adjudicating naturalization applications by the United States Citizenship and Immigration Services (USCIS).²⁹⁸ It gives a district court jurisdiction to intervene in a case where USCIS has failed to make a decision on the naturalization application within 120 days of the applicant's "examination" by USCIS. In so doing it provides a statutory remedy for naturalization applicants against extensive post-interview delays by USCIS in adjudicating their applications.

Section 1447(b) includes five general elements:

1. USCIS must have failed to make a decision on the naturalization application;

²⁹⁷ Copyright (c) 2013 American Immigration Council. [Click here for information on reprinting this practice advisory](#). The Legal Action Center (LAC) thanks Linda Rose for her assistance with the original version of this Practice Advisory.

This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The cases cited herein are examples only and do not constitute an exhaustive search of relevant case law in all jurisdictions.

²⁹⁸ Section 1447(b) reads as follows:

If there is a failure to make a determination under [INA] § 335 [8 U.S.C. § 1446] before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States District Court for the District in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions to the Service to determine the matter.

2. The delay in decision-making by USCIS must have lasted for at least 120 days after the “examination”;
3. The suit must be filed in the federal district court where the applicant resides;
4. The court then acquires jurisdiction over the naturalization application; and
5. The court may either decide the naturalization application or may remand the case with instructions to USCIS.

This practice advisory will outline these basic elements and will discuss litigation concerning this provision and the issues that have arisen from this litigation. It will also discuss when attorneys fees under the Equal Access to Justice Act are available in § 1447(b) suits.

1. USCIS must have failed to make a decision on the naturalization application.

As an initial matter, for § 1447(b) to apply, there must be no decision on the naturalization application. Section 1447(b) is only a remedy for delays in the adjudication of naturalization applications; it does not provide for district court review of the denial of a naturalization application. Instead, when a naturalization application “is denied after a hearing before an immigration officer,” the applicant can seek review of the denial in the federal district court in the district in which he or she resides. 8 U.S.C. § 1421(c). A direct appeal under § 1421(c) is not discussed in this advisory.

2. A § 1447(b) action is ripe only after USCIS has failed to make a decision within 120 days of the naturalization “examination.”

The statute is very specific in identifying precisely when a naturalization applicant can ask the district court to intervene due to agency delay: when the agency fails to make a decision on the application within 120 days after the “date on which the examination is conducted under [§ 1446].” 8 U.S.C. § 1447(b).

The meaning of the term “examination” is critical to determining when a § 1447(b) action can be brought, since it is only after the “examination” has taken place that the 120 day period begins to run. The majority of courts – including the only courts of appeals to decide the issue – have held that “examination” refers to the *initial interview* scheduled under 8 U.S.C. § 1446. *See, e.g., Walji v. Gonzales*, 500 F.3d 432, 436 and n. 5 (5th Cir. 2007) (citing cases)²⁹⁹; *U.S.A. v. Hovsepian*, 359 F.3d 1144, 1151 (9th Cir. 2004) (en banc); *Omar v. USA*, 552 F. Supp. 2d 713 (M.D. Tenn. 2008); *Shendaj v. Dedvukaj*, 543 F. Supp. 2d 724 (E.D. Mich. 2008); *Imran v. Keisler*, 516 F.Supp.2d 967 (S.D. Iowa 2007); *see also* 8 C.F.R. § 335.2. These and other courts hold that a § 1447(b) action can be brought if USCIS has failed to make a decision within 120 days after the initial interview. In *Walji*, the Fifth Circuit reached this conclusion based upon the statutory

²⁹⁹ In *Walji*, the Fifth Circuit interpreted the Fourth Circuit decision *Etape v. Chertoff*, 497 F.3d 379 (4th Cir. 2007), as implicitly holding that the 120 day period begins to run from the date of the initial interview. Thus, *Etape* arguably can be construed as reaching this same result.

language of § 1447(b) (indicating that the “examination” was a distinct, single event); the statutory structure (distinguishing between the examination and the investigation of a naturalization application); the agency’s own regulations; and the legislative history of § 1447(b). *Walji*, 500 F.3d at 436-38.

A minority of courts hold that the term “examination” encompasses a “process” which includes both the interview and the investigation of the application, including FBI security checks. See, e.g., *Danilov v. Aguirre*, 370 F. Supp. 2d 441 (E.D. Va. 2005); *Yarovitskiy v. Hansen*, No. 07-1174, 2007 U.S. Dist. LEXIS 57734 (N.D. Ohio Aug. 8, 2007); *Kassemi v. DHS*, No. 06-1010, 2006 U.S. Dist. LEXIS 74516 (D.N.J. Oct. 13, 2005). Under this interpretation, these courts dismissed § 1447(b) suits as premature – even though they were filed more than 120 days after the initial interview – because security checks were still pending. For additional case cites on both sides of this issue, see the Legal Action Center’s (LAC) Litigation Issue Page on Naturalization Adjudication Delays, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/naturalization-adjudication-delays>.

Sometimes USCIS continues the initial examination on the naturalization application and instructs the applicant to submit additional evidence. USCIS will then schedule a *reexamination* of the applicant. See 8 C.F.R. § 335.3(b). Even when this happens, however, courts have held that USCIS still must make its decision within 120 days of the *initial* examination. See, e.g., *Angel v. Ridge*, 2005 U.S. Dist. LEXIS 10667 (S.D. Ill. 2005) (explicitly finding that the 120-day period ran from date of first interview, not a rescheduled interview). The regulations support this interpretation by specifically differentiating between an “initial” examination and a “reexamination” following a continuance. 8 C.F.R. § 335.3(b) (“[T]he reexamination on the continued case shall be scheduled within 120 days of the initial examination”). The regulations then reiterate that the decision must be made within 120 days of the “first” examination. See 8 C.F.R. § 336.1(a).

Obviously, the period between the initial examination and USCIS’ decision is not the only period of delay in naturalization cases. USCIS often delays in scheduling the initial examination and also delays in holding a hearing and making a decision after an administrative appeal. However, by its terms, § 1447(b) is not available to redress these delays. See, e.g., *Langer v. McElroy*, No. 00-2741, 2002 U.S. Dist. LEXIS 123847 (S.D. N.Y. Dec. 16, 2002) (no jurisdiction under § 1447(b) where agency delays in acting on the administrative appeal). Where extensive delays occur at these other stages of the agency’s adjudication, a mandamus or Administrative Procedure Act (APA) action in district court might be appropriate. In such an action, however, the sole relief available would be for the court to order USCIS to act on the application. Unlike § 1447(b), neither the mandamus statute nor the APA gives the court the jurisdiction to actually decide the application. See, e.g., *Ahmed v. Holder*, No. 13-00271, 2013 U.S. Dist. LEXIS 122648 (N.D. Oh. Aug. 27, 2013). For more on mandamus actions, including citations to naturalization cases, see the LAC’s practice advisories on mandamus, <http://www.legalactioncenter.org/practice-advisories-topic#fed-ct-review>; and the LAC’s Litigation Issue Page on Mandamus,

<http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/mandamus>.

3. The naturalization applicant must file the § 1447(b) action in the federal district court for the district in which the applicant resides.

Under the specific terms of the statute, a § 1447(b) suit must be filed in federal district court. Unlike an appeal of a removal decision, it is not filed in the court of appeals. Section 1447(b) also specifies that venue is in the district in which the applicant resides. For information on whom to sue and serve, see the LAC's Practice Advisory on this topic, http://www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf.

4. The statute vests jurisdiction over the suit in the district court.

Section 1447(b) explicitly gives the district court jurisdiction over the action. There is a question, however, as to whether this jurisdiction is exclusive, or whether the agency retains concurrent jurisdiction over the application. Frequently, after suit is filed under § 1447(b), USCIS will adjudicate the naturalization application and file a motion to dismiss the district court proceedings as moot. The agency takes the position that it retains concurrent jurisdiction with the district court. Moreover, where the application is denied by USCIS, the government takes the position that, after the § 1447(b) case is dismissed, the applicant must exhaust the administrative appeal required by statute before seeking federal court review of the denial. See 8 U.S.C. § 1421(c); 8 U.S.C. § 1447; 8 C.F.R. § 336.9(d). However, two federal courts of appeals have held that the administrative hearing referenced in the statute constitutes a claim processing requirement that is not jurisdictional. See *Schweika v. DHS*, 723 F.3d 710 (6th Cir. 2013); *Eche v. Holder*, 694 F.3d 1026, 1028 (9th Cir. 2012).³⁰⁰

All courts of appeals to have addressed the issue of concurrent jurisdiction under § 1447(b), as well as numerous district courts, reject USCIS' position and instead hold that, once the § 1447(b) suit is filed, only the federal court has jurisdiction; USCIS is without jurisdiction to decide the naturalization application unless the district court remands the case. See, e.g., *Bustamante v. Napolitano*, 582 F.3d 403 (2d Cir. 2009); *Etape v. Chertoff*, 497 F.3d 379 (4th Cir. 2007); *U.S. v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004); *Taalebinezhaad v. Chertoff*, 581 F. Supp. 2d 243 (D. Mass. 2008); *Castracani v. Chertoff*, 377 F. Supp. 2d 71 (D.D.C. 2005); see also *Al Maleki v. Holder*, 558 F.3d 1200, 1205 n.2 (10th Cir. 2009) (finding it unnecessary to answer the question but noting the persuasive reasoning of *Hovsepian* and *Etape*). Thus, in the Second, Fourth and Ninth Circuits, a denial of the application by USCIS after the § 1447(b) action is filed is without force because the agency had no jurisdiction to make the decision.

³⁰⁰ In *Schweika*, the Sixth Circuit specifically refused to defer to the regulation, which interprets this statutory provision as a jurisdictional prerequisite. See 8 C.F.R. 336.9(d). The court held that deference is never due to an agency's interpretation of a federal court's jurisdiction. *Schweika*, 723 F.3d at 718 (citing cases); accord *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000) (striking down for similar reasons a companion regulation, 8 C.F.R. § 336.9(b), which imposed a 120 statute of limitations on filing suit).

A minority of district courts have agreed with the government, holding that USCIS has concurrent jurisdiction with a federal court after a plaintiff files a § 1447(b) action. *See, e.g., Hamdan v. Chertoff*, No. 07-700, 2008 U.S. Dist. LEXIS 10886 (D.N.M. Dec. 17, 2008); *Perry v. Gonzales*, 472 F. Supp. 2d 623 (D.N.J. 2007); *Maki v. Gonzales*, 2007 U.S. Dist. LEXIS 55588 (C.D. Utah July 30, 2007). After finding that USCIS acted within its jurisdiction when it denied a naturalization application despite a pending § 1447(b) suit, these courts dismissed the suits as moot.

Under *Bustamante*, *Hovsepian* and *Etape*, it is now clear that in cases arising within the Second, Fourth and Ninth Circuits, USCIS will lose jurisdiction as soon as the applicant files a § 1447(b) suit. In these jurisdictions, USCIS cannot deprive a court of jurisdiction by denying the naturalization application. This issue remains an open question in all other circuits at the time of this update. In these other circuits, should USCIS deny your client's application after you have filed for district court review of the case under 8 U.S.C. § 1447(b), you can rely on *Bustamante*, *Etape* and *Hovsepian* to argue that the district court should disregard the USCIS decision and instead independently adjudicate the application. *See, e.g., Castracani v. Chertoff*, 377 F. Supp. 2d 71 (D.C. D.C. 2005) (adopting *Hovsepian*).

Where, after the § 1447(b) action is filed, USCIS indicates that it would grant naturalization, you and the government attorney can submit to the district court a joint motion to remand to USCIS. The motion could stipulate that, upon remand, USCIS agrees to approve the naturalization application and ask the court to order this relief. In this way, USCIS will have jurisdiction when it approves the application.

A separate jurisdiction question arises when the naturalization applicant is placed in removal proceedings – either before or after the § 1447(b) action is filed. At least one court of appeals addressed this jurisdiction question, but found it unnecessary to resolve because it held instead that the district court could not grant relief under § 1447(b) when removal proceedings were pending. *Ajlani v. Chertoff*, 545 F.3d 229 (2d Cir. 2008). In reaching this conclusion, the court found that § 1447(b) relief was not available because of the restrictions that 8 U.S.C. § 1429 imposes on naturalizing an applicant in removal proceedings. *Ajlani*, 545 F.3d at 239 (finding that the “priority afforded removal proceedings by § 1429 limits the courts' authority to grant naturalization pursuant to § 1421(c) or § 1447(b)"); *see also Saba-Bakare v. Chertoff*, 507 F.3d 337, 340 (5th Cir. 2007) (“§ 1429 requires that Saba-Bakare wait until the termination of the removal proceeding before either a district court or the USCIS entertains a question regarding his naturalization application”).

5. The district court may either decide the naturalization application or remand to USCIS with instructions.

Under § 1447(b), a court may "determine the matter" by granting or denying the naturalization application, or it may "remand the matter" for a determination by USCIS. 8 U.S.C. § 1447(b). Despite the statutory grant of authority to decide the naturalization application, the majority of district courts are reluctant to do so, particularly when

security checks are still pending. *See, e.g., Hussein v. Gonzales*, 474 F. Supp. 2d 1265, 1269 (M.D. Fla. 2007).

A few district courts have decided naturalization applications under § 1447(b), however. For example, in *Taalebinezhaad*, 581 F. Supp. 2d 243, 245-46 (D. Mass. 2008), the court denied the government's motion to remand the case to USCIS, instead deciding to adjudicate the naturalization application itself. The court relied in part on the fact that security checks were no longer pending. In response to the government's claim that it should remand the case so that USCIS could bring its expertise to bear, the court noted that USCIS, as a party to the § 1447(b) case, could present its findings to the court. *Taalebinezhaad*, 581 F. Supp. 2d at 246 (quoting *Etape v. Chertoff*, 497 F.3d 379, 387 (4th Cir. 2007)). *See also Lifshaz v. Gonzales*, No. 06-1470, 2007 U.S. Dist. LEXIS 28946 (W.D. Wash. April 19, 2007) (considering the government's national security interest, but still finding it appropriate to conduct a hearing to avoid further delay); *Astafieva v. Gonzales*, No. 06-04820, 2007 U.S. Dist. LEXIS 28993 (D. Cal. April 2, 2007) (granting petitioner's application for naturalization after conducting an in camera hearing); *Shalan v. Chertoff*, No. 05-10980, 2006 U.S. Dist. LEXIS 253 (D. Mass. Jan. 6, 2006) (scheduling a hearing instead of remanding the case to USCIS).³⁰¹

As noted, district courts have been reluctant to decide the naturalization application when security checks are not complete. However, a number of courts have remanded these cases with restrictions. For example, one court ordered that the case be held in abeyance for 60 days for the FBI to complete the name check; if after 60 days the name check was not complete, the government would have to show cause why the petitioner should not be naturalized immediately. *Aslam v. Gonzales*, No. 06-614, 2006 U.S. Dist. LEXIS 91747 (W.D. Wash. Dec. 19, 2006).

In other cases, the courts have placed time limits on when USCIS must act on an application after remand. In *Alawieh v. U.S. Attorney General*, No. 09-10413, 2009 U.S. Dist. LEXIS 15129 at *5 (E.D. Mich. Feb. 26, 2009), the court imposed a 45 day deadline for USCIS to decide the naturalization application, noting that an order without a deadline, "effectively instructs the government to do nothing at all inasmuch as it is not clear when, if ever, the instruction is violated." *See also Asfour v. Napolitano*, 732 F. Supp. 2d 512 (E.D. Pa. 2010) (ordering USCIS to adjudicate the application within 7 days in accord with the parties' agreement and retaining jurisdiction to ensure that defendant complied with the order); *Hussein v. Gonzales*, 474 F. Supp. 2d 1265, 1269 (M.D. Fla. 2007) (ordering USCIS to act on petitioner's application no later than 54 days from the date of the decision); *Alhassan v. Gonzales*, No. 06-1571, 2006 U.S. Dist. LEXIS 89018, *5-6 (D. Colo. Dec. 7, 2006) (ordering USCIS to adjudicate the application within 60 days of receiving the FBI name check). Courts also have imposed time limits on when security checks must be completed. *See, e.g., Al-Kudsi v. Gonzales*,

³⁰¹ Where the court adjudicates the naturalization under § 1447(b), its review is *de novo*. *See United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (*en banc*) (comparing judicial review under § 1447(b) to judicial review of a final denial of a naturalization application under 8 U.S.C. § 1421(c)).

No. 05-1584, 2006 U.S. Dist. LEXIS 16761 (D. Or. March 22, 2006) (where the attorney general was named as a defendant, court ordered him to instruct FBI to complete name check within 90 days; if not completed by then, USCIS was to treat the failure as a successfully completed name check and approve the naturalization); *Aarda v. United States Citizenship & Immigration Servs.*, No. 06-1561, 2007 U.S. Dist. LEXIS 9244, *2 (D. Minn. Feb. 8, 2007) (instructing defendants to complete all background checks within 120 days of the court's order).

6. Attorneys fees may be available under EAJA.

Several courts have awarded plaintiffs attorneys fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), in § 1447(b) cases. Under EAJA, the plaintiff must establish the following to be eligible for an award of attorneys fees from the government: (1) that the plaintiff is the prevailing party in the matter; (2) that the government failed to show that its position was substantially justified or that special circumstances make an award unjust; and (3) that the requested fees and costs are reasonable. 28 U.S.C. § 2412(d)(1)(A). For more information about EAJA, including information on the statutory filing deadlines, see the LAC's Practice Advisory, Requesting Attorneys Fees Under the Equal Access to Justice Act, http://www.legalactioncenter.org/sites/default/files/EAJA_Fees_04_07_06.pdf; see also the LAC's Litigation Issue Page on Adjudicating Naturalization Delays, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/naturalization-adjudication-delays>.

Courts have found that a plaintiff is the prevailing party in § 1447(b) cases if USCIS completes adjudication of the application after the court remands the matter to USCIS. In *Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir. 2009), the court upheld the district court award of fees, holding that the plaintiff prevailed under the test in *Buckhannon Bd. and Care Rest Home, Inc. v. W.V. Dep't of Health and Human Resources*, 532 U.S. 598 (2001). The Tenth Circuit held that USCIS did not act voluntarily when, pursuant to a joint motion, the court ordered it to administer the naturalization oath to the applicant by a date certain. See also *Alghamdi v. Ridge*, No. 05-344, 2006 U.S. Dist. LEXIS 68498 (N.D. Fla. Sept. 25, 2006); *Osman v. Mukasey*, 553 F. Supp. 2d 1252 (2008 W.D. Wash.); but see *Iqbal v. Holder*, 693 F.3d 1189, 1194-95 (10th Cir. 2012) (naturalization applicant in a § 1447(b) suit was not the prevailing party when court remanded case to USCIS without ordering any specific action to be taken by the agency).

Courts also have held that the government failed to demonstrate that its litigation position or its failure to act on the application – the underlying agency action behind the suit – was substantially justified because it provided no specific reasons for the delay. See e.g. *Alghamdi v. Ridge*, No. 05-344, 2006 U.S. Dist. LEXIS 68498 (N.D. Fla. Sept. 25, 2006); *Ibrahim v. Chertoff*, No. 07-2415, 2009 U.S. Dist. LEXIS 16148 (E.D. Ca. Feb. 9, 2009).

Not all courts have awarded EAJA fees in § 1447(b) cases, however. For example, in *Cody v. Caterisano*, 631 F.3d 136 (4th Cir. 2011), the Fourth Circuit upheld the district court determination that, although the naturalization applicant was a prevailing party,

USCIS's litigation position had been substantially justified. In *Aronov v. Napolitano*, 562 F.3d 84 (1st Cir. 2009) (en banc), the First Circuit reversed a district court award of fees. The court held that the plaintiff was not the prevailing party in the § 1447(b) case because the court's remand order under the circumstances presented did not satisfy the necessary "judicial imprimatur" on the favorable resolution of the case, as required by *Buckhannon*. The First Circuit in *Aronov* also held that the government demonstrated that its actions – the delay in adjudicating the naturalization application – were substantially justified. *Aronov*, 562 F.3d at 94.



PRACTICE ADVISORY³⁰²

August 28, 2013

ADVANCE PAROLE FOR DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) RECIPIENTS

By the Legal Action Center and Catholic Legal Immigration Network, Inc.³⁰³

I. Introduction

On June 15, 2012, the Secretary of the United States Department of Homeland Security (DHS) issued a memorandum allowing individuals who entered the United States before turning sixteen and who meet certain guidelines to pursue Deferred Action for Childhood Arrivals (DACA).³⁰⁴ One of the benefits of DACA is that the recipient may seek permission to travel abroad temporarily for humanitarian, educational, or employment purposes.³⁰⁵ A DACA recipient who seeks to temporarily leave and re-enter the United States must apply for advance parole.³⁰⁶

Parole is “the authorization to allow an otherwise inadmissible person to physically proceed into the United States under certain safeguards and controls.”³⁰⁷ Section 212(d)(5) of the Immigration and Nationality Act (INA) provides DHS with the discretionary authority to parole an individual into the United States “for urgent humanitarian reasons” or “significant public benefit.” Note that parole is not an “admission” into the United States; an individual who has been paroled has not been “admitted.”³⁰⁸ Instead, the parolee is considered an “applicant for

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³⁰³ Prepared by Emily Creighton, Tatyana Delgado, Mary Kenney, Susan Schreiber, and Patrick Taurel.

³⁰⁴ DHS Secretary Janet Napolitano Memorandum on “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” June 15, 2012, *available at* <http://1.usa.gov/M5MZhH>.

³⁰⁵ USCIS Frequently Asked Questions regarding DACA, *available at* <http://1.usa.gov/TJysu6> (hereinafter DACA FAQs).

³⁰⁶ DACA FAQs.

³⁰⁷ USCIS DACA National Standard Operating Procedures Manual at 125, Sept. 13, 2012, *available at* <http://cliniclegal.org/resources/deferred-action-childhood-arrivals> (hereinafter [DACA SOP](#)).

³⁰⁸ INA § 212(d)(5).

admission” and, as such, is subject to removal proceedings based upon grounds of inadmissibility, notwithstanding the grant of parole.³⁰⁹

Advance parole, an administrative practice derived from the general parole authority in INA § 212(d)(5), gives an individual who is in the United States advance authorization to enter the United States after temporary travel abroad.³¹⁰ U.S. Citizenship and Immigration Services (USCIS) has the authority to grant advance parole and issue a Form I-512L, an advance parole authorization document.³¹¹ This document allows a Customs and Border Protection (CBP) or other immigration inspector at a U.S. port-of-entry to parole an individual into the United States. Advance parole does not guarantee subsequent parole into the United States, however; the inspecting immigration official may, in his or her discretion, deny parole at the port-of-entry.³¹²

This practice advisory provides guidance on advance parole eligibility for DACA recipients; applying for advance parole; legal issues, including any potential risks to the client, to consider prior to traveling; and the post-travel impact on future immigration benefits. It is not designed to be a substitute for legal advice on an individual basis from an attorney or Board of Immigration Appeals (BIA or Board) accredited representative.

II. Advance Parole Eligibility for DACA Recipients

Prior to applying for advance parole, an individual must apply for and receive a DACA approval.³¹³ Indeed, an individual is *disqualified* from DACA if he or she departs the United States at any time after August 15, 2012 unless he or she is first granted *both* DACA and advance parole. In order to receive advance parole, a DACA recipient generally must show that s/he is traveling abroad for humanitarian, employment, or educational purposes.³¹⁴

The USCIS Frequently Asked Questions (FAQs) on DACA provide examples of situations that fall under the categories of humanitarian, employment, and educational purposes.³¹⁵ Humanitarian purposes relate to “travel for emergent, compelling, or sympathetic circumstances.”³¹⁶ This category includes obtaining medical assistance, attending a funeral service for a family member, visiting a sick relative, or other urgent family-related purposes.³¹⁷ Educational purposes include study abroad programs and academic research.³¹⁸ Employment purposes include overseas assignments or client meetings, interviews, conferences, trainings in

³⁰⁹ See, e.g., *Matter of G-A-C*, 22 I&N Dec. 83, 88-89 (BIA 1998).

³¹⁰ 8 C.F.R. § 212.5(f); see also USCIS definition of Parolee, including definition of Advance Parole, <http://1.usa.gov/91KMKG>; USCIS Adjudicator’s Field Manual, § 54.1(c); *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771, 777 (BIA 2012) (providing general information about advance parole).

³¹¹ INA § 212(d)(5); 8 C.F.R. §§ 212.5(a), (f); USCIS Adjudicator’s Field Manual, § 54.1(a).

³¹² Instructions for Application for Travel Document at 1, available at <http://1.usa.gov/xOVcM> (hereinafter Form I-131 instructions).

³¹³ DACA FAQs.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ DACA SOP at 126; DACA FAQs.

³¹⁷ *Id.*

³¹⁸ DACA SOP at 125; DACA FAQs.

other countries, and travel needed to pursue a job with a foreign employer in the United States.³¹⁹ The FAQs expressly provide that travel abroad for vacation is not a valid purpose for advance parole.³²⁰

USCIS guidance states that “USCIS will determine whether [the requester’s] purpose for international travel is justifiable based on the circumstances describe[d] in [the] request.”³²¹ This language appears to allow USCIS to decide DACA requests on a case-by-case basis and not to limit reasons for travel to the examples provided in the DACA FAQs. The USCIS DACA National Standard Operating Procedures Manual also provides that the humanitarian, educational, and employment categories “are to be construed broadly.”³²² In addition, the instructions for the USCIS Application for Travel Document (Form I-131), used to apply for advance parole, state that the humanitarian, employment, and educational purposes “include, but are not limited to” the examples listed in the instructions.³²³ As such, advocates may make the case for advance parole when DACA recipients seek to travel for humanitarian, educational, or employment purposes that USCIS has not specifically listed.³²⁴

III. Applying for Advance Parole

To apply for advance parole, a DACA recipient must submit Form I-131 to USCIS. The advance parole applicant must submit proof of DACA status – either a copy of the USCIS Notice of Action (Form I-797) showing a DACA approval or a copy of an approval order, notice or letter from U.S. Immigration and Customs Enforcement (ICE). The filing fee is \$360. In Part 4 of Form I-131, the DACA recipient must explain the purpose of the trip and the countries the applicant plans to visit. In addition, the requester must submit evidence of the purpose of the trip, the intended date(s) of travel, and the duration of the trip(s).³²⁵

DACA recipients must provide as much evidence as possible to explain the purpose of intended travel abroad. For a trip involving a humanitarian purpose, proper evidence includes but is not limited to the following:

- A letter from a medical professional explaining the reason for the need to travel abroad to obtain medical treatment;
- A letter from a hospital or treating medical professional explaining the relative’s ill condition; and/or
- A death certificate for a deceased relative

For a trip involving an educational purpose, evidence includes but is not limited to the following:

- A letter from an educational institution explaining the purpose of travel abroad; or

³¹⁹ DACA SOP at 126; *see also*, DACA FAQs.

³²⁰ DACA FAQs; DACA SOP at 125-26.

³²¹ DACA FAQs.

³²² DACA SOP at 125.

³²³ Form I-131 instructions, at 4-5.

³²⁴ One practitioner has reported obtaining a grant of advance parole for a DACA recipient who sought to travel abroad because of a death in the family and to undergo consular processing.

³²⁵ USCIS Form I-131 at 2-4, Form I-131 instructions at 8.

- A document showing enrollment in a program or class and documents showing the applicant is required to travel for a program or class or will benefit from such travel.

For a trip involving an employment purpose, appropriate evidence includes but is not limited to the following:

- A letter from an employer explaining the need to travel abroad; and/or
- A document showing an employment need, such as a conference or training program, and showing the applicant's participation.³²⁶

A single Form I-131 may be used to request that the DACA recipient be allowed to leave and re-enter the United States multiple times. However, the recipient must show that each trip is intended to serve a humanitarian, employment, or educational purpose and explain why the DACA recipient needs to travel multiple times.

Generally, USCIS does not grant expedited requests for advance parole for DACA recipients. However, in a dire emergency, USCIS is willing to consider an expedited request at a local USCIS office.³²⁷

IV. Travel Logistics

A DACA recipient who is granted advance parole receives an Authorization for Parole of an Alien into the United States (I-512L). The I-512L authorizes an immigration inspector at a port-of-entry to parole the individual into the United States. The document contains a date by which the individual must present the document to an inspector at a port-of-entry to seek parole. USCIS issues an I-512L that is valid for the duration of the intended trip.³²⁸

If the expected dates of travel are relatively soon after the date the advance parole application is submitted and approved, the individual needs to be ready to travel promptly after receiving the authorization document. The travel itinerary needs to be clear and well-organized to ensure that the individual returns to the United States within the time allotted in the document.

The advance parole authorization document makes clear that advance parole does not guarantee entry into the United States. DHS reserves the right to revoke or terminate the advance parole document. The individual is also subject to inspection by an immigration inspector at the time of seeking parole into the United States. DACA recipients should be aware of these facts – and of any risks presented in their cases – prior to traveling abroad.

V. Legal Issues to Consider Prior to Traveling Abroad

A. Prior Removal Orders

Prior to traveling abroad, it is important to determine whether the DACA recipient has an unexecuted deportation or removal order. If such an order exists, and if the DACA recipient were to depart the United States on advance parole, he or she likely would be found to have

³²⁶ DACA SOP at 125-126. *See also*, DACA FAQs; Form I-131 instructions at 8.

³²⁷ DACA SOP at 126.

³²⁸ Form I-131 instructions at 8.

executed the deportation/removal order and would face harsh future immigration consequences, such as the inability to re-enter the United States for a given period of time.

To avoid this, a DACA recipient with an unexecuted removal order can submit a motion to reopen removal proceedings with the Immigration Court or the BIA. Once removal proceedings are reopened, the removal order no longer exists. The DACA recipient then can move to administratively close or terminate the reopened proceedings. If either termination of proceedings or administrative closure is granted, the DACA recipient can travel on advance parole without risking the consequences of an executed removal order.

A motion to reopen asks the court to reopen proceedings for consideration of new evidence³²⁹, which in this case would be the grant of DACA and the recipient's need to travel on advance parole. A motion to reopen a final removal order of an Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceedings.³³⁰ Where an appeal has been decided by the BIA and no case is currently pending, a motion to reopen is to be filed with the Board.³³¹ Generally, a party may file only one motion to reopen in a case and must do so within 90 days of the date of the final removal order.³³² However, these number and time limitations do not apply to jointly filed motions.³³³ Thus, regardless of whether the DACA recipient's case was decided by the Immigration Court or the Board, counsel may wish to contact the relevant ICE Office of the Chief Council (OCC) to request that the parties jointly move to reopen and then administratively close or terminate the DACA recipient's removal proceedings.³³⁴ Should OCC not agree, and assuming a motion to reopen is barred by the time or number limitations, both immigration judges and the BIA have the *sua sponte* authority to reopen cases on their own motions.³³⁵ Consequently, as a last resort, a DACA recipient can request that the immigration judge or BIA reopen proceedings *sua sponte*.³³⁶

B. Unlawful Presence Bars

Any decisions regarding travel outside of the United States should include an analysis of a DACA recipient's unlawful presence in the United States to determine whether the recipient is subject to inadmissibility bars of INA § 212(a)(9)(B) (sometimes referred to as the three- and ten-year bars). Individuals under the age of 18 do not accrue unlawful presence for purposes of

³²⁹ INA § 240(c)(7).

³³⁰ 8 C.F.R. § 1003.23(b)(1)(ii).

³³¹ 8 C.F.R. § 1003.2(a); BIA Practice Manual § 5.2(a)(iii)(A).

³³² INA §§ 240(c)(7)(A), (7)(C)(i).

³³³ 8 C.F.R. §§ 1003.2(c)(3)(iii); 1003.23(b)(4)(iv).

³³⁴ Long-standing ICE policy has recognized that the agency should consider joining motions to reopen in appropriate cases. *See, e.g.*, John Morton, ICE Director, [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#) (June 17, 2011) (recognizing that "prosecutorial discretion" involves responding to or joining in a motion to reopen); William J. Howard, Principal Legal Advisor, [Prosecutorial Discretion](#) (October 24, 2005) (same).

³³⁵ 8 C.F.R. §§ 103.2(a); 1003.23(b)(1).

³³⁶ Even if OCC does not cooperate, the BIA has held that the Board and Immigration Judges may administratively close a case over the objection of either party. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

these bars and DACA recipients are considered to be lawfully present in the U.S. during the DACA grant period.³³⁷ However, DACA recipients who applied for DACA after turning 18 as well as DACA recipients who departed the United States and reentered or attempted to reenter the United States without being admitted – including those who are under the age of 18 – will have likely accrued unlawful presence prior to obtaining DACA.³³⁸

If the individual accrued unlawful presence under INA § 212(a)(9)(B) prior to obtaining DACA and subsequently travels with advance parole, does the individual become subject to the unlawful presence ground of inadmissibility upon departure from the United States? According to a recent BIA precedent decision, the answer should be no. In *Matter of Arrabally and Yerrabelly*, the Board held that travel on advance parole does not constitute a “departure” for purposes of the 10-year-bar for unlawful presence under INA § 212(a)(9)(B)(i)(II).³³⁹ While *Matter of Arrabally and Yerrabelly* addressed advance parole in the context of adjustment applications, the USCIS Administrative Appeals Office (AAO) has since applied this analysis in at least several cases involving individuals holding Temporary Protected Status (TPS), each of whom left temporarily following the accumulation of more than one year of unlawful presence and then returned to the United States under advance parole.³⁴⁰ Based on *Matter of Arrabally and Yerrabelly*, the AAO found that these applicants were not inadmissible and that waivers of inadmissibility were not necessary.³⁴¹

Although there has been no formal written guidance on this issue yet, it appears likely that USCIS views *Matter of Arrabally and Yerrabelly* as applicable to DACA recipients traveling on advance parole.³⁴² Indeed, some DACA recipients have received advance parole authorizations (Form I-512L) explicitly stating that traveling abroad under advance parole is not a departure within the context of INA § 212(a)(9)(B), pursuant to *Matter of Arrabally and Yerrabelly*.³⁴³ While this is a promising development, an I-512L issued more recently by the USCIS Nebraska Service Center does not include a reference to *Matter of Arrabally and Yerrabelly* or an explanation of the case’s impact on DACA recipients.³⁴⁴ Regardless of the

³³⁷ DACA FAQs.

³³⁸ INA §§ 212(a)(9)(B)(iii); 212(a)(9)(C) (minors not excepted statutorily from the accrual of unlawful presence under this subsection).

³³⁹ *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). This holding was applied in a recent Court of Appeals decision: *Ortiz-Bouchet v. United States A.G.*, 714 F.3d 1353, 1357 (11th Cir. 2013) (citing *Matter of Arrabally and Yerrabelly* and holding that a noncitizen’s exit pursuant to a grant of advance parole was not a “departure” within the meaning of § 212(a)(9)(B)(i)(II) and that the noncitizen was not inadmissible under this section).

³⁴⁰ See, e.g., [August 7, 2012 AAO Decision](#); [July 20, 2012 AAO Decision](#); [July 16, 2012 AAO Decision](#).

³⁴¹ *Id.*

³⁴² In November 2012, USCIS proposed changes to the instructions accompanying the Form I-131 that would apply the holding in *Matter of Arrabally and Yerrabelly* to DACA requesters. The revised Form I-131 issued in March 2013 did not include this advisal.

³⁴³ The [I-512L](#) (Authorization for Parole of an Alien Into the United States), issued in May 2013, states as follows: “Traveling abroad and returning to the United States under a grant of advance parole is not, itself, a ‘departure’ for purposes of section 212(a)(9)(B).” The document is on file with the author.

³⁴⁴ This [I-512L](#) was issued in July 2013. The document is on file with the author.

presence or absence of a warning on the I-512L, counsel should be prepared to argue that *Matter of Arrabally and Yerrabelly*'s holding precludes an inspecting immigration officer's application of INA § 212(a)(9)(B) to a DACA recipient returning to the United States pursuant to grant of advance parole. Though *Matter of Arrabally and Yerrabelly* is a precedent decision, attorneys may want to continue to monitor developments in this area before advising clients on the impact of travel.

It is also important to note that a DACA recipient who has already triggered the unlawful presence bars under INA § 212(a)(9)(B) or the permanent bar under INA § 212(a)(9)(C) (by previously leaving and re-entering without advance parole) will still be subject to these bars. Future travel under advance parole will not cure previously incurred bars.

C. Other Inadmissibility Considerations

A DACA recipient granted advance parole who returns to the United States shall be considered an applicant for admission.³⁴⁵ As such, the inspecting immigration officer may deny entry into the United States if the officer finds that any of the inadmissibility grounds apply.³⁴⁶ Thus, prior to departing the United States, DACA recipients with advance parole must consider not only whether they run afoul of the unlawful presence bars discussed above, but also all other inadmissibility grounds except for INA § 212(a)(7) (documentation requirements). Counsel should pay particular attention to the criminal inadmissibility grounds identified at INA § 212(a)(2), which are much broader than the crime disqualifications for DACA.³⁴⁷ Counsel should also be mindful that immigration-related fraud or misrepresentation and false claims to U.S. citizenship can bar admission.³⁴⁸

VI. Post-Travel Impact on Future Immigration Benefits

Advance parole may make some DACA recipients pursuing lawful permanent residency through immigrant visa petitions eligible for adjustment of status. If a DACA recipient travels abroad and returns under a grant of advance parole, then s/he is "paroled" into the United States within the meaning of INA §245(a), and may qualify for adjustment of status.

It's important to note, however, that eligibility for adjustment of status will most likely only apply to those DACA recipients who qualify to apply as "immediate relatives", i.e. the spouse or child of a U.S. citizen or the parent of an adult U.S. citizen. DACA recipients waiting to immigrate in a preference category who have previously worked without authorization or been in the U.S. without lawful status are ineligible to adjust status under INA §245(a).³⁴⁹ But for

³⁴⁵ Form I-131 instructions at 5.

³⁴⁶ See generally INA §§ 212(a) (inadmissibility grounds); 235(a) and (b) (inspection of applicants for admission); 8 C.F.R. § 235.1(f)(1) (applicants for admission must establish entitlement to enter).

³⁴⁷ For example, an individual convicted of misdemeanor simple possession of a controlled substance and sentenced to fewer than 90 days in prison would not be ineligible for DACA on that basis alone, but would be inadmissible. Compare DACA FAQ with INA § 212(a)(2)(A)(i)(II).

³⁴⁸ INA § 212(a)(6)(C).

³⁴⁹ INA § 245(c)(2); 8 CFR § 245.1(d)(3); AFM at 40.9.

those DACA recipients who are married to a U.S citizen, or qualify as children of U.S. citizens, travel on advance parole may have the dual benefits of eliminating exposure to the unlawful presence ground of inadmissibility and creating eligibility to adjust status in the United States.

At least one practitioner has shared that a DACA recipient successfully adjusted after traveling abroad on advance parole. Similarly, TPS recipients who originally entered without inspection, and thus – like DACA recipients – were unable to adjust, reportedly have been able to adjust after returning on advance parole. In these cases, their status as parolees upon their return rendered them eligible for adjustment.

PRACTICE ADVISORY³⁵⁰
August 15, 2013

**MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS:
CRACKING DOWN ON FOURTH AMENDMENT VIOLATIONS BY STATE AND
LOCAL LAW ENFORCEMENT OFFICERS**

By The Legal Action Center³⁵¹

Introduction

Increasingly, state and local law enforcement officers are assisting the federal government in immigration enforcement, whether through formal agreements under Section 287(g) of the Immigration and Nationality Act; through participation in Secure Communities and the Criminal Alien Program; through state laws such as those enacted in Arizona, Alabama, and elsewhere; or through policies promoted by local mayors, sheriffs, and police chiefs.

This practice advisory, which supplements a prior LAC practice advisory on [Motions to Suppress in Removal Proceedings: A General Overview](#), deals primarily with Fourth Amendment limitations on state and local immigration enforcement efforts and also briefly addresses Fifth Amendment violations that may arise from the same types of encounters with state or local officers. It also discusses some of the legal issues that may arise when noncitizens in removal proceedings move to suppress evidence obtained as a result of a constitutional violation by state or local law enforcement officers.

To briefly summarize the main themes of this practice advisory, the Supreme Court established in *Arizona v. United States* that state and local officers acting outside of a Section 287(g) agreement³⁵² cannot carry out stops or arrests based upon a suspicion of a civil immigration violation. At the same time, however, state and local officers may make inquiries concerning the

³⁵⁰ Copyright (c) 2013 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The cases cited herein are examples only and do not constitute an exhaustive search of relevant case law in all jurisdictions.

³⁵¹ Matthew Price, Jenner and Block LLP, and Melissa Crow were the principal authors of this practice advisory. The authors thank Rex Chen, Kate Desormeau, Mary Kenney, Michelle Mendez, Robert Pauw, Maureen Sweeney, and Michael Wishnie for their valuable input, and Kristin Macleod-Ball for her assistance with cite-checking. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

³⁵² Section 287(g) of the Immigration and Nationality Act authorizes the Attorney General to enter agreements with states and political subdivisions that permit specific state or local officers to perform functions of federal immigration officers. State or local officers acting under such an agreement must receive training concerning the immigration laws and are subject to federal supervision. See 8 U.S.C. § 1357(g)(1)-(8).

immigration status of individuals they stop for a lawful reason (for example, a traffic violation), so long as such inquiries do not prolong the stop. The precise boundaries of permissible conduct have not yet been defined in the case law; this area of law is very much still in flux.

When state and local law enforcement officers have violated the Fourth Amendment, a noncitizen may move to suppress evidence obtained through that violation. If successful, such a motion would prevent the evidence from being used in removal proceedings against the noncitizen and, in some cases, may result in the termination of proceedings. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court limited the exclusion of evidence in immigration proceedings to “egregious” or “widespread” violations of the Fourth Amendment by federal immigration officers. *Id.* at 1050-51. However, as discussed herein, there are compelling arguments that evidence obtained through any constitutional violation by state or local officers should be suppressed in removal proceedings and that the limitations in *Lopez-Mendoza* should be reconsidered.

One significant issue that may arise in litigating a motion to suppress is known as the “silver platter” doctrine.³⁵³ Under that doctrine, federal authorities, in federal proceedings, may use evidence obtained as a result of a constitutional violation by state or local officers – so long as federal officers had no involvement in the constitutional violation. In 1960, the Supreme Court overturned the silver platter doctrine as it applied to criminal cases; thus, the exclusionary rule – that is, the rule that evidence obtained through a constitutional violation must be excluded – now applies in federal criminal proceedings regardless of whether federal, state, or local officers committed the constitutional violation.³⁵⁴ However, the Supreme Court has continued to apply the silver platter doctrine in the context of certain federal civil proceedings. Whether the silver platter doctrine applies in immigration removal proceedings has not yet been decided. This practice advisory outlines arguments in favor of applying the exclusionary rule in civil immigration proceedings in cases in which state or local officers were responsible for the Fourth Amendment violation.

State and local law enforcement officers operating under a Section 287(g) agreement arguably are subject to the same regulatory requirements as federal immigration officers, and a violation of those requirements should result in termination of the proceedings in some cases.³⁵⁵ When state and local law enforcement officers are authorized by statute to carry out specific types of immigration enforcement, they are subject to statutory restrictions under federal law—including but not limited to INA § 287(g).³⁵⁶ The authors are not aware of any case law supporting a

³⁵³ The doctrine concerns evidence obtained by state authorities through a constitutional violation and handed to federal authorities “on a silver platter.”

³⁵⁴ *Elkins v. United States*, 364 U.S. 206 (1960).

³⁵⁵ See *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980) (holding that evidence obtained in violation of federal regulations could be suppressed if the violated regulation was promulgated to serve “a purpose of benefit to the alien,” and the violation “prejudiced interests of the alien which were protected by the regulation” (quoting *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979))). For a discussion of motions to suppress in removal proceedings based on regulatory violations, see LAC Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 12-13.

³⁵⁶ See, e.g., 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c). For more information regarding motions to suppress based on statutory violations, see LAC Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 12.

motion to suppress based exclusively upon such a statutory violation. Finally, state and local law enforcement officers may also be subject to restraints imposed by state constitutional law, state statutes, or departmental policies. In cases where the search and seizure protections offered by these state-law restrictions are more stringent than those under the Fourth Amendment, a violation ordinarily will not support a motion to suppress in removal proceedings.³⁵⁷ However, if relevant state standards are consistent with the Fourth Amendment, evidence of violations can often be used to bolster arguments in favor of suppression.

Part I: Establishing a Fourth Amendment Violation by State or Local Officers

Q: May state or local law enforcement officers conduct a civil immigration arrest?

A: Generally, no. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Supreme Court made clear that “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States. . . . If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”³⁵⁸ However, state or local law enforcement officers are permitted to conduct a civil immigration arrest when they are acting under a Section 287(g) agreement and in other “specific, limited circumstances” authorized by Congress.³⁵⁹

Q: May local law enforcement officers arrest an individual for violating a criminal immigration provision, such as illegal reentry?

A: In general, the authority of state officers to make arrests for federal crimes is an issue of state law.³⁶⁰ Applying that principle, some courts have found state officers to be empowered to make arrests for at least some federal immigration crimes.³⁶¹ However, there is a good argument that state and local officials should not generally be permitted to make arrests for immigration crimes. In *Arizona*, the Supreme Court emphasized that “[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders.”³⁶² Assuming that federal immigration crimes should be viewed as part of that comprehensive scheme of

³⁵⁷ The Supreme Court has held that “when States go above the Fourth Amendment minimum, the Constitution’s protections concerning search and seizure remain the same.” *Virginia v. Moore*, 553 U.S. 164, 173 (2008).

³⁵⁸ 132 S. Ct. at 2505 (internal citation omitted); see also *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (holding that suspicion of unlawful presence alone is an insufficient basis for a local police officer to prolong a stop); *Santos v. Frederick County Board of Commissioners*, ___ F.3d ___, 2013 U.S. App. LEXIS 16335, *26 (4th Cir. Aug. 17, 2013) (holding that “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law”).

³⁵⁹ *Arizona*, 132 S.Ct. at 2507. See also 8 U.S.C. §§ 1357(g)(1); 1103(a)(10), 1252c, 1324(c). Under all of these arrangements, state and local law enforcement officers may perform civil immigration arrests only in accordance with a “request, approval or other instruction from the Federal Government.” 132 S.Ct. at 2507.

³⁶⁰ *United States v. Di Re*, 332 U.S. 581, 589 (1948).

³⁶¹ See e.g., *Gonzales v. Peoria*, 722 F.2d 468, 475–476 (9th Cir. 1983), *overruled on other grounds*, *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298–1300 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999).

³⁶² *Arizona*, 132 S. Ct. at 2502.

federal regulation, only federal officers should be permitted to make arrests for those crimes, except when Congress has expressly directed otherwise. For example, in 8 U.S.C. § 1252c, Congress specifically authorized state and local officers to arrest and detain noncitizens unlawfully present in the United States who had previously been convicted of a felony in the United States and had been deported from, or had left, the United States following that conviction. However, state and local officers may only arrest such an individual “after [they] obtain appropriate confirmation from [federal officials] of the status of such individual and only for such period of time as may be required for [federal officers] to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.”³⁶³ Given that Congress has expressly authorized state and local arrest authority with respect to only certain types of immigration crimes, it is a fair inference that state and local officers are not permitted to make arrests or detentions for other federal immigration crimes.³⁶⁴ That is particularly so, given that federal immigration crimes are themselves often dependent upon complex determinations under civil immigration law. In *Arizona*, the Supreme Court appeared to leave open the question of whether the comprehensive federal scheme for regulating immigration would preempt (that is, preclude) state or local enforcement of criminal immigration law, just as it does state or local enforcement of civil immigration law.³⁶⁵

Further, even if state or local law enforcement officers did have the power to make an arrest for a criminal immigration violation, unlawful presence alone would not justify such an arrest. The Supreme Court made clear in *Arizona* that “it is not a crime for a removable alien to remain present in the United States,” and the Ninth Circuit has subsequently held that “because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference” of any criminal activity, such as illegal reentry.³⁶⁶

Q: May local law enforcement officers rely on a “pretext” to pull over a vehicle in order to ascertain the immigration status of one or more of its occupants?

A: There have been reports from a number of cities of police pulling over vehicles that appear to contain Latino or foreign-born individuals in order to check their immigration status. Local police may identify a reason for the stop – for example, a violation of a traffic law – that appears to be merely a pretext. When an apparently pretextual stop results in removal proceedings, the question is whether the government can introduce evidence (for example, admissions of alienage recorded on an I-213 form) obtained as a direct result of the stop.

The Supreme Court held in *Whren v. United States*, 517 U.S. 806 (1996), that so long as the police have an objectively reasonable basis for conducting a stop or an arrest, the stop

³⁶³ 8 U.S.C. § 1252c(a).

³⁶⁴ See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1093 (2004) (discussing this argument and relevant legislative history); but see *Vasquez-Alvarez*, 176 F.3d at 1297-1300 (rejecting this argument).

³⁶⁵ *Id.* at 2509.

³⁶⁶ *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012).

or arrest is permissible under the Fourth Amendment. The officer's subjective motivations are not relevant to the constitutional analysis.³⁶⁷ Thus, so long as the police officer can identify a lawful basis for the stop, the stop is constitutionally permissible.

However, in the same year that the Court decided *Whren*, it also reaffirmed that the administration of a criminal law on the basis of race or other impermissible classification may violate the Constitution.³⁶⁸ Additionally, to the extent that the police lack an objective basis for the stop, and therefore violate the Fourth Amendment in making the stop, the subjective motivations of the police in conducting the stop may be relevant in determining whether the Fourth Amendment violation is "egregious," warranting suppression under the standard of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).³⁶⁹ As several Circuits have held, an illegal stop carried out on the basis of race or ethnicity is an "egregious" constitutional violation.³⁷⁰

Q: When an individual is stopped for a lawful reason, may local law enforcement officers ask for identification or inquire as to the individual's immigration status?

A: Yes, so long as such questioning does not prolong the stop. Mere police questioning concerning identity or immigration status does not by itself constitute a seizure under the Fourth Amendment.³⁷¹ However, the law also provides that an officer may not *prolong the duration of a stop* in order to make inquiries into matters unrelated to the justification for the stop, unless there is probable cause of separate criminal activity.³⁷² Prolonging the stop in essence counts as an "extra seizure" that itself needs to be supported by probable cause or reasonable suspicion of criminal activity. Thus, when an officer prolongs a stop by questioning an individual concerning his or her immigration status,

³⁶⁷ *Whren*, at 813.

³⁶⁸ *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

³⁶⁹ For more information on "egregious" Fourth Amendment violations, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 8-10.

³⁷⁰ See, e.g., *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006); *Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449-50 (9th Cir. 1994); *Ghysels-Reals v. U.S. Att'y Gen.*, 418 Fed. App'x 894, 895-96 (11th Cir. 2011).

³⁷¹ *INS v. Delgado*, 466 U.S. 210 (1984). For a general discussion of applicable Fourth Amendment law on searches and seizures, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 13-23.

³⁷² *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); see also *United States v. Digiovanni*, 650 F.3d 498, 509 (4th Cir. 2011) (finding Fourth Amendment violation when, following ordinary traffic stop, officer "failed to diligently pursue the purposes of the stop and embarked on a sustained course of investigation into the presence of drugs in the car," which prolonged the stop); *United States v. Everett*, 601 F.3d 484, 495 (6th Cir. 2010) ("if the totality of the circumstances, viewed objectively, establishes that the officer, without reasonable suspicion, definitively abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation, this would surely bespeak a lack of diligence"); *United States v. Perez*, 526 F.3d 1115, 1121 (8th Cir. 2008) (finding Fourth Amendment violation when police officer engaged in a "blended process" of conducting a routine traffic stop and a drug investigation, where topics concerning the drug investigation more than doubled the length of the stop"); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007) (police may not prolong stop through questioning unrelated to purpose of stop); *United States v. Griffin*, 696 F.3d 1354, 1362 (11th Cir. 2012) (Fourth Amendment implicated when police questioning unrelated to the purpose of a stop measurably prolongs the stop).

there may be a Fourth Amendment violation, since mere unlawful presence is not a crime and does not provide probable cause to justify prolonging a stop.³⁷³

Q: When an individual is stopped for a lawful reason, may state or local law enforcement officers contact federal agents to determine the person’s immigration status?

A: Yes, under the Fourth Amendment, so long as the inquiry does not prolong the detention. Under 8 U.S.C. § 1357(g)(10), state or local officers are authorized to communicate with federal immigration officials regarding a person’s immigration status, even in the absence of any Section 287(g) agreement.³⁷⁴ However, in *United States v. Arizona*, the Supreme Court also made clear that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns,”³⁷⁵ and cited cases standing for the proposition that a stop may not be prolonged for reasons unrelated to suspicion of criminal activity.³⁷⁶ For example, if local police continue to detain a vehicle’s passengers in order to verify the passengers’ immigration status with ICE, even when the traffic stop has otherwise been completed, the prolongation of the stop would violate the Fourth Amendment because it would not be justified by probable cause or reasonable suspicion of any criminal violation. Likewise, state or local officers may not unnecessarily prolong a traffic stop, thereby delaying its completion until after an immigration investigation can be conducted.

Q: May state or local law enforcement officers prolong what began as a lawful traffic stop pending the arrival of a federal immigration officer or at the request of a federal immigration officer?

A: The law on this issue is unsettled. On the one hand, it is clear that a state or local officer may not *unilaterally* detain an individual upon suspicion that the individual has committed a civil immigration violation. A state or local officer also may not unilaterally prolong a stop in order to investigate an individual’s immigration status. On the other hand, however, Congress has stated that state officers may “cooperate” with federal officials in “the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”³⁷⁷ The precise scope of permissible cooperation has not yet been determined. Examples of clearly permissible cooperation “include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities.”³⁷⁸

³⁷³ *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

³⁷⁴ In some jurisdictions, state or local rules may limit communication with federal immigration officials. *See, e.g.*, New York City Executive Order No. 41 (2003); Los Angeles Police Dep’t Special Order No. 40 (1979).

³⁷⁵ 132 S. Ct. at 2509.

³⁷⁶ *Id.*

³⁷⁷ 8 U.S.C. § 1357(g)(10)(B).

³⁷⁸ *Arizona*, 132 S. Ct. at 2507.

Whether permissible cooperation extends beyond these situations to one, for example, in which federal authorities request state or local officers to detain an individual pending their arrival on the scene, has not been decided. Thus, in *Arizona*, the Supreme Court stated, “There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.”³⁷⁹ The Supreme Court did not address whether a request, approval, or other instruction from federal officials to detain a noncitizen could justify a state or local officer in doing so.³⁸⁰

Q: Under what circumstances may an encounter with state or local law enforcement officers give rise to a Fifth Amendment violation that might affect the admissibility of evidence in immigration proceedings?

A: Both federal courts and the Board of Immigration Appeals have held that involuntary admissions of alienage should be excluded on the basis that they violate the Due Process Clause of the Fifth Amendment.³⁸¹ To establish that an admission was made involuntarily, a respondent must demonstrate that it was obtained through duress, coercion or improper action, including but not limited to “physical abuse, hours of interrogation, denial of food or drink, threats or promises, or interference” with an individual’s attempt to exercise his or her rights.³⁸² The authors are not aware of any decisions where an admission of alienage during an encounter with state or local officers was suppressed on Fifth Amendment grounds. However, numerous courts have analyzed the voluntariness of such admissions, implicitly confirming that the exclusionary rule would apply in the event of duress, coercion or other improper action.³⁸³

³⁷⁹ *Id.*

³⁸⁰ ICE routinely makes such requests when it issues a detainer to state or local authorities to hold an individual for up to 48 hours. 8 CFR § 287.7. The situations under which a detainer may raise Fourth Amendment and statutory questions, and whether a detainer can be distinguished as a constitutional matter from a detention by state or local officials at the instruction of ICE or CBP following a traffic stop, have not been fully litigated. See *Jimenez-Moreno v. Napolitano*, No. 11-5452 (N.D. Ill. filed Aug. 11, 2011), Amended Complaint available at <http://legalactioncenter.org/sites/default/files/Jimenez%20Moreno%20v%20Napolitano--Amended%20Complaint.pdf>; see also *Brizuela v. Feliciano*, No. 12-0226 (D. Conn., Settlement Agreement and Stipulation of Dismissal approved Mar. 1, 2013, Petition for Writ of Habeas Corpus and Complaint available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Brizuela%20v.%20Feliciano%20Complaint.pdf>. See also Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOYOLA L.A. L. REV. (forthcoming, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524.

³⁸¹ See *Navia-Duran v. INS*, 568 F.2d 803, 810-11 (1st Cir. 1977); *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006); *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009); *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990); *Choy v. Barber*, 279 F.2d 642, 646-47 (9th Cir. 1960); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

³⁸² See *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For a more detailed discussion of the circumstances that might warrant suppression of evidence on Fifth Amendment grounds, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 24-27.

³⁸³ See, e.g., *Ghysels-Reals v. U.S. Atty. Gen.* 418 Fed. Appx. 894, 896 (11th Cir. 2011) (unpublished) (noting that respondent, who was detained by the police during a routine traffic stop, had not presented evidence to show that information obtained “was false or had resulted from coercion or duress”); *Matter of Angel Oswaldo Sinchi-Barros*, A094-072-050, 2011 WL 6706339, *2 (BIA Nov. 29, 2011) (unpublished) (noting lack of evidence that Minneapolis police had extracted statements relating to alienage by “threats, violence, or express or implied promises sufficient to overbear [the respondent’s] will and critically impair his capacity for self-determination” (internal citations and

In some cases, a Fourth Amendment violation by state or local officers may taint any statements made by the respondent following a subsequent transfer to ICE.³⁸⁴ The critical issue is whether the statements resulted from “exploitation of th[e prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”³⁸⁵ Relevant factors include the length of time since the illegal seizure, the presence of intervening circumstances, and the nature and purpose of the underlying misconduct.³⁸⁶ If an analysis of these factors reveals that the evidence could not have been obtained but for the illegal conduct, it may be subject to suppression as “fruit of the poisonous tree.”³⁸⁷

Part II: Application of the Exclusionary Rule to Constitutional Violations by State or Local Law Enforcement Officers

Q: Does the exclusionary rule generally apply in immigration proceedings when state or local officers have obtained evidence in violation of a respondent’s constitutional rights?

A: Historically, under the “silver platter” doctrine, a federal court could admit evidence that had been illegally obtained by state officers. In *Elkins v. United States*, 364 U.S. 206 (1960), the Supreme Court overturned that doctrine in criminal cases.³⁸⁸ However, one Court of Appeals has suggested in dicta that the silver platter doctrine continues to apply in immigration removal proceedings – that is, evidence is admissible in such proceedings even when obtained by a state or local officer in violation of the Fourth Amendment.³⁸⁹

The court reached that conclusion based upon the Supreme Court’s decision in *United States v. Janis*, 428 U.S. 433 (1976), a case involving a federal civil tax proceeding. In *Janis*, the Supreme Court refused to suppress evidence unlawfully obtained by a state law enforcement officer because it concluded that there would be a minimal deterrent effect from excluding such evidence in a federal civil tax proceeding. According to the Supreme Court, a state law enforcement officer had little interest in the outcome of a

quotations omitted)); *Angel Israel Ibarra Uruga*, A200-021-409, 2012 WL 3911870 (BIA Aug. 30, 2012) (unpublished) (noting lack of evidence that the respondent’s statement to a Pennsylvania State Trooper had resulted from duress, coercion, or intimidation); cf. *Elenilson Alexander Gutierrez-Landaverde*, A087-686-663, 2013 WL 2613046 (BIA May 30, 2013) (unpublished) (noting that the respondent, who was interrogated by a sheriff’s office operating under a 287(g) agreement, had not established that assertions made in Form I-213 were untrue or obtained by coercion, duress or intimidation).

³⁸⁴ For an example of a decision acknowledging the validity of this argument, see *Matter of* [Redacted], Order of Holt, J., Aug. 2011, at 8-9, available at <http://legalactioncenter.org/sites/default/files/Elliott%20Decision.pdf>.

³⁸⁵ *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (internal quotation omitted).

³⁸⁶ *United States v. Gross*, 662 F.3d 393, 401-02 (6th Cir. 2011).

³⁸⁷ *Wong Sun*, 371 U.S. at 487-88; see also *Santos v. Frederick County Board of Commissioners*, __ F.3d __, 2013 U.S. App. LEXIS 16335, *28-*29 (4th Cir. Aug. 17, 2013) (noting that an ICE detainer does not “cleanse” an unlawful seizure by local law enforcement officials). For a discussion of the fruit-of-the-poisonous-tree doctrine, see LAC Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 4.

³⁸⁸ *Elkins*, 364 U.S. at 223 (holding that “evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant’s immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant’s timely objection”).

³⁸⁹ See *Lopez-Gabriel v. Holder*, 653 F.3d 683, 686 (8th Cir. 2011).

federal civil tax proceeding. The state officer therefore was not likely to be motivated to obtain evidence to be used in a federal civil tax proceeding, and consequently, the prospect that evidence might be excluded from a federal civil tax proceeding was unlikely to deter the state officer from unconstitutional conduct. In those circumstances, the Supreme Court reasoned, the exclusionary rule was inappropriate: it would impose social costs (the exclusion of probative evidence from a civil proceeding) without bringing out appreciable deterrence benefits (because state officers were not likely to regulate their conduct based upon what might happen in a federal civil tax proceeding).

There are significant differences between the tax enforcement context and the immigration enforcement context that undercut the relevance of *Janis* to immigration removal proceedings. Specifically, *Janis* pointed to three reasons for applying the silver platter doctrine and refusing to suppress evidence that had been illegally obtained by state law enforcement officers.

First, in *Janis*, a state court had already suppressed the evidence from a state criminal tax proceeding. The Court reasoned that there would be limited additional deterrent benefit from suppressing the evidence in the federal civil proceeding as well. In the immigration context, however, states may not impose parallel penalties for federal immigration offenses, whether criminal or civil.³⁹⁰ Thus, the only proceeding in which immigration-related evidence can be used is a federal proceeding.

Second, in *Janis*, the Court assumed that state officers did not care very much about the outcome of federal civil tax proceedings, and therefore would not be prone to committing constitutional violations in order to obtain evidence for those proceedings. While that may be true in the context of tax enforcement, it is not true of immigration enforcement. In recent years, numerous states, and even some localities, have taken a strong interest in assisting the federal government with immigration enforcement.³⁹¹ State and local officers – at least in those locales – are therefore likely to be motivated to obtain evidence that could be used in an immigration removal proceeding.³⁹² If so, then applying the exclusionary rule in civil immigration proceedings could have a significant deterrent effect on unconstitutional conduct.

Third, the Court stated that even if state officers did care about the outcome of federal proceedings, the suppression of evidence in a federal criminal trial would suffice to deter state officer misconduct. There would be limited additional deterrent benefit from suppressing evidence in federal civil proceedings. While that reasoning may make sense in the tax context, it does not make sense in the immigration context, where the number of federal criminal proceedings is far smaller than the number of civil removal proceedings. State officers understand that any immigration-related evidence they obtain

³⁹⁰ *Arizona*, 132 S. Ct. at 2502-3.

³⁹¹ See David Gray et. al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 25-33 (2012).

³⁹² For additional factors warranting renewed deterrence of unconstitutional conduct in recent years, see pages 12-13, *infra*.

is much more likely to be used in a civil proceeding than in a criminal proceeding. Limiting the exclusionary rule to criminal proceedings therefore significantly undercuts its deterrent impact.

Both federal courts and the BIA have indicated that evidence unlawfully obtained by state and local law enforcement officers may be suppressed in removal proceedings. For example, in *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011), the Ninth Circuit presumed that a deputy sheriff's actions could trigger Fourth Amendment scrutiny for purposes of excluding evidence in immigration court. However, the court ultimately determined that the sheriff's behavior was not sufficiently egregious to warrant suppression.³⁹³ In a number of unpublished cases, the BIA has either affirmed an immigration judge's decision to exclude evidence procured by state or local officers or remanded cases involving allegations of constitutional violations by such officers for additional fact-finding.³⁹⁴

Q: Even if the exclusionary rule does not generally apply in immigration proceedings when state or local officers engage in unconstitutional conduct, might there be an exception when such officers are engaged in a joint operation with federal immigration officers?

A: Yes – even if the silver platter doctrine generally precludes application of the exclusionary rule where an illegal search or seizure was carried out exclusively by state or local officers, it does not apply when federal officers participated in some way in the illegal course of conduct. For example, if state or local officers illegally entered a premises and detained the people found there, and then a federal immigration officer arrived on the scene to interview those people and determine whether they might be removable, there would be a strong argument that the silver platter doctrine would not preclude the application of the exclusionary rule. Thus, in *Lustig v. United States*, 338 U.S. 74 (1949), decided at a time when federal courts could still admit evidence unlawfully obtained by state officers in criminal cases, the Supreme Court held that the exclusionary rule should apply to evidence obtained by local police officers through an

³⁹³ 673 F.3d at 1034-37. See also *Ghysels-Reals v. U.S. Atty. Gen.* 418 Fed. Appx. 894 (11th Cir. 2011) (unpublished) (concluding that circumstances of traffic stop by police did not warrant exclusion of evidence in removal proceedings); *Santos v. Holder*, 486 Fed. Appx. 918, 920 (2d Cir. 2012) (unpublished) (holding that immigration judge erred in denying motion to suppress without a hearing when respondent had established a *prima facie* case that Massachusetts state trooper had stopped and arrested him because of his race).

³⁹⁴ See, e.g., *Concepcion Vargas-Lopez, et al.*, A099-577-393, 2009 WL 4639868, *2 (BIA Nov. 2009) (unpublished) (upholding immigration judge's decision to hold an evidentiary hearing to determine whether an allegedly unlawful seizure and interrogation during a traffic stop by a state officer was an egregious Fourth Amendment violation that warranted suppression of Form I-213); *Francisco S.*, A094-810-418 (BIA May 7, 2009) (unpublished) (affirming immigration judge's decision to exclude evidence of alienage obtained during a traffic stop because a reasonable officer should have known that the tactics used violated the respondent's Fourth Amendment rights), available at <http://legalactioncenter.org/sites/default/files/Francisco.pdf>; *Quinteros*, A088-239-850 (BIA, Mar. 21, 2011) (unpublished) (remanding case to immigration judge to assess the validity of a traffic stop and arrest by local police that led to immigration questioning by a 287(g) officer and, ultimately, to the initiation of removal proceedings), available at <http://legalactioncenter.org/sites/default/files/Quinteros.pdf>.

illegal entry into a hotel room, when a federal officer later joined the local police in the hotel room and applied his expertise to sifting through the various pieces of evidence with an eye toward federal prosecution. The Supreme Court held that “[t]he decisive factor in determining [whether the exclusionary rule applies or is precluded by the silver platter doctrine] is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means.”³⁹⁵ Thus, “[t]he fact that state officers preceded [the federal officer] in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course.”³⁹⁶ Indeed, the Supreme Court held, “[i]t surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes the articles out of a bag. It would trivialize law to base legal significance on such a differentiation.”³⁹⁷ Thus, the silver platter doctrine should not preclude suppression in cases where state or local law enforcement agencies collaborate with federal immigration officers.

Q: Is an exception to the silver platter doctrine warranted when state or local officers are operating under a Section 287(g) agreement?

A: This issue has not yet been decided. However, the Immigration and Nationality Act makes clear that, under Section 287(g) agreements, state or local officers are subject to the direction of the Attorney General and “shall be considered to be acting under color of Federal authority,” at least for purposes of civil rights actions.³⁹⁸ There is a good argument that state and local officers acting under a Section 287(g) agreement should be treated as federal officers for purposes of the exclusion of evidence, in which case the silver platter doctrine would not apply. The logic of applying the silver platter doctrine to federal civil proceedings like the tax proceedings at issue in *Janis* is that officers charged with enforcing the criminal law of one sovereign have a limited interest in enforcing the civil law of a different sovereign. They are not likely to be motivated to commit constitutional violations in order to obtain evidence for another sovereign’s civil proceedings. Thus, applying the exclusionary rule to suppress evidence in those civil proceedings is unlikely to have any significant deterrent impact on their conduct.

As discussed above, that argument is dubious in the immigration context even when state and local officers are operating independently of a Section 287(g) agreement, but carries even less force when such an agreement is in place. Under a Section 287(g) agreement, a state or local officer “perform[s] a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”³⁹⁹ That is, by signing such an agreement, states or political subdivisions agree to have their officers take on the role of enforcing federal immigration law. Because the entire premise of

³⁹⁵ *Id.* at 79.

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 78.

³⁹⁸ 8 U.S.C. § 1357(g)(3), (8).

³⁹⁹ 8 U.S.C. § 1357(g)(1).

Section 287(g) agreements is that state or local officers will take an interest in assisting in the enforcement of civil immigration enforcement, it is logical that officers acting under such agreements are motivated to obtain evidence to be used in civil immigration proceedings, and that they will be deterred from unconstitutional conduct if evidence obtained through a constitutional violation is excluded from such proceedings. Accordingly, there is no justification for allowing the silver platter doctrine in the context of a Section 287(g) agreement.

Q: To the extent that the exclusionary rule applies to evidence obtained through illegal conduct by state or local officers, is it limited to cases involving egregious constitutional violations?

A: In addressing motions to suppress evidence seized by state or local officers in the immigration context, federal courts and the BIA have generally assumed that the noncitizen must establish an “egregious” constitutional violation.⁴⁰⁰ But no court has expressly confronted the question.

There are good reasons to conclude that the exclusionary rule should apply with full force in immigration proceedings when a Fourth Amendment violation is committed by state or local officers. In *Lopez-Mendoza*, the Supreme Court limited the exclusionary rule’s application in immigration proceedings to “egregious” violations based on factors that either no longer hold true, or do not apply to state and local police officers.

First, the Court emphasized the low rate of formal deportation hearings. In 1984 when *Lopez-Mendoza* was decided, over 97.5% of noncitizens charged with violating the civil immigration laws agreed to leave the United States voluntarily without a formal hearing.⁴⁰¹ The Court also noted that, even where a formal hearing took place, it was rare for noncitizens to challenge the circumstances of their arrests.⁴⁰² Relying on these figures, the Court reasoned that “the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.”⁴⁰³ Today, however, removal hearings are commonplace. Immigration courts decide more than 220,000 removal proceedings each year,⁴⁰⁴ and the percentage of noncitizens choosing voluntary departure has dropped from 97.5% when *Lopez-Mendoza* was

⁴⁰⁰ See, e.g., *Martins v. Att’y Gen. of United States*, 306 F. App’x 802, 804-05 (3d Cir. 2009) (no egregious violation); *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010) (same); *Garcia-Torres v. Holder*, 660 F.3d 333, 336-37 (8th Cir. 2011) cert. denied, 133 S. Ct. 108 (2012) (same); *Martinez-Medina v. Holder*, 673 F.3d 1029, 1034-35 (9th Cir. 2011) (same); *Ghysels-Reals v. U.S. Att’y Gen.*, 418 Fed. App’x 894, 895-96 (11th Cir. 2011) (same); *Angel Oswaldo Sinchi-Barros*, A094-072-050, 2011 WL 6706339 (BIA Nov. 29, 2011) (unpublished) (same); *Angel Israel Ibarra Uruga*, A200-021-409, 2012 WL 3911870 (BIA Aug. 30, 2012) (unpublished) (same); *Reymundo Alvarez Araceli*, A094-217-297, 2013 WL 3899764 (BIA Jun. 28, 2013) (unpublished) (remanding to permit immigration judge to determine whether evidence of alienage was procured through an egregious violation of respondent’s constitutional rights by a local law enforcement officer).

⁴⁰¹ 468 U.S. at 1044.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ U.S. Dep’t of Justice, Executive Office for Immigration Review, *FY 2011 Statistical Yearbook*, at D1 (February 2012), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

decided to 45% in 2011.⁴⁰⁵ Because the higher percentage of contested hearings means that evidence is more likely to be needed to effectuate a removal, there is a stronger incentive today than there was when *Lopez-Mendoza* was decided for an officer to obtain evidence through illegal means.

Second, the Court cited as “perhaps the most important” factor guiding its decision the existence of the former Immigration and Naturalization Service’s “comprehensive scheme” for deterring its officers from committing Fourth Amendment violations, including “rules restricting stop, interrogation, and arrest practices.”⁴⁰⁶ In light of these apparent administrative protections, the Court expected that the additional deterrent value of applying the Fourth Amendment exclusionary rule would be minimal. However, state and local law enforcement officers who are not operating under a Section 287(g) agreement do not receive federal immigration training. Nor are such state or local officers subject to federal regulations that limit the stop-and-arrest authority of federal immigration officers. There simply is no reason to believe that state and local officers will be any more scrupulous in observing constitutional constraints in the immigration context than in enforcing criminal law generally. Just as the exclusionary rule is needed in the criminal context to deter violations of the Fourth Amendment by state and local officers, it is needed in the immigration context as well.

Third, the Court emphasized “the availability of alternative remedies” like declaratory relief “for institutional practices by INS that might violate Fourth Amendment rights.”⁴⁰⁷ Such alternative remedies further reduced the deterrent value of the exclusionary rule. Where state and local officers detain or arrest an individual for suspected immigration violations, however, there is no “agency under central federal control,”⁴⁰⁸ that can be held accountable. Without a single target for declaratory relief, few tools are available to deter constitutional violations other than the exclusionary rule. Thus, the *Lopez-Mendoza* Court’s rationale for limiting the application of the exclusionary rule in immigration proceedings should not apply when the constitutional violation is committed by state or local officers.

Finally, *Lopez-Mendoza* suggests that the Court’s “conclusions concerning the exclusionary rule’s value might change if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”⁴⁰⁹ Even if *Lopez-Mendoza*’s limitations on the exclusionary rule were held to apply to state and local officers in general, that conclusion should change if Fourth Amendment violations by state and local officers are widespread. No court has yet ruled on what kind of record evidence might suffice to establish “widespread” violations under *Lopez-Mendoza*. But

⁴⁰⁵ See Dep’t of Homeland Security, *Yearbook of Immigration Statistics: 2011*, Table 39, available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

⁴⁰⁶ 468 U.S. at 1044-45.

⁴⁰⁷ *Id.* at 1045.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 1050.

one court has remanded a case to the BIA to allow a noncitizen to attempt to establish such a record.⁴¹⁰

⁴¹⁰ See *Oliva-Ramos v. Holder*, 694 F.3d 259, 280-82 (3d Cir. 2012). For more information on the “widespread” exception, see LAC Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 11-12.

Q: When state and local officers arrest a noncitizen in violation of the Fourth Amendment, and federal officials thereafter learn of the noncitizen through Secure Communities and initiate removal proceedings, can removal proceedings be terminated on the ground that they are the direct result of the illegal arrest?

A: The fact that a noncitizen came to the attention of federal authorities through a Secure Communities database search following an illegal arrest will not, on its own, warrant the termination of removal proceedings. In *Lopez-Mendoza*, the Supreme Court held that “[t]he ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest. . . .”⁴¹¹ However, courts are divided on how to interpret this statement.⁴¹² To the extent that the government relies in removal proceedings upon evidence of alienage obtained as a direct result of the unlawful arrest, including evidence obtained from a Secure Communities database search, such evidence may potentially be subject to suppression as “fruit of the poisonous tree.” Courts are divided on the viability of suppressing evidence that the government previously had in its possession but identified only through illegal conduct.⁴¹³

⁴¹¹ See *Lopez-Mendoza*, 468 U.S. at 1039.

⁴¹² For more information on the way different courts have interpreted this provision, see LAC Practice Advisory, [Motions to Suppress in Removal Proceedings: A General Overview](#), at 2-4.

⁴¹³ For more information on the “fruit of the poisonous tree” doctrine, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 4-5.

PRACTICE ADVISORY⁴¹⁴

**IMMIGRATION BENEFITS AND PITFALLS FOR LGBT
FAMILIES IN A POST-DOMA WORLD**

August 5, 2013

INTRODUCTION

On June 26, 2013, the U.S. Supreme Court issued a landmark decision in [*United States v. Windsor*](#), holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. See *United States v. Windsor*, No. 12-307, 570 U.S. ___, 2013 WL 3196928 (June 26, 2013) (striking 1 U.S.C. § 7). When DOMA was enacted by Congress and signed into law by President Clinton in 1996, no state or country in the world permitted same-sex couples to marry. Over the last decade, after Canada, Massachusetts, and then other jurisdictions began to allow lesbian and gay couples to marry, the impact of DOMA became more concrete. Section 3 of DOMA was the only impediment to filing applications for lawful permanent residence for noncitizen spouses.⁴¹⁵ There are an estimated 36,000 lesbian and gay binational couples who have been affected by DOMA.⁴¹⁶ In finding that “no legitimate purpose overcomes [DOMA’s] purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,” the Supreme Court ended this chapter of institutional discrimination.

The immigration agencies have begun the task of implementing the *Windsor* decision. As practitioners and advocates, we are working to minimize delay and unnecessary hurdles in order to ensure that noncitizens in same-sex marriages are afforded the same immigration benefits as all other couples. This practice advisory highlights some of the issues LGBT families will face

⁴¹⁴ Copyright (c) 2013 American Immigration Council and Immigration Equality. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. The authors of this Practice Advisory are Victoria Neilson, Beth Werlin, and Mary Kenney. We are grateful to Betsy Lawrence for her valuable input and edits.

⁴¹⁵ As of this writing, there are thirteen marriage equality states plus the District of Columbia, and over a dozen countries with marriage equality. The states are California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. For a list of marriage equality states and countries and documentary requirements to marry, see Immigration Equality, “Where Can We Marry?” available at <http://immigrationequality.org/issues/couples-and-families/where-can-we-marry/>

⁴¹⁶ See Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law, by Human Rights Watch and Immigration Equality, 2006, available at <http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf>

in a post-DOMA world. It is not intended to provide exhaustive guidance on all marriage-related immigration issues. We encourage practitioners to contact Immigration Equality and the American Immigration Council at vneilson@immigrationequality.org or clearinghouse@immcouncil.org about problems they encounter, as this will inform ongoing advocacy.

***Windsor* and the Immediate Response of Immigration Agencies**

In *United States v. Windsor*, the Supreme Court struck down Section 3 of DOMA, which defines the term “marriage” as a union between a man and a woman for purposes of all federal statutes and federal agency regulations and rulings. The immigration agencies relied upon this provision to deny immigration benefits to noncitizens in valid same-sex marriages with United States citizens (USC) or lawful permanent residents (LPR). Although *Windsor* involved federal estate taxes rather than immigration benefits, the Court’s holding applies broadly to all federal programs impacted by DOMA. In finding that DOMA violated the equal protection clause of the Fifth Amendment to the U.S. Constitution, the Court explained, “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.” Slip Op. at 22.

Shortly after issuance of the decision, Department of Homeland Security (DHS) Secretary Janet Napolitano [stated](#) that DHS would take steps to implement the ruling and ensure that “all married couples will be treated equally and fairly.” Subsequently, U.S. Citizenship and Immigration Services (USCIS) released a “[Frequently Asked Questions](#)” (FAQ) (discussed in more detail in § I.B, *infra*) and has begun approving visa petitions filed on behalf of noncitizens by their USC spouses. And on July 26, 2013, USCIS expanded on the initial FAQ with a new webpage entitled “[Same-Sex Marriages](#).” (Same-Sex Marriage Guidance). Among other things, this guidance sets forth procedures for reopening visa petitions that USCIS denied solely based on Section 3 of DOMA prior to *Windsor*. See § II.B, *infra*.

The Department of State (DOS) also weighed in early on, [asserting](#), “We recognize the significance of this decision for affected families, and we are working to interpret the decision and implement policy and procedural changes as soon as possible.” On August 2, 2013, DOS posted “[FAQs for Post-Defense of Marriage Act](#)” (DOS FAQs). The DOS FAQs state that “[e]ffective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses.” DOS concurrently issued internal guidance entitled, “[Next Steps on DOMA – Guidance for Posts](#)” (DOS Guidance for Posts), which expands on some of the issues addressed in the DOS FAQs.

Perhaps most significantly, on July 17, 2013, the Board of Immigration Appeals (BIA or Board) – whose decisions are binding on all DHS officers and employees and immigration judges, 8 C.F.R. § 1003.1(g) – issued its first post-*Windsor* published decision. [Matter of Zeleniak](#), 26 I&N Dec. 158 (BIA 2013). The BIA stated, “The Supreme Court’s ruling in *Windsor* has therefore removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriage and spouses if the marriage is valid under the laws of the State where it was celebrated.” *Matter of Zeleniak*, 26 I&N Dec. at 159.

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Conclusion

I. ESTABLISHING A MARRIAGE

A. Marriage and Immigration Law

There are a number of immigration benefits and forms of relief from removal that depend on the existence of a valid marriage. Thus, the validity of a marriage can be an issue in an affirmative application for an immigration benefit filed with USCIS or DOS or in an application for relief from removal filed with an immigration judge (IJ). The following are examples of immigration benefits and forms of relief that are dependent on the existence of a marriage.

- Adjustment of status or consular processing based on a family-based visa petition
- Adjustment of status or consular processing based on being a derivative of a beneficiary of a visa petition (family-based or employment-based)
- Cancellation of removal requiring a qualifying relative
- Waivers that require a qualifying relative (such as § 212(h), § 212(i) and unlawful presence waivers)
- Derivative beneficiary of an asylum application
- Derivative beneficiary of a nonimmigrant visa
- Fiancé/e petition
- VAWA self-petition

In *Matter of Zeleniak*, the BIA explicitly recognized the broad range of INA provisions affected by *Windsor*. 26 I&N Dec. at 159 (noting that Supreme Court’s ruling impacts the benefits and forms of relief listed above).

B. Place of Celebration Rule

With 13 U.S. states plus the District of Columbia offering LGBT families marriage equality, one of the most immediate questions is whether the couple has to live in a marriage equality state in order to apply for immigration benefits. The most straightforward scenario is one in which a couple was married in and resides in a state with marriage equality, such as Vermont. But what happens if the couple that married in Vermont lives in Florida at the time the visa petition is filed and adjudicated? When evaluating the validity of a marriage for immigration purposes, DHS generally employs a place of celebration rule. Under this rule, “the validity of a marriage is determined by the law of the State where the marriage was celebrated.” *Matter of Lovo-Lara*, 23 I&N Dec. 746, 753 (BIA 2005). The BIA recently affirmed this rule in *Matter of Zeleniak*, 26 I&N Dec. at 160 (citing *Matter of Lovo-Lara*). In the example above, because the marriage was validly celebrated in Vermont, and assuming it is otherwise bona fide, it should not matter that the couple could not have married in Florida, their subsequent state of domicile.

In its [FAQ](#) issued after *Windsor*, USCIS affirmed that this is its general policy, but clouded the issue by stating that there were “some limited exceptions under which immigration agencies have historically considered the law of the state of residence in addition to the law of the state of celebration of the marriage.” See “[DHS Issues Guidance on DOMA Implementation](#),” AILA InfoNet Doc. #13070240. The longer [Same-Sex Marriage Guidance](#) initially included the same

ambiguous language, but significantly, on August, 2, 2013, USCIS removed the reference to “exceptions” to the place of celebration rule.⁴¹⁷ Furthermore, the BIA’s decision in *Matter of Zeleniak* does not indicate any exceptions to this rule. The [DOS Guidance for Posts](#) goes further and states explicitly, “The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.”

It is notable that the first reported gay married couple to receive an approved visa petition reside in Florida and married in New York.⁴¹⁸ And, the first I-485 was approved for a Colorado lesbian couple who married in Iowa.⁴¹⁹ In both instances, the couple married in a marriage equality state but lived in a state with a constitutional amendment banning same-sex marriage. The couple in *Zeleniak* married in Vermont and resided in New Jersey, a state that offers civil unions but not full marriage equality. If you have a case in which this issue is raised, please contact Immigration Equality or the American Immigration Council at vneilson@immigrationequality.org or clearinghouse@immcouncil.org.

C. Requirements to Marry in Marriage Equality States and Countries

Since many people live in states and countries that do not have marriage equality, practitioners may get questions about where couples can marry. Importantly, none of the U.S. marriage equality states has a residence requirement, though in some states there may be a wait of a few days between obtaining a license and performing a ceremony. However, if a couple lives in a state that does not recognize their marriage, they may be unable to divorce there, and many marriage equality states do have residence requirements in order to divorce. Some countries have residence requirements to marry or allow a couple to marry only if at least one spouse is a citizen of the country.⁴²⁰

D. Proving Bona Fides

All couples who seek to have one spouse immigrate on the basis of their marriage must demonstrate that the marriage is bona fide; that is, that it was not entered into for the sole purpose of evading the immigration laws. The petitioner has the burden of showing – by a preponderance of the evidence – that the marriage was entered into in good faith. See *Matter of Casillas*, 22 I&N Dec. 154, 156 (BIA 1998); see also INA § 291 (burden on petitioner to demonstrate eligibility for visa petition). In general, USCIS will consider whether the parties

⁴¹⁷ The [DOS FAQs](#) state, “If your marriage is valid in the jurisdiction (U.S. state or foreign country) where it took place, it is valid for immigration purposes” and direct readers to the USCIS Same-Sex Marriage Guidance for more information.

⁴¹⁸ “Gay Married Man in Florida Is Approved for Green Card,” by Julia Preston, *The New York Times*, June 30, 2013, available at http://www.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html?_r=0.

⁴¹⁹ “HISTORY MADE! First Same-Sex Spouse Granted Green Card,” by Diane Anderson, *The Advocate*, July 4, 2013, available at <http://www.advocate.com/society/marriage-equality/2013/07/04/history-made-first-same-sex-spouse-granted-green-card>.

⁴²⁰ For further information, see “Where Can We Marry?” available at <http://immigrationequality.org/issues/couples-and-families/where-can-we-marry/>.

intended to establish a life together. *Matter of Laureano*, 19 I&N Dec. 1, 2-3 (BIA 1983). While the parties' intent at the time that they married is the issue, conduct subsequent to the marriage can be relevant to their intent at the time of marriage. *Matter of Laureano*, 19 I&N Dec. at 3 (citing *Lutwick v. United States*, 344 U.S. 604, 617 (1953)).

In different-sex marriages, evidence that is often presented to demonstrate that a marriage is bona fide includes, though it is not limited to: proof that the parties filed joint tax returns as a married couple, listed one another as beneficiaries on insurance policies, shared a bank account, were listed jointly on property leases, or owned a home together. *See, e.g., Matter of Phillis*, 15 I&N Dec. 385, 387 (BIA 1975). Other evidence that is typically submitted includes written testimony (from both the couple and family members) and pictures and other documentation of the parties' courtship, marriage, and shared experiences. *Id.* Proving that a marriage is bona fide may be more challenging for an LGBT couple than for a different-sex couple because evidence of joint assets and liabilities are often not available to them. Prior to June 26, 2013, married same-sex couples were prohibited from filing federal taxes jointly. Even post-*Windsor*, couples who do not live in marriage equality states likely will not be able to file state taxes jointly.

Significantly, no federal anti-discrimination law covers sexual orientation. While some states and localities have anti-discrimination protections, many others do not.⁴²¹ Moreover, even in jurisdictions that do provide protections, small employers and employers with religious affiliations are often exempted. Therefore, some couples may choose not to mingle finances (e.g., add a spouse to employer-sponsored health insurance or retirement benefits, a lease or mortgage, or a bank account) for fear of facing discrimination. For couples living together abroad or where the foreign spouse lives abroad, the fear of being "outed" may be even greater, especially if the foreign spouse lives in a country where LGBT people face persecution and possible criminal penalties.

In addition to added challenges in showing intermingled finances, it may be more difficult to provide extrinsic evidence of courtship and emotional ties. Some couples may choose not to be open about their relationship with family members who may disown an LGBT child or even become violent. Thus, the couple may not be able to provide photos of themselves taken with their extended families or have proof of a public wedding celebration.

E. Marriage Fraud and Related Provisions

The INA includes several marriage fraud and related provisions, any one of which could impact the adjudication of a visa petition that is premised upon a same sex-marriage. Same-sex marriages will be scrutinized by USCIS to the same degree as different-sex marriages. Moreover, while at least one issue discussed below may not be of concern immediately, all of these issues eventually will be relevant to same-sex marriages.

⁴²¹ See Lambda Legal, "In Your State," for a breakdown of anti-discrimination laws, available at <http://www.lambdalegal.org/states-regions/?gclid=CLXI4cWaqrgCFcyj4Aod-DkAdA>.

- **INA § 204(c).** Under this provision, an individual who is determined to have engaged in marriage fraud will be barred from receiving a visa on any basis in the future.⁴²² Marriage fraud under the statute is broadly defined. It includes marriages (or attempts or conspiracies to marry) that the government finds were entered into for the purpose of evading the immigration laws whether or not the parties applied for and/or were granted a visa petition. INA § 204(c)(1), (2).⁴²³ USCIS must have substantial and probative evidence that the noncitizen committed, attempted to commit, or conspired to commit marriage fraud and must make an independent decision based upon the evidence in the record. *Matter of Tawfik*, 20 I&N Dec. at 167. The petitioner should be afforded an opportunity to review all derogatory information and documents considered by the agency, as well as an opportunity to rebut the derogatory evidence and to present evidence in support of the visa petition prior to the issuance of the adverse decision. 8 C.F.R. § 103.2(b)(16)(i), (ii).

In adjudicating a petition based on a same-sex marriage, a prior petition based on a different-sex marriage might be cause for USCIS to suspect marriage fraud with respect to the prior marriage. Note that there is a difference between failing to produce evidence of a bona fide marriage and a sham marriage. *Compare* 8 C.F.R. §§ 204.2(a)(1)(iii)(B) *with* 204.2(a)(1)(ii). There are many reasons that people marry. For example, the beneficiary may be bisexual; the beneficiary may not have identified as lesbian or gay at the time of the marriage (and may have “come out” later in life); the beneficiary may have wanted to combat the fears of family or community members about his sexual orientation. None of these reasons would support a finding that the prior marriage was fraudulent, nor should they lead to a finding that the *current* marriage is not bona fide. However, it is important for practitioners to explore fully the factual reasons for the prior marriage and to prepare the applicant to explain the marriage. In some instances, it may be helpful to submit an affidavit from an expert, such as a mental health counselor or religious advisor, who may have helped the applicant sort through coming out issues.

- **204(g), restriction where marriages entered into while in removal proceedings.** In general, a visa petition filed by a USC or LPR for a spouse based upon a marriage entered into while the beneficiary was in removal proceedings may not be approved until the beneficiary has lived outside of the United States for two years, beginning on the date of the marriage. INA § 204(g). A person is considered to be in removal proceedings during both administrative and judicial appeals of the proceedings. INA §§ 204(g), 245(e)(2). Additionally, a person is considered to be in removal proceedings when such proceedings are administratively closed. *See Matter of Munoz-Santos*, 20 I&N Dec. 205, 207 (BIA

⁴²² Note that there also are criminal penalties for knowingly engaging in marriage fraud for the purpose of evading any provision of the immigration laws. INA § 275(c). This practice advisory addresses only the civil immigration-related aspects of marriage fraud.

⁴²³ *See also Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990) (explaining that where marriage fraud is found, “the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy”).

1990) (describing administrative closure as an “administrative convenience” that does not result in a final deportation order).

A major exception to this restriction is for bona fide marriages. *See* INA § 245(e)(3).⁴²⁴ To satisfy the bona fide marriage exception, the beneficiary must demonstrate by clear and convincing evidence that he married in good faith, in accordance with the laws of the place of celebration, did not marry to procure admission as an immigrant, and did not marry as a result of a financial arrangement. *Id.* The regulations set forth the procedure to be followed and evidence required to establish the bona fide marriage exemption. 8 C.F.R. § 204.2(a)(1)(iii).

Because, up until the *Windsor* decision, same-sex marriages were not recognized under immigration law, a noncitizen would not have entered such a marriage for the purpose of procuring an immigration benefit and thus should not have a problem establishing that the marriage was entered into in good faith. Thus, § 204(g) should not present a problem for couples whose marriages predate *Windsor*. However, with respect to same-sex marriages entered into after *Windsor*, USCIS likely will consider this issue as seriously as it does for different-sex marriages.

- **212(a)(6)(C), Prior Misrepresentation.**

Any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks, has sought, or has procured any benefit under the INA is inadmissible. INA § 212(a)(6)(C)(i). A defense to this ground of inadmissibility is that the statement was not a knowing and deliberate misrepresentation. *See, e.g., Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979) (recognizing that a noncitizen must know that the statement is false); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (requiring that the statement must be made with knowledge of its falsity). Even if a person is found subject to § 212(a)(6)(C), he may apply for a discretionary “fraud waiver” under INA § 212(i) if he: 1) is the spouse or son or daughter of a USC or an LPR; and 2) can demonstrate that the denial of admission would result in extreme hardship to this relative.

In the past, lesbian and gay binational couples were in the uniquely disadvantaged position of having their relationships recognized for the purpose of finding immigrant intent under INA § 214(b)⁴²⁵ and having nonimmigrant visa applications – such as student or visitor visas – denied for this reason, but not recognized for the purpose of granting benefits. As a result, couples may have been less than forthcoming about the nature of their relationship when interacting with DHS or DOS. For example, a noncitizen may have indicated that his financial sponsor for a student visa was a family

⁴²⁴ Note that the restriction and exemption applicable to visa petitions also apply to adjustment of status applications. *Id.*; *see also* 8 C.F.R. § 245.1(c)(8).

⁴²⁵ INA § 214(b) states that, with only limited exceptions, applicants for nonimmigrant visas will be presumed to be immigrants until they demonstrate to the satisfaction of both the consular officer, at the time of their visa application, and the immigration officer, at the time of admission, their nonimmigrant intent.

friend, when he was actually a partner or husband. It is unclear how the agencies will handle these situations. We are hopeful that DHS and DOS will take a reasonable approach given the systematic and unconstitutional discrimination that such couples faced.

One issue that arose frequently before *Windsor* was whether a noncitizen in a marriage with a same-sex partner should answer “married” or “single” on agency forms. This question was posed to USCIS in a listening session and the agency response was “USCIS is looking into this issue and will provide a response as soon as possible.”⁴²⁶ Since USCIS never answered this question definitively, it seems unlikely either answer – “single” or “married” – would be considered a misrepresentation.

F. Marriages Where a Spouse Is Transgender

Windsor also has implications for couples where one spouse is transgender. In April 2012, USCIS issued guidance on adjudicating marriage-based petitions where a spouse or fiancé/e is transgender. See “[Adjudication of Immigration Benefits for Transgender Individuals](#),” AILA InfoNet Doc. No. 12041360. USCIS took the position that a transgender person would be considered her affirmed gender as long as she had either amended identity documents or obtained a medical certification from a doctor affirming gender. This guidance went a long way towards clarifying USCIS policies and allowing many transgender individuals to benefit from marriage-based petitions. Nonetheless, while DOMA was in effect, USCIS did not recognize marriages involving a transgender spouse where the transgender individual was unable to provide documentary or medical evidence of gender transition.

Post *Windsor*, a couple may file a marriage-based petition or fiancé/e visa even if the transgender person cannot meet the requirements of the USCIS transgender guidance. For example, a transgender woman in the Philippines who has taken few or no medical steps to transition to female likely would not be able to obtain a medical certification that she is female. However, her USC partner could file a fiancé/e visa even if the couple is legally viewed as same-sex. It is advisable for the attorney to refer to the couple in a way that respects the self-identification of the couple, but explains their legal rights under current guidance. An appropriate explanation may be: “I represent a U.S. citizen male in a long-term relationship with a transgender woman from the Philippines. Because she has not taken steps to medically transition to female, it is my understanding that USCIS will view this relationship as same-sex.” Such a framing will alert USCIS to the legal standard while also respecting the fact that the couple may not view themselves as same-sex. The couple then can proceed with their application as a same-sex couple would. Note, however, that USCIS’s guidance indicates that the transgender spouse will not be provided identity documents in the affirmed gender unless she provides appropriate legal or medical documentation.

⁴²⁶ USCIS “Listening Session -- LGBT Community” Questions and Answers, June 9, 2010, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnexto id=5a87338dc3d19210VgnVCM100000082ca60aRCRD&vgnnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD>.

G. Civil Unions

One significant unanswered question is whether couples who have entered into civil unions, registered partnerships, or similar non-marital relationship recognition will be afforded full marriage benefits under immigration law. In fact, in the 2011 Attorney General decision *Matter of Dorman*, 25 I&N Dec. 485, 485 (A.G. 2011), one of the questions posed to the Board of Immigration Appeals was, “whether respondent’s same-sex partnership or civil union qualifies him to be considered a ‘spouse’ under New Jersey law.”⁴²⁷

The [DOS FAQs](#) indicate that the agency will not treat civil unions as marriages. The guidance provides:

Q: I am in a civil union or domestic partnership; will this be treated the same as a marriage?

A: At this time, only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes.

To date, DHS has not addressed this issue in its guidance. It is unclear if USCIS’s adjudication of applications based on non-marital relationship recognition will be different from DOS’s adjudication, given the somewhat different contexts in which the agencies will confront the issue. Moreover, given DOS’s inclusion of temporal language— “at this time”— in its guidance, it is possible that the agency may be considering the issue further. Nonetheless, if a couple that currently has a civil union can marry relatively easily, doing so will allow them to file an application with far more certainty than an application based on a civil union.

There are circumstances, however, where a couple may have a civil union but be unable to marry now. For example, the authors are aware of the following scenarios:

Case 1: A couple has entered into a New Jersey civil union. The noncitizen partner applies for asylum; the application is denied, and he is removed from the United States. He is not eligible for a waiver to return to the United States unless his USC partner is considered a qualifying relative.

Case 2: A lesbian couple had a child together in Australia. At the time the noncitizen partner gave birth, the two had been joined in a Vermont civil union. The couple later moved to the United States and the foreign partner died. If the child is considered a “step-child,” then the USC can petition for her. If not, she may be unable to obtain permanent residency because the child’s Australian grandparent is opposed to an adoption.

⁴²⁷ The BIA has yet to rule on this issue in *Matter of Dorman* or in any published decision.

There is support for the argument that the immigration agencies should consider a civil union as the functional equivalent of a marriage. The Foreign Affairs Manual recognizes common law marriages, but only if they are the full legal equivalent of marriage:

In the absence of a marriage certificate, an official verification, or a legal brief verifying full marital rights, a common law marriage or cohabitation is considered to be a “valid marriage” for purposes of administering the U.S. immigration law only if:

- (1) It bestows all of the same legal rights and duties possessed by partners in a lawfully contracted marriage; and
- (2) Local laws recognize such cohabitation as being fully equivalent in every respect to a traditional legal marriage, e.g.:
 - (a) The relationship can only be terminated by divorce;
 - (b) There is a potential right to alimony;
 - (c) There is a right to intestate distribution of an estate; and
 - (d) There is a right of custody, if there are children.

9 FAM 40.1 N1.2 Cohabitation, (CT:VISA-1614; 01-07-2011), available at <http://www.state.gov/documents/organization/86920.pdf>. Thus, the argument that a civil union is the equivalent of a marriage likely would be dependent on the specific rules governing the rights and obligations imposed under the law of the state or country that granted the civil union status.

Regardless of whether DHS and DOS accept civil unions for marriage-based benefits under the INA, there may be arguments that that children of the relationship qualify as step-children if the laws of the state or country that celebrated the civil union bestow parental rights.

II. APPLYING FOR BENEFITS

A. When Can Couples File?

The short answer is now. Within a week of the ruling, Secretary Napolitano issued a [statement](#) “direct[ing] U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse” effective immediately. The [Same-Sex Marriage Guidance](#) confirms that applications can be filed now and that there is no need to wait for further regulations, forms or guidance. As discussed above, already, USCIS has approved I-130s and adjustment of status applications. Likewise, the [DOS FAQs](#) provide that “effective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses.” The only reason to delay filing is if there are complex legal questions and the practitioner wants to wait for further DHS and/or DOS guidance.

B. Previously Denied Visas

Before *Windsor*, some USCs filed I-130s on behalf of their same-sex spouses. While some of these petitions remained pending on the date the Supreme Court issued *Windsor*, others had been denied. For those that are still pending, USCIS now is adjudicating them. The authors also are aware of several previously denied I-130s being reopened by USCIS.

Moreover, the [Same-Sex Marriage Guidance](#) specifies that USCIS will reopen cases it denied solely because of Section 3 of DOMA after February 23, 2011, the date that DOJ stopped defending DOMA in Court. The agency will “make a concerted effort” to identify the petitions and notify the petitioner, at the last known address, of reopening and request updated information in support of the application. Any related application, “such as a concurrently filed I-485,” also will be reopened. In addition, any person with an I-130 that was denied because of DOMA, regardless of the date of the denial (including those denied prior to February 23, 2011), can contact USCIS directly at USCIS-626@uscis.dhs.gov. However, if the I-130 was denied before February 23, 2011 (when USCIS began to keep a list of denials), then he or she must notify USCIS **before March 31, 2014** at USCIS-626@uscis.dhs.gov to request reopening. No fee will be required to reopen any of these applications.

The [Same-Sex Marriage Guidance](#) also provides information about employment authorization that previously was denied or revoked. Where USCIS cannot immediately make a decision on a reopened adjustment of status application, it will “(1) immediately process any pending or denied application for employment authorization or (2) reopen and approve any previously revoked application for employment authorization.” If the applicant has not yet had biometrics taken, he or she will be scheduled for an appointment, and if he or she has had biometrics taken, the EAD can issue without further action by the applicant.

The [Same-Sex Marriage Guidance](#) further specifies that applicants for other types of benefits, besides I-130s, who were denied due to DOMA, can contact the agency at USCIS-626@uscis.dhs.gov. The Guidance does not specify what these other benefits may be, but as discussed in this advisory, they could include: fiancé/e visas; derivative benefits; step-parent/child petitions; and follow to join petitions.

There may still be some instances when an individual may prefer to file a new I-130 and I-485 rather than wait for reopening. The Guidance clarifies that applications can be filed anew, but that the applicable fees would then apply.

C. Unlawful Presence and Waivers

In most cases, individuals who entered the United States without being admitted or paroled are not eligible to adjust status, regardless of whether they are married to a USC. INA § 245(a). Likewise, individuals, other than immediate relatives (i.e., spouses or minor children of USCs or parents of adult USCs), who entered lawfully but overstayed their visas are not eligible to adjust status. INA § 245(c)(2). These individuals must leave the United States and pursue an immigrant visa through consular processing. However, because many of these individuals will have accrued unlawful presence, departing the United States will likely trigger the 3 or 10 year

bar to admissibility. INA § 212(a)(9)(B) (3 year bar if unlawfully present for more than 180 days but less than one year, and 10 year bar if unlawfully present for more than one year).

There are waivers available for spouses of USCIs and LPRs who can show that refusal of admission of the immigrant would result in extreme hardship to the immigrant's USC or LPR spouse or parent. INA § 212(a)(9)(B)(v). Until recently, the only way to obtain an unlawful presence waiver was to apply from outside the United States in the course of consular processing. As a result, families would be separated for extended periods of time, often well over a year, while USCIS considered the waiver application. However, a new rule, effective March 4, 2013, permits immediate relatives of USCIs (but not LPRs) to request a provisional unlawful presence waiver prior to travelling abroad for consular processing. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536 (Jan. 3, 2013). For more information about provisional waivers, see AILA InfoNet Featured Topic entitled, "Provisional (Stateside) Waivers," available at <http://www.aila.org/Issues/Issue.aspx?docid=38225>.

To qualify for a waiver of unlawful presence, the applicant must demonstrate extreme hardship to his USC spouse or parent.⁴²⁸ Like other waivers, hardship to a USC spouse or parent may include evidence of age, family ties in the United States (and lack of ties abroad), length of time spent in the United States, health/medical conditions, economic and financial conditions, etc. In addition, hardship for lesbian and gay married couples may be bolstered by evidence similar to that submitted in asylum applications if there are reports of persecution or extreme discrimination against LGBT people in the noncitizen spouse's home country.

D. Concerns with Consular Processing

A noncitizen spouse who is not in the United States can apply for lawful permanent residence through consular processing. However, in some countries, this may create a significant threat to the safety of the foreign national. According to a report issued by the United Nations in November 2011, there are 76 countries that criminalize homosexuality.⁴²⁹ The Department of State also has acknowledged the dangers that LGBT American travelers may face in certain countries, including, "fines, deportation, flogging, or even [death] sentence[s]."⁴³⁰

Immigration Equality and AILA have expressed concerns to DOS about the safety of individuals seeking to consular process in countries where they could face criminal prosecution. They have asked DOS to protect the identities of LGBT applicants for marriage-based benefits and to take additional steps to ensure applicants' safety and confidentiality. Moreover, they have asked

⁴²⁸ [The Same-Sex Marriage Guidance](#) specifies that "same-sex marriages will be treated exactly the same as opposite-sex marriages" for purposes of waivers.

⁴²⁹ "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity," Report of the United Nations High Commissioner for Human Rights, November 17, 2011, at 13, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf.

⁴³⁰ See LGBT Travel Information, April 9, 2013, available at http://travel.state.gov/travel/cis_pa_tw/lgbt/lgbt_5887.html.

DOS to allow some same-sex fiancé/es or spouses to utilize third country processing, if the circumstances in the home country are unusually dangerous.

Until DOS issues guidance on how it will ensure the safety of applicants in dangerous countries, practitioners are advised to alert their clients to the potential dangers. Third country processing is available and may be requested in cases where the applicant is “homeless” or where a nonresident is legally and physically present in the consular district, or if not physically present, where there are “exceptional circumstances.” 22 C.F.R. § 42.61(a); 9 FAM 42.61 N.3.1-3.2. Practitioners should reach out to the consulate before filing to discuss safety concerns or consider requesting third country processing.

III. OTHER EFFECTS OF THE SUPREME COURT’S DECISION

A. Family Preference Visas

With the end of DOMA, USCs and LPRs may file immigrant visa petitions (Form I-130) for their spouses. Unfortunately, there also are some adverse consequences for gay and lesbian noncitizens who seek status through the family preference system.

Noncitizens with lesbian or gay spouses, who previously qualified as “unmarried sons and daughters,” of USCs (F1) now will be considered married sons and daughters under the F3 category, which has a much longer waiting period. For example, if a USC filed an I-130 for her Dutch daughter who is married to a Dutch woman, under DOMA, the beneficiary would have fallen under the F1 category because the marriage would not have been legally recognized. With the demise of DOMA, the beneficiary now will be considered married, and she will fall into the F3 category which, under the most recent Visa Bulletin, will add another four years’ waiting time.⁴³¹ The silver lining in this dark cloud is that when the beneficiary’s priority date finally does become current, she could include her spouse as a derivative on her immigrant visa application.

Noncitizens who were considered unmarried sons and daughters of LPRs (F2B) under DOMA will no longer be eligible for a family preference visa, as LPRs may not sponsor a married son or daughter. The would-be beneficiary now will have to wait for the parent to become a U.S. citizen. Of course, in either of the scenarios above, if the noncitizen is married to a USC or LPR, the USC or LPR spouse could file an I-130 on the noncitizen’s behalf.

B. Dual Foreign Nationals/Derivative Beneficiaries

In the past, dual foreign national couples (where both spouses are noncitizens), were unable to come to the United States as principal and derivative beneficiaries on the same family- or employment-based visa petition. For example, a South African engineer on an H-1B visa could not bring his husband as an H-4. Instead the noncitizen spouse was relegated to a “co-habiting B” visa, which required the spouse to prove nonimmigrant intent and maintain a foreign residence. After *Windsor*, the spouse can derive status through the primary beneficiary’s

⁴³¹ DOS posts the visa bulletins at http://www.travel.state.gov/visa/bulletin/bulletin_1360.html.

nonimmigrant visa⁴³² and obtain lawful permanent residence if the primary visa holder's employer ultimately sponsors him for permanent status. Where a Petition for Alien Worker (Form I-140) and/or Application for Adjustment of Status (Form I-485) is currently pending, practitioners should consider filing an amended I-140 or filing an application for adjustment of status for the newly acquired or recognized spouse. However, if the spouse recently entered the United States in B-2 status or other status where INA § 214(b) controls, a better course may be to return home to consular process after the principal's visa is granted to avoid an immigrant intent issue. Additional steps may be required for a newly-acquired spouse to receive follow-to-join benefits, including the need to update the I-140 as explained above and/or the need to file an Application for Action on an Approved Application or Petition (Form I-824) to request USCIS to inform the National Visa Center of the family member's future consular processing.

Practitioners also should be mindful of the fast-approaching deadline to secure an immigrant visa for winners of the 2013 Diversity Visa Lottery. Because all lottery winners must obtain their LPR status (adjustment of status approved or immigrant visa issued) by September 30, 2013, it is advisable to act quickly to amend the application. For additional information, see AILA Practice Alert, "Diversity Visa 2013 Winners and the End of the Defense of Marriage Act," AILA InfoNet Doc. No. 13071749. Moreover, the [DOS Guidance for Posts](#) specifies that winners of DV 2013 and DV 2014 may include their same-sex spouses and step-children acquired through a same-sex marriage as derivatives on their immigrant visa application even though they were not included in the initial lottery application.

C. Step-Children

With the end of DOMA, USC or LPR spouses may now petition for the biological children of their spouse as step-children. Where the couple planned to have a child together, both parents will probably see themselves as "parents," rather than "step-parents," but under the INA, a non-biological parent who is married to the child's biological parent is considered a step-parent so long as the marriage took place before the child turned 18.⁴³³ INA § 101(b)(1)(B). Practitioners also should consider arguing that a step-child relationship can be formed in the context of a civil union or other non-marital relationship, provided that the law of the state or country where the union took place grants parental rights based on the relationship. See § I.G, *supra*, for a discussion of civil unions.

⁴³² See [DOS FAQs](#) ("Starting immediately, same-sex spouses and their children are equally eligible for NIV derivative visas. Same-sex spouses and their children . . . can qualify as derivatives where the law permits issuance of the visa to a spouse or stepchild."). The DOS FAQs also confirm that documentation requirements for certain nonimmigrant visa classifications will apply to same-sex spouses and stepchildren in the same way that they apply to opposite gender spouses. For example, F-2 and M-2 applicants will need to obtain an I-20A prior to application.

⁴³³ While the USCIS FAQs does not specifically address step-children, the [DOS Guidance for Posts](#) does, stating, "Stepchildren acquired through such marriages are eligible to the same extent as stepchildren acquired through opposite sex marriage. Same-sex spouses (and qualified children or stepchildren) can also qualify as dependents of employment-based categories and family-preference categories, and as follow-to-join derivatives."

A. Naturalization

Most LPRs must wait five years to apply to for naturalization. However, the spouse of a USC can apply for naturalization after three years if the couple has “been living in marital union” for three years. 8 C.F.R. § 319.1(a)(3). *See also* INA § 319(a). [The Same-Sex Marriage Guidance](#) states that for purposes of this provision, “same-sex marriages will be treated exactly the same as opposite-sex marriages.” Note that there is nothing in the statute or the regulations requiring the applicant to have obtained LPR status through a marriage-based petition in order to apply for naturalization after three years. For example, an individual who obtained LPR status subsequent to obtaining asylee status could qualify to naturalize three years after becoming a resident, as long as she was living “in marital union” with her wife for three years.

IV. NONCITIZENS WITH PENDING OR COMPLETED REMOVAL PROCEEDINGS

With section 3 of DOMA no longer an obstacle, many gay and lesbian noncitizens will be eligible to apply for relief from removal that is dependent on the existence of a marriage to a USC or LPR. As discussed above, these forms of relief include adjustment of status, cancellation of removal for nonimmigrants, waivers under INA §§ 212(h) and (i), and VAWA protection. This section offers strategies to consider for noncitizens whose removal cases are affected by the Supreme Court’s decision in *Windsor*.

A. Noncitizens with Pending Removal Cases

Individuals who are in removal proceedings before the immigration court should apply for relief in the regular course of proceedings. If the case is on appeal at the BIA, the individual may file a motion to remand to the immigration court for a hearing on the application. By filing a remand motion *before* the BIA rules on the appeal, a person preserves the statutory right to file *one* motion to reconsider and reopen, should the need later arise. Motions to remand generally are subject to the same substantive requirements as motions to reopen, and therefore the noncitizen should submit supporting evidence and applications along with the motion itself. *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992); 8 C.F.R. § 1003.23(b)(3) (setting forth substantive requirements for motion to reopen). *See also* Board of Immigration Appeals Practice Manual, § 5.8, available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf>.

If a noncitizen is eligible for adjustment of status, he should file the visa petition (I-130) with USCIS, and, if needed, request that the IJ continue proceedings. *See* 8 C.F.R. § 1003.29 (authorizing the IJ to grant a continuance “for good cause shown”). There is a presumption that a continuance will be granted in this situation. *See Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009).⁴³⁴

⁴³⁴ The Board set forth the following factors the IJ may consider in adjudicating a motion for a continuance to await the adjudication of a pending family-based visa petition: (1) the DHS response to the motion; (2) whether the underlying visa petition is *prima facie* approvable; (3) the noncitizen’s statutory eligibility for adjustment of status; (4) whether the respondent’s

If the IJ or the BIA had administratively closed the individual's case,⁴³⁵ she may move to recalendar the case or reinstate the appeal in order to apply for relief from removal. *See Matter of Avetisyan*, 25 I&N Dec. 688, 695 & n.5 (BIA 2012). Note that a person may choose *not* to file a motion to recalendar or reinstate if that is not in his best interest; however, DHS may move to recalendar or reinstate even if the noncitizen does not. Either party can oppose a motion to recalender.

B. Noncitizens with Final Orders

Pending Petition for Review. A person who has a pending petition for review challenging a removal order may seek a remand from the court of appeals. If the lawyer for the Department of Justice consents to the motion to remand, it is likely that the court will grant it.

Administrative Motion to Reconsider or Reopen. Regardless of whether an individual sought judicial review, he may file a motion to reconsider and/or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case). *See* INA §§ 240(c)(6) and (7). A motion to reconsider is used to request that the IJ or BIA correct a factual or legal error in a prior decision based on the existing record. Alternatively, a motion to reopen asks the court to reopen proceedings for consideration of new evidence. Typically, when a person is asking to apply for a form of relief that was previously unavailable (such as adjustment of status or cancellation of removal), she files a motion to reopen. *See* 8 C.F.R. § 1003.23(b)(3) (addressing motions to reopen for the purpose of applying for relief). The motion, *inter alia*, should be accompanied by an application for relief and supporting evidence. *Id.*

Keep in mind, individuals who were granted withholding of removal (for example, after having missed the one year deadline for applying for asylum) may move to reopen if they now are eligible for another form of relief. If, however, an individual was granted withholding instead of asylum because of a criminal conviction or because the applicant did not merit a favorable exercise of discretion, the practitioner should first research whether these adverse factors would render the individual ineligible for the new relief sought.

As with all cases where a motion is filed, there may be some risk that DHS will arrest and detain the individual.

Adjustment of Status with Pending Visa Petition

Even if the noncitizen does not have an approved visa petition, he still may file a motion to reopen after the visa petition (I-130) is filed on his behalf. Under BIA case law, a “properly filed” motion to reopen may be granted to adjust status if: (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of*

application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors. *Matter of Hashmi*, 24 I&N Dec. at 790.

⁴³⁵ IJs administratively closed many cases affected by DOMA over the past couple of years, particularly following DOJ's announcement that it no longer would defend DOMA in the courts.

Shaar, 21 I&N Dec. 541 (BIA 1996) (did not overstay an order of voluntary departure), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the marriage is bona fide; and (5) DHS does not oppose the motion. *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002). Importantly, the fifth factor – DHS’s opposition – is not dispositive. *Matter of Lamus-Pava*, 25 I&N Dec. 61, 64-65 (BIA 2009) (finding that DHS does not have “veto power” over a motion to reopen).

Dealing with the Filing Deadline

If a removal order was issued recently and the person is within the 30 or 90 day period for filing a motion to reconsider or a motion to reopen, she should try to submit the motion before the deadline. See INA §§ 240(c)(6)(B) and (c)(7)(C)(i).

If the time for filing has elapsed, individuals may be able to establish that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, it is important to file as soon as practicable, if possible, within 30 or 90 days of *Windsor* (June 26, 2013).

DHS also may join a motion to reconsider or reopen, which would excuse the filing deadline. 8 C.F.R. § 1003.23(b)(iv). ICE has issued prosecutorial discretion guidance strongly encouraging DHS trial attorneys to join motions to reopen. Specifically, ICE provides, “[w]here a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is eligible to be granted the relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1002.23, [trial attorneys should] *strongly consider* exercising prosecutorial discretion.” William Howard, Principal Legal Advisor, ICE, “[Prosecutorial Discretion](#)” (Oct. 24, 2005) (emphasis added).

Finally, the IJ and the BIA have *sua sponte* authority to reopen at any time. See 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1). The BIA has said that an “exceptional situations” standard applies when adjudicating *sua sponte* motions. See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional situation. See, e.g., *Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where the Ninth Circuit interpreted the meaning of “crime of violence” differently from the BIA).

Noncitizens Who Are Outside the United States

Noncitizens outside the United States should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), pose an additional obstacle to obtaining relief. Although the BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions to reopen or reconsider, see *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the First and Eighth Circuits, which have not decided the issue) have invalidated the bar.⁴³⁶ If filing a motion to reconsider or reopen in the

⁴³⁶ See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v.*

First or Eighth Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen or reconsider statute. Thus, it is advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is filed within 30 or 90 days of the removal order or the filing deadline should be equitably tolled. To date, the departure bar litigation has not been successful in the *sua sponte* context. See, e.g., *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d 650, 658-65 (2d Cir. 2010); *Desai v. AG of the United States*, 695 F.3d 267, 268 (3d Cir. 2012). In addition, the courts of appeals generally have held that they lack jurisdiction to review *sua sponte* motions. See, e.g., *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (compiling cases from other circuits).

Please contact the Legal Action Center at clearinghouse@immcouncil.org for advice about cases implicating the departure bar.

C. Prosecutorial Discretion

Gay and lesbian noncitizens in long term relationships or married to USCIs or LPRs who are in removal proceedings but are not eligible for relief or who are denied relief should consider seeking prosecutorial discretion from DHS. This may include individuals who entered the United States without being admitted or paroled and thus are not eligible for adjustment of status, those who are unable to marry, and those who are unable to meet the hardship standard for cancellation of removal or a waiver.

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include granting a stay of removal or deferred action; deciding not to issue a Notice to Appear or canceling it before it is filed with the immigration court; or declining to appeal a favorable IJ decision. DHS also has discretion to grant deferred action in cases with strong humanitarian factors.

On October 5, 2012, ICE issued a memorandum regarding prosecutorial discretion for LGBT families. Specifically, ICE states that the “family relationships” – a favorable factor in deciding whether to exercise prosecutorial discretion – “encompasses two adults who are in a committed, long-term, same-sex relationship.” See Gary Mead, Executive Associate Director, ICE, et al., [“Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships”](#) (October 5, 2012). See also the American Immigration Council’s practice advisories

Holder, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

[Prosecutorial Discretion: How to Advocate for Your Client](#) (June 24, 2011), [DHS Review of Low Priority Cases for Prosecutorial Discretion](#) (Feb. 13, 2012), and [Deferred Action for Childhood Arrivals](#) (Oct. 25, 2012); and Penn State Law’s Center for Immigrants’ Rights, in collaboration with Maggio + Kattar and Duane Morris LLP, toolkit on deferred action, [Private Bills and Deferred Action Toolkit](#).

V. COUPLES WHO ARE NOT MARRIED

A. Fiancé/e Visas

If the noncitizen is outside the United States, a USC may petition for a K-1 fiancé/e visa (I-129F) for her partner.⁴³⁷ The visa is only available to individuals who are coming to the United States “solely to conclude a valid marriage with the petitioner within ninety days after admission.” INA § 101(a)(15)(K)(i). The couple must show that they have a bona fide intention to marry and are legally able to marry. INA § 214(d)(1). If the petitioner resides in a state that does not celebrate marriages for same-sex couples, it is important to provide an affidavit detailing the couple’s plans to marry in a jurisdiction that has marriage equality and to attach any documentary evidence to support the affidavit (e.g., contract with a venue for the ceremony, travel itinerary, etc.).⁴³⁸ In addition, the couple must establish that they previously have met in person within two years of filing the petition. INA § 214(d)(1). USCIS has discretion to waive this requirement in limited circumstances, including where there is extreme hardship. *See* 8 C.F.R. § 214.2(k)(2).

After the marriage takes place, the noncitizen may pursue adjustment of status. However, if the marriage does not take place within 90 days, the noncitizen is required to leave the United States or risk deportation. INA § 214(d)(1).

As discussed in § II.D, *supra*, practitioners must be alert to potential safety issues for noncitizens who are seeking fiancé/e visas in countries where same-sex relationships are criminalized.

B. Couples Who Cannot Marry

There are various situations in which individuals will face significant hurdles in marrying their partners. One situation is where a person fled her home country to seek asylum in the United States and now is unable to file an asylee relative petition for her partner overseas because they are not married. In most countries from which LGBT individuals can win asylum, marriage

⁴³⁷ The [Same-Sex Marriage Guidance](#) specifies that a USC can file a fiancé/e visa for a same-sex partner so long as all other requirements for the visa are met. Likewise, the [DOS FAQs](#) provide that “a same-sex engagement may allow your fiancé to enter the United States for the purpose of marriage.”

⁴³⁸ In the analogous situation of applications for fiancé/e visas where one spouse is transgender, USCIS explicitly directs the petitioner to include evidence of plans to marry in a state which would recognize the couple’s marriage if the petitioner lives in a state that would not allow the couple to marry. *See* “[Adjudication of Immigration Benefits for Transgender Individuals](#),” AILA InfoNet Doc. No. 12041360.

would not have been an option in the country of origin. Also, since only USCs can file fiancé/e visa applications, an asylee is not able to petition for a partner left behind for at least five years (i.e., until after she naturalizes). In cases where the foreign partner is in danger, humanitarian parole may be an option.⁴³⁹ It remains to be seen whether USCIS will extend humanitarian parole more broadly to cover the partners of LGBT asylees.

There also may be couples in the United States who – due to advanced age, disability, or extreme poverty – cannot travel to a marriage equality state to wed. Furthermore, individuals who live in states without marriage equality may be unable to obtain a divorce from a prior same-sex marriage in the courts of the state of residence, and the state of celebration may require residence to divorce. In this situation, a gay man or lesbian may be unable to marry a current partner if he or she cannot divorce a previous same-sex spouse.

If the noncitizen is in removal proceedings, he may be able to obtain prosecutorial discretion based on the relationship with a USC or LPR even if the couple is not married. See Gary Mead, Executive Associate Director, ICE, et al., “[Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships](#)” (October 5, 2012). See also § IV.C, *supra* (discussing prosecutorial discretion).

Some noncitizens who are detained also may be unable to marry. While the Performance-Based National Detention Standards allow ICE detainees to marry,⁴⁴⁰ if the person is detained in a state that does not have marriage equality, permission to marry likely will be denied. Practitioners may advocate with ICE to release the detainee under an alternatives to detention program or transfer the noncitizen to a jurisdiction where she can marry if there is a bona fide relationship and marrying would afford immigration relief.

CONCLUSION

For many years, LGBT people have faced systematic discrimination under federal law, including immigration law. With the end of DOMA, married LGBT binational couples can access the panoply of marriage-based immigration benefits. Thus far, the immigration agencies have taken prompt and positive steps toward implementing *Windsor*. Undoubtedly, however, problems and unique issues will arise over the coming months. Practitioners may need to educate adjudicators about changes in the law as well as unique factual circumstances encountered by LGBT families. Immigration Equality, the American Immigration Council, and AILA will be monitoring implementation and advocating with the immigration agencies. Please contact us at

⁴³⁹ See USCIS “Questions and Answers: Humanitarian Parole,” at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ed662cc252f93210VgnVCM100000b92ca60aRCRD&vgnnextchannel=accc3e4d77d73210VgnVCM100000082ca60aRCRD>.

⁴⁴⁰ ICE states that requests for marriage by those in detention will be considered on a case-by-case basis, and “[o]rordinarily, a detainee’s request for permission to marry shall be granted.” See “Performance-Based National Detention Standards 2011” at 339, available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>. However, the Guidelines state that the individual must be legally eligible to marry in the state where he is being held.

vneilson@immigrationequality.org or clearinghouse@immcouncil.org if you encounter difficulties with the agencies or have specific questions about case strategies that are not covered by this advisory.



PRACTICE ADVISORY⁴⁴¹

July 25, 2013

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

On June 15, 2012, Department of Homeland Security (DHS) Secretary Janet Napolitano issued a [memorandum](#) to U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE) explaining how prosecutorial discretion should be applied to individuals who came to the United States as children. Specifically, the memorandum directs that certain young people who do not present a risk to national security or public safety and meet specified criteria will be eligible to receive deferred action for two years, subject to renewal, and to apply for work authorization. Requests are to be decided on a case-by-case basis, and requesters must pass a background check before they can receive deferred action. The memorandum builds on prior DHS guidance regarding the exercise of prosecutorial discretion in low priority cases.⁴⁴²

Since June, USCIS has issued [FAQs](#) providing more details about the eligibility criteria and request process for deferred action for childhood arrivals (DACA), as well as a form and instructions. USCIS will receive and review DACA requests for all individuals except those in immigration detention, who instead should contact their deportation officer or the ICE Enforcement and Removal Operations (ERO) Community Outreach Office.⁴⁴³ Individuals who

⁴⁴¹ Copyright (c) 2012 American Immigration Council. Click [here](#) for information on reprinting this practice advisory. This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The American Immigration Council's Legal Action Center, the American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild co-authored this practice advisory. If you have any questions about information in this advisory, please contact clearinghouse@immcouncil.org.

⁴⁴² For information on prior prosecutorial discretion guidance, see the Legal Action Center's Practice Advisories, [DHS Review of Low Priority Cases for Prosecutorial Discretion](#) (updated February 13, 2012) and [Prosecutorial Discretion: How to Advocate for Your Client](#) (June 24, 2011).

⁴⁴³ The FAQ, which was last updated on January 18, 2013, directs detained individuals to contact the ICE Office of the Public Advocate. That office, however, was defunded on March 26, 2013.

meet the eligibility criteria may request DACA by submitting [Form I-821D](#) (Consideration of Deferred Action for Childhood Arrivals), accompanied by [Form I-765](#) (Application for Employment Authorization), [Form I-765WS](#) (Worksheet), and the requisite fees totaling \$465. Note that the I-821D will not be considered if not concurrently filed with Form I-765, Form I-765WS, and the required fees.

The DACA policy does not supersede ICE's previously issued prosecutorial discretion guidance outlined in the [June 17, 2011 Morton memo](#). For clients in removal proceedings who do not meet the narrow eligibility criteria under DACA, attorneys should assess the viability of deferred action requests or other requests for prosecutorial discretion based on the prior guidance. Such requests should be submitted to the local ICE Office of Chief Counsel or Field Office Director, as appropriate.

What is deferred action?

Deferred action is a discretionary decision by DHS not to pursue enforcement against a person for a specific period. Though an individual granted deferred action is considered by DHS to be lawfully present during the period deferred action is in effect, a grant of deferred action does not alter an individual's existing immigration status or provide a path to citizenship.⁴⁴⁴ Thus, deferred action cannot be used to establish eligibility for an immigration status that requires maintenance of lawful status. Deferred action, however, may allow a person to qualify for certain state benefits, such as drivers licenses, though state requirements vary.

While deferred action does not cure any prior or subsequent period of unlawful presence, time in deferred action status is considered a period of stay authorized by the Secretary of DHS. An individual does not accrue unlawful presence for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I) while in deferred action status⁴⁴⁵ or while a DACA request is pending if the individual filed a request before reaching age 18. DHS can renew or terminate a grant of deferred action at any time.

Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 567, 127 Stat. 198, 382 (2013). ICE has indicated that if a person is currently in immigration detention and believes he or she meets the guidelines for DACA, he or she should not request consideration of deferred action from USCIS but should reach out to a detention officer or contact ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>.

⁴⁴⁴ See USCIS [FAQs](#); ICE Detention and Removal Operations Policy and Procedure Manual §§ 1.2, 20.8(a) (2006).

⁴⁴⁵ See Donald Neufeld, Acting Assoc. Dir., USCIS, [Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212\(a\)\(9\)\(B\)\(i\) and 212\(a\)\(9\)\(C\)\(i\)\(I\) of the Act](#) (May 6, 2009) at 7.

What are the eligibility criteria for DACA?

To establish eligibility for DACA, individuals must demonstrate that they:

- Were under the age of 31 on June 15, 2012;
- Arrived in the United States before turning 16;
- Continuously resided in the United States from June 15, 2007, to the present;
- Were physically present in the United States on June 15, 2012, as well as at the time of requesting deferred action from USCIS;
- Entered without inspection before June 15, 2012, or any lawful immigration status expired on or before June 15, 2012;⁴⁴⁶
- On the date of the request, are in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate,⁴⁴⁷ or are honorably discharged veterans of the U.S. Coast Guard or the U.S. Armed Forces;
- Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors occurring on different dates and arising out of different acts, omissions, or schemes of misconduct, and do not otherwise pose a threat to national security or public safety.

Determinations will be made on a case-by-case basis and are within the discretion of USCIS.

Will individuals who receive deferred action be eligible to work?

Yes. Under 8 C.F.R. § 274a.12(c)(14), individuals who receive deferred action may apply for and obtain employment authorization for the period of deferred action if they can establish “an economic necessity for employment.” An [application](#) for employment authorization and the accompanying worksheet should be filed concurrently with a DACA request. According to the Form I-765 [instructions](#), the correct eligibility category for a DACA requester to enter in response to question 16 on the I-765 is (c)(33). An individual who applies for and receives a renewal of deferred action separately must request a renewal of his or her employment authorization.

There is little guidance on what evidence is necessary to establish economic necessity for purposes of DACA, but it is important to distinguish between economic necessity and economic hardship. Economic necessity also governs requests for employment authorization by U visa holders, who are not required to demonstrate economic hardship. In practice, any individual with an approved DACA request who demonstrates a need for employment should be eligible for work authorization.

⁴⁴⁶ Individuals without lawful status as of June 15, 2012, are eligible for DACA regardless of whether any applications for immigration benefits or relief from removal were pending on that date.

⁴⁴⁷ We are aware of DACA approvals involving individuals who were unable to complete high school on account of a developmental disability.

What is the process for requesting DACA?

On or after August 15, 2012, requesters — other than those in detention — should send a completed and signed [Form I-821D](#) (Consideration of Deferred Action for Childhood Arrivals) and supporting documentation, along with [Form I-765](#) (Application for Employment Authorization), the [Form I-765WS](#) (Worksheet), and the requisite fees totaling \$465,⁴⁴⁸ to the USCIS lockbox designated for their state of residence.⁴⁴⁹ Requesters *must* submit an Application for Employment Authorization and the associated fee. Once USCIS determines that a request is complete, the agency will send the requester a receipt notice, followed by an appointment notice requiring the requester to attend a biometrics appointment at an Application Support Center. Requesters who wish to receive notices by email or text message may submit a [Form G-1145](#) (E-Notification of Application/Petition Acceptance).

All requesters will be subject to background checks as part of the review of their requests for deferred action. USCIS will issue a written Request for Evidence (RFE) if more information or evidence is needed or if an in-person interview will be required.⁴⁵⁰ Requesters will be able to track the status of their DACA requests online and will receive a final written decision from USCIS.

What Social Security numbers are DACA applicants required to provide?

USCIS guidance states that Question 9 of Form I-765 asks only for Social Security numbers that were “officially issued” to the requester by the Social Security Administration. This would presumably include Social Security numbers that were “officially issued” based on fraudulent underlying documents. However, other numbers (real or invented) used by the requester need not be provided. Applying the same rationale to Question 5 of Part I of Form I-821D, requesters only should provide a Social Security number that was officially issued to them.⁴⁵¹

Are attorneys and accredited representatives who provide pro bono assistance to DACA requesters and individuals at group workshops required to enter an appearance?

The FAQs state that an attorney or accredited representative who provides pro bono assistance to a potential DACA requester at a group workshop and who intends to represent the person after the workshop must file a Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative). If the attorney or accredited representative does not intend to represent the person after the workshop, he or she should assess the “extent of the relationship with the

⁴⁴⁸ This includes \$380 for employment authorization and \$85 for biometrics.

⁴⁴⁹ The mailing addresses and instructions are available at www.uscis.gov/i-821d.

⁴⁵⁰ In-person interviews will be used to obtain additional information regarding a requester’s eligibility for DACA and to conduct random quality control checks. We have received reports that interviews are increasingly common.

⁴⁵¹ Requesters should avoid submitting evidence of continuous residence in the United States that includes a Social Security number that is not their own, particularly if the evidence might be construed to indicate that the requester used that person’s Social Security number without that person’s consent.

individual and the nature and type of assistance provided” to determine whether a G-28 is necessary. The FAQs suggest that an attorney or accredited representative who decides not to submit a G-28 may want to clarify the limited scope of the representation to the individual and/or USCIS.

Are fee waivers available under DACA?

There are no fee waivers associated with DACA, but — in accordance with 8 C.F.R. § 103.7(d) — limited fee exemptions are available. To request a fee exemption, attorneys should send USCIS a letter and supporting documentation establishing that their clients meet one of the following conditions:

- Are under 18 and homeless;
- Are under 18, are in foster care or otherwise lack any parental or familial support, and have an income under 150% of the U.S. poverty level;
- Cannot care for themselves because they suffer from a serious, chronic disability and have an income under 150% of the U.S. poverty level; or
- At the time of the request, have accumulated \$25,000 or more in debt in the past 12 months as a result of unreimbursed medical expenses for themselves or an immediate family member, and their income is less than 150% of the poverty level.

Requests for such exemptions must be filed and granted **before** an individual files a DACA request without the requisite fee.

Documentary evidence must be submitted in support of the fee exemption. Acceptable evidence includes:

- Affidavits from community-based or religious organizations to establish homelessness or lack of parental or familial support;
- Copies of tax returns, bank statements, pay stubs, or other reliable evidence of income;
- Affidavits from the requester or responsible third parties attesting that the requester does not file tax returns, has no bank accounts, and/or has no income;
- Copies of medical records, insurance records, bank statements, or other reliable evidence of unreimbursed medical expenses of at least \$25,000.

USCIS will issue requests for evidence (RFEs) if more information is needed. Additional information is provided on the [USCIS Fee Exemption Guidance Web page](#).

Is there a minimum age requirement for DACA requesters?

Individuals who have never been in removal proceedings or whose proceedings were terminated must be at least 15 years old at the time they request DACA. Individuals who are under 15 but otherwise meet the eligibility criteria for DACA can submit a request once they turn 15.

Individuals in removal proceedings or subject to a final removal or voluntary departure order can request DACA even if they are under 15. Eligible individuals who are in immigration custody may not submit a request to USCIS, but instead are advised to identify themselves to their ICE detention officer or ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>. In emergent circumstances, the individual should consider contacting the Law Enforcement Support Center hotline, at 1-855-448-6903 (24 hours/day, 7 days/week).

What should I do if my client appears eligible for DACA but has voluntary departure?

ICE has confirmed in stakeholder meetings that its attorneys are to join or submit motions to reopen and then agree to administratively close cases of individuals who appear eligible for DACA, have been granted voluntary departure, and are currently within the voluntary departure period. The filing of a motion to reopen automatically terminates the voluntary departure order. 8 C.F.R. § 1240.26(e)(1). Attorneys who have clients in this situation should immediately contact the ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday).

If an individual overstays a period of voluntary departure without having his or her case reopened, the grant of voluntary departure will automatically convert to a final order of removal and subject him or her to severe consequences.⁴⁵² DHS has not issued guidance on whether a grant of deferred action would be construed as a justifiable basis for not abiding by the terms of a voluntary departure grant or whether the voluntary departure period will be tolled during the period of the request for deferred action. For these reasons, attorneys should consider advising their clients to seek to withdraw a request for voluntary departure *prior* to the designated departure date if ICE has not joined or submitted a motion to reopen.

Is my client eligible for DACA if he or she was admitted for duration of status or for a period of time that extended past June 14, 2012, but violated that status before June 15, 2012?

Not necessarily. A person who lawfully entered the United States would not become eligible merely based on an immigration status violation. If such a person violated his or her status by, for example, engaging in unauthorized employment, failing to report for work, or failing to pursue a designated course of study, that person would not automatically be eligible for deferred

⁴⁵² A person who overstays the voluntary departure period may be subject to a fine of up to \$5,000 and is barred for ten years from being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. INA § 240B(d). For more information about the consequences of overstaying voluntary departure and how a grant of voluntary departure can be terminated, see the Legal Action Center's Practice Advisory, [*Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart*](#) (July 6, 2009).

action. He or she would only be eligible if the Executive Office for Immigration Review issued a final order of removal before June 15, 2012.

What documentation can be used to establish a requester's identity?

According to the FAQs and Form I-821D instructions, a requester may establish identity by providing passports or other national identity documents that include a photograph or fingerprint, birth certificates or school or military identification documents that include a photograph, U.S.-government immigration or other documents that include both a requester's name and photograph, and/or other relevant documents.

How should individuals who were waved through inspection or who entered the United States with fraudulent documents characterize their status at the time of entry?

Such individuals do not fall neatly into the categories listed in the drop-down box under Question 15 (Status at Entry) on Form I-821D. In both cases, the best answer to this question is generally "No lawful status," which is listed in the parenthetical preceding the drop-down box. This response can be written directly on the form.⁴⁵³

Similar questions arise with respect to Question 14 (Manner of Entry) and Question 15 (Current Immigration Status) on Form I-765. Once again, "No lawful status" should suffice both for individuals who were waved through inspection and for those who entered with fraudulent documents.⁴⁵⁴

What documentation can be used to establish immigration status on June 15, 2012?

The FAQ and Form I-821D instructions also provide a list of documents that requesters may submit to demonstrate that they were not in lawful immigration status on June 15, 2012. Acceptable documents include an Arrival/Departure Record, which indicates that a requester's authorized stay in the U.S. has expired; final orders of exclusion, deportation, or removal issued before June 15, 2012; charging documents placing a requester in removal proceedings; and/or other relevant documents. Requesters who entered the United States without inspection and have never been in removal proceedings need not submit evidence of their lack of immigration status. A requester who was inspected and admitted, but nonetheless was not issued any documentation at entry (e.g., a procedurally valid entry under *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980) and *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010)), should consider what evidence may be produced to establish the date and manner of entry. It is important that he or she

⁴⁵³ For information about different types of entries into the United States and their impact on a DACA request, see the Legal Action Center's Practice Advisory, [Inspection and Entry at a Port of Entry: When is there an Admission?](#) (January 29, 2013).

⁴⁵⁴ Under *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), an individual who was waved through a port of entry has been "admitted" under INA § 245(a). Accordingly, such individuals should not characterize their manner of entry as "Entered Without Inspection" or "EWI," which could have adverse implications for future immigration applications.

consistently claim an entry with inspection rather than erroneously concede entry without inspection.

What documentation can be used to establish physical presence and continuous residence in the United States?

Those who request deferred action must document three aspects of their physical presence in the United States, namely, that they:

- Entered the United States before turning 16;
- Have continuously resided in the country since June 15, 2007 (i.e., for the five year period prior to June 15, 2012); and
- Were physically present in the United States on June 15, 2012.

Documents that a requester may use to establish when he or she entered the United States include, but are not limited to:

- Passports with admission stamps;
- Arrival/Departure records (Form I-94, I-95, or I-95W);
- Any INS or DHS document stating date of entry to the U.S., including Form I-862 (Notice to Appear);
- Records from U.S. schools requesters have attended that include the name of the school and dates of attendance, including transcripts or report cards;
- Travel records, including transportation tickets;
- Hospital or medical records that include the name of the medical facility or provider and the dates of treatment;
- Official records from a religious institution establishing that a requester was present at a religious ceremony on a particular date; and/or
- Other relevant documents.⁴⁵⁵

USCIS will accept circumstantial evidence that requesters entered the country before reaching age 16.

Documents that a requester may use to establish his or her physical presence in the United States on June 15, 2012 and continuous residence for the five previous years include, but are not limited to:

- Rent receipts, utility bills, or other receipts or letters from companies that include the dates on which a requester received services in the United States;

⁴⁵⁵ Unlike previous versions of the USCIS FAQ, current instructions no longer list financial, employment, or military documents as examples of acceptable evidence of a requester's arrival in the United States prior to his or her 16th birthday. However, the list of acceptable forms of evidence provided by USCIS is not exhaustive, and given the potential verifiability of such evidence, it is not clear if this omission was deliberate or an oversight.

- Records from U.S. schools requesters have attended that include the name of the school and dates of attendance, including transcripts or report cards;
- Employment records that include relevant dates as well as the name of the requester and the employer or other interested party, including W-2 Forms, certifications of filing federal or state income tax returns, pay stubs, signed letters from employers that include the employer's contact information and the requester's address at the time of employment, exact periods of employment and layoffs, and duties for the employer; or, for self-employed requesters, letters from banks and firms with whom the requester has done business;⁴⁵⁶
- Military records, including Certificates of Release or Discharge from Active Duty (Form DD-214) or National Guard Report of Separation and Record of Service (NGB Form 22);
- Tax receipts or insurance policies;
- Money order receipts for money sent into or out of the United States;
- Dated bank transactions;
- Deeds, mortgages, rental agreement contracts, or other contracts to which the requester was a party;
- Automobile license receipts, titles, or registrations;
- Official records from a religious institution establishing that a requester was present at a religious ceremony;
- Hospital or medical records that include the name of the medical facility or provider and the dates of treatment;
- Passport entries;
- Birth certificates for children born in the United States;
- U.S. Social Security card;
- Postmarked letters and correspondence between the requester and another person or organization establishing the requester's U.S. address and the date of correspondence; and/or
- Other relevant documents.

USCIS will accept circumstantial evidence that requesters were present in the United States on June 15, 2012. In addition, although requesters must provide some direct evidence that they meet the five year continuous residence requirement, they may provide circumstantial evidence to fill in gaps in their direct evidence. For example, a requester may submit two or more affidavits from other people who have direct personal knowledge of the events and circumstances during the gap period.

The USCIS guidance does not require *uninterrupted* physical presence for five years—only *continuous residence*. The FAQs state that requesters should provide documentation of as much of the five year continuous residence period as possible, but are not required to demonstrate that they resided in the United States for every day or even every month of that period. USCIS states that a requester may submit evidence that he or she resided in the United States for every *year* of

⁴⁵⁶ See discussion *infra* p. 15 (“What are the potential immigration or criminal consequences of submitting certain documents or information as evidence with Form I-821D?”).

the five year period, which will be examined “in its totality” to determine if it is “more likely than not” that the requester has continuously resided in the United States since June 15, 2007. USCIS may be more likely to request additional evidence in cases where requesters have failed to document their physical presence in the United States at the beginning and the end of the five-year period.

As discussed further below, brief, casual, and innocent absences from the United States will not interrupt continuous residence.⁴⁵⁷ If documents submitted in support of the continuous residence requirement indicate that the requester has been out of the country for a period of time that was not “brief, casual and innocent” or there are lengthy gaps in residence, USCIS may ask for additional documentation.

Other applications that require proof of physical presence and/or residence⁴⁵⁸ may provide insight into documenting eligibility for DACA. *See, e.g.*, 8 C.F.R. §§ 244.9(a)(2); 245.13(e), (f); 245.15(i), (j); and 245.22. Acceptable documents also have included immigration court records, applications for immigration benefits, correspondence with immigration agencies, driver’s licenses, marriage certificates, personal checks bearing a dated bank cancellation stamp, and credit card statements.

Attorneys also may find it useful to review any prior applications that their clients have filed to ensure that all the information included in a request for deferred action is consistent. Such applications may be obtained through a Freedom of Information Act request, if necessary. Some of these applications may have been supported by additional evidence of residence or entry.

What constitutes a “brief, casual, and innocent” absence from the United States?

An absence will be considered “brief, casual, and innocent” if it occurred on or after June 15, 2007, and before August 15, 2012 and:

- Was short and reasonably calculated to accomplish its purpose;
- Was not because of an order of exclusion, deportation, or removal;

⁴⁵⁷ This provision is similar to, but not entirely limited by, what is referred to as the *Fleuti* doctrine, under which a trip abroad does not break the continuity of residence if it was “innocent, casual, and brief.” *See Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963); Legal Action Center Practice Advisory, [*Brief, Casual and Innocent Absences” from the United States*](#) (January 29, 2013) (discussing the “brief, casual and innocent” standard under existing case law).

⁴⁵⁸ Examples include: the Nicaraguan Adjustment and Central American Relief Act (NACARA), the Haitian Refugee Immigration Fairness Act (HRIFA), and Temporary Protected Status (TPS). Attorneys may also wish to review guidance found in the instructions to other applications for immigration benefits that require a showing of continuous residence or physical presence, such as EOIR-40 (Suspension of Deportation), EOIR-42A (Cancellation for Lawful Permanent Residents), EOIR-42B (Cancellation for Non-Lawful Permanent Residents), I-687 (Application for Temporary Residence under 245A), and I-881 (Special Rule Cancellation).

- Was not because of an order of voluntary departure or an administrative grant of voluntary departure prior to the initiation of exclusion, deportation, or removal proceedings; and
- The purpose of the absence and the requester's actions while outside the United States were not contrary to the law.⁴⁵⁹

While it is important to remember that DACA is a type of prosecutorial discretion, which means that all requests will be evaluated on a case-by-case basis, the following DACA grants may serve to illustrate how the agency is construing the phrase:

One trip lasting several months:

- Requester traveled to Requester's native country for 3 months in 2008 when Requester was 12 years old for the purpose of obtaining original documents that could only be obtained in person in Requester's native country. Requester never left the United States after returning from that trip.
- Requester included with DACA application a letter describing the trip. The letter indicated that Requester was brought to Requester's native country by Requester's parents because they wanted to obtain a passport for Requester and Requester's siblings.

Multiple departures:

- Requester departed and reentered the United States three times during the continuous residence period to visit Requester's ailing grandmother (three weeks in summer 2007, two weeks in winter 2008, and a few days in spring 2011). Requester corroborated the travel with school records, photos and Requester's grandmother's death certificate.

USCIS encourages requesters to submit evidence that any absences from the United States prior to August 15, 2012 were brief, casual, and innocent. This evidence may include, but is not limited to:

- Passport entries,
- Transportation tickets,
- Hotel receipts,
- Evidence of the purpose of the requester's travel,
- An advance parole document, and/or
- Any other relevant information.

For many DACA requesters, the submission of evidence regarding departures and reentries may constitute an admission of inadmissibility under INA § 212(a)(9)(C). While such an admission

⁴⁵⁹ USCIS has not indicated that this bar would apply to illegal conduct necessary to return to the United States, like entering in violation of INA §§ 275-76. Moreover, we are aware of DACA approvals in which the applicant's reentry into the United States occurred without inspection.

does not affect eligibility for DACA, it may have adverse implications for future immigration applications.

Are individuals eligible for DACA if they came to the United States before turning 16, subsequently departed, returned after reaching age 16 but prior to June 15, 2007, have continuously resided here since then, and satisfy all other requirements?

Yes. Such individuals satisfy the eligibility requirements for DACA because they were under age 16 at the time of their initial entries and have continually resided in the United States since June 15, 2007. These DACA requesters, however, must have “established residence” in the United States prior to turning 16. According to the FAQs, evidence that a DACA requester established residence can include records showing that the requester attended school, worked in the United States, or lived in the United States for multiple years prior to turning 16. A requester who meets these requirements also must demonstrate that he or she continuously resided in the United States from June 15, 2007 until the present to be eligible for DACA.

What documentation can be used to establish that an individual has fulfilled the educational requirements?

The FAQs and Form I-821D instructions provide a non-exclusive list of documents that can be used to prove compliance with the educational requirements, but note that circumstantial evidence will not be accepted for this purpose.⁴⁶⁰ Individuals may demonstrate that they are enrolled in school on the date they request DACA, have graduated from high school,⁴⁶¹ or have obtained a GED certificate by presenting:

- A diploma from a public or private U.S. high school or secondary school;
- A GED certificate or other recognized equivalent of a high school diploma under state law, including certificate of completion, certificate of attendance, or alternate award from a public or private U.S. high school or secondary school;
- Other documentation that the requester has passed a GED or comparable state-authorized exam;
- School or educational program records, including report cards transcripts, progress reports, acceptance letters, school registration cards, and/or letters from the school or program, that include the name of the U.S. school or educational program a requester is currently attending, the requester’s current educational or grade level, and the requester’s dates of attendance; and/or
- Other relevant records.

⁴⁶⁰ See discussion *infra* pp. 14-15 (“Will USCIS accept affidavits to fulfill the eligibility criteria for DACA?” and “Will USCIS consider circumstantial evidence to establish eligibility for DACA?”).

⁴⁶¹ We are aware of DACA approvals involving individuals who were unable to complete high school on account of a developmental disability.

Which requesters may be eligible for DACA under the “currently in school” requirement, and what additional information will they need to provide to request a renewal?

Requesters who are enrolled in the following types of programs may be considered “currently in school” for the purposes of DACA:

- Public or private elementary school, junior high or high school (including home school);⁴⁶²
- Education, literacy, vocational, or career training programs, including but not limited to those funded wholly or partially by federal or state grants,⁴⁶³ that seek to place requesters in postsecondary education, job training, or employment, if requesters are working towards such post-program placement;
- English as a Second Language (ESL) program, *only if* requesters are participating in the program as a prerequisite to enrollment in postsecondary education, job training, or employment *and* working towards such post-program placement;⁴⁶⁴ or
- Educational programs that assist students in obtaining a high school diploma or its equivalent under state law, or in passing a GED or other state-authorized exam, if the program is funded in whole or in part by federal or state grants or is of demonstrated effectiveness.

Those requesters seeking to fulfill the “currently in school” educational requirement may need to provide additional information to renew their deferred action status two years after making an initial request. Although details will be forthcoming, according to the FAQs, requesters enrolled in schools or programs would need to demonstrate the following to renew deferral after two years:

⁴⁶² See U.S. Department of Homeland Security National Standard Operating Procedures, “Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)” (Sep. 13, 2012) at 55, *available at* http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf (accessed July 25, 2013) (home schooling satisfies “currently in school” requirement, however cases involving home school claims are to be referred to the Center Fraud Detection Operations).

⁴⁶³ According to the FAQs, enrollment in programs not partially or wholly funded by federal or state grants may meet the educational requirements of DACA, where such programs are “administered by providers of demonstrated effectiveness, such as institutions of higher education, including community colleges, and certain community-based organizations.” Requesters will have the burden of proving the demonstrated effectiveness of such programs. USCIS will consider factors including the duration, effectiveness, and overall quality of particular programs.

⁴⁶⁴ According to the FAQs, requesters seeking to fulfill the “currently in school” educational requirement with an ESL program must demonstrate that their enrollment “is connected to . . . placement in postsecondary education, job training or employment” and of the program’s demonstrated effectiveness. ESL programs qualify for DACA purposes if they are administered by a 501(c)(3) non-profit organization.

- Requesters enrolled in high school or secondary school must show either that they have graduated from the school in which they were enrolled at the time of their original request or made “substantial, measurable progress” towards graduation;
- Requesters enrolled in elementary or middle school must demonstrate they have graduated from the school in which they were enrolled at the time of their original request *and* made “substantial, measurable progress” towards graduation from high school, or have made “substantial, measurable progress” towards graduation from the school in which they were enrolled at the time of their original request;
- Requesters enrolled in educational programs assisting students in obtaining a high school diploma or GED must show that they have received a high school diploma or its equivalent or passed the GED exam or equivalent state-authorized exam; and
- Requesters enrolled in educational, literacy, vocational, or career training programs must demonstrate that they are enrolled in postsecondary education, have obtained employment for which they were trained, or have made “substantial, measurable progress” towards completing the program.

What documentation can be used to establish that an individual has fulfilled the military service requirements?

USCIS states that circumstantial evidence will not be accepted to demonstrate that a requester meets the military service requirements. The FAQs and Form I-821D instructions provide a non-exclusive list of documents that can be used to prove that requesters have been honorably discharged from the U.S. Coast Guard or U.S. Armed Forces. These include, but are not limited to Form DD-214 (Certificate of Release or Discharge from Active Duty), NGB Form 22 (National Guard Report of Separation and Record of Service), military personnel records, and military health records.

Initial consideration of the military service provisions suggests that they will benefit a very small number of people, as noncitizens who entered the United States without inspection or who are not in a lawful immigration status generally may not enlist in the U.S. Armed Forces or Coast Guard. Under the military service provisions, 10 U.S.C. § 504(b)(1), only U.S. citizens and nationals, lawful permanent residents, certain persons from Palau, Micronesia, and the Republic of the Marshall Islands, and certain other persons whose enlistment has been determined by a Service Secretary to be “vital to the national interest” may enlist. Among the limited number of individuals who are “honorably discharged veterans” under age 31, and otherwise eligible for deferred action, most also would be eligible for naturalization under INA § 329, and therefore not in need of deferred action.

Importantly, the June 15, 2012 memorandum did not alter the enlistment rules for individuals who receive deferred action. To date, no Service Secretary has exercised his or her statutory authority to enlist undocumented noncitizens or individuals who have been granted deferred action. See 10 U.S.C. § 504(b)(2) (providing that the Secretary may authorize the enlistment of individuals not typically permitted to enlist). Attorneys should ensure that their clients are aware that the new policy does not expand the categories of noncitizens eligible for enlistment and that their clients will not be eligible to enlist, even if they are successful in seeking deferred action.

Will USCIS accept affidavits to fulfill the eligibility criteria for DACA?

As previously discussed, affidavits cannot be used to prove the educational or military service requirements, physical presence on June 15, 2012, arrival in the U.S. prior to age 16, the under-31 age requirement, or criminal history. Failure to submit required primary evidence to establish these eligibility criteria will result in the issuance of a request for evidence (RFE).

Affidavits may be used to fill a gap in other documentation demonstrating that a requester meets the five year continuous residence requirement and/or that any departures during the five years were “brief, casual, and innocent.” To fulfill these criteria, requesters must submit two or more affidavits from other individuals who have direct personal knowledge of relevant events and circumstances.

Will USCIS consider circumstantial evidence to establish eligibility for DACA?

In the absence of other documentation, circumstantial evidence may be used to prove physical presence on June 15, 2012 and/or arrival in the U.S. prior to age 16, to fill gaps in direct evidence of the required five year continuous residence period, and/or to show that any departures during the period of continuous residence were “brief, casual, and innocent.” Circumstantial evidence is evidence that, though it requires an inference to connect it to a conclusion of fact, could lead an examiner to conclude that it is more likely than not that the fact sought to be proven is true. For example, to satisfy the continuous residence guideline, rental agreements in the name of the DACA requester’s parent, though merely circumstantial evidence of the requester’s residence, could be submitted.

This suggests that DHS will likely apply a presumption of presence for individuals who can show presence on days near June 15, 2012, but not necessarily on that day. This is similar to the approach employed for adjustment applications under INA § 245(i), in which a requester must demonstrate presence on December 21, 2000. In those cases, the agency typically considers evidence of presence both before and after the qualifying date to be sufficient to meet the requester’s burden.

Circumstantial evidence may not be used to prove an individual’s age on June 15, 2012, or to document the educational or military service requirements.

What are the potential immigration or criminal consequences of submitting certain documents or information as evidence with Form I-821D?

Confidentiality provisions outlined in the FAQs indicate that information provided to USCIS in the DACA process is protected from disclosure to ICE or CBP for the purpose of immigration enforcement unless the requester meets the [criteria](#) for the issuance of a Notice to Appear. Information may be shared, however, with other law enforcement agencies, including ICE and CBP, where the requester meets the criteria for issuance of a Notice to Appear or for purposes *other* than removal. These “other purposes” include the identification or prevention of fraudulent claims, national security, and investigation or prosecution of criminal offenses.

Importantly, even these restrictions are not guaranteed, and all USCIS policy memoranda have expressly noted that the policy may be changed at any time.

Attorneys should carefully examine all documents before submitting them to USCIS in support of a DACA request to assess whether they might contain information that could adversely affect the requester. These documents may include records related to employment, financial, and tax matters.

What are the potential immigration consequences for an employer of providing a DACA requester with information regarding his or her employment?

The FAQs indicate that employers may provide DACA requesters with information verifying their employment and that USCIS will not share this information with ICE for civil immigration enforcement purposes pursuant to INA § 274A unless USCIS determines there is evidence of “egregious violations of criminal statutes or widespread abuses.” However, the guidance does not preclude the imposition of criminal sanctions against employers under the same statutory provision.⁴⁶⁵ Also, as with the general confidentiality provisions, these protections may be subject to change.

How can I determine whether my client has been convicted of any disqualifying crimes?

Attorneys should question their clients in detail about their criminal histories and take steps to obtain copies of all police reports and records of disposition of any criminal charges, including any juvenile adjudications, no matter how minor or how long ago they occurred. A relatively simple way to obtain an individual’s adult arrest record is through an FBI criminal background check, which requires the submission of an application form, fingerprints, and an \$18 fee.⁴⁶⁶ In addition, many states have web-based systems that enable individuals and their attorneys to access criminal records.⁴⁶⁷

Some states require that the individual provide fingerprints in person in order to obtain records. Because individuals with pending warrants could be arrested if they go to a law enforcement office to provide fingerprints, attorneys should explore alternative ways of obtaining criminal histories, such as private fingerprinting services or web-based records requests.

State laws govern access to juvenile records. Most states consider those records to be public, but restrict access after the person attains the age of majority. Attorneys should seek records relating

⁴⁶⁵ For more information regarding potential employer liability stemming from data provided to DACA requesters, see AILA Verification and Documentation Liaison Committee, *Practice Advisory: Counseling Employers on DACA Issues* (updated September 21, 2012), AILA InfoNet Doc. No. 12090749.

⁴⁶⁶ More information about FBI criminal background checks is available at <http://www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi>.

⁴⁶⁷ Information about state-based criminal history systems is available at http://www.publicrecordsinfo.com/criminal_records.htm.

to juvenile delinquency, including diversion or referrals to restorative justice programs, for all clients interested in requesting DACA. In cases where records are unavailable, attorneys should explain the reasons on Form I-821D and cite to any relevant state statutes.

Because USCIS will conduct independent background checks following collection of biometrics, requesters are not required to submit evidence of good moral character. However, if a client has a criminal record or other adverse factors affecting his case, such evidence may be helpful.

What crimes render a requester ineligible for deferred action?

Individuals are not eligible for deferred action if they have been convicted of a felony, a significant misdemeanor,⁴⁶⁸ or three or more non-significant misdemeanors (not including minor traffic offenses) unless DHS determines that there are exceptional circumstances. DHS has not provided any guidance as to what could constitute an exceptional circumstance. Attorneys relying on the exceptional circumstances exception are strongly encouraged to expressly request in the cover letter accompanying the application that USCIS consider the case under the exceptional circumstances rubric.⁴⁶⁹ Moreover, counsel should submit evidence supporting the assertion that the case presents exceptional circumstances. The FAQs specify that immigration-related offenses classified as felonies and misdemeanors under state laws (such as Arizona's SB 1070) do not make an individual ineligible for DACA. Presumably, criminal violations of federal immigration law will be considered.

The federal criminal classification scheme governs whether an offense is considered a felony or misdemeanor for purposes of DACA. A "felony" is an offense punishable by a potential sentence of more than one year. A misdemeanor is an offense punishable by imprisonment of more than five days but not more than a year. The label a state attaches to a particular offense is not relevant. Thus, some offenses that a state labels as a misdemeanor, but which include a potential sentence of more than one year, will be a felony. A violation which carries a sentence of five days or less, such as a municipal violation, may not be counted as a misdemeanor, but may nonetheless be taken into consideration under the totality of the circumstances. Attorneys also should be cautious of federal tickets, which under the Assimilated Crimes Act, could be counted as a misdemeanor.

A "significant misdemeanor" for purposes of the DACA request process includes a misdemeanor as defined by federal law and for which the maximum term of imprisonment authorized is one year or less but greater than five days and that, regardless of the sentence imposed, involves burglary, domestic violence, sexual abuse or exploitation, unlawful possession or use of a

⁴⁶⁸ This term does not appear in the Immigration and Nationality Act or elsewhere in the U.S. Code.

⁴⁶⁹ The Standard Operating Procedures Manual provides that the requester "must fully document the exceptional circumstances." U.S. Department of Homeland Security National Standard Operating Procedures, "Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)" (Sep. 13, 2012) at 74, *available at* http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf (accessed July 25, 2013).

firearm, driving under the influence, and drug distribution or trafficking. A “significant misdemeanor” may also include any other misdemeanor for which a requester was sentenced to more than 90 days imprisonment, not including suspended sentences, pretrial detention or time held pursuant to an immigration detainer. The policy specifically notes that a conviction for driving under the influence of drugs or alcohol is a significant misdemeanor, regardless of the sentence imposed. The FAQ, however, does not define the term “driving under the influence,” leaving it unclear whether USCIS will regard all -- or just some -- offenses involving driving after the consumption of alcohol as significant misdemeanors. In some situations, counsel representing potential DACA requesters who have been convicted of certain state offenses involving driving after the consumption of alcohol may consider arguing that their clients have not been convicted of “driving under the influence” for DACA purposes. It could be argued that “driving under the influence” for DACA purposes should mean what it ordinarily means in federal law -- namely, driving with a Blood Alcohol Concentration (“BAC”) or Breath Alcohol Concentration (“BrAC”) at or above 0.08.⁴⁷⁰ Some states criminalize driving after the consumption of lesser quantities of alcohol.⁴⁷¹ If your client has been convicted of such a lesser offense, arguably your client has not been convicted of a “driving under the influence” for DACA purposes. Bear in mind that even if USCIS concurs with this argument, a request may nevertheless be denied in the exercise of discretion. Thus, attorneys representing potential DACA requesters with such convictions should advise the client in writing of the substantial risks inherent in requesting DACA with a conviction for driving after the consumption of alcohol. Moreover, it may be wise to argue in the alternative that if USCIS concludes that the individual is barred from DACA on account of the offense, the case presents exceptional circumstances warranting a grant of DACA.

The FAQs separately define a “non-significant misdemeanor.” The term includes any misdemeanor punishable by imprisonment of more than five days but not more than a year that is

⁴⁷⁰ For Federal lands under the administration of the National Park Service, a 0.08 per se Blood Alcohol Concentration or Breath Alcohol Concentration limit has been operative since 2003. 36 CFR § 4.23(a)(2). A 0.08 standard also applies on military installations, which are administered by the Department of Defense. 32 CFR § 634.34(a)(3). Likewise, the Coast Guard embraces this limit for recreational vessel operators on waters subject to its jurisdiction. 33 CFR § 95.020(a). The Uniform Code of Military Justice embraces a default limit of 0.10, an even higher concentration of alcohol than 0.08. 10 U.S.C. § 911. In addition, Congress restricts certain transportation funding to those States that enact and enforce a 0.08 limit. 23 U.S.C. § 163.

⁴⁷¹ Col. Rev. Stat. § 42-4-1301(1) (g) (“Driving while ability impaired”); D.C. Code § 50-2205.02(2) (if BAC is 0.05 or more, prima facie evidence that driver under the influence); MD Code, Transportation § 21-902(b)(1)(driving while impaired by alcohol, *Turner v. State*, 956 A.2d 820, 828 (Md. Ct. Spec. App. 2008) (driving “under the influence” requires “substantial” impairment whereas conviction for driving “while impaired” requires simple impairment “to some extent.”)); Mich. Comp. Laws § 257.625(3) (“driving while visibly impaired,” a lesser included offense under Michigan’s DUI statute, *People v. Prehn*, 396 NW 2d 472 (Mich. Ct. of App. 1986)); NY VTL § 1192(1) (driving while ability impaired, a lesser included offense under New York’s DWI statute, *People v. Smith*, 18 NY 3d 544 (NY 2012)); Okla. Stat. Ann. § 47-761(A) (driving while ability impaired held a lesser included offense to driving under the influence, *Bernhardt v. State*, 719 P.2d 832, 834 (Okla. Crim. App. 1986)).

not identified as a per se “significant misdemeanor” (The federal criminal classification scheme see above), for which a person receives a sentence of 90 days or less, again, not including suspended sentences, pretrial detention or time held pursuant to an immigration detainer.

Individuals with three or more non-significant misdemeanors not occurring on the same date and not arising out of the same act, omission or scheme of misconduct are ineligible for deferred action. Minor traffic offenses, including driving without a license, will not count towards the three or more non-significant misdemeanor bar. However, DHS has stated that a person’s entire history of offenses can be considered, along with other facts, to determine whether deferred action is warranted under the totality of the circumstances.

Further, Form I-821D asks whether a requester has ever been “arrested for, charged with, or convicted of a crime in any country other than the United States.” Unlike the question on the I-821D regarding convictions in the United States, the question on foreign crimes neither mentions the words “felony or misdemeanor” nor the exception for minor traffic violations. Although the Board of Immigration Appeals has case law regarding how to classify a foreign crime,⁴⁷² DHS does not indicate how it intends to treat these offenses for DACA purposes. A question remains whether DHS will use the maximum punishment under the foreign law to determine whether the offense is a felony or a misdemeanor for DACA purposes.

A requester who does not meet the eligibility requirements risks being placed in removal proceedings or being detained. In addition, for cases that involve a “criminal offense, fraud, or a threat to national security or public safety,” confidentiality protections, which are discussed above, will likely not apply unless DHS determines there are exceptional circumstances. USCIS will apply its existing [Notice to Appear guidance](#) governing referral of cases to ICE and issuance of notices to appear, which is also discussed below. As to how DACA will interact with other provisions of immigration law, such as mandatory detention or reinstatement provisions, there is no clear guidance at this time; requesters with such issues may wish to delay applying until further guidance is provided.

What additional documents must requesters who have been arrested submit?

Form I-821D requires a requester who answers “yes” to Part III, question 1, regarding arrests, charges and convictions in the United States to furnish “copies of all arrest records, charging documents, dispositions (outcomes), sentencing records, etc.” A requester with a foreign conviction must furnish the same level of documentation.

How will DHS treat juvenile delinquency adjudications?

DHS uses the term “juvenile conviction” to refer to a juvenile delinquency adjudication. DHS states that a juvenile delinquency adjudication will not automatically disqualify a requester from DACA relief. A minor with a delinquency adjudication will get a case-by-case review to see if

⁴⁷² See, e.g., *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981) (requiring offense to be for conduct deemed criminal in the United States and evaluating crime in light of U.S. standards for purposes of determining whether offense was criminal or delinquent).

the “particular circumstances” of his or her case warrant a positive exercise of prosecutorial discretion. Attorneys should explore the circumstances and facts surrounding any juvenile delinquency adjudication to anticipate how DHS might characterize the underlying conduct that gave rise to the delinquency adjudication, as well as seek out evidence of mitigation or rehabilitation, as appropriate. For example, a noncitizen who receives a delinquency adjudication because of an offense that otherwise would have been considered a significant misdemeanor for an adult, may be found ineligible. A noncitizen convicted as an adult offender has an adult conviction, and does not receive case-by-case treatment based on age.

Some requesters may be precluded from accessing records due to a court seal or a state law. For example, California law permits juvenile records to be unsealed under very limited circumstances, which do not encompass DACA. As previously mentioned, attorneys should explain the reason that relevant records are unavailable and cite to any applicable state statutes.

Will expunged convictions be considered under the new policy?

The same policy relating to juvenile “convictions” applies to expunged convictions. Requesters with expunged convictions will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted. This is a departure from immigration law precedent, which treats expunged convictions as convictions for immigration purposes.

What other conduct-based activities are bars to deferred action?

Even absent a criminal conviction, individuals are ineligible for deferred action if their background checks or other information reveal that they pose a threat to public safety or national security. Relevant factors include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.⁴⁷³

Under a totality of circumstances test, DHS may consider allegations of participation in criminal activities based on the facts surrounding dismissed charges, as well as participation in drug/alcohol programs or anger management classes, among other factors. Attorneys should review the circumstances of any dismissed charges to see if the requester could nonetheless be found ineligible for deferred action or even at risk of enforcement action. Police reports or complaints suggesting drug use or drug trafficking, assaults against family members or partners, and sex crimes should be explored in detail to see if the conduct could be construed as “participation in criminal activities.”

Suspected gang membership also presents a bar to DACA. Unfortunately, many people will not know if they are suspected of being gang members until USCIS completes a background check through the National Crime Information Center (“NCIC”), which cross-references the Violent

⁴⁷³ Gang membership may prove to be an area of concern for potential requesters, given the reported difficulties former gang members face obtaining other immigration benefits and prosecutorial discretion in general.

Gang and Terrorist Organization File (“VGTOF”).⁴⁷⁴ The criteria for inclusion in the VGTOF are either self-admission as a gang member upon arrest or incarceration, or two of the following: (1) identification “as a gang member by a reliable informant”; (2) identification “as a gang member by an informant whose information has been corroborated”; (3) “frequent[ing] a gang’s area, associat[ing] with known members, and/or affect[ing] gang dress, tattoos, or hand signals”; (4) being “arrested multiple times with known gang members for offenses consistent with gang activity”; or (5) “[s]elf-admission” as a gang member at some point other than upon arrest or incarceration.⁴⁷⁵ Additionally, USCIS may rely on reports from local police departments to determine gang membership, and has not indicated whether individuals will be advised if this is the reason for a failed request, much less whether a requester will be notified of the issue and provided an opportunity to rebut allegations of gang membership. Attorneys should carefully review criminal history information, as well as any tickets,⁴⁷⁶ for any gang references. Attorneys should submit an FBI background check request,⁴⁷⁷ a FOIA request to ICE and/or a public records act request to the local police department to determine if a client is believed to be a current or former gang member.

Attorneys are advised to review distinctions between gang members and nonmembers. For example, a gang membership determination could be incorrect if a USCIS officer misreads

⁴⁷⁴ All cases processed by the adjudications unit within a USCIS service center or local office include an NCIC query. *See* General Adjudication Procedures; Chapter 10.3(f), *available at* <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html>. The NCIC contains VGTOF information. A 2007 Bureau of Justice Statistics report states that 17% of police departments submit VGTOF information to NCIC. Lynn Langton, Bureau of Justice Statistics, *Gang Units in Large Local Law Enforcement Agencies*, at 8 (2007), *available at* <http://www.bjs.gov/content/pub/pdf/gulllea07.pdf>; *see also* Michael D. Kirkpatrick, Asst. Dir., FBI, Statement before the United States Senate Subcommittee on Immigration (Nov. 13, 2003) (describing the role of VGTOF within NCIC), *available at* <http://www.fbi.gov/news/testimony/the-fbis-national-crime-information-center>.

⁴⁷⁵ NCIC 2000 Operating Manual: VGTOF File, § 9.2, *available at* <http://www.leads.ohio.gov/manuals/ncic/VGTOF.htm>; *see also* Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 Buff. L. Rev. 461, 474-78 (2013) (discussing history and over-inclusive nature of VGTOF). Counsel should be aware that, as compared to the VGTOF, state law enforcement agencies may have different -- and in some cases, narrower -- inclusion criteria for entry into state databases. *See, e.g.*, Minn. Stat. § 299C.091(2)(b) (individual may be entered into gang database only if the individual meets certain extra-conviction criteria *and* the individual has been convicted of a gross misdemeanor or felony, or has been adjudicated or has a stayed adjudication as a juvenile for an offense that would be a gross misdemeanor or felony if committed by an adult). For more information about state gang-related legislation, visit the Bureau of Justice Assistance’s National Gang Center website, which is available at <http://www.nationalgangcenter.gov/Legislation>.

⁴⁷⁶ For example, in Texas, an individual can be ticketed with being a gang member on campus, which is a violation of the Texas education code. Tex. Educ. Code § 37.121 (Fraternities, Sororities, Secret Societies, and Gangs).

⁴⁷⁷ Attorneys may wish to request information contained in the VGTOF on the FBI background check fingerprint form in the “Reason Fingerprinted” field.

tattoos and incorrectly concludes that the person in question belongs to a specific gang. Alternatively, an individual may have been a gang member in his teenage years, but subsequently left the gang. Factors that should be taken into account when deciding to apply for DACA are the recency of the gang activity, the age of the applicant, the age of the applicant at the time he or she was in a gang, any mitigating facts behind a delinquency adjudication or conviction, and other significant equities. Individuals might still receive favorable consideration despite negative equities. However, as discussed above, such an individual risks removal if he or she is considered an enforcement priority. Practitioners are advised to follow trends in this area closely. A similar analysis would apply when reviewing whether someone could be deemed to be a national security threat.⁴⁷⁸

Individuals in immigration detention who have been accused of gang activity face different and more difficult hurdles than those who are not detained. ICE agents will check with local law enforcement and other databases in assessing whether a person is in a gang and may determine that a person is ineligible for DACA based on evidence that is not substantiated. We have heard reports that ICE declines to release individuals whom ICE deems ineligible for DACA. In the event of an imminent removal where evidence of DACA eligibility is not immediately available, attorneys should prepare a prosecutorial discretion request and, if appropriate, a request for an administrative stay of removal.

What constitutes an exceptional circumstance to overcome a bar to DACA?

DHS has not provided any guidance as to what could constitute an exceptional circumstance, but practitioners should assume that DHS will apply this exception sparingly. It is unclear whether evidence of rehabilitation, mitigating factors, equities, or significant time since the activity at issue will overcome the bar. Because individuals who would face these bars are necessarily likely to be considered enforcement priorities, attorneys should proceed with caution, if at all, in affirmative filings, and should consider providing clients with clear written warnings of the heightened risks associated with making a request under these circumstances. Attorneys relying on the exceptional circumstances exception are strongly encouraged to expressly request in the cover letter accompanying the application that USCIS consider the case under the exceptional circumstances rubric.⁴⁷⁹ Moreover, counsel should submit evidence supporting the assertion that the case presents exceptional circumstances.

⁴⁷⁸ It is likely that USCIS will rely on the Fraud Detection and National Security (FDNS) Directorate which has placed FDNS officers in every USCIS office. According to USCIS, the Fraud Detection and National Security Data System (FDNS-DS) will be used to identify fraud and track potential patterns of abuse. The Terrorist Screening Database may also be used.

⁴⁷⁹ The Standard Operating Procedures Manual provides that the requester “must fully document the exceptional circumstances.” U.S. Department of Homeland Security National Standard Operating Procedures, “Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)” (Sep. 13, 2012) at 74, *available at* http://legalactioncenter.org/sites/default/files/2013-HQFO-00305_Document.pdf (accessed July 25, 2013).

Are individuals who are currently in removal proceedings or subject to a final removal order or a voluntary departure order eligible for DACA?

Yes. According to the FAQs, individuals who fall into these categories, meet the eligibility guidelines. Any such individuals who are not currently in immigration detention should submit their requests to USCIS — not ICE as stated in the initial FAQs released on June 15, 2012. The request should include a copy of the removal order or the decision of the immigration court or the Board of Immigration Appeals, if available. Such individuals may be under 15 at the time of the request, but cannot have been 31 or older as of June 15, 2012, to be considered for DACA. If an individual does not meet the age requirements for DACA, he or she may ask ICE to consider a request for prosecutorial discretion under the June 17, 2011 Morton memo.

Individuals who are *prima facie* eligible for DACA in immigration detention should notify their detention officer or contact the ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>. Once ICE is made aware of the case, ICE has explained that the Office of the Principal Legal Adviser (OPLA), in consultation with ERO, will determine whether the detainee meets the DACA guidelines.⁴⁸⁰ If OPLA and ERO determine that an individual meets the DACA guidelines, ICE may, in the exercise of discretion, administratively close removal proceedings and release the detainee with or without conditions. It is the requester's responsibility to apply for DACA with USCIS upon release. If a person is in danger of imminent removal, he or she should immediately contact the Law Enforcement Support Center hotline at 1-855-448-6903 (24 hours/day, 7 days/week). There is anecdotal evidence that ICE has released individuals to apply for DACA where the person only lacked the educational requirement. Thus, if a client does not immediately meet the education requirements, attorneys still should consider requesting DACA. Additionally, anecdotal evidence exists of ICE offering deferred action to individuals prosecuted for felony identity theft or criminal impersonation when the person was working with documents that did not belong to them -- crimes that would *per se* bar a person from eligibility for DACA. Attorneys should explore whether the individual can present evidence of "exceptional circumstances," to overcome the criminal bar, especially if the person is not eligible for any other relief.

Individuals who recently received a final order of removal and are still within the statutory time period for seeking reopening (within 90 days of the entry of a final order of removal under INA § 240(c)(7)(C)), may want to consider filing a motion to reopen based on the new DACA guidance. An individual beyond the reopening period may seek DHS's consent to file a joint motion to reopen or even present a motion to the immigration court or Board of Immigration Appeals (BIA) for *sua sponte* consideration.⁴⁸¹ Even though such individuals are eligible for DACA, it is generally to their advantage to reopen the case in order to obtain administrative

⁴⁸⁰ ICE/NGO DACA Meeting, April 16, 2013 (notes on file with the American Immigration Council).

⁴⁸¹ Although some ICE offices have reportedly agreed to join motions to reopen for individuals with final orders who appear to be eligible for DACA, the agency does not have an official policy to this effect.

closure or termination. This may put them in a better position in the event DACA is rescinded, a renewal request is denied, or the individual becomes eligible for another form of relief from removal. However, by seeking DHS's consent to file a joint motion to reopen, some requesters will be alerting the agency to the fact that they failed to leave the United States when ordered to do so. If DACA is not granted, ICE may be more likely to take action against such individuals.

Can individuals request DACA if they were previously offered, but did not accept an offer of administrative closure, or if a request for prosecutorial discretion was declined?

Yes. Any individuals who can demonstrate that they meet the guidelines are eligible for DACA, even if their cases were considered in the course of DHS's case-by-case review process and regardless of the results. Since Secretary Napolitano's June 15th announcement, ICE has granted deferred action to certain individuals who met the DACA guidelines and whose cases had been identified previously for administrative closure.

Will deferred action requesters accrue unlawful presence while their requests are pending?

Requesters who are 18 years old or older will continue to accrue unlawful presence while their DACA requests are pending. Individuals under 18 years old do not accrue unlawful presence. See INA § 212(a)(9)(B)(iii)(I). Based on the FAQs, those who request deferred action while under age 18 will not accrue unlawful presence even if they turn 18 while their requests are pending.

An individual granted deferred action will not accrue unlawful presence during the period of deferred action, but previous or subsequent periods of unlawful presence are not erased by a DACA grant.

The FAQs state that a person granted deferred action is eligible to apply for advance parole, and may be able to depart and reenter the country as a parolee. Under the recent BIA decision in *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), an adjustment applicant who otherwise would trigger the three- or ten-year bar simply because he or she traveled abroad under advance parole, is not considered to have departed the United States.⁴⁸² Thus, individuals who already have a path to residency, but who are not currently eligible to adjust, may find themselves adjustable after travel on advance parole. Note, however, that if a person has already triggered inadmissibility under 212(a)(9)(B) or (C), travel under advance parole will not cure the previously incurred bar.

What will happen to individuals who meet the eligibility criteria but are stopped or arrested by ICE or CBP?

On June 15, 2012, Secretary Napolitano instructed ICE and CBP to immediately exercise their discretion, on a case-by-case basis, to prevent individuals who meet the eligibility criteria from being apprehended, held under ICE detainers, placed into removal proceedings, or removed from

⁴⁸² See discussion *infra* pp. 25-27 ("Will individuals who request DACA be permitted to travel outside the United States?").

the United States. On a June 18, 2012 national stakeholder call, CBP announced that individuals who encounter CBP will be briefly detained for screening purposes. Following an interview and a background check, CBP will release individuals who are found to be prima facie eligible for deferred action. CBP will instruct eligible individuals to file a DACA request with USCIS.

If ICE or CBP has pursued enforcement action in violation of this policy, contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (24 hours/day, 7 days/week) or ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>.

Can individuals in removal proceedings who are granted deferred action influence whether their cases are terminated, administratively closed or pursued?

Once an NTA has been filed with the immigration court, only the immigration judge can decide whether to terminate or administratively close proceedings. Joint motions for such relief are invariably granted. In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), however, the Board held that an immigration judge could grant a motion to administratively close proceedings filed by either party over the objection of the other party. Thus, a respondent can seek to administratively close a case even if ICE counsel does not agree. Conversely, because a party's opposition to administrative closure is a factor that an immigration judge must consider under *Matter of Avetisyan*, a respondent also can object to an ICE motion for administrative closure.

Attorneys should bear in mind that there may be strategic advantages to termination or administrative closure, or even continuing on to the merits, depending on a particular respondent's situation. Attorneys should thoroughly weigh options before deciding on a particular course of action. Notably, there is no legal authority requiring that a case be administratively closed or terminated before DHS grants deferred action.

Will individuals who request DACA be permitted to travel outside the United States?

Individuals who travel outside the United States *after* August 15, 2012 — either before they request DACA or while their requests are pending — will not be considered for DACA. Thus, all clients should understand that any departure after August 15, 2012, but before a grant of deferred action (regardless of being brief, casual and innocent) will disqualify them from receiving DACA.

Individuals who have been granted deferred action may be permitted to travel abroad, but only pursuant to a grant of advance parole from USCIS. After receiving deferred action, individuals seeking to travel outside the United States must apply for advance parole by filing [Form I-131 \(Application for Travel Document\)](#) and paying the \$360 filing fee. USCIS will determine whether the purpose of travel is justifiable based on the individual circumstances described in an individual's request. Generally, however, USCIS will grant advance parole to a DACA recipient only if the purpose of the intended travel is humanitarian, educational or employment-related. The advance parole must have been granted prior to any departure. We have heard reports that

USCIS has granted advance parole to DACA recipients, however the travel authorization period has been limited to the period of time specified in the application.

The FAQs state that humanitarian purposes for travel include travel to obtain medical treatment, attend a family member's funeral services, or visit an ill relative. Educational purposes for travel include semester-abroad programs and academic research, while employment-related reasons for travel include overseas assignments, interviews, conferences, training, or client meetings. The FAQs explicitly exclude travel for vacation as an acceptable basis for advance parole.

Individuals who receive deferred action but are subject to a final order of removal may apply for advance parole. However, the FAQs caution that before leaving the United States, such individuals should seek to reopen their cases before the immigration courts and obtain administrative closure or termination of their removal proceedings prior to departure.⁴⁸³ Otherwise, their departures may cause them to be "considered deported or removed, with potentially serious future immigration consequences." Questions about this process may be directed to the ICE Enforcement and Removal Operations (ERO) Community Outreach Office by calling the Community and Detainee Helpline at 1-888-351-4024 (9 a.m. to 8 p.m., Monday - Friday) or by completing the ERO Community Outreach Contact Form available at <http://www.ice.gov/exec/forms/pa-contact/pa-contact.asp>.

Even if travel abroad is permitted via advance parole, it may not be in an individual's best interest. Although unlawful presence will not accrue during any deferred action period, individuals may be subject to the inadmissibility bars if they have previously been unlawfully present in the United States for more than 180 days.⁴⁸⁴

The Board's recent decision in *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), however, hints at a possible advantage to travel on advance parole for those that have not already triggered inadmissibility bars. Under the specific circumstances of that case (where an applicant for adjustment appeared to have triggered the unlawful presence ground of inadmissibility solely because of travel on advance parole), the BIA held that a departure under advance parole after more than 180 days of unlawful presence did not trigger the three- and ten-year bars.⁴⁸⁵

⁴⁸³ If the requester's case is before the BIA and the case is administratively closed, departure will automatically withdraw the appeal. 8 C.F.R. § 1003.4.

⁴⁸⁴ Minors are protected by statutory exceptions under INA § 212(a)(9)(B), so no period of time in which a person was under 18 years of age will be taken into account when determining the period of unlawful presence for purposes of the three and ten-year bar. However, this same protection does not extend to minors subject to the permanent bar at INA § 212(a)(9)(C). See [AFM 40.9.2\(b\)\(2\)](#) (interpreting the exception at INA §212(a)(9)(B)(iii) to apply only to the three and ten-year bar); [Memorandum from Paul Virtue, Acting Executive Associate Commissioner \(INS\), to Management Team \(March 31, 1997\)](#) (same).

⁴⁸⁵ An advance parole authorization (Form I-512L) issued to a DACA recipient in May of 2013 and shared with the American Immigration Council provided as follows: "Traveling abroad and returning to the United States under a grant of advance parole is not, itself, a 'departure' for purposes of section 212(a)(9)(B). *Matter of Arrabally*, 25 I&N Dec. 771 (BIA 2012).

Obtaining advance parole authorization for parole will not relieve you of inadmissibility

If a person has already triggered inadmissibility under 212(a)(9)(B) or (C), travel under advance parole will not cure the previously incurred bar.⁴⁸⁶ Under *Arrabally*, an argument could be made that individuals who already have a path to residency, but who are not currently eligible to adjust (such as an EWI immediate relative of a U.S. citizen, entering as a parolee), may find they are not only eligible to apply to adjust after travel on advance parole (because they now are in parole rather than EWI status), but also need not apply for a waiver of the three- or ten-year bar.⁴⁸⁷ Given the short time *Arrabally* has been in play and the lack of guidance on how USCIS may treat such departures, attorneys should monitor developments in this area before advising clients on the impact of travel.

Under no circumstances should an individual granted deferred action travel abroad without a grant of advance parole. Such an individual will be subject to any applicable grounds of inadmissibility upon returning to the United States.

Will family members of individuals who receive deferred action under this policy also be granted deferred action?

Only individuals who meet all the eligibility criteria will be granted deferred action under the new memorandum. Family members, including dependents who do not independently qualify, will not receive deferred action pursuant to this process. Although such family members may still be eligible for prosecutorial discretion pursuant to prior guidance issued by USCIS or ICE or the [ongoing review](#) of pending removal cases announced in August 2011, there is no affirmative process for requesting such relief. Thus, if family members are not currently in removal proceedings, not likely to be placed into proceedings, and not under an imminent threat of deportation, they will not be able to request prosecutorial discretion under the prior guidance.

There is no indication that family members of individuals who receive deferred action will have a heightened risk of immigration enforcement. To the contrary, confidentiality provisions outlined in the FAQs indicate that these individuals are not at any increased risk. Further, the fact that a family member has been granted deferred action may be a positive discretionary factor in evaluating enforcement priorities.

under 212(a)(9)(B)(i) on the basis of any other departure, past or future, undertaken without grants of advance parole.” (Emphasis in original).

⁴⁸⁶ It is also important to note that a person travelling to U.S. territories may be subject to grounds of inadmissibility. See 8 C.F.R. 235.5.

⁴⁸⁷ The Administrative Appeals Office recently found that an individual who left the United States on advance parole, and subsequently reentered had not made a departure within the meaning of INA § 212(a)(9)(B)(i)(II) and that a waiver of inadmissibility was thus unnecessary. AILA InfoNet Doc. No. 12102242.

Can a grant of deferred action be extended beyond two years?

Yes. Unless a grant of deferred action is terminated prematurely, a recipient may request a renewal of both deferred action and employment authorization. Like the original requests, these requests will be considered on a case-by-case basis.

What will happen to individuals whose requests for deferred action are denied?

Attorneys are advised to warn their clients in writing that even for prima facie eligible cases, deferred action is not guaranteed. The warning should further explain that requesters will be revealing and, in most cases, documenting their removability to a government agency that can initiate removal proceedings.⁴⁸⁸ If USCIS denies deferred action to a requester subject to a final order of removal, that individual may still request prosecutorial discretion pursuant to the prior guidance issued by ICE on June 17, 2011, or the ongoing review of pending removal cases announced in August 2011. Such requests may be submitted to the local ICE Office of Chief Counsel or Field Office Director, as appropriate.

In cases where USCIS denies an individual's request for deferred action and the individual is not subject to a final order of removal, USCIS will apply its existing [Notice to Appear guidance](#) governing referral of cases to ICE and issuance of notices to appear. This guidance prioritizes the prosecution of cases involving criminal convictions, fraud, and threats to national security or public safety.⁴⁸⁹ In addition, DHS said in the FAQs that individuals who knowingly make a misrepresentation or knowingly fail to disclose facts in the deferred action request process "will be treated as an immigration enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and/or removal from the United States." Other cases will be referred to ICE for removal proceedings only where DHS determines that there are "exceptional circumstances," a term which is not defined. However, USCIS has indicated that, even where a DACA requester is referred to ICE for immigration purposes, information regarding that individual's family members or guardians will *not* be given to ICE for the purpose of seeking the removal of the family member or guardian.

USCIS may share information regarding requesters, as well as their family members and guardians, with national security and law enforcement agencies, including ICE and CBP, for purposes unrelated to immigration enforcement, including for assistance in consideration of

⁴⁸⁸ Confidentiality provisions outlined in the most recent FAQs indicate that such information regarding requesters or their family members or guardians is protected from disclosure for the purpose of immigration enforcement unless the requester meets the USCIS criteria for the issuance of a Notice to Appear. Notably, the policy is subject to change.

⁴⁸⁹ In accordance with its existing guidance, USCIS also will continue to issue notices to appear as required by statute or regulation, including in cases involving denials of Form I-751 (Petition to Remove the Conditions of Residence), denials of Form I-829 (Petition by Entrepreneur to Remove Conditions), terminations of refugee status, denials of NACARA 202 and HRIFA adjustments, asylum referrals, termination of asylum or withholding of removal, positive credible fear findings, and certain NACARA 203 cases.

DACA requests, to identify or prevent fraudulent claims, for national security purposes, or to investigate or prosecute criminal offenses.

Keep in mind, however, that all of these policies may be changed at any time.

Can individuals appeal a denial of deferred action under the new memorandum?

No. However, requesters or their attorneys can contact the National Customer Service Center at 1-800-375-5383 to request review if: (i) USCIS denied a DACA request based on abandonment in a case where the requester responded to a Request for Evidence within the prescribed time; or (ii) USCIS mailed the Request for Evidence to the wrong address despite the requester's prior submission of a [Form AR-11 \(Change of Address\)](#) or online change of address. There is no prejudice to filing a new request.

Can an individual pursue DACA as well as other relief?

Yes. However, an individual cannot be a visa holder and a DACA recipient at the same time, as DACA is reserved for individuals who do not have a lawful immigration status.



PRACTICE ADVISORY⁴⁹⁰

Updated June 20, 2013

THE CHILD STATUS PROTECTION ACT

By Mary Kenney

The Child Status Protection Act (CSPA)⁴⁹¹ was enacted to provide relief to children who “age-out”—that is, turn 21 and lose their preferential immigration status as a “child”—as a result of both visa backlogs and delays by the U.S. Citizenship and Immigration Services (USCIS) in processing visa petitions and asylum and refugee applications. The Immigration and Nationality Act (INA) defines a “child” as an unmarried individual under 21 years of age.⁴⁹² The CSPA does not change this definition, but instead changes the point at which the child’s age is calculated.

Prior to the CSPA, a child who turned 21 before the relevant application for immigration benefits was decided would age-out.⁴⁹³ As the result of agency delays and visa backlogs, many children aged out before their cases were complete. For cases to which it pertains, the CSPA now freezes the age of the child at an earlier date in the process, and in this way preserves the status of “child” for many individuals who otherwise would age out.

The CSPA’s method of calculating a person’s age varies depending on the type of immigration benefit that is sought. The CSPA applies to:

- Derivative beneficiaries of asylum and refugee applications;
- Children of U.S. citizens;
- Children of lawful permanent residents (LPRs); and
- Derivative beneficiaries of family-based, employment-based and diversity visas.

⁴⁹⁰ Copyright (c) 2013 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

⁴⁹¹ Pub. L. No. 107-208 (Aug. 6, 2002).

⁴⁹² INA §101(b)(1).

⁴⁹³ To be considered a “child,” the individual also must be unmarried at the relevant time. INA §101(b)(1); *see also* INA §101(a)(39). The CSPA did not change this requirement.

According to USCIS, the CSPA does not apply to applicants for or derivatives of the Nicaraguan Adjustment and Central American Relief Act; Haitian Refugee Immigration Fairness Act; Family Unity; Special Immigrant Juvenile Status; Cuban Adjustment Act; or nonimmigrant visas.⁴⁹⁴ While the Board of Immigration Appeals (BIA) has held that, generally, the CSPA does not apply to K visas because these are non-immigrant visas,⁴⁹⁵ USCIS has outlined limited circumstances where it finds that the CSPA will cover K-4 beneficiaries.⁴⁹⁶ The BIA also has held that the CSPA does not apply to prevent a qualifying relative from aging-out for purposes of cancellation of removal.⁴⁹⁷

This practice advisory provides an overview of the CSPA, its effective date, and the interpretation and implementation of it by USCIS, U.S. Department of State (DOS), the BIA and the courts. The CSPA is complex. Although, it has been law for more than ten years, there are no regulations implementing it. Instead, both USCIS and DOS are relying on interpretative memoranda and cables and BIA decisions, both precedential and nonprecedential.⁴⁹⁸ Moreover, some of these interpretations construe the CSPA narrowly, even where an expansive interpretation is more consistent with the statute's purpose and language. As discussed in this Advisory, the BIA's narrow interpretation of the statute has led to federal court challenges.

1. DERIVATIVE BENEFICIARIES OF ASYLEES AND REFUGEES

The child of an individual granted asylee or refugee status may be granted the same status if accompanying or following-to-join the parent.⁴⁹⁹ The CSPA amends the asylum and refugee provisions by freezing the age of a child on the date that the parent files the asylum or refugee application, regardless of how old the child is when the asylum or refugee application is finally

⁴⁹⁴ See "Revised Guidance for the CSPA" (Mar. 30, 2008), *published on* AILA InfoNet at Doc. No. 08050669 (posted May 6, 2008); *see also* *Midi v. Holder*, 566 F.3d 132 (4th Cir. 2009) (CSPA does not apply to HRIFA cases). For more on nonimmigrant V visas and "aging-out," see "Adjudication of Form I-539 for V-2 and V-3 extension" (Jan. 10, 2005), *published on* AILA InfoNet at Doc. No. 05020460 (posted Feb. 4, 2005).

⁴⁹⁵ See *Matter of Akram*, 25 I&N Dec. 874, 877 n.5 (BIA 2012).

⁴⁹⁶ See "Revised Guidance for the CSPA," *supra*. For reasons unrelated to the CSPA, aging-out should no longer be a problem for a K-2 visa holder (child of a fiancé(e) of a U.S. citizen). In *Matter of Le*, 25 I&N Dec. 541 (BIA 2011), the BIA, interpreting the INA provisions relating to K-visas, held that the eligibility requirements in INA §245(a) that an applicant be eligible for a visa and that a visa be immediately available are to be established on the date that a K-2 visa holder is admitted to the U.S. Consequently, if a K-2 visa holder is under 21 on the date of admission, he or she may adjust as the "child" of the fiancé(e) even if over 21 at the time of adjustment.

⁴⁹⁷ See *Matter of Isidro-Zamorano*, 25 I&N Dec. 829 (BIA 2012) (where cancellation applicant's son or daughter was under 21 at the time application was filed but turned 21 before it was decided, applicant no longer had a qualifying relative).

⁴⁹⁸ Many of these and other resources are collected on the [CSPA](#) featured topic page on AILA's InfoNet. For a comprehensive discussion of the CSPA, *see also* C. Wheeler, [AILA's Focus on the Child Status Protection Act](#) (2008).

⁴⁹⁹ INA §§207(c)(2) and 208(b)(3).

approved.⁵⁰⁰ Thus, a child who is 20 when the parent files for asylum will retain the status of a child even if the child is 22 when the asylum application is approved.

USCIS has issued several memoranda explaining how the CSPA will be applied to the children of asylees and refugees.⁵⁰¹ USCIS is interpreting the CSPA as allowing a derivative applicant who is eligible for CSPA coverage to retain the status of “child” for all eligibility determinations related to the asylum or refugee status, including the application for asylum (Form I-589); adjustment as an asylee or a refugee under INA §209 (Form I-485); admission to the United States as a refugee (Form I-590); and an application to accompany or follow to join a parent (Form I-730).⁵⁰²

There are two ways for a child to obtain derivative asylee or refugee status. First, the child can be included in the parent’s asylum or refugee application. In these circumstances, the CSPA will apply if (1) the child was under 21 when the asylum or refugee application was filed; and (2) the parent adds the child’s name to the application before it is adjudicated.⁵⁰³ For example, the CSPA will apply if an asylum applicant adds a 22 year-old child who is present in the United States to a pending asylum application, provided the child was under 21 when the asylum application was filed. Note that for refugee cases, USCIS interprets the date that a refugee application is “filed” as being the date that the refugee is interviewed by a Department of Homeland Security (DHS) officer.⁵⁰⁴ Thus, for any asylum or refugee application filed on or after August 6, 2002, a derivative child named in the application will retain classification as a child for purposes of the initial asylum or refugee determination, for any subsequent Form I-730 Refugee/Asylee Relative Petition, and/or for the section 209 adjustment.⁵⁰⁵

Second, a child not included in the asylum or refugee application (or in asylum cases, a child who is not present in the United States), may obtain derivative asylee or refugee status if the parent files a Form I-730, Refugee/Asylee Relative Petition, within two years of being granted asylum or admitted to the United States as a refugee. The CSPA also applies to children who obtain derivative asylum benefits through an I-730.

USCIS has interpreted the effective date provision of the CSPA (CSPA §8) as allowing CSPA coverage in asylum and refugee cases in any of the following situations:

⁵⁰⁰ CSPA §§4 and 5, codified at INA §§207(c)(2)(B) and 208(b)(3)(B).

⁵⁰¹ See “HR 1209—Child Status Protection Act” (August 7, 2002), published on AILA InfoNet at Doc. No. 02090531 (posted Feb. 5, 2003); [“Processing Derivative Refugees and Asylees under the Child Status Protection Act,”](#) July 23, 2003; and “The Child Status Protection Act—Children of Asylees and Refugees” (August 17, 2004), published on AILA InfoNet at Doc. No. 04091561 (posted Sept. 15, 2004). The Executive Office for Immigration Review (EOIR) also has issued a memorandum discussing the application of the CSPA in certain asylum cases. See “Conditional Grants of Asylum Based on Coercive Population Control Policies” (Sept. 30, 2003), published on AILA InfoNet at Doc. No. 03100642 (posted Oct. 6, 2003).

⁵⁰² See “The Child Status Protection Act—Children of Asylees and Refugees,” *supra*.

⁵⁰³ See “HR 1209—Child Status Protection Act,” *supra*.

⁵⁰⁴ See “Processing Derivative Refugees and Asylees under the Child Status Protection Act.”

⁵⁰⁵ See “The Child Status Protection Act—Children of Asylees and Refugees,” *supra*.

- The parent’s application for refugee/asylum status was pending on or filed after August 6, 2002, and the derivative was under the age of 21 at the time of filing;
- The Form I-730 from which the derivative is benefiting was pending on August 6, 2002, and the derivative was under the age of 21 at the time the I-730 was filed;
- The parent’s application for refugee/asylum status or the I-730 was filed prior to August 6, 2002, and the derivative turned 21 years of age on or after August 6.⁵⁰⁶

Note that forms I-590 (for classification as a refugee) and I-730 (Refugee/Asylum Relative Petition) are considered to have been pending on August 6, 2002, even if they were approved, as long as the beneficiaries had not been issued travel documentation as of that date.⁵⁰⁷

Finally, with respect to asylum adjustment cases under INA §209, USCIS indicates in a footnote in one memorandum that when the adjustment application is being adjudicated, the applicant is already an asylee based on classification as a child.⁵⁰⁸ Thus, USCIS concludes that the applicant remains eligible to retain the classification of child—apparently even where the child aged out prior to August 6, 2002—for an I-485 application filed on or *after* this date (emphasis in the original).⁵⁰⁹

2. IMMEDIATE RELATIVE—CHILD OF A U.S. CITIZEN

As a general rule, the CSPA freezes the age of a child of a U.S. citizen (USC) on the date that the USC parent files an I-130 visa petition for the child (or the date on which an immediate relative files a self-petition under VAWA).⁵¹⁰ Thus, if a USC father files an I-130 for his unmarried daughter when the daughter is 20, the daughter will retain the status of a “child” even if the visa petition or adjustment of status application is not adjudicated until the daughter is 22 years old.

The CSPA includes two statutory modifications to this general rule, both of which involve conversions of a petition from a preference category to the immediate relative category. First, when an LPR parent petitions for a child under the Family 2A preference category, and the LPR naturalizes while the petition is pending, the age of the child will freeze on the date of the parent’s naturalization. If the child is under 21 on that date, the petition will be converted to an immediate relative petition.⁵¹¹

Second, when a USC parent files a visa petition for a married son or daughter under the third preference, and the son or daughter legally terminates the marriage while the petition is pending,

⁵⁰⁶ See “Processing Derivative Refugees and Asylees under the Child Status Protection Act,” *supra*.

⁵⁰⁷ *Id.*

⁵⁰⁸ See “The Child Status Protection Act—Children of Asylees and Refugees,” *supra*.

⁵⁰⁹ There are no examples in the memo to illustrate this situation; in the only adjustment example in which the child ages out *prior* to the effective date of the statute, the I-485 is already filed and still pending on the effective date.

⁵¹⁰ CSPA §2, codified at INA §201(f)(1); INA §201(f)(4); see also Revised Guidance *supra*.

⁵¹¹ CSPA §2, codified at INA §201(f)(2); see also “Revised Guidance for the CSPA,” *supra*.

the son or daughter's age will freeze on the date that the marriage is legally terminated. If this age is under 21, the petition will be converted to an immediate relative petition.⁵¹²

Additionally, although not in the statute, DOS has stated that it will allow certain beneficiaries who initially fell within the immediate relative category but who aged out and were converted to the family 1st preference category and who, under the CSPA, are again eligible for immediate relative status, to opt out of such a conversion.⁵¹³ DOS explains that beneficiaries with children may want to remain in the 1st preference category in order to have their children included as derivatives—an option that is not open to immediate relatives. This opt-out from CSPA coverage will be allowed if the beneficiary requests this and if the priority date falls within the first preference cut-off date. It is not clear from the DOS cable, however, whether this option is limited to those whose cases initially began in the immediate relative category.

3. CHILD OF LPR OR DERIVATIVE CHILD OF FAMILY-BASED, EMPLOYMENT-BASED, OR DIVERSITY VISA

The process for determining the age of the child beneficiary—either direct or derivative—of a family-sponsored, employment-based, or diversity visa under the CSPA is more complicated. The statutory formula for these cases is that the child's age will freeze as of the date that a visa number becomes available for the petition in question reduced by the number of days that the petition was pending, but only if the child seeks to acquire the status of an LPR within one year of the date the visa became available.⁵¹⁴ This CSPA benefit also applies to self-petitioners and to derivatives of self-petitioners.⁵¹⁵

This formula can be broken down into three steps:

- First, determine the child's age at the time a visa number becomes available;
- Second, subtract from this age the number of days that the visa petition was pending; and
- Third, determine whether the beneficiary sought LPR status within one year of the visa availability date.

The first two steps will determine the child's age. This age will only be frozen, however, if the third step is met. Each of these steps is discussed briefly below. Both the legacy-Immigration and Naturalization Service (INS) memoranda and DOS cables cited in this practice advisory contain examples illustrating how this formula is to be applied in a variety of case situations. DOS also provides a worksheet to calculate age.⁵¹⁶

When calculating the child's age, remember that the USA PATRIOT Act provides extended "child" status to someone who turned 21 during or after September 2001, provided he or she is a beneficiary of a petition or application that was filed on or before September 11, 2001.⁵¹⁷

⁵¹² CSPA §2, codified at INA §201(f)(3).

⁵¹³ See "DOS Issues Revised Cable on Child Status Protection Act" (Jan. 2003), *published on AILA InfoNet at Doc. No. 03020550 (posted Feb. 5, 2003)*.

⁵¹⁴ CSPA §3, codified at INA §203(h).

⁵¹⁵ INA §203(h)(4).

⁵¹⁶ See "DOS Issues Revised Cable on Child Status Protection Act," *supra*.

⁵¹⁷ USA PATRIOT Act, Pub.L. No. 107-56, 115 Stat. 272 (2001).

Beneficiaries of petitions filed on or before this date who turned 21 during September 2001 are entitled to a 90-day extension of their child status. This means that these beneficiaries can subtract 90 days from their biological age before calculating their CSPA age. Beneficiaries of petitions filed on or before this date who turn 21 after September 2001 are entitled to a 45-day extension of their child status, which means they can subtract 45 days from their biological age.

a. How do I determine when a visa number has become available?

The first step is to determine the child's age at the time that a visa number became available for the petition in question. Both USCIS and DOS state that a visa number becomes available on the first day of the month that the DOS *Visa Bulletin* says that the priority date has been reached. If the visa number is already available when the petition is approved, however, the agencies interpret the "visa availability" date for the CSPA as the date that the petition is approved.⁵¹⁸

If a visa availability date retrogresses after the individual has filed an application for adjustment of status (Form I-485) based on an *approved* visa petition, USCIS states that it will retain the I-485 and note on it the visa availability date at the time that the I-485 was filed. When a visa number again becomes available, USCIS is to calculate the beneficiary's age under the CSPA formula by using the earlier visa availability date marked on the I-485.⁵¹⁹ USCIS says that it will not follow this practice if the I-485 was not filed at the time that the visa availability date retrogressed. Instead, if the I-485 is filed after the visa availability date retrogresses but before one year of when the visa availability date again becomes current, the beneficiary's age is calculated using the second visa availability date.⁵²⁰

b. How do I determine how long a visa petition has been pending?

A child's age will be determined by subtracting the number of days that the visa petition was pending from the child's age at the time a visa number became available. Generally, a petition is pending between the date that the petition is properly filed (receipt date) and the date that an approval is issued. In family-sponsored cases, the receipt date is also the priority date. For employment-based cases, however, the date to be used in CSPA calculations is the date the I-140 visa petition is filed (the receipt date) and not the priority date.⁵²¹

Both USCIS and DOS state that for a derivative of a diversity visa, a petition is considered pending between the first day of the diversity visa mail-in application period for the program

⁵¹⁸ See "Revised Guidance for the CSPA," *supra*; "DOS Cable on Child Status Protection Act" (Aug. 6, 2002), *published on* AILA InfoNet at Doc. No. 02090940 (*posted* Sept. 9, 2002). DOS rejected an alternate interpretation advanced by AILA that a *visa number* is distinguishable from a visa, and that a *visa number* becomes available when the priority date becomes current, even if the visa itself is not available yet. See "DOS Answers to AILA Questions" (March 27, 2003), *published on* AILA InfoNet at Doc. No. 03040340 (*posted* Apr. 3, 2003).

⁵¹⁹ See "Revised Guidance for the CSPA," *supra*.

⁵²⁰ *Id.*

⁵²¹ *Id.*

year in which the principal has qualified and the date on the letter notifying the principal applicant that the application was selected.⁵²²

c. How do I determine whether the beneficiary sought LPR status within one year of visa availability?

The child's age—determined by the first two steps described above—will freeze only if the beneficiary has “sought to acquire” the status of an LPR within one year of the visa availability. There has been litigation over what steps will satisfy the “sought to acquire” requirement. For a child beneficiary who is adjusting status, USCIS has interpreted the phrase narrowly, stating that it is limited to filing an I-485 application for adjustment.⁵²³

DOS also has interpreted it narrowly, indicating that in consular processing cases, the date that a child seeks to acquire LPR status is the date Form DS 230, Part I is submitted by the child, or by the child's parent on the child's behalf. DOS has stressed that in derivative cases, it must be Part I of an application filed specifically on behalf of the derivative child; it is not enough for the principal to seek LPR status within the one-year time frame.⁵²⁴ In cases in which no record of Part I of the visa packet for a derivative child exists at the consular post, DOS places the burden on the derivative to demonstrate sufficient alternate proof.⁵²⁵

Until 2012, the BIA—in nonprecedent decisions—interpreted the phrase as including more than the mere filing of an adjustment application or Part I of the visa packet.⁵²⁶ However, it retracted from this broad interpretation in a precedent decision issued in 2012. In *Matter of Vasquez*,⁵²⁷ the BIA held that a noncitizen could satisfy the “sought to acquire” provision by either filing an adjustment application⁵²⁸ or showing that there were other extraordinary circumstances in the case, particularly where the timely failure to file was beyond the applicant's control. The BIA used as an example a case in which an applicant pays an attorney to assist with the application, prepares and signs the application prior to the deadline, but then the attorney fails to file the application on time.⁵²⁹ The Board then went on to state that “actions that do not approximate the filing of an application or extraordinary circumstances, such as contacting an attorney about initiating the process for obtaining a visa that has become available, are insufficient” to satisfy the “sought to acquire provision.”⁵³⁰

⁵²² *Id.*; see also “DOS Cable on Child Status Protection Act,” *supra*.

⁵²³ See “Revised Guidance for the CSPA,” *supra*.

⁵²⁴ See “DOS Issues Revised Cable on Child Status Protection Act,” *supra*.

⁵²⁵ *Id.*

⁵²⁶ See, e.g., *In re Murillo* (BIA Oct. 6, 2010), published on AILA InfoNet at Doc. No. 10101363 (posted Oct. 13, 2010) (finding that the phrase “is broad enough to include substantial steps taken toward the filing of the relevant application during the relevant time period but which fall short of actual filing or submission to the relevant agency”).

⁵²⁷ 25 I&N Dec. 817 (BIA 2012).

⁵²⁸ *Matter of Vasquez* was an adjustment of status case; presumably its holding extends to the appropriate forms for consular processing.

⁵²⁹ *Id.*, 25 I&N Dec. at 821-22.

⁵³⁰ *Id.*, 25 I&N Dec. at 822.

4. AUTOMATIC CONVERSION AND RETENTION OF PRIORITY DATE FOR AGED-OUT BENEFICIARIES

The CSPA does not protect all beneficiaries from “aging out.” Some individuals will be found to be over 21 when the CSPA formula for determining the age of the beneficiary is applied. For some of these aged-out individuals, the CSPA provides alternate benefits – specifically, retention of the earlier priority date and conversion of the visa petition.

The CSPA created a new statutory provision which states that if the age of a beneficiary is determined to be 21 years or older for purposes of INA §§203(a)(2)(A) (visa classification for children of LPRs) or 203(d) (derivative beneficiaries of family, employment and diversity visa petitions), “the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.”⁵³¹

In *Matter of Wang*,⁵³² the BIA narrowly interpreted this provision by holding that the priority date retention and automatic conversion benefits do not apply to a derivative beneficiary of a 4th preference family-based visa petition. Instead, the BIA found that this section only would apply to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary. Thus, the BIA found that Wang’s aged-out daughter—who had been named as a derivative beneficiary on the 4th preference visa petition filed for Wang by his brother—could not retain the priority date of this 4th preference visa petition.

Under the BIA’s interpretation in *Matter of Wang*, the CSPA’s alternative benefit for aged-out beneficiaries only applies to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary; that is, it only would apply to those in the family 2A preference category. This interpretation ignores the plain language of the provision, which, by referencing INA §203(d), covers all derivative beneficiaries, including those under other family-based petitions and those under employment-based and diversity petitions.

Section 203(h)(3) has been subject to extensive litigation. The Court of Appeals for the Second Circuit interpreted the statute to reach the same result as the BIA in *Matter of Wang*.⁵³³ In contrast, the Courts of Appeals for the Fifth and Ninth Circuits rejected the BIA’s interpretation, and instead found that INA §203(h)(3) also applied to beneficiaries of the 3rd and 4th family-based visa classifications.⁵³⁴

The Ninth Circuit’s decision was reached in consolidated cases, one of which is a nationwide class action. The certified class is defined to include parents:

- who gained LPR status through 3d and 4th preference family-based visa petitions;
- whose petitions listed their children as derivatives;
- who subsequently filed second preference visa petitions for their aged-out children; and

⁵³¹ CSPA §3, codified at INA §203(h)(3).

⁵³² *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009).

⁵³³ *Li v. Renaud*, 654 F.3d 376 (2d Cir. 2011).

⁵³⁴ *Khalid v. Holder*, 655 F.2d 363 (5th Cir. 2011); *Cuellar de Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012), *petition for cert. filed* (U.S. Jan. 25, 2013) (No. 12-930).

- whose aged-out children were not granted the benefits of INA §203(h)(3).⁵³⁵

The district court’s class certification decision was never appealed; instead, only the district court’s decision upholding the BIA’s interpretation of §203(h)(3) was appealed to the Ninth Circuit. Thus the class remains certified. Although the Ninth Circuit ruled favorably in an *en banc* decision in the consolidated cases, including the class action, it has since stayed its decision pending a decision by the U.S. Supreme Court as to whether it will accept certiorari based upon the government’s petition. The ultimate decision in the Ninth Circuit cases—whether reached by the Supreme Court or not—will apply to the nationwide class.

5. CONVERSION FROM 2d PREFERENCE TO 1st PREFERENCE; OPT-OUT PROVISION

The CSPA also addresses what happens to a visa petition for an unmarried son or daughter of an LPR when the parent naturalizes. It provides that a family-based visa petition filed by an LPR on behalf of an unmarried son or daughter (who is over 21) will automatically convert to a first preference petition if the LPR naturalizes while the petition is still pending.⁵³⁶ If the beneficiary was assigned a priority date prior to the conversion of the petition, he or she will maintain that priority date after the conversion.⁵³⁷

This provision also allows the beneficiary to elect not to have the petition converted, or if already converted, to have the conversion revoked. When the beneficiary makes this election, the case will continue as if the parent had not naturalized.⁵³⁸ This option will primarily benefit Mexicans and Filipinos because the backlog for the first preference category for these countries is greater than the backlog for the Family 2B preference category.⁵³⁹

USCIS will allow a beneficiary to “opt out” regardless of whether the original petition was initially filed in the 2B preference category or was first filed in the 2A preference category and later converted to the 2B category because the child aged out.⁵⁴⁰ USCIS reads the statutory language “initially filed” to mean that the petition was *initially filed* for a beneficiary who is *now* in the 2B unmarried son or daughter classification, regardless of whether the petition was originally filed in the 2A category.

USCIS also takes the position that it is the beneficiary’s natural age at the time of naturalization that is “locked in” or “fixed,” and not the beneficiary’s CSPA adjusted age.⁵⁴¹ The BIA agrees.

⁵³⁵ *Costello v. Chertoff*, No. 08-688 (C.D. Cal. July 16, 2009) (class certification order).

⁵³⁶ CSPA §6, codified at INA §204(k)(1).

⁵³⁷ CSPA §6, codified at INA §204(k)(3).

⁵³⁸ CSPA §6, codified at INA §204(k)(2); see “Clarification of Aging Out Provisions as They Affect Preference Relatives and Immediate Family Members Under The Child Status Protection Act Section 6 And Form I-539 Adjudications for V Status” (June 14, 2006), *published on AILA InfoNet at Doc. No. 06062870 (posted June 28, 2006)*.

⁵³⁹ See, e.g., DOS [Visa Bulletin, July 2009](#).

⁵⁴⁰ See “Clarification of Aging Out Provisions as They Affect Preference Relatives,” *supra*.

⁵⁴¹ “Question and Answer, USCIS National Stakeholder Meeting” (April 29, 2008), *published on AILA InfoNet at Doc. No. 08050667 (posted June 4, 2008)*.

In a precedent decision, the BIA held that, pursuant to INA §204(k)(1), the fact that the beneficiary was over 21 at the time that his mother naturalized meant that the 2A family-based petition that she had filed on his behalf automatically converted to the 1st family preference, as he was now the son of a U.S. citizen.⁵⁴² The BIA found that the age-determination formula of the CSPA—found at INA §203(h)(1)—was irrelevant once the mother had naturalized.

In the same decision, the BIA also ruled that the son could not opt out of the 1st preference to remain in the family 2A preference category, finding that INA §204(k)(2) restricted this alternative to opting out of the 1st preference to only the family 2B preference category.⁵⁴³ In that case, the family 2B category would not have benefited the son.

6. DOES THE CSPA APPLY RETROACTIVELY?

The CSPA was effective on August 6, 2002. It applies to all children who turn 21 after this effective date, provided all other requirements of the CSPA are met.⁵⁴⁴ The statute has an effective date provision (section 8) which governs how the statute is to be applied to cases in which some relevant event occurred prior to August 6, 2002, the date that the CSPA was adopted, but other events took place after this date. USCIS has interpreted this provision as applying the CSPA to three sets of cases:

- Cases in which the visa petition was approved prior to August 6, 2002, but a final determination has not been made on a beneficiary's application for an immigrant visa or adjustment of status pursuant to the approved petition;
- Cases in which the visa petition is pending on or after August 6, 2002; and
- Cases in which the application for an immigrant visa or adjustment of status is pending on or after August 6, 2002.⁵⁴⁵

USCIS had interpreted the statutory term “final determination” (as used in CSPA §8(1)) to mean agency approval or denial issued by USCIS or EOIR.⁵⁴⁶ In contrast, the Ninth Circuit in *Padash v. INS*,⁵⁴⁷ rejected the interpretation of a “final determination” as limited to an agency determination, and instead found that there was no final determination of an adjustment application when an appeal of the agency's denial of the application was pending in federal court.

⁵⁴² *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011).

⁵⁴³ *Id.*

⁵⁴⁴ Both USCIS and DOS agree that the statute applies to a child who ages out after August 6, 2002, the statute's effective date. In determining whether a child aged out before or after this date, it is important to remember the 45-day extension contained in the USA PATRIOT Act. See discussion at p. 5-6, *supra*.

⁵⁴⁵ CSPA §8 (not codified in the INA).

⁵⁴⁶ It is not clear whether this remains the agency's interpretation, since the memo in which this interpretation appeared has since been replaced. See “Revised Guidance for the CSPA,” *supra*, replacing “[The Child Status Protection Act—Memorandum Number 2](#),” February 14, 2003.

⁵⁴⁷ *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004).

In *Padash*, the petitioner was a derivative beneficiary of a 4th preference visa petition. He was a child at the time that the visa became available, and applied for adjustment of status within one year of that date. He turned 21, however, while his adjustment application was pending before an immigration judge (IJ). In decisions pre-dating the effective date of the CSPA, both the IJ and the BIA denied his adjustment application because he had “aged out.” Padash filed a petition for review, which was pending on the effective date of the CSPA.

The Ninth Circuit first found that Padash satisfied the definition of a child under Section 3 of the CSPA (8 USC §1153(h)(1)). The court next considered whether the CSPA applied to him. Following basic rules of statutory interpretation, the court determined that because the appeal of his adjustment of status application was pending before the court on the effective date of the statute, no “final determination” had yet been made on the application and the CSPA did apply to him.

The BIA also has resolved an issue relating to the meaning of CSPA § (8)(1). In *Matter of Avila-Perez*,⁵⁴⁸ the BIA held that the CSPA applied where a visa petition for an immediate relative was approved prior to August 6, 2002, but no adjustment application was pending on that date. Instead, the adjustment application was filed subsequently. In so holding, the BIA rejected DHS’ argument that, for this effective date provision to be triggered, an adjustment application must have been pending on August 6, 2002.

Over a year later, USCIS issued a new memorandum that, *inter alia*, implements the holding of *Matter of Avila-Perez*.⁵⁴⁹ This memo reverses USCIS’ earlier position that had required an application for permanent residence to be pending on August 6, 2002. It also attempts to remedy the situation for those wrongly denied or discouraged from filing under the old policy.

First, it allows a beneficiary of a visa petition approved prior to August 6, 2002 to file a motion to reopen his or her adjustment application where that application had been denied, under the prior policy, because it was filed after August 6, 2002, provided the beneficiary meets all other requirements for CSPA coverage.

Second, the memorandum also provides for those who did not apply for adjustment of status but who would have been eligible but for the erroneous agency policy. It allows a beneficiary whose visa became available on or after August 7, 2001, (one year prior to the statute’s adoption date) to apply for adjustment now, even though this adjustment application would not be filed within one year of the visa availability date.

On June 15, 2009, USCIS issued guidance on this memorandum in the form of a “Questions and Answers” fact sheet.⁵⁵⁰ This fact sheet does not offer any new interpretation but instead attempts to explain the April 30, 2008, memorandum.

⁵⁴⁸ 24 I&N Dec. 78 (BIA 2007).

⁵⁴⁹ See Revised Guidance *supra* note 494.

⁵⁵⁰ “Questions and Answers, USCIS Guidance on the Applicability of the Child Status Protection Act (CSPA)” (June 15, 2009), *published on AILA InfoNet at Doc. No. 09061634 (posted June 16, 2009).*

PRACTICE ADVISORY⁵⁵¹

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**IMMIGRATION LAWSUITS AND THE APA:
THE BASICS OF A DISTRICT COURT ACTION**

By Mary Kenney

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1. Introduction

Suits under the Administrative Procedure Act (APA) can be an effective means of challenging unlawful agency decisions or action in immigration cases outside of the removal context. This practice advisory will discuss the primary issues involved in an APA suit, with examples of how these issues have been decided in immigration cases and arguments that can be made to meet the various procedural requirements for an APA action.

- **What is the APA?**

The APA is a federal statute that regulates federal agency action in a number of ways. This practice advisory will focus on the provisions of the APA that allow an individual to sue a federal agency or official in federal district court for unlawful action (including the unlawful failure to act). The suit must be for non-monetary relief such as an injunction. The relevant portions of the APA are found at 5 USC §701 et seq.

The APA states that a person who is suffering a legal wrong because of agency action, or who is adversely affected by agency action within the meaning of a relevant statute, is entitled to judicial review. 5 USC §702. The APA creates a “cause of action.” It provides an individual a basis to sue a federal agency where Congress has not specifically provided such a basis anywhere else in the law. The APA also provides a waiver of sovereign immunity that allows a person to sue the federal government over unlawful agency action for non-monetary damages.

The APA is *not* a jurisdictional statute – it does not give a court the initial authority to hear the case. In APA cases, jurisdiction will be based on 28 USC §1331, the Federal Question Statute.

- **What types of immigration-related claims can be brought under the APA?**

The APA has been used to remedy unlawful action by immigration agencies in various types of immigration cases that fall outside of the removal context.⁵⁵² The following are just a few examples of successful APA challenges:

⁵⁵² See Section 6, *supra*, discussing limits on district court jurisdiction over issues arising from removal proceedings imposed by section 242(a)(5) of the Immigration and Nationality Act.

- Court reversed denial of a religious worker visa petition where it was based upon the improper application of a regulation, *Camphill Soltane v. USDOJ*, 381 F.3d 143 (3d Cir. 2004);
- Court granted preliminary injunction where there was a reasonable question whether directives from the Executive Office for Immigration Review (EOIR) to immigration judges violated the APA, *Baharona-Gomez v. EOIR*, 167 F.3d 1228 (9th Cir. 1999);
- Court reversed denial by United States Citizenship and Immigration Services (USCIS) of specific consent to pursue special immigrant juvenile status in state court, *Young Zheng v. Pogash*, 416 F. Supp. 2d 550 (S.D. Tex. 2006);
- Court reversed USCIS denial of an H-1B visa where the Administrative Appeals Office (AAO) made findings that were not based on evidence in the record and ignored contrary evidence that was in the record, *Fred 26 Importers v. U.S. DHS*, 445 F. Supp. 2d 1174 (C.D. Cal. 2006).

2. Forum/Venue

- **Where is an APA suit filed?**

An APA suit is filed in a federal district court. Venue is determined according to 28 USC §1391(e), which states that a suit against the federal government or a federal official acting in his or her official capacity can be brought in any judicial district where 1) a defendant resides; 2) a substantial part of the events or omissions giving rise to the claim occurred; or 3) the plaintiff resides if no real property is involved in the action.

An APA suit is a civil action and, therefore, the Federal Rules of Civil Procedure and the district court's local rules apply. The local rules are available on each district court's website.

3. Statute of limitations

- **When can an APA suit be filed?**

All courts that have ruled on the issue have applied the general six-year statute of limitations for suits against the United States to APA actions.

The APA does not contain a statute of limitations. However, there is a general six-year statute of limitations for civil actions brought against the United States. 28 USC §2401(a).⁵⁵³ All courts that have considered the question of what statute of limitations

⁵⁵³ The one exception to the six-year statute of limitations is for suits that accrue under a statute that was adopted after December 1, 1990, in which case a four-year statute of limitations is applicable. 28 USC §1658. The APA itself was enacted prior to 1990, so §1658 would not apply to it. However, it is unclear whether §1658 would apply if the APA suit challenged conduct as violating a statute that was enacted after December 1, 1990. In such cases, the safer practice would be to file within four years where possible.

applies to APA actions agree that the six-year limitations period found in §2401(a) is applicable (note, however, that there are no cases specifically addressing this issue in the immigration context). See, e.g., *Trafalgar Capital Associations, Inc. v. Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998); *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647, 656 (2d Cir. 1998); *Pennsylvania Dept. of Public Welfare v. United States Department of Health and Human Services*, 101 F.3d 939, 944-45 (3d Cir. 1996); *Jersey Heights Neighborhood Assoc. v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999); *Dunn McCampbell Royalty Interest Inc. v. National Park Service*, 112 F.3d 1283, 1286 (5th Cir. 1997); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 815 (8th Cir. 2006); *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 438 F.3d 937, 942-43 (9th Cir. 2006); *Daingerfield Island Protective Society v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994).

4. Jurisdiction

- **What is the jurisdictional basis for an APA suit?**

The “federal question” statute, 28 USC §1331, is the basis for jurisdiction in an APA suit for review of agency action. The APA, 5 USC §§702 et seq., can also be listed in the jurisdictional section of a complaint. While the APA does not provide an independent grant of jurisdiction to the court, it does waive sovereign immunity in suits against the government for injunctive relief. Such a waiver is necessary for the court to exercise its jurisdiction. See *FDIC v. Meyer*, 510 U.S. 471 (1994) (sovereign immunity is jurisdictional in nature).

The **APA** is not an independent grant of subject matter jurisdiction to the federal courts. See *Califano v. Sanders*, 430 U.S. 99 (1977). In contrast, 28 USC § 1331 provides a general grant of subject matter jurisdiction to federal district courts in civil actions over “federal questions” arising under the Constitution, laws or treaties of the United States.

The Supreme Court has found that 28 USC §1331 serves as the jurisdictional basis for federal courts “to review agency action.” *Califano*, 430 U.S. at 105; see also *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988) (“[I]t is common ground that if review is proper under the APA, the District Court has jurisdiction under 28 USC §1331”). Courts of Appeals uniformly agree that 28 USC §1331 is the jurisdictional basis for a suit to review agency action under the APA. See, e.g., *Ana International Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004) (finding that this rule applies in the immigration context); *Yeboah v. U.S. DOJ*, 345 F.3d 216, 220 (3d Cir. 2003) (SIJS visa case); *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999) (immigrant visa case); *Sigman Coal Co. v. Apfel*, 226 F.3d 291, 301 (4th Cir. 2000); *Dixie Fuel Co. v. Comm’r of Social Security*, 171 F.3d 1052, 1057 (6th Cir. 1998); *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006).

A plaintiff’s erroneous reliance on the APA as the sole ground of jurisdiction, without alleging jurisdiction under 28 USC §1331, can result in dismissal of the case. See, e.g., *Figgins v. CIS*, No. 1:05-CV-107 TS, 2006 U.S. Dist. LEXIS 28734 (N.D. Ut. May 8,

2006) (case dismissed where viable ground of jurisdiction was not pled along with the APA).⁵⁵⁴

- **Because an APA action is against the federal government, does the APA include a waiver of sovereign immunity?**

Yes. The United States is immune from suit and can only be sued if there is a specific waiver of this immunity. The APA includes a statutory waiver of sovereign immunity for suits that seek non-monetary relief.

The waiver of sovereign immunity, found in 5 USC §702, states:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency . . . acted or failed to act . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

The waiver of sovereign immunity found in the APA applies to suits that seek relief other than money damages. Generally, this would include suits for injunctive and declaratory relief. *See, e.g., Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006); *Sabhari v. Reno*, 197 F.3d 938, 943 (8th Cir. 1999) (challenge to the denial of an immigrant visa petition); *Shah v. Chertoff*, No. 3:05-CV-1608-BH (K) ECF, 2006 U.S. Dist. LEXIS 73754, at *5-6 (N.D. Tex. 2006) (challenge to denial of an L-1A visa extension).

The APA's waiver of sovereign immunity applies to agency action or inaction, including action or inaction by an agency officer or employee. Several courts have held that this waiver applies in suits against unlawful agency action even if the suit is not brought under the APA. *Treasurer of N.J. v. United States Dep't of the Treasury*, 684 F.3d 382, 399-400 (3d Cir. 2012); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 774-75 (7th Cir. 2011) ("The waiver applies when any federal statute authorizes review of agency action, as well as in cases involving constitutional challenges and other claims arising under federal law."); *Trudeau*, 456 F.3d at 186; *Presbyterian Church v. U.S.*, 870 F.2d 518, 524-25 (9th Cir. 1989) (waiver found in a challenge to INS investigation brought directly under the Constitution).

⁵⁵⁴ In *Figgins*, the plaintiffs erroneously relied on INA §279 for jurisdiction. That statute was amended in 1996 such that it now provides a district court with jurisdiction only over actions *brought by the United States*. It does *not* provide jurisdiction for cases *against the United States*. At the same time, however, it also does not bar jurisdiction that is based on some other ground in suits *against* the United States. *See Sabhari v. Reno*, 197 F.3d 938, 942 (8th Cir. 1999).

- **Are there other jurisdictional grounds that can or must be included in an APA complaint?**

Whether there are other jurisdictional grounds to include in the complaint will depend on the nature of the lawsuit and the claims that are raised. It is best to include all potential grounds of jurisdiction.

For example, if you have a claim for mandamus, you will want to include the federal mandamus statute, 28 USC §1361.⁵⁵⁵

In contrast, the Declaratory Judgment Act, 28 USC §2201, is a procedural statute that does not confer jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see also Fleet Bank Nat'l Assoc. v. Burke*, 160 F.3d 883, 886 (2d Cir. 1998); *State ex rel. Missouri Highway and Transportation Com'n v. Cuffley*, 12 F.3d 1332, 1334 (8th Cir. 1997). As such, the Declaratory Judgment Act provides for relief rather than for jurisdiction. The jurisdictional basis for a claim under the Declaratory Judgment Act, as under the APA, is 28 USC §1331.

5. Cause of Action

- **What does it mean for the APA to provide a cause of action?**

The courts have made clear that, while the APA is not a basis for federal jurisdiction, it does provide a “cause of action” for parties who have been adversely affected by agency action. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) (stating that 5 USC §704⁵⁵⁶ provides a cause of action for all “final agency action for which there is no other adequate remedy in a court”); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (holding that §704 expressly creates a “right of action” absent clear and convincing evidence of legislative intention to preclude review); *Chehazeh v. A.G. of the United States*, 666 F.3d 118, 125 n.11 (3d Cir. 2012) (citing *Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009)).⁵⁵⁷

⁵⁵⁵ For more on mandamus actions, *see* the Legal Action Center's (LAC) Practice Advisory “Mandamus Actions: Avoiding Dismissal and Proving the Case” (August 6, 2009), http://www.legalactioncenter.org/sites/default/files/lac_pa_081505.pdf.

⁵⁵⁶ Section 704 states in relevant part: “Actions Reviewable. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”

⁵⁵⁷ The Third Circuit has noted that it and other courts may have used the term “jurisdiction” too “loose[ly]” when dismissing cases for a “lack of jurisdiction” that fail to satisfy the APA prerequisites. *Chehazeh*, 666 F.3d at 125 n.11. In accord with this, the court points out that, in accord with this, “the Seventh and Eighth circuits have recently held that whether a court has the authority to review a decision of the BIA under the APA is not a jurisdictional question.” *Id.* (citing *Vahora v. Holder*, 626 F.3d 907, 917 (7th Cir. 2010); *Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010)).

As a “cause of action,” the APA provides an individual with a basis to sue a federal agency for unlawful agency action where Congress has not specifically provided such a basis anywhere else in the law. It also “permits the courts to provide redress for a particular kind of ‘claim.’” *Trudeau v. Federal Trade Commission*, 456 F.3d 178, 189 (D.C. Cir. 2006). Because the APA creates this specific cause of action, the Supreme Court has held that a separate indication of Congressional intent of the right to sue is not necessary. *Japan Whaling Assoc.*, 478 U.S. at 230 n.4; *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (finding that a private right of action is not necessary because review is available under the APA); *Central S.D. Cooperative Grazing District v. Secretary*, 266 F.3d 889, 894 (8th Cir. 2001) (“Although [the statute at issue] does not authorize a private right of action, the [APA] provides for judicial review of agency action”); *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995) (a plaintiff who has alleged a cause of action under the APA need not rely on an implied right of action under any other statute).

- **What “agency action” is reviewable under the APA?**

The APA states that a person who is suffering a legal wrong because of agency action, or who is adversely affected by agency action within the meaning of a relevant statute, is entitled to judicial review. 5 USC §702. “Agency action” is defined to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 USC §551(13). Thus, for example, an agency action may include the denial of a visa petition or an application for adjustment. It can also include the agency’s failure to adjudicate a visa petition or adjustment application.

6. Limitations on Judicial Review under the APA

There are a number of limitations on when a suit can be brought under the APA. The following section will briefly discuss some of the most frequently encountered of these various limitations:

- **No judicial review where another statute specifically precludes review**

5 USC §701(a)(1) states that the APA does not apply to the extent that another statute precludes judicial review. There are a number of bars to judicial review found in the INA. *See, e.g.*, 8 USC §§212(h) and (i)(2) (precluding judicial review of certain discretionary waivers); §242(a)(2)(B) (precluding review of certain discretionary decisions in both the removal and non-removal context); §242(a)(5) (designating a petition for review in court of appeals as the “sole and exclusive means” of review of a final order of removal). In all cases, it is important to determine if there is a statutory bar to judicial review that could impact the APA claim, and if so, exactly what the scope and impact of that bar is.

One of the more significant INA restrictions on judicial review relevant here is the limit on review of an order of removal to a petition for review in a court of appeals. INA §242(a)(5) (stating that a petition for review filed in a federal court of appeals is the “sole

and exclusive means for judicial review” of an order of removal). Several courts have held that, in addition to barring direct challenges to removal orders by means other than a petition for review, this section bars district court actions that *indirectly* challenge removal orders. *Martinez v. Napolitano*, 704 F.3d 620, 622-23 (9th Cir. 2012) (involving a district court challenge to BIA’s determination that a noncitizen ordered removed was not eligible for asylum); *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011) (finding that district court mandamus action for order compelling USCIS to decide an I-212 waiver and adjustment application was barred as an indirect challenge to a reinstated removal order); *Estrada v. Holder*, 604 F.3d 402, 408 (7th Cir. 2010) (involving a district court challenge to legacy INS’s rescission of the plaintiff’s LPR status). The distinction between an independent claim and an indirect challenge turns on the substance of the relief that the plaintiff is seeking; when a claim challenges “an agency determination that is ‘inextricably linked’ to the order of removal, it is prohibited by section 1252(a)(5).” *Martinez*, 704 F.3d at 622-23 (citations omitted).

A second provision of the INA that impacts APA review is the bar to review of certain discretionary decisions. INA §242(a)(2)(B). This provision, adopted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, §304 (Sept. 30, 1996), contains two parts.

- §242(a)(2)(B)(i) bars review over “any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245.” Prior to 2005, and with respect to adjustment of status applications under INA §245, the majority of courts interpreted this section as limiting review over discretionary denials of adjustment, but not over denials that were based upon nondiscretionary statutory eligibility issues. *Mamigonian v. Biggs*, 710 F.3d 936, 944 n. 5 (9th Cir. 2013) (citing cases).

In 2005, Congress amended §242(a)(2)(B) in the Real ID Act, Pub. L. No. 109-13, 119 Stat. 302 (2005), by adding language indicating that the jurisdictional limits in the section apply to agency decisions made outside of the removal context. *Id.* at 943. Following this, at least one court of appeals has held that district courts no longer have jurisdiction to review adjustment of status denials that are based upon nondiscretionary eligibility issues even when the individual is not in removal proceedings.⁵⁵⁸ *Lee v. USCIS*, 592 F.3d 612, 619-20 (4th Cir. 2010). Two other courts of appeals have held to the contrary, however, finding that – although the Real ID Act extended the limits on discretionary review to district courts – it did not extend the scope of such limitations where the individual was not in removal proceedings. *Mamigonian*, 710 F.3d at 945; *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) (“Determination of eligibility for

⁵⁵⁸ Where an individual is in removal proceedings and able to renew the adjustment application before the immigration judge, INA §242(a)(5) would limit judicial review to a petition for review in the court of appeals following a BIA appeal.

adjustment – unlike the granting of adjustment itself – is a purely legal question and does not implicate agency discretion”).⁵⁵⁹

- §242(a)(2)(B)(ii) limits review over any other action or decision (other than asylum), “the authority for which is specified under this title to be in the discretion” of DHS. As with subsection (i), the Real ID Act extended this provision to non-removal actions in district court. However, over the years, courts have identified important limits on its applicability. First, in *Kucana v. Holder*, 558 U.S. 233 (2010), the Supreme Court made clear that subsection (ii) limits judicial review only when the statute grants discretionary authority to DHS, not when such discretion is granted solely by regulation.

Additionally, a number of courts have held that the grant of discretion to DHS must be clear in the statute; thus, because the INA does not grant DHS discretion to deny an I-130 visa petition, these courts concluded that §242(a)(2)(B)(ii) does not bar review of such denials. See, e.g., *Ginters v. Frazier*, 614 F.3d 822 (8th Cir. 2010); *Ruiz v. Mukasey*, 552 F.3d 269 (2d Cir. 2009); *Ayanbadejo v. DHS*, 517 F.3d 273 (5th Cir. 2008). Similarly, the Eleventh Circuit found that a district court retained review under §242(a)(2)(B)(ii) over statutory eligibility issues related to Temporary Protected Status (TPS) even though the ultimate grant of TPS was in the unreviewable discretion of DHS. *Mejia Rodriguez v. DHS*, 562 F.3d 1137 (11th Cir. 2009).

- **No review of agency action committed to agency discretion by law**

5 USC §701(a)(2) states that agency action is reviewable under the APA except “where it is committed to agency discretion by law.” The government takes an expansive view of what constitutes agency action committed to agency discretion by law, and will move to dismiss a case on this basis. Fortunately, courts have taken a more limited view. The Supreme Court has set forth several important guiding principles.

First, the Court has held that the APA embodies “a basic presumption of judicial review.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). “[O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Id.* at 141.

Under §701(a)(2) of the APA, this presumption of judicial review over agency action can be overcome where such action is committed to agency discretion by law. However, the Supreme Court has held that such circumstances are “rare,” and only occur “where the relevant statute ‘is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” *Lincoln v. Vigil*, 508 U.S. 182, 190-

⁵⁵⁹ For more on the INA bar to review of discretionary decisions, see the LAC’s Practice Advisory “Federal Court Jurisdiction Over Discretionary Decisions After Real ID: Mandamus, Other Affirmative Suits and Petitions for Review” (April 5, 2006), http://www.legalactioncenter.org/sites/default/files/realid_update_040506.pdf.

91 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). In such rare circumstances, the courts may find that there is no law for the court to apply to judge the agency's exercise of discretion. Furthermore, in these cases, the court will find that the grant of discretion to the agency is unfettered and not subject to review under the APA.

Therefore, the first step in any analysis under §701(a)(2) is to look at the statute to see if it sets forth a standard against which to measure the agency action. For example, in *Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d 683, 688 (9th Cir. 2003), the court determined that the statute setting forth eligibility requirements for employment based investor visas provided a standard to measure USCIS's decision of whether to approve a preference petition for such a visa. As such, the court found that there was law to apply and that there could be judicial review under the APA.

Similarly, the court in *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005), found that under the APA, the court could review the denial of an adjustment of status application by USCIS where the denial was based on a statutory eligibility issue. The court found that the statute set forth standards for eligibility under which the court could review the agency action. It distinguished such statutory eligibility issues from denials of adjustment applications in the exercise of discretion. *See also Shah v. Chertoff*, No. 3:05-CV-1608-BH (K) ECF, 2006 U.S. Dist. LEXIS 73754, *28 (N.D. Tex. 2006) (finding that the issue subject to APA review was the question of eligibility for an extension of L-1A visa – for which there were statutory guidelines to apply – and not the discretionary denial of such an extension).

In contrast, courts have found that agency action is wholly committed to agency discretion in limited circumstances where neither the statute nor the regulations provide any guidelines for the exercise of discretion. For example, courts have held that the BIA's refusal to reopen a case sua sponte is unreviewable on this basis. *See, e.g., Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823 (9th Cir. 2011); *but see Chehazeh v. A.G. of the United States*, 666 F.3d 118 (3d Cir. 2012) (upholding district court review over BIA sua sponte reopening of a final removal decision).⁵⁶⁰

Similarly, the Fifth Circuit held that, under prior law, the APA did not apply to review of a grant of prehearing voluntary departure because there were no guidelines for the exercise of this discretionary authority set forth in the law. *Perales v. Casillas*, 903 F.2d 1043, 1050 (5th Cir. 1990). A number of courts also have held that the APA does not apply to the discretionary waiver of a foreign residency requirement under INA §212(e) for the same reason. *See, e.g., Singh v. Moyer*, 887 F.2d 1035, 1039 (7th Cir. 1989); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *Dina v. Attorney General*, 793 F.2d 473, 476-77 (2d Cir. 1986) (per curiam).

⁵⁶⁰ While these and several cases cited below are removal cases, and thus were not brought under the APA, the same reasoning would apply in an APA case.

However, even where a statute provides unfettered discretion to an agency, if the agency adopts regulations or practices to guide its exercise of discretion, these can provide the necessary standard for judicial review of the agency action under the APA. Thus, it is also important to look at regulations and agency guidelines to see if they contain factors that an agency must consider in reaching its decision. If so, judicial review arguably can be exercised under the APA

For example, in *M.B. v. Quarantillo*, 301 F.3d 109, 113 (3d Cir. 2002), the court found that the regulations that governed special immigrant juvenile visa petitions set forth “the material matters to be included in a petition.” The court found that these regulations, coupled with agency field guidance, provided sufficient standards by which to review the agency action. As such, judicial review could be exercised under the APA. Similarly, a number of courts have found that the regulations limit when the BIA can affirm the decision of an IJ without issuing an opinion, and that these regulations therefore supply the “law to apply” for judicial review. See, e.g., *Haoud v. Ashcroft*, 350 F.3d 201, 206 (1st Cir. 2003); *Smirko v. Ashcroft*, 387 F.3d 279, 291-292 (3d Cir. 2004); but see *Ngure v. Ashcroft*, 367 F.3d 975, 987 (8th Cir. 2004) (finding no review because decision committed to agency discretion by law).

- **Exhaustion of administrative remedies**

Generally, before seeking federal court review of a decision of an administrative agency, an individual must exhaust all administrative remedies. If the individual fails to do this, the court may refuse to review the case. The Supreme Court has held, however, that there are limits on when exhaustion of administrative remedies can be required in a suit under the APA. *Darby v. Cisneros*, 509 U.S. 137 (1993). Specifically, *Darby* held that in federal court cases brought under the APA, a plaintiff can only be required to exhaust administrative remedies that are mandated by either a statute or regulation.

For a case to be exempt from the exhaustion requirement under *Darby*, the following criteria must be met:

- the federal suit is brought pursuant to the APA;
- there is no statute that mandates an administrative appeal;
- Either: a) there is no regulation that mandates an administrative appeal; or b) if there is a regulation that mandates an administrative appeal, it does not also stay the administrative decision pending the administrative appeal; and
- The adverse agency decision being challenged is final for purposes of the APA.

For additional discussion of each of these requirements, see the LAC’s Practice Advisory “Failure to Appeal to the AAO: Does it Bar All Federal Court Review of the Case?” (July 22, 2004), http://www.legalactioncenter.org/sites/default/files/lac_pa_072704.pdf.

The *Darby* rule has been applied in immigration cases brought under the APA, with the courts concluding that no exhaustion of administrative remedies was required. See, e.g., *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (APA challenge to denial of a

spousal immigration petition); *Pinho v. Gonzales*, 432 F.3d 193, 202 (3d Cir. 2005) (applying *Darby* and finding that possibility that removal proceedings could be instituted in future in which adjustment application could be renewed did not establish a mandatory exhaustion requirement); *Hillcrest Baptist Church v. USA*, No. C06-1042Z, 2007 U.S. Dist. LEXIS 12782, *6 (W.D. WA. Feb. 23, 2007) (adjustment of status in a religious worker case).

- **Final agency action**

Section 704 of the APA states that “final agency action” for which there is no other adequate remedy in a court is subject to review under the APA. This “finality” requirement is somewhat intertwined with exhaustion; where there are administrative remedies that must be exhausted in accord with *Darby v. Cisneros*, 509 U.S. 137 (1993), an agency action generally will not be “final” until such exhaustion has taken place. See *Pinho v. Gonzales*, 432 F.3d 193, 200 (3d Cir. 2005) (“Finality requires exhaustion of administrative remedies”); see also *Air Espana v. Brien*, 165 F.3d 148 (2d Cir. 1999) (INS fine against airline carriers was not final where airlines’ voluntary appeal to the BIA was still pending); *Beverly Enterprise, Inc. v. Herman*, 50 F. Supp. 2d 7, 12 (D. D.C. 1999) (DOL determination that plaintiff employer violated the Immigration Nursing Relief Act not final where plaintiff’s administrative appeal was still pending).

The “finality” requirement is also distinct from the exhaustion requirement, however. Even where exhaustion of administrative remedies is not required under the *Darby* analysis, the APA still requires that the agency decision be “final” in order for it to be challenged in federal district court. The Supreme Court indicated that generally two conditions must be satisfied for agency action to be “final”: 1) the action must mark the “‘consummation’ of the agency’s decision-making process” and cannot be “of a mere tentative or interlocutory nature;” and 2) the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Under this standard, USCIS’s denial of “specific consent” for a state court dependency hearing for a special immigrant juvenile visa was held to be final agency action. *Zheng v. Pogash*, 416 F. Supp. 2d 550, 556 n.9 (S.D. Tex. 2006). Similarly, an AAO denial of an adjustment application has been found to be a final agency decision when there are no removal proceedings pending in which the issue could be raised. *Pinho v. Gonzales*, 432 F.3d 193, 202 (3d Cir. 2005); but see *Barut v. USCIS*, No. 06-3246-CV-S-RED, 2006 U.S. Dist. LEXIS 61424 (W.D. Mo. 2006) (adjustment denial is not a final agency action because application can be renewed in removal proceedings).

Other immigration agency actions, however, are not final under the APA. For example, USCIS’s finding of marriage fraud was not final agency action; rather, it would only become final action when the visa petition was denied. *Bangura v. Hansen*, 434 F.3d 487, 501 (6th Cir. 2006); see also *Hernandez v. DHS*, No. 06-CV-12457-DT, 2006 U.S. Dist. LEXIS 71786 (E.D. Mich. 2006) (USCIS denial of TPS not final agency action where plaintiff placed in removal proceedings and can renew the TPS claim in these

proceedings); *E.J.'s Luncheonette v. De Haan*, 01 CIV 5603 (LMM), 2002 U.S. Dist. LEXIS 105 (S.D. NY 2002) (denial of a request for Reduction in Recruitment as part of a labor certification was not final agency action; instead, only a Notice of Findings which denied the labor certification would be final action); *Transport Robert Ltee v. U.S. INS*, 940 F. Supp. 338 (D. D.C. 1996) (letter from INS Associate Commissioner refusing to certify truck drivers as B-1 business visitors was not final agency action).

7. Parties to an APA suit

- **Who has standing to bring an APA suit?**

In all federal litigation, Article III of the Constitution imposes a requirement that a plaintiff have “standing” to sue, which generally requires that the plaintiff have suffered a sufficient injury-in-fact. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). However, the APA imposes an *additional* standing requirement. The APA states that:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 USC §702. The Supreme Court has interpreted this provision as requiring that a plaintiff not only have an injury but also demonstrate standing under the APA by showing that “the interests sought to be protected by the [plaintiff are] arguably within the zone of interests to be protected or regulated by the statute ... in question.” *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

The “zone of interest” test does not require a plaintiff to establish that Congress specifically intended to benefit the plaintiff. Rather, there is a two-step inquiry. “First, the court must determine what interests the statute *arguably* was intended to protect, and second, the court must determine whether the ‘plaintiff’s interests affected by the agency action in question are among them.’” *Bangura v. Hansen*, 434 F.3d 487, 499 (6th Cir. 2006) (quoting *NCUA v. First National Bank & Trust Co.*, 522 U.S. 479, 492 (1998)). One court has described this test as “a fairly weak prudential restraint, requiring some non-trivial relation between the interests protected by the statute and the interest the plaintiff seeks to vindicate.” *Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995). Even so, the “zone of interest” test “denies a right of review if the plaintiff’s interests are ... marginally related or inconsistent with the purposes implicit in the statute.” *NCUA*, 522 U.S. at 491 (quotations omitted).

Applying this test in the immigration context, numerous courts have held that a non-citizen beneficiary of a family or employment-based visa petition is within the “zone of interest” of the statute and thus has standing to sue over the denial or revocation of a visa petition. *See, e.g., Bangura*, 434 F.3d at 499-500; *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998); *Ghaley v. INS*, 48 F.3d 1426, 1434 n.6 (7th Cir. 1995); *Taneja v. Smith*, 795

F.2d 355, 358 n.7 (4th Cir. 1986). An applicant for a special immigrant juvenile visa also has been found to fall within the zone of interest of that provision of the INA. *Yu v. Brown*, 36 F.Supp. 2d 922 (D. N.M. 1999).

In contrast, several courts held that noncitizens who were serving criminal sentences for deportable offenses were not within the “zone of interest” of former INA § 242(i) and thus had no standing to challenge the immigration service’s failure to initiate deportation proceedings prior to completion of their criminal sentences. See *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847-48 (10th Cir. 1995); *Giddings v. Chandler*, 979 F.2d 1104, 1109-10 (5th Cir. 1992).

- **Who can be named as a defendant?**

The APA provides that the United States can be named as a defendant in an APA action. 5 USC §702. It also specifies, however, that an action seeking mandatory or injunctive relief “shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.” *Id.* In light of this, it is best to name as defendants the specific individual within the agency who can carry out any injunction or other mandatory order of the court. Note, however, that this does not mean this individual is being sued in his or her individual capacity. Instead, the individual is named as a defendant in his or her official capacity within the agency. For more on this topic, see the LAC’s practice advisory “Whom To Sue And Whom To Serve In Immigration-Related District Court Litigation” (Updated May 13, 2010), http://www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf.

8. Standard of Review

- **What is the scope and standard of review in an APA suit?**

5 USC §706 provides for two general types of relief and generally sets forth the scope of review for each. First, the court can “compel agency action unlawfully withheld or unreasonably delayed.” 5 USC §706(1). This provision is similar to a mandamus action to compel delayed agency decision-making or action. A “central point” is that the “only agency action that can be compelled under the APA is action legally required.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). Moreover, a court may only compel an agency “to take action upon a matter, without directing how it shall act.” *Id.* Congress need not have set a definitive deadline for an agency to act, however, in order for a court to find a delay unreasonable; §706(1) mandates that all action be done within a reasonable amount of time. *Kaplan v. Chertoff*, No. 06-5304, 2007 U.S. Dist. LEXIS 22935, *71-72 (E.D. Pa. Mar. 29, 2007) (finding that an APA claim was adequately stated against both USCIS and the FBI with respect to delays in adjustment of status and naturalization applications).

Second, the APA states that a court can “hold unlawful and set aside agency actions, findings and conclusions” that meet one or more of six standards. 5 USC §706(2). Four

of these standards apply to all cases without limitation, and thus most often would apply to the type of suit discussed in this practice advisory. These four standards are:

- Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
- Contrary to constitutional right, power, privilege or immunity;
- In excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
- Without observance of procedures required by law.

5 USC §§706(2)(A)-(D); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (“In all cases agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion or otherwise no in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”).

9. Discovery

- **Can discovery be carried out against the government agency in an APA suit?**

Yes, in certain cases. The general rule in an APA action is that judicial review is limited to the administrative record and thus no discovery is allowed. There are exceptions to this rule. Moreover, in any case in which there are additional claims besides the APA claim, the court may permit discovery outside of the administrative record with respect to the non-APA claims.

As a general rule, judicial review under the APA is limited to the administrative record that was before the agency when it made its decision. *Overton Park*, 401 U.S. at 420; *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review [in an APA suit] should be the administrative record already in existence, not some new record made initially in the reviewing court”). Based upon this general rule, the government will frequently oppose discovery in an APA action.

There are exceptions to the general rule. The primary exception applies when there is no administrative record for the court to review, or the record may be insufficient with respect to the claims in the suit. Such an incomplete record “may frustrate judicial review,” *Voyageurs National Park Assoc. v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004), and discovery may be necessary to supplement the agency record. *See also Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (court may inquire outside the record when necessary to explain the agency’s action or when the agency has relied on documents not in the record).

This often will be the case where the suit challenges a pattern or practice of agency decisions or action, rather than the decision in one individual case. In such pattern and practice cases, there may not be a single agency record to be reviewed and the court may permit discovery.

Even in individual cases, however, discovery may be necessary to supplement the agency record. To remedy an incomplete or inadequate record, the district court may allow discovery, although the court may narrowly tailor the scope of discovery to respond to whatever is missing in the agency record. *Voyageurs National Park Assoc.*, 381 F.3d at 766. In particular, the Supreme Court has said that inquiry into the mental processes of the agency decision-maker is to be avoided unless it is “the only way there can be effective judicial review.” *Overton Park*, 401 U.S. at 420.

For example, in an APA challenge to the denial of a marriage-based visa petition for alleged fraud, the plaintiffs sought to depose two agency employees engaged in the investigation of the visa petition. *Sabhari v. Cangemi*, No. 04-1104 ADM/JSM, 2005 U.S. Dist. LEXIS 3550 (D. Minn. 2005). The plaintiffs argued that these depositions were necessary because the record was incomplete in that there was no contemporaneous administrative record to explain why USCIS deviated from its normal practices and procedures when investigating the marriage petition. *Id.*, 2005 U.S. Dist. LEXIS 3550, *6. The district court agreed with this, but more narrowly tailored the discovery, ordering that the defendant USCIS was to submit the information that plaintiffs sought in affidavits rather than by deposition. *Id.*

10. Attorney’s Fees

- **Is it possible to get attorney’s fees in these cases?**

Yes. The Equal Access to Justice Act (EAJA), 28 USC § 2412(d) & 5 USC § 504 et seq., authorizes payment of attorney’s fees and costs for successful litigation against the government in the federal courts. Thus, it is always a good idea to request attorney’s fees as part of the relief sought in an APA case. For more on EAJA fees, see the LAC’s practice advisory, “Requesting Attorney’s Fees Under the Equal Access to Justice Act” (Updated Dec. 15, 2008), http://www.legalactioncenter.org/sites/default/files/EAJA_Fees_04_07_06.pdf.

PRACTICE ADVISORY⁵⁶¹

May 2, 2013

**MONCRIEFFE V. HOLDER: IMPLICATIONS FOR DRUG CHARGES
AND OTHER ISSUES INVOLVING THE CATEGORICAL APPROACH**

INTRODUCTION

Under the immigration laws as long interpreted by the courts, a noncitizen generally is not subject to removal or other negative immigration consequences based on a criminal conviction unless the conviction fits categorically within one of the criminal removal grounds. The “categorical approach” requires adjudicators to determine whether *all* of the conduct covered under the statute of conviction (or, under the “modified categorical approach,” the conduct covered under a divisible sub-portion of the statute) fits within the alleged criminal removal classification. If it does not, the person does not fit within the removal classification. Importantly, adjudicators may not consider the particular conduct underlying the defendant’s conviction. Application of the categorical approach follows upon Congress’ choice to require a conviction and thus to rely on the criminal process to determine immigration consequences of criminal conduct.

In recent years, however, in response to federal government efforts to cut back on the categorical approach, the Board of Immigration Appeals (BIA), the Attorney General and some federal courts have issued rulings that have chipped away at it. Examples include the following:

- The BIA and some federal courts decided that a noncitizen convicted under a state statute that covers non-deportable conduct may nevertheless be deemed deportable as long as the statute’s “elements” match up with those of the federal statute cross-referenced in the relevant deportation provision. *See, e.g., Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008); *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011).
- The BIA and some federal courts found that a noncitizen seeking relief from removal may be deemed convicted of a relief-barring offense if the record of conviction is inconclusive, based on the noncitizen’s statutory burden of proof

⁵⁶¹ This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

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in the relief eligibility context. *See, e.g., Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc).

- The BIA held that a criminal statute may be deemed divisible allowing application of a modified categorical approach (where the adjudicator reviews the record of conviction to determine under which portion of the statute a person was convicted) even where the different means of committing a violation are not enumerated in the statute as separate alternatives. *See Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).
- Former Attorney General Mukasey ruled that the government may, in some cases, go beyond the categorical and modified categorical approach to look at evidence outside the record of conviction in order to determine removability under the crime involving moral turpitude ground. *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

On April 23, in *Moncrieffe v. Holder*, the Supreme Court, in unequivocal language, reaffirmed the traditional categorical approach for determining whether a conviction falls within a removal classification. Specifically, the Court held that a Georgia marijuana possession with intent to distribute conviction may not be deemed a drug trafficking aggravated felony for removability purposes when the statute of conviction covers some conduct (social sharing of marijuana) falling outside the aggravated felony drug trafficking definition at issue. The Court thus explicitly rejected *Matter of Aruna*'s deviation from the traditional categorical approach. The Court's analysis also significantly undermined the reasoning behind the other above-listed retreats from the categorical approach. *See Moncrieffe v. Holder*, No. 11-702, 569 U.S. ___, 2013 U.S. LEXIS 3313, 2013 WL 1729220 (April 23, 2013).

This practice advisory covers: (1) the holding in *Moncrieffe*; (2) the decision's potential broader implications; (3) strategies for noncitizen criminal defendants; and (4) steps that lawyers (or immigrants themselves) should take immediately in pending or already concluded removal proceedings affected by *Moncrieffe*.

* * *

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I. THE SUPREME COURT’S SPECIFIC HOLDING IN *MONCRIEFFE* AND IMPLICATIONS FOR OTHER STATES’ MARIJUANA STATUTES.

A. The *Moncrieffe* Holding

Adrian Moncrieffe, a long time permanent resident, pleaded guilty in 2007 to the Georgia offense of possession of marijuana with intent to distribute. The case arose when the police found 1.3 grams of marijuana in his car. The federal government sought to deport him for the conviction, arguing that it was punishable as a felony under the Controlled Substances Act (CSA) and thereby automatically an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). Adopting the government’s argument, the immigration judge ordered Mr. Moncrieffe removed. Both the BIA and the Court of Appeals for the Fifth Circuit affirmed, rejecting Mr. Moncrieffe’s reliance upon 21 U.S.C. § 841(b)(4), which makes distribution of a small amount of marijuana without remuneration punishable only as a misdemeanor. The Fifth Circuit’s decision accorded with prior decisions from the Sixth and First Circuits, but conflicted with decisions from the Second and Third Circuits.⁵⁶² The U.S. Supreme Court granted certiorari to resolve the circuit split.

In a 7-2 decision, the Court reversed the Fifth Circuit. It held that when mere social sharing of marijuana is punishable under a state statute as “possession with intent to distribute,” no convictions under such a statute would constitute an aggravated felony. *Op. at 1.*⁵⁶³ In doing so, the Court unequivocally endorsed the categorical approach, reaffirmed that any exceptions to the approach are limited, and then found no such exceptions applicable here.

The Court began its analysis by affirming the strict application of the categorical approach to aggravated felony determinations:

Under this approach we look “not to the facts of the particular prior case,” but instead to whether “the state statute defining the crime of conviction” categorically fits within the “generic” federal definition of a corresponding aggravated felony. [*Gonzales v. Duenas-Alvarez*, 549 U.S.183, 186 (2007)] (citing [Taylor v. United States](#), 495 U.S. 575, 599-600 (1990)). . . . [A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense “‘necessarily’ involved . . . facts equating to [the] generic [federal offense].” *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion)

⁵⁶² Compare 662 F.3d 387 (5th Cir. 2011) (case below), *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011) (is an aggravated felony), and *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008) (same), with *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008) (is not an aggravated felony), and *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003) (same).

⁵⁶³ The citations to *Moncrieffe* used throughout this practice advisory (*Op. at* __) refer to the slip opinion, available at http://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.

Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction “rested upon [nothing] more than the least of th[e] acts” criminalized, and then determine whether even those acts are encompassed by the generic federal offense. *Johnson v. United States*, 559 U.S. 133, 137 (2010). . . .

The aggravated felony at issue here, “illicit trafficking in a controlled substance,” is a “generic crim[e].” *Nijhawan*, 557 U.S., at 37. So the categorical approach applies. *Ibid*.

Op. at 5-6.

Citing to *Lopez v. Gonzalez*, 549 U.S. 47 (2006), the Court explained that to qualify as an aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), a state drug conviction “must meet two conditions. First, it must ‘necessarily’ proscribe conduct that is an offense under the CSA; and second, the CSA must ‘necessarily’ prescribe felony punishment for that conduct.” Op. at 6. The Court found that the Georgia offense satisfied the first condition, but not the second. Specifically, the Court observed that while the federal crime of possession with intent to distribute a controlled substance under 21 U.S.C. § 841(a)(1) may be punished as a felony, it also may be also be punished as a misdemeanor under § 841(b)(4) if only a small amount of marijuana is distributed for no remuneration. The Court concluded that because the conviction did not establish that it involved either remuneration or more than a small amount of marijuana, it did not qualify as an aggravated felony:

In Georgia, the statute of conviction does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, *see, e.g., Taylor v. State*, 260 Ga. App. 890, 581 S.E.2d 386, 388 (2003) (6.6 grams), and that “distribution” does not require remuneration, *see, e.g., Hadden v. State*, 181 Ga. App. 628, 628–629, 353 S.E.2d 532, 533–534 (1987). So Moncrieffe’s conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not “necessarily” involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

Op. at 9.

Significantly, the Court flatly rejected the Board and Fifth Circuit’s conclusion that any marijuana distribution conviction is presumptively a felony because, *in practice*, “that is how federal criminal prosecutions for marijuana distribution operate.” Op. at 11-12. Rather, the Court reversed the presumption, reasoning “that ambiguity in criminal statutes referenced by the immigration statute must be construed in the noncitizen’s favor,” even if the result is that some offenders avoid aggravated felony status. Op. at 20-21. The Court also rebuffed the government’s reliance on *Nijhawan v. Holder*, 557 U.S. 29 (2009), in suggesting “the § 841(b)(4) factors are like the monetary threshold” at issue in that case

and “thus similarly amenable to the circumstance-specific inquiry” employed there. Op. at 17. The Court unequivocally clarified that drug trafficking is a generic removal ground to which the categorical approach applies, not a circumstance-specific one, so that there is no place for the government-proposed (and Board-endorsed) “minitrials,” in which noncitizens must demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana.

The Court overruled the contrary precedent in the Fifth, First, and Sixth Circuits, see, e.g., *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), as well as the Board’s decisions in *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012) and *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008).

B. Implications for Other States’ Marijuana Statutes

The Court’s holding in *Moncrieffe* means that many convictions for distribution of marijuana will no longer constitute an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). (Note, however, that such convictions will continue to qualify as controlled substance offenses, which render a person removable under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) and/or inadmissible under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).) Specific implications include:

- In states similar to Georgia, where the statute does not require remuneration or any minimum quantity of marijuana and where there is no separate offense for social sharing of marijuana, a conviction for marijuana distribution should not constitute an aggravated felony (though it may be necessary or at least helpful to point to state case law that makes clear that the statute would cover small amounts of marijuana and the exchange of drugs without remuneration). See op. at 6 (explaining “there must be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’”) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). This is the case even for noncitizens whose underlying conduct may have consisted of transfer for remuneration, or a large amount of marijuana. Roughly half the states employ broad statutes that do not require remuneration or any minimum quantity of marijuana. Op. at 19.
- In other states, there may be a series of separate offenses, only one of which specifically covers social sharing of marijuana. See, e.g., N.Y. Penal Law Ann. § 221.35 (West 2008) (“A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, without consideration, [marihuana] of an aggregate weight of two grams or less; or one cigarette containing marihuana.”). A conviction under such a statute would not constitute an aggravated felony. Thirteen states have similar statutes. Op. at 18 n.10. Whether a conviction under *another* marijuana distribution statute in one of these states is an aggravated felony would depend on whether or not the other statute also may cover distribution of a small amount of marijuana without remuneration. See, e.g., N.Y. Penal Law Ann. § 221.40 (West 2008) (which covers distribution without remuneration of 2 to 25 grams of marijuana)

- Convictions under statutes that include an element of “selling” would seem to establish remuneration (unless case law specified otherwise) and would thus constitute an aggravated felony.
- Convictions under statutes that proscribe the distribution of more than a small amount of marijuana also would qualify as an aggravated felony. Neither the CSA nor *Moncrieffe* defines “small amount,” but the Court noted the Board’s suggestion of 30 grams as a “useful guidepost,” based on the exception in INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). Op. at 8 n.7 (citing *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 703 (2012)).

Section III provides additional discussion of arguments that certain distribution offenses may not qualify as aggravated felonies.

II. THE DECISION’S POTENTIAL BROADER IMPLICATIONS.

The Supreme Court’s decision in *Moncrieffe* also has important broader implications for various challenges to government deviations from the categorical approach. This section presents a preliminary analysis of some of the potential implications and arguments.

A. Burden of Proof for Relief

***Moncrieffe* supports the argument that the immigrant’s burden of proof in the relief eligibility context does not affect the legal determination of whether a particular conviction does or does not fall within a criminal bar category – use in challenges to *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009)**

When a noncitizen applies for relief from removal, he or she has the burden of proof to demonstrate eligibility for that relief. See INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A). For many forms of relief, a person is not eligible if he or she has been convicted of specified crimes. For example, lawful permanent residents are ineligible for cancellation of removal if they have been convicted of an aggravated felony. See INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). Likewise, individuals convicted of aggravated felonies are ineligible for asylum and naturalization.⁵⁶⁴ The BIA and several courts have interpreted the burden of proof provision to mean that a noncitizen with a past conviction is ineligible for relief when the record of conviction is inconclusive as to whether the conviction falls within the criminal bar category. See, e.g., *Matter of Almanza-Arenas*, 24

⁵⁶⁴ See INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (making a particularly serious crime a bar to asylum eligibility); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (deeming an aggravated felony conviction to be a particularly serious crime); INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (requiring good moral character for naturalization); INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (deeming individuals convicted of an aggravated felony as not having good moral character). The good moral character bar to naturalization applies to murder convictions at any time and to other aggravated felony convictions on or after November 29, 1990. *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1994).

In addition, DHS can terminate asylum status if the person is convicted of an aggravated felony. INA § 208(c)(2), 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 1208.24.

I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009). But see *Thomas v. Att’y Gen. of U.S.*, 625 F.3d 134 (3d Cir. 2010) (holding that inconclusive record is sufficient to establish that aggravated felony bar does not apply); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008)(same). See also *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

The *Moncrieffe* Court’s analysis rejects the notion that a criminal bar classification, such as the aggravated felony inquiry at issue in the case, may be treated as a factual question to which a burden of proof provision would be relevant.⁵⁶⁵ Throughout the decision, the Court treats the adjudication of whether a past conviction falls within the aggravated felony definition not as a factual question, but instead as a legal determination that looks at the language of the statute of conviction and then determines from the statutory language what the conviction “necessarily” involved. Thus, the Court states: “Under this approach we look ‘not to the facts of the particular prior case,’ but instead to whether ‘the state statute defining the crime of conviction’ categorically fits within the ‘generic’ federal definition of a corresponding aggravated felony.” Op. at 5.

The Court then explains: “Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must *presume* that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized, . . .” Op. at 5 (emphasis added). Nothing in the Court’s discussion suggests that this legal determination/presumption would change based on a burden of proof provision. In fact, the government’s regulations provide that the immigrant’s “preponderance of the evidence” burden with respect to an application for relief from removal is not even triggered unless the evidence indicates that a ground for denial may apply. See 8 C.F.R. § 1240.8(d). In any event, such a “preponderance of the evidence” burden is relevant to questions of a factual nature (e.g., other relief eligibility questions such as length of residence in the United States)⁵⁶⁶ and not to the strict categorical approach legal inquiry the Supreme Court applies to a criminal classification question.

The following portions of the Court’s decision in *Moncrieffe* provide further support for challenging the government’s reliance on the noncitizen’s burden of proof in the relief eligibility context:

- The Supreme Court expressly states that the analysis of whether a noncitizen is “convicted” of an aggravated felony in the relief eligibility context – the context of its earlier decision in *Carachuri-Rosendo v. Holder*, 560 U.S. ___ (2010) (concerning eligibility for cancellation of removal) – is “the same” as the analysis in the deportability context in which the issue arises in *Moncrieffe*. Op. at 6 n.4.

⁵⁶⁵ In fact, on April 30, 2013, the Ninth Circuit ordered the parties in *Almanza-Arenas v. Holder*, No. 09-71415, to submit supplemental briefs addressing whether *Moncrieffe* overrules *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

⁵⁶⁶ See 2 McCormick on Evidence § 339, at 484 (a “preponderance of the evidence” standard applies to factual questions).

- The Court confirms this by pointedly observing that once an individual's conviction is found not to be an aggravated felony for deportability purposes, the person will be eligible for relief: "At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria." Op. at 19.⁵⁶⁷
- The Court rejects an approach that would require the submission of evidence at a post hoc minitrial in immigration court to determine whether a conviction fits within a criminal offense category, op. at 15-16, as would presumably be required if the crime classification question is treated as a case-specific factual question subject to a burden of proof provision.
- Further, the Court notes that the post hoc minitrial can result in different determinations relating to convictions of the same offense. As the Court explains, "two noncitizens, each 'convicted of' the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." Op. at 16. The categorical approach was designed to avoid the potential unfairness of such an outcome. *Id.* These kinds of disparities are an inevitable result of a rule that an inconclusive record of conviction cannot show relief eligibility, because noncitizens convicted of the same offense will be found eligible, or not, depending on what facts happen to appear in the record of conviction, or what the government happens to introduce in the case of a detained immigrant who cannot access criminal records herself. *See Young*, 697 F.3d at 992 (Fletcher, J., dissenting in part). The Court also observes that it is no answer to say that defense counsel in the criminal case could build an appropriate record when the facts are fresh because "there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts . . . that are irrelevant to the offense charged." Op. at 18.

* * *

⁵⁶⁷ The conclusory fashion in which the Court finds that there is no bar to relief echoes the Second Circuit's incredulity in *Martinez v. Mukasey* that the government even made the argument that the noncitizen had to prove that he or she was not convicted of an aggravated felony. *See Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (Calabresi, J.) ("The Government makes one additional and rather startling argument . . . This argument flies in the face of the categorical approach insofar as it requires any alien seeking cancellation of removal to prove the facts of his crime to the BIA.").

B. What Constitutes a Divisible Statute

***Moncrieffe* supports the understanding that a statute may only be deemed divisible and subject to the modified categorical approach when it describes different crimes separately – use in challenges to *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012); *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc).**

The courts have stated that, when a statute of conviction is “divisible,” i.e., has at least one portion of the statute covering only conduct falling within the criminal classification at issue, the adjudicator may go beyond the statutory text to look at the record of conviction in order to determine if an individual’s conviction falls within that portion of the statute. There is a dispute, however, about what constitutes a divisible statute. Arguably, the alternative means of committing a violation must be separately described in the statute, such as by use of subsections, in order for the statute to be deemed divisible. The BIA has taken a broader view, finding divisibility in “all statutes of conviction, regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct.” *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

Moncrieffe implicitly rejects the BIA’s broader view of divisibility. In describing when it has allowed a court to look beyond the language of the statute to the record of conviction, the Court speaks of “state statutes that contain several different crimes, each described separately” Op. at 5. Then, in analyzing the Georgia statute of conviction at issue in *Moncrieffe*, the Court applies such a view of divisibility to determine which of the following crimes, listed in the statute in the disjunctive, Mr. Moncrieffe was convicted of – “possess, have under [one’s] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.” After looking to the record of conviction (the plea agreement) to find that Mr. Moncrieffe was convicted of the crime of possession with intent to distribute marijuana, op. at 7, the Court then goes on to consider whether this offense was “necessarily” an aggravated felony. Significantly, in doing so, the Court looked only at the statute of conviction without looking again at the record of conviction. Op. at 9. Thus, the Court indicated it did not consider the “possession with intent” prong further divisible as to the critical factors of amount of marijuana or the presence of remuneration – even though there is a broad range of conduct that may result in this conviction – given that the statute does not describe different crimes based on such factors. Op. at 9.

Practitioners should be aware that the Court has pending a criminal sentencing case that squarely raises the question of when a criminal statute may be deemed divisible. *Descamps v. U.S.*, No. 11-9540, argued on January 7, 2013. The Court’s upcoming decision in *Descamps* may provide further and more detailed guidance on when a criminal statute may be deemed divisible for immigration purposes.⁵⁶⁸

C. Challenging *Matter of Silva-Trevino*

⁵⁶⁸ For further guidance on the possible significance of *Descamps* to immigration cases, see K. Brady & I. Wheeler, *Waiting for Descamps: How the Supreme Court Might Save Your Crim-Imm Case* (Feb. 2013), available at <http://immigrantdefenseproject.org/wp-content/uploads/2013/02/Descamps-advisory-final.pdf>.

***Moncrieffe* reaffirms the principle that the categorical approach looks only to the statute of conviction (and, where the statute is divisible, the record of conviction) and not extrinsic evidence – use in challenges to *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)**

In *Matter of Silva-Trevino*, former Attorney General Mukasey ruled that the government may go beyond the categorical and modified categorical approach to look at facts and extrinsic evidence outside the record of conviction to determine removability under the crime involving moral turpitude (“CIMT”) ground. 24 I&N Dec. 687 (AG 2008).

Moncrieffe provides many arguments to challenge *Silva-Trevino*. First, the decision refutes one of the government’s main arguments in defense of *Silva-Trevino*. The government argued in *Moncrieffe*, as it has in CIMT context, that the statute at issue requires a “circumstance-specific approach,” as was applied in *Nijhawan v. Holder*, 557 U.S. 29 (2009). In *Nijhawan*, the Court considered INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) -- “an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000” – and determined that the \$10,000 loss requirement was a case-specific circumstance to which the categorical approach does not apply.

But the Supreme Court in *Moncrieffe* found that applicability of the *Nijhawan* circumstance-specific approach was a rare exception to the general applicability of the categorical approach. It found that the circumstance-specific approach applies only when the “circumstance” itself is written into the immigration statute by a qualifying phrase, such as “in which,” describing a subset of offenses to which the removal ground applies. Op. at 17 (noting that the monetary threshold language at issue in *Nijhawan* triggered the circumstance-specific examination). By contrast, the provision at issue in *Moncrieffe* was a generic offense to which the categorical approach applies because the immigration statute prescribes no circumstantial limitations. Op. at 17; see also *id.* at 15 (“[N]o statutory authority for . . . case-specific factfinding in immigration court . . . is apparent in the INA.”). *Moncrieffe* thus supports the conclusion reached by several courts that the CIMT removal grounds do not permit “circumstance-specific” treatment under *Nijhawan* because they include no express directive to examine underlying conduct. See *Prudencio v. Holder*, 669 F.3d 472, 483 (4th Cir. 2012); *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1310 n.7 (11th Cir. 2011); *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 477 (3d Cir. 2009).

Further, *Moncrieffe* provides the following additional support for challenging *Matter of Silva-Trevino*:

- *Moncrieffe* cites with approval the long history of applying the categorical approach in immigration cases specifically addressing the CIMT removal grounds. The Court observes that the categorical approach “has a long pedigree in our Nation’s immigration law,” citing a scholarly article examining cases applying that approach as early as 1913 to the exclusion ground for CIMTs. Op. at 6 (citing Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. Rev. 1669 (2011)). The Court repeatedly cites those early CIMT cases for the proposition that the immigration statute generally requires an analysis of the conduct

necessary to offend the criminal statute, rather than the underlying facts of a particular case. Op. at 5, 6, 16.

- *Moncrieffe* holds that, “*post hoc* investigation into the facts of predicate offenses” conducted in “minitrials conducted long after the fact” yields arbitrary and unfair results, especially where respondents in removal proceedings are detained and/or unrepresented and lack meaningful access to evidence. Op. at 15, 16. The Court thus rejected a rule under which removal determinations hinge on the fortuity of “what evidence remains available” years later or “how it is perceived by an individual immigration judge.” Op. at 16. Further, the categorical approach ensures “that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law.” Op. at 20 n.11.
- *Moncrieffe* observes that the minitrials that the government proposed in that case “would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention . . . where they have little ability to collect evidence.” Op. at 16. This starkly contradicts claims that the government sometimes makes in defense of *Silva-Trevino*, namely, that it, rather than a detained noncitizen, is the only party prejudiced by re-trying long-past criminal conduct in a civil removal proceeding because it (sometimes) bears the burden of proof.
- Although *Moncrieffe* acknowledges that Sixth Amendment concerns about judicial fact-finding “do not apply in th[e] context” of removal proceedings, op. at 13, the Court reaffirms that the analytical limits imposed by Court decisions in the criminal context, such as in *Taylor v. U.S.*, 495 U.S. 575 (1990), and *Shepard v. U.S.*, 544 U.S. 13 (2005), still apply with full force in the immigration context. Op. at 5, 7, 16, 22. This undermines *Silva-Trevino*’s contention that the lack of Sixth Amendment concerns in removal proceedings justify the abandonment of the categorical approach. See *Silva-Trevino*, 24 I&N Dec. at 700-01.

D. Minimum Conduct Approach

***Moncrieffe* reaffirms the general principle that one must look to the minimum conduct covered under the statute of conviction – use in challenges to agency decisions that disregard or overlook non-removable conduct covered by the statute of conviction**

Moncrieffe reaffirms the general principle that, under the categorical approach, the adjudicator must look to the minimum conduct covered under the statute of conviction. The Court states: “Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.” Op. at 5.

The Court dismissed government concerns that application of such a minimum conduct test would lead to noncitizens escaping aggravated felony treatment. The Court stated: “[Some] offenders may avoid aggravated felony status by operation of the categorical approach. But the Government’s objection to that underinclusive result is little more than an attack on the categorical approach itself. We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions.” Op. at 20.

The Court’s strong reaffirmation of the minimum conduct test will provide additional support for challenges to agency decisions that disregard or overlook that a statute of conviction covers conduct falling outside the removal ground. See, e.g., agency decisions at issue in *Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013), *petition for rehearing pending* (agency found New York drug “sale” conviction to be drug trafficking aggravated felony even though the offense covers offer to sell conduct not covered under the federal “drug trafficking crime” definition referenced in the aggravated felony definition); *Rojas v. Attorney General*, No. 12-1227 (3d Cir.), *sua sponte rehearing en banc pending* (agency found Pennsylvania drug paraphernalia conviction to be controlled substance offense even though Pennsylvania defines “drug” more broadly than federal definition of “controlled substance”); *Matter of Mendez-Orellana*, 25 I&N Dec. 254, 255-56 (BIA 2010) (BIA treated a conviction under a firearm statute that included antique firearms as presumptively deportable even though the federal firearm statute referenced in the deportation statute excludes antique guns as an affirmative defense).

The Court, however, does identify two limitations on the minimum conduct test. First, the Court describes what has been called the modified categorical approach. It indicates that where the statute of conviction is divisible (such that it identifies at least one sub-crime whose minimal conduct does fall within the removal ground), the adjudicator may look to the record of conviction to “determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or ‘some comparable judicial record of the factual basis for the plea.’” Op. at 5 (quoting *Nijhawan*, 557 U.S. at 35 (quoting *Shepard*, 544 U.S. at 26)).

Second, the Court states: “our focus on the minimum conduct criminalized by the state statute is not an invitation to apply ‘legal imagination’ to the state offense; there must be a ‘realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’” Op. at 5-6 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Later, the Court addresses the aggravated felony conviction under INA § 101(a)(43)(C), which refers to a federal firearms statute with an exception for antique firearms. See INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C) (referencing 18 U.S.C. § 921, which includes the exception at § 921(a)(3)). The Court states in dictum that, in order to establish that a conviction under a state firearms law that does not have an antique firearms exception is an aggravated felony, the “realistic probability” standard must be met, i.e., “a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.” Op. at 21.

One way a person may show that the state actually prosecutes the relevant offense is to cite state case law. Op. at 9 (citing Georgia court cases to show that Georgia does

prosecute the marijuana offense at issue in *Moncrieffe*). The realistic probability standard also may be satisfied, however, where the criminal statute expressly covers the conduct falling outside the removal category. See *Ramos v. U.S. Atty Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (finding that “realistic probability” is created where the statute’s language expressly demonstrates “that it will punish crimes that do qualify as theft offenses and crimes that do not.”); *U.S. v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (finding that because Oregon burglary statute explicitly covers vehicles and boats “that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of” burglary). See also *Kawashima v. Holder*, 132 S. Ct. 1166, 1175 (2012) (Court accepted the government’s argument that a federal tax evasion conviction was not categorically a “fraud or deceit” aggravated felony because the tax evasion provision covered certain non-deceitful conduct without citing a case that actually involved prosecution for such conduct and despite government concession at oral argument that such cases would be rare).

➤ Practice Tip

A practitioner should examine closely the notice to appear to determine if the statute of conviction necessarily satisfies the generic ground of deportability charged in the notice to appear. As discussed above, *Moncrieffe* highlighted the firearm aggravated felony definition as one such situation where a conviction may not satisfy the generic ground because the federal criminal statute (18 U.S.C. § 921) contains an exception for antique firearms. Op. at 21. This means that a person cannot be convicted for a federal firearm offense for having an antique gun or a gun that used antique ammunition.

The California Penal Code, unlike 18 U.S.C. § 921(a)(3), makes it crime to possess an antique firearm. P.C. § 25400(a); see *Gil v. Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011) (holding that conviction under predecessor California statute met federal gun definition even though former statute included conviction for an antique firearm). Despite the fact that convictions under the California statute would seem to necessarily fail the categorical inquiry, the noncitizen convicted under this provision still must show a realistic probability that California would prosecute a defendant for having an antique weapon. See op. at 21 and discussion above regarding ways to meet the “reasonable probability” standard.

E. Rule of Lenity

***Moncrieffe* reaffirms the applicability of the criminal rule of lenity in immigration cases involving interpretation of terms also used in criminal statutes – use in challenges to government interpretations of terms such as “drug trafficking crime,” “crime of violence,” “aggravated felony,” and “conviction.”**

In *Moncrieffe*, the Supreme Court reaffirms the applicability of the criminal rule of lenity in immigration cases that involve interpretation of terms contained in criminal statutes. The Court states: “[We] err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizens’ favor.” Op. at 20-21 (citing *Carachuri-Rosendo v. Holder*, 560 U.S. ___, ___ (slip op. at 17) (2010);

Leocal v. Ashcroft, 543 U.S. 1, 11, n.8 (2004)). Thus, practitioners should cite the criminal rule of lenity in support of arguments relating to interpretation of criminal statutes cross-referenced in the Immigration and Nationality Act. *See, e.g.*, federal criminal code “drug trafficking crime” and “crime of violence” definitions referenced in INA §§ 101(a)(43)(B)&(F); 8 U.S.C. §§ 1101(a)(43)(B)&(F). Practitioners also should consider citing the criminal rule of lenity in support of arguments relating to the reach of terms in the immigration statute itself that have criminal law applications. *See, e.g.*, “aggravated felony” and “conviction” terms referenced in INA § 276(b), 8 U.S.C. § 1326(b) (INA criminal illegal reentry statute where these terms are used as defined in INA §§ 101(a)(43) and 101(a)(48)(A)).

F. No Deference to the Agency

***Moncrieffe* represents yet another criminal removal case where the Court does not discuss or even mention *Chevron* deference to the agency when determining how the categorical approach is applied – use in any challenges where the government seeks *Chevron* deference to its interpretation of how the categorical approach is applied**

Moncrieffe represents yet another criminal removal case where the Court rejects the immigration agency’s deviation from the categorical approach without considering or even mentioning deference to the agency under *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). This supports the notion that the categorical approach has been effectively incorporated into the statute as a result of its “long pedigree in our Nation’s immigration laws,” as recognized by the Court in *Moncrieffe*. Op. at 6 (citing Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. Rev. 1669, 1668-1702, 1749-1752 (2011) (tracing judicial decisions back to 1913)). Practitioners should point to the Supreme Court’s history of not applying *Chevron* when the government seeks deference to its decisions cutting back on the categorical approach in immigration cases.

III. ANALYZING CRIMINAL STATUTES AND STRATEGIES FOR CRIMINAL DEFENDANTS.

For criminal defendants, the *Moncrieffe* decision provides a possible roadmap for avoiding adverse immigration consequences. It is true that the prosecuting authorities control the scope and extent of charge bargaining and that no defendant has the right to any specific plea bargain. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). Nevertheless, 94% of state criminal convictions are the result of plea bargains. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Moreover, effective plea bargaining is one approach to avoid adverse immigration consequences. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

* * *

A. State Court Strategies

1. Controlled Substances

The Court recognized fourteen states that had statutes which specifically proscribe § 841(b) conduct (i.e., distribution of a small amount of marijuana for no remuneration).⁵⁶⁹ Thus, in at least every one of those states, criminal defense counsel can plead a client to a charge that would not be an aggravated felony. In some states, like Georgia, the statute defines a range of crimes. Op. at 7, 9. In others, like New York, the only crime defined under the statutory subsection involves distribution without remuneration. Op. at 14 (discussing N. Y. Penal Law Ann. §221.35(West 2008)). In Texas, there is a specific crime for distributing a quarter ounce or less of marijuana for no remuneration. V.T.C.A., Health & Safety Code § 481.120(b)(1). It is important to note, however, that § 841(b) only applies to marijuana and does not include other federally controlled substances. 21 U.S.C. § 841(b)(4). Distribution of other federally controlled substances is a felony regardless of whether there was remuneration. See 21 U.S.C. §§ 841-843 (providing that distribution of virtually any controlled substance other than marijuana is a felony under federal law without exception).

Furthermore, as the Court noted, with the exception of a single offense for simple possession for personal use of 30 grams or less of marijuana, a person with a conviction under one of these fourteen state statutes still will be deportable under the controlled substance ground of deportability. Op. at 19; INA § 237(a)(2)(B)(i), 8 U.S.C. §1227(a)(2)(B)(i).

➤ Practice Tip

Moncrieffe may preclude the government from establishing that certain controlled substance distribution offenses are convictions for an aggravated felony even when a noncitizen has a conviction that does not specifically fall under a state’s counterpart to 21 U.S.C. § 841(b)(4). Florida’s controlled substance law presents one such situation.

The Controlled Substances Act (CSA) definition of the term “marihuana” includes “the resin extracted from any part of the plant.” 21 U.S.C. § 802(16)(d) (governing § 841(b)(4), the CSA misdemeanor marijuana distribution provision at issue in *Moncrieffe*). Unlike federal law, the Florida drug offense that is specific to non-remunerative transfer of marijuana does “not include the resin extracted from the plants of the genus *Cannabis*.” Compare Fla. Stat. § 893.13(2)(b)(3) (2010) with 21 U.S.C. § 802(d)(16). This means that a person with a Florida conviction for distributing cannabis resin, commonly known as “hashish,” could have been guilty of giving away a small amount of hashish, but the lack of remuneration would be legally irrelevant because the Florida statute does not require proof of remuneration.

⁵⁶⁹ See Cal. Health & Safety Code Ann. §11360(b) (West Supp. 2013); Colo. Rev. Stat. Ann. §18–18–406(5)(2012); Fla. Stat. §893.13(2)(b)(3) (2010); Ill. Comp. Stat., ch. 20, §§550/3,550/4, 550/6 (West 2010); Iowa Code §124.410 (2009); Minn. Stat. §152.027(4)(a) (2010); N.M. Stat. Ann. §30–31–22(E) (Supp. 2011); N.Y. Penal Law Ann. §221.35(West 2008) Ohio Rev. Code Ann. §2925.03(C)(3)(h) (Lexis 2012 Cum. Supp.); Ore. Rev. Stat. §475.860(3) (2011); Pa. Stat. Ann., Tit. 35, §780–113(a)(31)(Purdon Supp. 2012); S.D. Codified Laws §22–42–7 (Supp. 2012); Tex. Health & Safety Code Ann. §481.120(b)(1) (West 2010); W. Va. Code Ann. §60A–4–402(c) (Lexis 2010).

Under the Court’s test in *Moncrieffe*, “not only must the state offense of conviction meet the ‘elements’” of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony.” Op. at 5. Applying the *Moncrieffe* test to a Florida conviction for distribution of hashish reveals that the offense taken at its minimum includes the federal misdemeanor offense of giving away a small quantity of marijuana, including the resin (hashish). That Florida treats hashish distribution more seriously than the United States Code does not change the applicability of the categorical approach. As a result, anyone with a Florida conviction for distributing hashish should not have an aggravated felony conviction under the Court’s test because DHS will not be able to prove that the conviction was not for an offense punishable as a misdemeanor under federal law. The defendant’s alleged actual conduct is not part of the calculation because *Moncrieffe*’s central holding is that a factfinder must focus on the statute of conviction rather than the defendant’s conduct. See op. at 5-6.

Similarly, a conviction for distribution of a small amount of any unnamed controlled substance under Florida law should not be deemed an aggravated felony because the conviction could have been for distribution of a small amount of cannabis resin.

The Florida structure may exist in many other states. Practitioners should examine carefully any controlled substance aggravated felony charge to determine whether the statute of conviction taken at a minimum would necessarily result in a felony conviction under the federal controlled substance laws.

➤ Practice Tip

If a defendant is charged under a statute that covers marijuana and other controlled substances and the charging document is silent about the identity of the controlled substance, a defendant, if possible should not allocute to any other drug. See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (holding that the government fails to meet its burden where the record of conviction fails to identify the substance). A plea of nolo contendere to a charging document that does not identify the controlled substance should protect the defendant from the harsh consequences of an aggravated felony charge because the Department of Homeland Security will not have evidence to prove conclusively that the offense would be punishable as a felony under federal law.

B. Federal Court Strategies

1. Reentry Prosecutions

A noncitizen charged with violating INA § 276, 8 U.S.C. § 1326, for illegally reentering the United States after having been deported faces both statutory and Guideline sentencing enhancements. INA § 276(b)(2), 8 U.S.C. § 1326(b)(2) (interpreted by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (holding that § 1326(b)(2) created an enhancement)); U.S.S.G §2L1.2(b)(1)(C). For example, a noncitizen convicted for illegal reentry can get an eight-level increase under the United States Sentencing Guidelines for having an aggravated felony conviction. *Id.* Federal criminal defense

practitioners in pending cases should ensure that a defendant's sentence does not include an enhancement for a conviction that is not an aggravated felony under *Moncrieffe*.

A federal criminal defendant can raise a collateral challenge to the lawfulness of a prior removal order in certain circumstances. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839-40 (1987) (holding due process requires judicial review of underlying deportation proceedings); INA § 276(d), 8 U.S.C. § 1326(d) (setting out requirements for raising collateral challenges).

2. Controlled Substances

The Court noted that any federal marijuana distribution conviction will be a deportable offense under the controlled substance ground of deportability. *Op.* at 19. Nevertheless, it may be possible that a noncitizen defendant pleading guilty to an offense under 21 U.S.C. § 841(b)(4) could be eligible to expunge the offense so that she or he would not have any conviction for immigration purposes. This seemingly counterintuitive scenario is possible because the language in 21 U.S.C. § 841(b)(4) provides that a person be treated in accordance with 21 U.S.C. § 844 and 18 U.S.C. § 3607. Section 3607 of Title 18, in turn, provides a mechanism for a defendant to receive a disposition that is not a conviction for any purpose whatsoever.⁵⁷⁰

Although there may be some tension between the language in 18 U.S.C. § 3607 unequivocally stating that ameliorative treatment under the statute “shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime” and INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), which defines a conviction for immigration purposes, the explicit command of 18 U.S.C. § 3607 would arguably include the consequence of having a conviction for immigration purposes. There is not a single published case since the law changed in 1996 interpreting whether a disposition expunged under 18 U.S.C. § 3607 is a conviction under 8 U.S.C. § 1101(a)(48). Nevertheless, the holding in *Moncrieffe* and the statutory text of 18 U.S.C. § 3607 suggest that any defendant with some leverage with the prosecutors might consider seeking to come under its ameliorative terms.⁵⁷¹

IV. SUGGESTED STRATEGIES FOR NONCITIZENS WITH REMOVAL CASES AFFECTED BY *MONCRIEFFE*.

This section offers strategies to consider for noncitizens whose removal cases are affected by *Moncrieffe*. Keep in mind, most individuals directly affected by *Moncrieffe* still are removable from the United States under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), for a controlled substance offense and, thus, likely only will pursue these strategies if they are eligible for a form of relief from removal.

⁵⁷⁰ A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose. 18 U.S.C. § 3607(a) & (c).

⁵⁷¹ A defendant who is providing substantial assistance to a federal prosecution might be an example of someone who might have sufficient leverage to obtain such a favorable plea bargain.

For sample motions and other documents to help implement these strategies, please see *Sample Carachuri-Rosendo Motions* (June 21, 2010), at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/CARACHURI-ROSENDO.pdf and *Vartelas v. Holder: Implications for LPRs Who Take Brief Trips Abroad and Other Potential Favorable Impacts* (April 5, 2012) (beginning on page 15) at http://www.legalactioncenter.org/sites/default/files/vartelas_practice_advisory_fin.pdf. Although these samples address different substantive law, they nonetheless may provide helpful guidance.

A. Noncitizens with Pending Removal Cases

Individuals who are in removal proceedings before the immigration court or on appeal at the BIA should bring *Moncrieffe* to the attention of the IJ or the BIA. If the aggravated felony charge was the only ground of removability on the Notice to Appear (NTA), he or she may file a motion to terminate. In this situation, DHS likely will seek to amend the charges on the NTA. See 8 C.F.R. § 1240.10(e); *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976). If the case is on appeal at the BIA, the individual may file a motion to terminate and/or remand to the Immigration Court for a hearing on relief from removal. By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

Individuals who are in administrative removal proceedings under INA § 238(b) should bring *Moncrieffe* to the attention of DHS. DHS has discretion to initiate administrative removal proceedings only against non-LPRs and individuals with conditional permanent residency who are convicted of an aggravated felony. Individuals in § 238(b) proceedings have the opportunity to rebut the charges of removability, INA § 238(b)(4)(C), 8 C.F.R. § 238.1, and should argue that DHS improperly initiated § 238(b) proceedings because they were not convicted of an aggravated felony. If the noncitizen has not been convicted of an aggravated felony, DHS must terminate proceedings. At this point, DHS may initiate removal proceedings under INA § 240 by issuing an NTA. 8 C.F.R. § 238.1(e).

B. Noncitizens with Final Orders

A person who filed a petition for review challenging a final order should consider pursuing *both* the suggested strategy for court of appeals cases and an administrative motion.

Pending Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand the case to the BIA under *Moncrieffe*; the motion should explain the impact of *Moncrieffe* on removability and the person's prospects for relief. The Department of Justice attorney may consent to such a motion. If briefing is ongoing, the opening brief and/or the reply brief should address *Moncrieffe*. If briefing is complete, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Moncrieffe* and its relevance to the case.

Denied Petition for Review. If the court of appeals already denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the

mandate. If the court has issued the mandate, the person may file a motion to recall (withdraw) the mandate. Through the motion, the person should ask the court to reconsider its prior decision in light of *Moncrieffe* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Moncrieffe*.

Administrative Motion to Reconsider or Reopen. Regardless whether an individual sought judicial review, she or he may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case) or with DHS if the person was in administrative removal proceedings under INA § 238(b).⁵⁷² As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. See INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i); see also 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision).⁵⁷³ If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Moncrieffe*, i.e., by May 23, 2013 or by July 22, 2013, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Moncrieffe* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.⁵⁷⁴

C. Noncitizens Who Are Outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their

⁵⁷² There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. See INA § 240(c)(6)(C).

⁵⁷³ One court suggested that a person may file a 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).

⁵⁷⁴ Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA's denial of a *sua sponte* motion. See *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

return.” See *Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS should facilitate the petitioner’s return to the United States.⁵⁷⁵

Noncitizens outside the United States who are considering filing administrative motions should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), will pose an additional obstacle to obtaining relief. Although the BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, see *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the First and Eighth Circuit, which have not decided the issue) have invalidated the bar. See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012). If filing a motion to reconsider or reopen in the First or Eighth Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen or reconsider statute or impermissibly contracts the BIA’s jurisdiction. Thus, it is advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency’s congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. See, e.g., *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.⁵⁷⁶

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA’s decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nationalimmigrationproject.org or Beth Werlin at bwerlin@immcouncil.org.

⁵⁷⁵ For more information about returning to the United States after prevailing in court or on an administrative motion, see the practice advisory, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (December 21, 2012) at http://www.legalactioncenter.org/sites/default/files/return_to_the_united_states_after_prevailing_on_a_petition_for_review_or_motion_to_reopen_or_reconsider.pdf.

⁵⁷⁶ For additional information on the departure bar regulations, see the practice advisory, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (March 14, 2012) at http://www.legalactioncenter.org/sites/default/files/departure_bar_practice_advisory.pdf.

**THE FUGITIVE DISENTITLEMENT DOCTRINE:
FOIA AND PETITIONS FOR REVIEW**

By Emily Creighton

Practice Advisory¹
Updated April 29, 2013

In the immigration context, the fugitive disentitlement doctrine arises frequently 1) when courts of appeals apply the doctrine to deny petitions for review and 2) when government agencies invoke the doctrine to deny Freedom of Information Act (FOIA) requests.²

First, this practice advisory explores the development of the doctrine and the different contexts in which the courts and DHS apply the doctrine. Second, the advisory explains why DHS cannot apply the doctrine to deny FOIA requests and ways individuals may challenge these FOIA denials. Third, the advisory describes specific scenarios where courts of appeals invoke the doctrine to dismiss petitions for review, and offers arguments that individuals may use to challenge the doctrine.

I. What is the Fugitive Disentitlement Doctrine?

The fugitive disentitlement doctrine is an equitable doctrine that developed in the criminal law context to limit a person's ability to appeal as long as he or she remained a "fugitive." According to the doctrine, an appellate court may dismiss an appeal when the party seeking relief becomes a fugitive. *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993). The First Circuit described the purpose of the doctrine:

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² The concept of disentitlement also arises in other contexts not directly discussed here, such as when the IJ or Board denies a motion to reopen as a matter of discretion after a respondent has failed to report for removal. See *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985).

The fugitive-from-justice doctrine is a prudential device which courts may invoke to estop fugitives from challenging criminal convictions in absentia. The driving force behind the doctrine is the idea that a criminal defendant, following conviction and initiation of an appeal, should not be allowed, by absconding, to create a ‘heads I win, tails you lose’ situation.

United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1098 (1st Cir. 1992) (citations omitted).

The Supreme Court has described the dual enforceability and deterrent justifications for the fugitive disentitlement doctrine: 1) when a person is a “fugitive,” there is no assurance that a court’s judgment will be enforceable, and 2) dismissal of an appeal after the defendant has fled the court’s jurisdiction “serves an important deterrent function and advances an interest in efficient, dignified appellant practice.” *Ortega-Rodriguez*, 507 U.S. at 240-42. Although the Supreme Court has never extended the application of the doctrine to cases outside of the criminal context, courts of appeals have applied the doctrine in the civil context. *See, e.g., Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278, 281-82 (2d Cir. 1997) (holding that defendants in a civil action were subject to the doctrine because they failed to appear for depositions, to comply with a court order to appear, or to submit to authorities after bench warrants were issued); *Conforte v. Commissioner*, 692 F.2d 587, 590 (9th Cir. 1982), *stay denied*, 459 U.S. 1309 (1983) (finding a petitioner could not appeal a judgment in a civil case because he was a fugitive from a criminal conviction and both actions were related to a general tax evasion scheme).

Courts also have extended the doctrine to immigration cases. *See, e.g., Bar-Levy v. INS*, 990 F.2d 33, 35 (2d Cir. 1993) (“[a]lthough an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice”); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir. 2004) (dismissing petition for review because petitioners did not comply with notice to report for removal); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003) (dismissing petition for review because petitioner was out of touch with lawyer and court for approximately two years); *Arana v. INS*, 673 F.2d 75, 77 (3d Cir. 1982) (dismissing petition for review after petitioner failed to comply with an order to report for deportation and could not be located by federal authorities or his lawyer); *Hussein v. INS*, 817 F.2d 63 (9th Cir. 1986) (dismissing petition for review because of petitioner’s escape from custody at Florence, Arizona).

Not all circuits have applied the doctrine. The Eighth Circuit, for example, has not yet applied the doctrine to dismiss a petition for review. *See Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (declining to apply the doctrine to dismiss the petition for review when the applicant voluntarily departed to Canada); *Nnebedum v. Gonzales*, 205 Fed. Appx. 479, 480-81 (8th Cir. 2006) (declining to apply the doctrine, denying petition for review on other grounds). However, despite the decisions of some courts to refrain from applying the doctrine, no court of appeals has said that the doctrine does not apply in the immigration context.

In addition to the courts, DHS has adopted the doctrine to reject FOIA requests after a determination that the FOIA requester is a “fugitive.”³ Denial letters provided to the Legal Action Center state that 1) agency records indicate the requester is a fugitive, 2) that neither the requester nor an agent acting on behalf of the requester is entitled to the access, appeal or review provisions of the Freedom of Information Act, and 3) that the agency will not process the request until the individual surrenders to federal authorities and ceases to be a fugitive. In at least one letter, the agency stated that a relationship existed between the information/records sought and the individual’s status as a fugitive, and that the requested records could assist the client in continuing to elude apprehension.

II. Freedom of Information Act

A. What are the Arguments Against Application of the Fugitive Disentitlement Doctrine to Deny FOIA Requests?

i. Any Person May Request Information under FOIA

FOIA explicitly provides that “any person” may request documents under the Act. 5 U.S.C. § 552(a)(3).⁴ Courts have long held that the “any person” standard applies to both U.S. citizens and foreign citizens. *Stone v. Export-Import Bank of the United States*, 552 F.2d 132, 136-37 (5th Cir. 1977), *reh’g denied*, 555 F.2d 1391 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

Agencies may only withhold information from a FOIA requester under certain exceptions outlined at 5 U.S.C. § 552(b)(1)-(9). Prior to the enactment of FOIA, agencies had discretion to withhold information if the agency believed it to be “in the public interest,” for example, or “for good cause shown.” *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (citing former provisions of the APA). FOIA’s purpose was to increase public access to information and by directing agencies to disclose information to “any person,” agencies could no longer consider the particular interests of the FOIA requester. *Id.* at 1077. *See also O’Rourke v. United States Dep’t of Justice*, 684 F. Supp. 716, 719 (D.D.C. 1988) (“the Act focuses on whether the material should be accessible to the public and *not on which members of the public should have access*”) (emphasis added).

Unless requested material falls into one of the specific statutory exemptions, it must be made available on demand to any member of the general public. None of the exceptions at § 552(b)(1)-(9) allows information to be withheld due to the fugitive status of the individual requester. The FOIA statute simply does not provide agencies with equitable latitude to deny FOIA requests based on the fugitive disentitlement doctrine.

³ *See, e.g.*, DEPARTMENT OF HOMELAND SECURITY, 2009 ANNUAL FOIA REPORT TO THE ATT’Y GEN. 6 (2010), at http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2009.pdf (indicating that ICE denied 5 initial FOIA requests because the individual was labeled a fugitive).

⁴ “Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to *any person*.” 5 U.S.C. § 552(a)(3) (emphasis added).

ii. Equitable Principles Cannot be Applied to Deny FOIA Requests

Denial of information under the FOIA statute on equitable grounds is not appropriate. Although the fugitive disentitlement doctrine was created by the courts to dismiss an appeal for equitable reasons, these equitable principles cannot be applied to create a new exemption to disclosure under the FOIA statute.

Because FOIA explicitly provides exemptions to disclosure, the Act already “strikes a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion, i.e., the public interest in freedom of information and countervailing public and private interests in secrecy.” *Soucie*, 448 F.2d at 1077. *See also O’Rourke*, 684 F. Supp. at 718-19 (declining to dismiss a FOIA action based on the specific motives of the requesters, because the motives in obtaining the information was irrelevant under the statute and “use of broad equitable powers” was not appropriate in the FOIA context).

iii. In the Alternative, the Equitable Principles Underlying the Fugitive Disentitlement Doctrine do not Apply

In addition to a lack of authority under the FOIA statute for application of the doctrine to deny FOIA requests, the equitable considerations underlying the fugitive disentitlement doctrine are not present in the FOIA context. As mentioned, the Supreme Court has explained the dual enforceability and deterrent function of the doctrine: 1) when a person is a “fugitive,” there is no assurance that a court’s judgment will be enforceable, and 2) dismissal of an appeal after the defendant has fled the court’s jurisdiction “serves an important deterrent function and advances an interest in efficient, dignified appellate practice.” *Ortega-Rodriguez*, 507 U.S. at 240-42. Neither of these functions is relevant in the FOIA context.

First, the agency responding to the FOIA requester is not a court that will issue a judgment. Therefore the enforceability of the judgment is not a concern. *Cf. Antonio-Martinez v. INS*, 317 F.3d at 1093 (expressing concern that the fugitive appellant possessed a “heads I win, tails you’ll never find me” mentality). In addition, the deterrent function of the disentitlement doctrine does not apply in the FOIA context. As the Supreme Court explained in *Ortega-Rodriguez*, judicial defiance is not punishable by disentitlement when the defiance has no connection to the proceeding. 507 U.S. at 250-51 (finding that the doctrine should not be de facto applied to a person who escaped and was recaptured before appeal because the person’s former fugitive status did not necessarily affect appellate proceedings). Therefore, the nature of the proceeding and the fugitive appellant’s role in the court proceeding are intrinsic to the doctrine’s purpose: to preserve the integrity of the appellate process, including the time and resources of the court and any to the government that might result from a fugitive’s absence. *Id.* at 249. Here, the process of requesting information under FOIA does not resemble a court proceeding. The requester does not have the same obligations as an appellant before a federal court, and must only comply with the statutory requirements for requesting documents under FOIA. Unlike a fugitive in a court proceeding, a fugitive submitting a FOIA request does not cause a delay in FOIA proceedings or defy the jurisdiction of any court or agency. While the status of an appellant is arguably important in a court proceeding, the status of the requester is immaterial to the process of requesting documents under FOIA.

B. How Can You Challenge a FOIA Denial Based on the Fugitive Disentitlement Doctrine?

As explained above, the agency has no authority under FOIA to withhold documents because of an individual's "fugitive" status. The arguments discussed above can be asserted in an administrative and federal court appeal of the agency's refusal to respond to the FOIA request.

First, the FOIA statute provides the right to seek administrative review of a denied or unanswered request. An agency is required to determine whether it will comply with an initial FOIA request within 20 days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). If the agency does not respond to the request within 20 days, the failure to respond may be treated as a constructive denial and appealed. Because DHS refuses to respond to requests based on the fugitive disentitlement, the agency's refusal may be treated as a constructive denial.

The agency has an additional twenty days to respond to the appeal of the initial denial. § 552(a)(6)(A)(ii). If the agency fails to respond to both the initial FOIA request and the administrative appeal, the requester is deemed to have exhausted all administrative remedies. § 552(a)(6)(C). At this point, the requester may file suit in district court.

C. Obstacle to Consider – Fugitive Disentitlement Doctrine Applied to Dismiss FOIA Appeal

After appealing a denial of a FOIA request based on the fugitive disentitlement doctrine, it is important to consider that the suit challenging the denial itself may be dismissed under the doctrine.

In *Doyle v. U.S. Dep't of Justice*, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of a FOIA lawsuit based on the plaintiff's fugitive status. 668 F.2d 1365 (D.C. Cir. 1981). The plaintiff in *Doyle* had a pending bench warrant issued for his arrest, and the court of appeals reasoned that the petitioner's FOIA request for all of the Department of Justice records pertaining to him were "not devoid of a relationship to the sentence he [was] evading." *Id.* at 1365. In addition, the court reasoned the doctrine could be used to dismiss the case even though the plaintiff's fugitive status was not an exception to the disclosure requirements under FOIA. *Id.* But see *Maydak v. U.S. Dep't of Educ.*, No. 04-4436, 2005 U.S. App. LEXIS 20292 (3d Cir. Sept. 21, 2005) (reasoning that the doctrine might not apply to bar review of a FOIA action if a person filed the FOIA suit in a court separate from the court the petitioner had fled).

Cases That Address the Fugitive Disentitlement Doctrine in FOIA Lawsuits:

- D.C. Cir.
 - In *Doyle v. U.S. Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) – affirmed district court decision dismissing plaintiff's FOIA complaint under the doctrine
- 3d Cir.
 - *Meddah v. Reno*, No. 98-1444, 1998 U.S. Dist. LEXIS 23620 (E.D. Pa. Dec. 8, 1998) – applied the doctrine to dismiss plaintiff's FOIA complaint

- *Maydak v. United States Dep't of Educ.*, No. 04-4436, 2005 U.S. App. LEXIS 20292 (3d Cir. Sept. 21, 2005) – affirmed district court decision dismissing plaintiff's FOIA complaint under the doctrine

I. Petitions for Review

A. When Do Courts Apply the Fugitive Disentitlement Doctrine to Deny Petitions for Review in Immigration Cases?

1. When Petitioners Fail to Comply with Notice to Report for Removal

Courts of appeals apply the doctrine to deny petitions for review after finding that a person failed to report to DHS after being issued a notice to report for removal (notices to report for removal are often referred to as “bag and baggage letters”). See *Martin v. Mukasey*, 517 F.3d 1201, 1203-04 (10th Cir. 2008) (finding a person was a fugitive when he failed to comply with a DHS notice to report with identity documents and a one-way ticket to his home country); *Giri v. Keisler*, 507 F.3d 833, 834-35 (5th Cir. 2007) (applying the doctrine after finding petitioners had received and failed to comply with notices to report for removal); *Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007) (“for an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with that letter”); *Bright v. Holder*, 649 F.3d 397, 400 (5th Cir. 2011) (applying the doctrine to dismiss appeal after petitioner did not report for removal even though petitioner’s location was known to DHS).

Bright v. Holder, 649 F.3d 397, 400 (5th Cir. 2011)

Some courts also have found that the arrest of a person during an appeal does not cure the individual’s fugitive status if he or she initially did not comply with a notice to report for removal. The Sixth Circuit dismissed a petition for review of an individual who was taken into custody during the pendency of his appeal. *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007). The court reasoned he was subject to the fugitive disentitlement doctrine because he failed to initially comply with a notice to report for removal after he filed his appeal. *Id.* at 441 n.1, 442 (noting that the court would still have retained Article III jurisdiction to hear petitioner’s appeal if he was removed to Mexico).

The Ninth Circuit found that the doctrine applied even when a removal order was wrongfully issued. See *Zapon v. U.S. Dep't of Justice*, 53 F.3d 283 (9th Cir. 1995). In *Zapon*, the petitioners did not receive notice of a deportation hearing and were ordered deported in absentia. *Id.* at 284. The court reasoned that although the deportation orders were wrongfully issued because the petitioners were never notified of their hearing, the petitioners still were required to comply with the outstanding orders to report for removal. *Id.* at 284-85 (finding the government was substantially justified in opposing petitioners’ stay of deportation based on the disentitlement doctrine).

2. When Petitioner Cannot be Located After Stay of Removal Granted

Courts have found that a petitioner may be a fugitive even if a removal order has been stayed. In *Antonio-Martinez v. INS*, the Ninth Circuit held that as long as the deportation order was outstanding, the petitioner had an obligation to keep the agency informed of his location so the

agency could take him into custody when the stay was lifted. 317 F.3d 1089, 1093 (9th Cir. 2003). The court held that because the petitioner failed to inform INS of his change of address as required by 8 U.S.C. § 1305(a) and 8 C.F.R. § 265.1, his counsel and INS were unable to locate him. Thus, petitioner was a fugitive. *Id.* at 1091-92. The court noted that, although a person granted a stay may not be subject to deportation or confinement while his or her case is adjudicated, but is still subject to the court's authority. *Id.* at 1093 (comparing a person with a stayed deportation order to a criminal defendant on bail pending appeal).

In *Sapoundjiev v. Ashcroft*, the Seventh Circuit held that petitioners were obligated to comply with a notice to report for removal even though they received stays of removal the day before they were required to report. 376 F.3d 727, 729 (7th Cir. 2004). The court held that the stay order "did not affect the Sapoundjievs' obligation to surrender, so that removal could be implemented if the stay should be lifted." *Id.* at 728.

3. Failure to Provide Change of Address

Even if a person did not receive a notice to report for removal, if he or she also did not provide DHS with a change of address, the courts may apply the fugitive disentitlement doctrine. In *Arana v. INS*, the Third Circuit found that although petitioner may not have received notice of an order to report for deportation because he moved from his last-known address, the fugitive disentitlement doctrine prevented petitioner from pursuing the appeal until he informed the government of his current whereabouts. 673 F.2d 75, 76-77 (3d Cir. 1982). *See also Antonio-Martinez v. INS*, 317 F.3d 1089, 1091-92 (9th Cir. 2003) (holding that because the petitioner failed to inform the court of his change of address as required by 8 U.S.C. § 1305(a) and 8 C.F.R. § 265.1, his counsel and INS were unable to locate him and he was subject to the doctrine).

4. The Merits of the Appeal are Connected to Events that Took Place When Petitioner was a "Fugitive" and/or the Government's case is Prejudiced

Some courts have considered whether the merits of the petitioner's case are related to the "fugitive" period. The Second Circuit, in *Gao*, found this connection important when it dismissed petitioner's case pursuant to the doctrine. It reasoned that allowing the petitioner to proceed would "unduly prejudice the government" because the changed circumstances that would warrant reopening the petitioner's asylum case -- his marriage and the birth of his two children -- took place when petitioner was a fugitive (after receipt of his bag and baggage letter). *Gao v. Gonzales*, 481 F.3d 173, 177-78 (2d Cir. 2007). The court concluded that allowing the case to move forward despite the nexus between petitioner's fugitive status and the merits of the case "would have the perverse effect of encouraging aliens to evade lawful deportation orders in the hope that, while they remain fugitives, they may contrive through their own efforts a new basis for challenging deportation." *Id.* at 178; *Wang v. Holder*, No. 08-5073, 2010 U.S. App. LEXIS 2778, *4 (2d Cir. Feb. 11, 2010) ("the ground on which [petitioner] now seeks relief is an event of his own making that transpired while he was a fugitive") (citations omitted).

B. What are the Arguments Against the Application of the Doctrine to Petitions for Review?

1. The Fugitive Disentitlement Doctrine is a Severe Sanction

Courts that have declined to apply the doctrine emphasize that the doctrine is a “severe” sanction that is not lightly imposed. *See Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) (“[t]he Supreme Court cautioned against frequent use of fugitive dismissal, stating that it is too blunt an instrument for deterring other petitioners from absconding and for preserving the court’s authority and dignity.”); *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007) (describing the doctrine as “an extreme sanction”); *Wu v. Holder*, 646 F.3d 133, 137-38 (2d Cir. 2011) (declining to apply the doctrine to a “simple case” where petitioner did not seek to take unfair advantage of the courts). *See also Armentero v. INS*, 412 F.3d 1088, 1090-96 (9th Cir. 2005) (Berzon, dissenting) (arguing that the court should not have considered the fugitive disentitlement argument because, *inter alia*, the government improperly raised the doctrine as a basis for dismissal in its supplemental reply brief and because the resolution of the issues in the case would not be unenforceable due to the petitioner’s fugitive status).

It is important to keep in mind that the fugitive disentitlement doctrine is an equitable doctrine. Courts have wide discretion to determine whether or not to apply the doctrine, and are not required to invoke it to dismiss an individual’s case. Therefore, it is important to emphasize the favorable and compelling factors in a person’s case even if his or her fugitive status is unclear.

2. The Petitioner is not Intentionally Evading the Jurisdiction of the Court

a. The petitioner did not receive the notice to report for removal.

In some cases, petitioner may have an argument that the doctrine should not apply because he or she did not receive the notice to report for removal. The Ninth Circuit has found that the Board improperly applied the fugitive disentitlement doctrine to deny a motion to reopen when critical documents, including a notice to report for removal, were sent to the wrong address on multiple occasions by the agency. *See Bhasin v. Gonzales*, 423 F.3d 977, 988-89 (9th Cir. 2005) (distinguishing *Bhasin* from *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985), where the Board denied a motion to reopen only after the agency had attempted to locate respondents at “their last known address, the male respondent’s last known place of employment, the postal service, the California Department of Motor Vehicles, and the local gas and phone companies”).

b. The government has not sufficiently demonstrated that the petitioner is evading the law.

It may be possible to demonstrate that even after an individual fails to respond to a bag and baggage letter, he or she is not actively evading the court’s jurisdiction. In *Wu v. Holder*, the Second Circuit explained that the petitioner did not exhibit a “disdain” for authority by failing to report to DHS in response to bag-and-baggage letters when he had also received orders from the court enjoining DHS from deporting him. 646 F.3d at 136. The court recognized that the petitioner should have contacted DHS directly or through counsel, but distinguished this failure to comply with an executive command from failing to comply with a court order – an action that would more directly implicate the fugitive disentitlement doctrine. *Id.* at 137. In *Sun v. Mukasey*,

the Ninth Circuit reasoned that, although petitioner received a bag and baggage letter, at the time of her appeal, her counsel, DHS and the court knew her whereabouts. 555 F.3d 802, 805 (9th Cir. 2009). Thus, she was not “currently a fugitive,” and it was not appropriate to apply the doctrine to dismiss her case. *Id.*; see also *Brar v. Holder*, No. 08-71471, 2009 U.S. App. LEXIS 12843, *3-4 (9th Cir. June 16, 2009) (although petitioner did not report for removal, there was “no evidence that the petitioner was in hiding or had fled to avoid deportation”).

3. Petitioner’s Existing Fugitive Status is not Sufficiently Connected to Issue on Appeal and/or the Government’s Case is not Prejudiced

It may also be possible to argue that the petitioner’s fugitive status is not sufficiently connected to the issue on appeal and therefore, the equitable reasons for applying the doctrine are not present. In *Armentero v. INS*, the dissent argued that the petitioner’s fugitive status was not connected to the appellate proceedings because the question on appeal only addressed who was the proper respondent in the petitioner’s habeas petition. 412 F.3d 1088, 1094-95 (9th Cir. 2005) (Berzon, dissenting). The dissent reasoned that deciding that question did not implicate the doctrine because the court’s decision on that discrete issue would be enforceable and deciding the issue would not encourage future litigants to flee the court’s jurisdiction. *Id.* Note, however, that the majority in *Armentero* found the doctrine applied. *Id.* at 1088.

In *Wu*, the Second Circuit found that the petitioner’s fugitive status did arise from the case at issue, but nevertheless, the government had provided no evidence that the petitioner’s fugitive status prejudiced the government’s case. *Wu*, 646 F.3d at 137-38. The court distinguished the petitioner’s case from *Gao*, where the “petitioner premised his claim to relief entirely on events that occurred during the period of his fugitivity, thereby making the government rebut new facts in order to defeat his position on the merits.” *Id.* at 138.

4. The Petitioner Surrendered to DHS Custody Prior to or During Appeal and Former Fugitive Status Lacks Connection to Proceedings

If the petitioner fled custody and then surrendered before filing an appeal, the petitioner may argue that his or her former fugitive status lacked the connection to the appellate proceeding necessary to justify application of the doctrine. In *Ortega-Rodriguez v. United States*, the Supreme Court explicitly held that the doctrine should not be applied to dismiss a case when a defendant’s flight and recapture occurred prior to the appeal and had “no connection to the course of appellate proceedings.” 507 U.S. 234, 246 (1993).

In addition, the petitioner may argue that the doctrine should not apply if he or she surrendered to custody during the pendency of the appeal. The Seventh Circuit explicitly held that the doctrine did not apply to a person who initially did not comply with a notice to report for removal, but later surrendered to DHS. *Gutierrez-Almazan v. Gonzales*, 453 F.3d 956, 957 (7th Cir. 2006) (“a petitioner in an immigration case who fails to report and then faces a motion to dismiss under the fugitive disentitlement doctrine may still surrender to immigration authorities and preserve his appeal”). The court reasoned that the petitioner did not “escape” the jurisdiction of the court, but initially failed to appear because he received a stay of removal and his lawyer erroneously advised him he did not need to comply with the order. *Id.* at 957. But see *Garcia-Flores v. Gonzales*, 477 F.3d 439, 441-42 (6th Cir. 2007) (dismissing a petition for review even though the appellant was taken into custody during the pendency of his appeal).

5. The Petitioner Voluntarily Departed the United States and is not Intentionally Evading Jurisdiction of the Court

A petitioner may argue that the doctrine does not apply after they have departed the United States. The Eighth Circuit declined to apply the doctrine when a person left the United States in compliance with a voluntary departure order and continued to pursue her appeal. *See Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007). The government argued that the petitioner was a fugitive because she requested a stay of deportation after leaving the country and then did not meet with government officials to discuss her stay request. *Id.* The court disagreed, reasoning that the petitioner departed in compliance with a court order; the record did not demonstrate that petitioner was attempting to evade the law; and that the court's judgment still would be enforceable despite the petitioner's absence. *Id.*; *See also Fiadjoe v. AG*, 411 F.3d 135, 164 n. 9 (3d Cir. 2005) (Smith, dissenting) (describing how the government initially moved to dismiss based on the doctrine, but later withdrew the motion when the petitioner explained through letter briefs that she "self-deported" to Canada).

C. Circuit Court Decisions Applying/Declining to Apply the Fugitive Disentitlement Doctrine to Dismiss Petitions for Review or Appeals in Immigration Cases:

Declined to Apply the Doctrine:

- 2d Cir.
 - *Wu v. Holder*, 646 F.3d 133 (2d Cir. 2011) – declined to apply the doctrine to dismiss petition for review
- 7th Cir.
 - *Gutierrez-Almazan*, 453 F.3d 956 (7th Cir. 2006) – declined to apply the doctrine to dismiss petition for review
- 8th Cir.
 - *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) - declined to apply the doctrine to dismiss petition for review; granted petition and remanded to the BIA
 - *Nnebedum v. Gonzales*, No. 05-2801, 2006 U.S. App. LEXIS 28340 (8th Cir. 2006) – declined to apply doctrine to dismiss petition for review; denied petition on other grounds
- 9th Cir.
 - *Brar v. Holder*, No. 08-71471, 2009 U.S. App. LEXIS 12843 (June 16, 2009) – declined to apply the doctrine to dismiss petition for review; reversed BIA's denial of petitioner's motion to reopen based on the fugitive disentitlement doctrine
 - *Sun v. Mukasey*, 555 F.3d 802 (9th Cir. 2009) – declined to apply the doctrine to dismiss petition for review; granted petition and remanded to the BIA
 - *Zadoorian v. Gonzales*, No. 02-74007, 2005 U.S. App. LEXIS 22972 (9th Cir. 2005) – declined to apply the doctrine to dismiss petition for review; denied petition on other grounds

- *Luan v. INS*, No. 96-70323, 1997 U.S. App. LEXIS 26543 (9th Cir. 1997) – declined to apply the doctrine to dismiss petition for review; denied petition on other grounds

Applied the Doctrine:

- 2d Cir.
 - *Wang v. Holder*, No. 08-5073, 2010 U.S. App. LEXIS 2778 (2d Cir. Feb. 11, 2010) – applied the doctrine to dismiss petition for review
 - *Lukose v. Holder*, No. 08-5332, 2009 U.S. App. LEXIS 19584 (2d Cir. Sept. 1, 2009) – applied the doctrine to dismiss petition for review
 - *Guo v. United States Dep’t of Justice*, No. 07-4455, 2008 U.S. App. LEXIS 9330 (2d Cir. April 30, 2008) – applied the doctrine to dismiss petition for review
 - *Rong v. DOJ*, No. 07-2998, 2008 U.S. App. LEXIS 19434 (2d Cir. Sept. 10, 2008) – applied the doctrine to dismiss petition for review
 - *Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007) – applied the doctrine to dismiss petition for review
 - *Huang v. United States Dep’t of Justice*, No. 05-4255, 2007 U.S. App. LEXIS 11764 (2d Cir. May 18, 2007)
 - *Bar-Levy v. INS*, 990 F.2d 33 (2d Cir. 1993) – applied the doctrine to dismiss petition for review
- 3d Cir.
 - *Arana v. INS*, 673 F.2d 75 (3d Cir. 1982), *reh’g denied*, 673 F.2d 75 (3d Cir. 1982) – applied the doctrine to dismiss appeal
- 5th Cir.
 - *Bright v. Holder*, 649 F.3d 397 (5th Cir. 2011) – applied the doctrine to dismiss petition for review
 - *Hamideh-Hamideh v. Holder*, No. 08-60268, 2009 U.S. App. LEXIS 2192 (5th Cir. Feb. 2009) – applied the doctrine to dismiss petition for review
 - *Momani v. Mukasey*, No. 07-60105, 2007 U.S. App. LEXIS 28375 (5th Cir. Dec. 7, 2007) – applied the doctrine to dismiss petition for review
 - *Giri v. Keisler*, 507 F.3d 833 (5th Cir. 2007) – applied the doctrine to dismiss petition for review
- 6th Cir.
 - *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007) – applied the doctrine to dismiss petition for review
 - *Kacaj v. Gonzales*, No. 04-3315, 2006 U.S. App. LEXIS 1695 (6th Cir. 2006) – applied the doctrine to dismiss petition for review
 - *Juncaj v. INS*, No. 95-3430, 1995 U.S. App. LEXIS 35505 (6th Cir. 1995) – applied the doctrine to dismiss petition for review

- 7th Cir.
 - *Dembele v. Gonzales*, 168 Fed. Appx. 106 (7th Cir. 2006) – applied the doctrine to dismiss the appeal
 - *Sapoundjiev v. Ashcroft*, 376 F.3d 727 (7th Cir. 2004) – applied the doctrine to dismiss petition for review
- 9th Cir.
 - *Bello-Tobon v. Gonzales*, No. 06-71152, 2007 U.S. App. LEXIS 6774 (9th Cir. 2007) – applied the doctrine to dismiss petition for review
 - *Armentero v. INS*, 412 F.3d 1088 (9th Cir. 2005) – applied the doctrine to dismiss appeal; dissent argued the doctrine was improperly applied
 - *Antonio-Martinez v. INS*, 317 F.3d 1089 (9th Cir. 2003) – applied the doctrine to dismiss petition for review
 - *Hussein v. INS*, 817 F.2d 63 (9th Cir. 1986) – applied the doctrine to dismiss petition for review
- 10th Cir.
 - *Martin v. Mukasey*, 517 F.3d 1201 (10th Cir. 2008) – applied the doctrine to dismiss petition for review

PRACTICE ADVISORY⁵⁷⁷

REINSTATEMENT OF REMOVAL

by Trina Realmuto⁵⁷⁸

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.⁵⁷⁹

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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⁵⁷⁸ 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@nlpnl.org. Special thanks to Beth Werlin for her valuable comments and detailed edits and to Dan Kesselbrenner for prompting this update.

⁵⁷⁹ 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,⁵⁸⁰ 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”)⁵⁸¹ (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 lawsuits⁵⁸²
- Nicaraguans and Cuban applicants for adjustment under § 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)⁵⁸³
- Salvadoran, Guatemalan, and Eastern European applicants under NACARA § 203⁵⁸⁴

⁵⁸⁰ Some online versions incorrectly use the word “chapter” rather than “Act.”

⁵⁸¹ Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

⁵⁸² 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).

⁵⁸³ LIFE Act § 1505(a)(1) amending NACARA § 202(a)(2); 8 C.F.R. § 241.8(d).

- Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998⁵⁸⁵

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).⁵⁸⁶ 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 detains, 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

⁵⁸⁴ LIFE Act § 1505(c).

⁵⁸⁵ LIFE Act § 1505(b)(1) amending HRIFA § 902(a)(2); 8 C.F.R. § 241.8(d).

⁵⁸⁶ *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).

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 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)⁵⁸⁷

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).

⁵⁸⁷ 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).

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).⁵⁸⁸

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.⁵⁸⁹ 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.⁵⁹⁰ 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

⁵⁸⁸ 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.

⁵⁸⁹ 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].

⁵⁹⁰ 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.

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 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,

1997.⁵⁹¹ 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 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)).⁵⁹² 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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⁵⁹¹ 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).

⁵⁹² *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.

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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.⁵⁹³

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.⁵⁹⁴ 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.⁵⁹⁵

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

⁵⁹³ *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).

⁵⁹⁴ 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.

⁵⁹⁵ 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

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 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,⁵⁹⁶ 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.⁵⁹⁷ *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.

⁵⁹⁶ See sample letter to DHS requesting a copy of the reinstatement order attached to the end of this advisory.

⁵⁹⁷ 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).

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 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.⁵⁹⁸

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.⁵⁹⁹

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

⁵⁹⁸ 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).

⁵⁹⁹ 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”).

appropriate procedural vehicle to raise such claims. *Luna v. Holder*, 637 F.3d 85, 104-05 (2d Cir. 2011).

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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 46.⁶⁰⁰ 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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⁶⁰⁰ *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. ⁶⁰¹
<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). ⁶⁰²	<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). ⁶⁰³	*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 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.

⁶⁰¹ 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).

⁶⁰² 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*).

⁶⁰³ See also *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 110 (4th Cir. 2001) (same) (decided prior to *Fernandez-Vargas*).

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 (*Cardova-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 2005,⁶⁰⁴ with little or no analysis, some courts stated that they could not review prior removal orders.⁶⁰⁵ Other courts recognized habeas jurisdiction to review the prior order if the person was denied judicial review in the prior proceeding.⁶⁰⁶

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.

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

⁶⁰⁴ Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

⁶⁰⁵ 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).

⁶⁰⁶ *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).

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)).	

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").⁶⁰⁷ 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 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.

⁶⁰⁷ 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").

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).⁶⁰⁸ 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.⁶⁰⁹ 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.

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.

⁶⁰⁸ *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).

⁶⁰⁹ 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.

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.⁶¹⁰ Nonetheless, all courts have upheld the reinstatement procedures.⁶¹¹ 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, 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 §

⁶¹⁰ 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).

⁶¹¹ 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).

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.⁶¹² 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.

⁶¹² 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.

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.⁶¹³ Whether the 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

⁶¹³ The regulations include the following:

- 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”).

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.

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)

DACA PRACTICE ADVISORY¹
January 29, 2013

By the Legal Action Center²

“BRIEF, CASUAL AND INNOCENT” ABSENCES FROM THE UNITED STATES

To establish eligibility for Deferred Action for Childhood Arrivals (DACA), requesters must demonstrate that they have continuously resided in the United States from June 15, 2007 to the present.³ “Brief, casual, and innocent” absences from the United States between June 15, 2007 and August 15, 2012 will not interrupt continuous residence.⁴ [USCIS guidance](#) sets forth the following criteria for evaluating such absences:

- The absence was short and reasonably calculated to accomplish the purpose for the absence;
- The absence was not because of an order of exclusion, deportation, or removal;
- The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before the requester was placed in exclusion, deportation, or removal proceedings; and
- The purpose of the absence and/or the requester’s actions while outside the United States were not contrary to law.⁵

Evidence demonstrating an absence was “brief, casual, and innocent” may include:

- passport entries;
- plane or other transportation tickets or itinerary showing travel dates;
- hotel receipts;

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² LAC attorney Emily Creighton authored this practice advisory.

³ For information regarding other DACA eligibility requirements, see the LAC Practice Advisory, [Deferred Action for Childhood Arrivals](#).

⁴ Any departure on or after August 15, 2012, but before a grant of deferred action (regardless of being brief, casual and innocent) will disqualify a requester from receiving DACA.

⁵ USCIS Frequently Asked Questions [hereinafter USCIS [FAQ](#)] (updated January 18, 2013) at 9.

- evidence of the purpose of the requester’s travel (e.g., requester attended a wedding or funeral);
- copy of advance parole document; and
- any other evidence that could support a brief, casual, and innocent absence.⁶

The general concept of a “brief, casual and innocent” absence comes from the U.S. Supreme Court’s decision in *Rosenberg v. Fleuti*, which used these terms to characterize a lawful permanent resident’s afternoon-long excursion to Mexico.⁷

In response to numerous inquiries from immigration attorneys concerned with DACA clients’ previous absences from the United States, the Legal Action Center has developed this practice advisory to summarize existing case law construing “brief, casual and innocent.” Though such case law may inform USCIS’s review of absences from the United States, it is critical that attorneys understand that DACA adjudicators are not bound by these decisions. Notably, USCIS has not referred to *Fleuti* or related case law as a frame of reference as to whether a departure might disqualify an applicant. Instead USCIS appears to be applying its “brief, casual and innocent” criteria on a case by case basis, consistent with other guidance

In advising clients, attorneys should bear in mind that DACA is not a statutory benefit, but rather an act of administrative grace. USCIS has repeatedly avowed its commitment to interpreting the DACA guidance flexibly, with a view toward fulfilling the broader purposes of the program. Thus, prospective DACA requesters who meet the other eligibility requirements should not be deterred from applying based on an absence from the United States that may not clearly qualify as “brief, casual and innocent” under *Fleuti* and its progeny.

What was the Supreme Court’s holding in *Fleuti*, and how has the *Fleuti* doctrine evolved?

In *Fleuti*, the Court held that a lawful permanent resident who crossed into Mexico for a few hours had made an “innocent, casual, and brief excursion.”⁸ Because this trip did not meaningfully interrupt his prior period of continuous residence, the Court held that his return to the United States was not an “entry” under a prior version of the Immigration and Nationality Act.⁹ In construing the statute, the Court considered Congress’s intent to protect permanent residents from restrictive interpretations of “entry,” as well as the length of the absence from the United States, the purpose of the departure, and whether travel documents had to be procured for

⁶ If documentary evidence is unavailable, USCIS will accept circumstantial evidence that any travel outside of the United States during the five year period was brief, casual, and innocent. If the requester submits affidavits to explain that an absence was brief, casual and innocent, he or she must submit two or more affidavits by people other than the requester who have direct personal knowledge of the events and circumstances during the period where there is a gap in evidence. USCIS FAQ at 19-20.

⁷ 374 U.S. 449, 462 (1963).

⁸ *Rosenberg v. Fleuti*, 374 U.S. 449, 461-62 (1963).

⁹ *Id.* at 461-62 (interpreting the meaning of “entry” in former INA § 101(a)(13)).

the trip to determine whether the individual's prior period of continuous residence had been meaningfully interrupted.¹⁰

Following the Supreme Court's decision, the *Fleuti* doctrine began to influence the law regarding interruptions of continuous residence in other contexts. It was incorporated into the statutory provisions governing continuous presence for suspension of deportation, as well as the legalization provisions of the Immigration Reform and Control Act of 1986 (IRCA). Though many courts and the Board of Immigration Appeals (BIA or Board) have held that the *Fleuti* doctrine was superseded by the Illegal and Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the Supreme Court recently left the door open regarding the case's continued viability.¹¹

How does the purpose of a trip affect the courts' characterization of both long and short absences from the United States?

Courts have generally engaged in a "balancing of the *Fleuti* factors," including the length of an absence, but no one factor is conclusive.¹² While trips beyond a few weeks may be subject to greater scrutiny, courts have exercised leniency under *Fleuti* when the purpose of the trip was lawful and the person intended to return to the United States. For example, the Second Circuit explained that a permanent resident's three-week trip to attend a training course conducted by his employer did not meaningfully interrupt his residence because the trip was temporary and was intended to "qualify him for more useful employment services as he continue[d] his permanent residence."¹³ Likewise, the Ninth Circuit found that a permanent resident who traveled to the Philippines for three months to settle his affairs and to bring his family to the United States should be allowed to reenter the United States because the purpose of the trip demonstrated a desire "to preserve, not interrupt, his permanent resident status."¹⁴

Courts have been particularly inclined to find that an absence was brief, casual and innocent if a trip was very short and its purpose was lawful. For example, the Ninth Circuit held that a five day vacation to Mexico did not interrupt seven years of continuous presence when a suspension

¹⁰ *Id.*

¹¹ See *Vartelas v. Holder*, 132 S. Ct. 1479, 1484 n.2 (2012) ("Vartelas does not challenge the ruling in *Collado-Munoz*. We therefore assume, but do not decide, that IIRIRA's amendments to §1101(a)(13)(A) abrogated *Fleuti*."). In *Vartelas*, the Court held that the *Fleuti* doctrine continues to apply to permanent residents with pre-IIRIRA convictions who travel abroad. See *id.* at 1486, 1492.

¹² See, e.g., *Jubilado v. United States*, 819 F.2d at 212; see also *Heitland v. INS*, 551 F.2d 495, 504 (2d Cir. 1977) ("the significance of an absence will depend upon the relevant factors and circumstances found in each case").

¹³ *Itzconvit v. Selective Service Local Board No. 6*, 447 F.2d 888, 894 (2d Cir. 1971).

¹⁴ See *Jubilado v. United States*, 819 F.2d 210, 213 (9th Cir. 1987) (holding that IIRIRA § 301(a)(13) abrogated the *Fleuti* doctrine with regard to departures made by LPRs who have been convicted of or admitted to commission of certain crimes).

of deportation applicant had not left the United States on other occasions.¹⁵ The Seventh Circuit found that two short visits to Canada – one that lasted several days and the other an overnight trip – did not meaningfully interrupt a permanent resident’s continuous residence where an individual erroneously believed he was a United States citizen and traveled with his family to Canada on vacation.¹⁶ Similarly, the BIA found a three-day trip to Mexico while deportation proceedings were pending to be brief, casual, and innocent because the visit was short and the purpose of the respondent’s trip was to visit his ill father.¹⁷ By contrast, the Ninth Circuit found two long absences from the United States during a seven year period – one for five months and one for nine months – broke the noncitizen’s continuous residence for suspension of deportation when the second trip appeared to be for an indefinite period of time.¹⁸

Even trips that last several weeks or months may not meaningfully interrupt continuous residence. As the Ninth Circuit said in a case involving suspension of deportation, “[a]n absence of six or even 16 months does not interrupt the requisite continuity of physical presence as a matter of law.”¹⁹ For example, a district court found that a legalization applicant’s four month trip to Brazil met the *Fleuti* standard because she had left the United States to help her mother who was scheduled for major surgery, purchased a return ticket to the United States, and attempted to apply for advance parole before her departure.²⁰ Similarly, the Ninth Circuit found that a college student’s semester-long trip to Thailand to visit his ill mother was not meaningfully interruptive where the student timed his trip according to his school calendar and had lived in the United States for 12 years, during which time he completed bachelor’s degree and took steps to further his career in the United States.²¹

Short absences have been deemed to interrupt continuous presence when the purpose of the trip was contrary to law. For example, the Fifth Circuit upheld a BIA finding that a permanent resident who spent only a few days in Mexico had meaningfully interrupted his residence when the purpose of his trip was to help another individual unlawfully enter the United States.²² Many courts have reached similar conclusions when the intent to commit the unlawful act occurred

¹⁵ *Wadman v. INS*, 329 F.2d 812, 816 (9th Cir. 1964); see also *Munoz-Ortiz v. INS*, No. 98-71470, 2000 U.S. App. LEXIS 28090, at *2, *8 (9th Cir. 2000) (finding that the departure of an individual who mistakenly drove into Canada on his way to an immigration hearing was “brief, casual and innocent”); *Git Foo Wong v. INS*, 358 F.2d 151, 151-53 (9th Cir. 1966) (finding that a two-hour sightseeing visit to Mexico did not meaningfully interrupt ten years of continuous presence even though the petitioner had made a false claim to U.S. citizenship at age 15).

¹⁶ See *Zimmerman v. Lehmann*, 339 F.2d 943, 946-49 (7th Cir. 1965).

¹⁷ See *Matter of Cervantes-Torres*, 21 I. & N. Dec. 351, 356 (BIA 1996).

¹⁸ See *Mamane v. INS*, 566 F.2d 1103, 1105 (9th Cir. 1977) (noting with respect to the second trip that the entire family had left for Thailand and intended to stay abroad until the noncitizen’s husband recovered from injuries suffered in an accident in the United States).

¹⁹ *Kamheangpatiyooth v. INS*, 597 F.2d 1253, 1258 (9th Cir. 1979)

²⁰ *De Oliveria v. INS*, 873 F. Supp. 338, 344 (C.D. Cal. 1994).

²¹ See *Kamheangpatiyooth*, 597 F.2d at 1258. The court also found that the student’s long residence with only a 30 day absence, when viewed with other factors, indicated “expulsion would be unexpected and would entail great hardship.” *Id.* at 1257.

²² See *Lopez De Jesus v. INS*, 312 F.3d 155, 161 (5th Cir. 2002).

after an individual had left the United States. The Seventh Circuit found that a permanent resident meaningfully interrupted his residence in the United States when he traveled to Macedonia and after arriving, agreed to help his wife and three children unlawfully enter the United States.²³ Though he was gone for only four days and intended to resume his residence in the United States, the court found that his absence could not be considered “innocent” after he agreed to commit an illegal act.²⁴ Likewise, the Ninth Circuit found that the fact that an individual decided to smuggle marijuana into the United States only after he was in Mexico was not controlling because while the “‘purpose’ of the visit’ . . . may have been innocent when it began . . . it was not innocent when [he] sought to re-enter this country.”²⁵

What are the consequences of an unlawful entry or reentry under *Fleuti*?

Courts have differed in their application of the *Fleuti* doctrine when a person’s entry or reentry was deemed unlawful. Some courts have found the manner of entry is not dispositive when applying *Fleuti*. The Ninth Circuit, for example, has explained that “[i]llegal entry or reentry into the United States, was not, without more, the type of unlawful conduct that would necessarily render an absence not innocent and therefore ‘meaningful.’”²⁶ The court found that an applicant for suspension of deportation who entered the United States at age 17 and lived in the United States for 17 years did not necessarily interrupt her residence by taking a three and a half month vacation to Honduras and Mexico even though she reentered on the “pretext that she intended to stay only a few days.”²⁷ The court found that “not every violation of law taints an otherwise innocent trip abroad,” and remanded to the Board to conduct a proper *Fleuti* inquiry.²⁸ A California district court found that INS had improperly applied the *Fleuti* doctrine when it denied parole to a legalization applicant who left to visit his gravely ill mother in Mexico for three weeks and then attempted to enter the United States using a counterfeit “green card.”²⁹ The court contrasted the petitioner’s case with other cases where individuals had been apprehended smuggling people or drugs into the United States and found that, unlike the petitioner, the purpose of those individuals’ trips violated the immigration laws.³⁰

Other courts have imposed harsher consequences for unlawful reentry. The Seventh Circuit, for example, found that a permanent resident interrupted his residence after a two week trip to Mexico when he was stopped by Border Patrol agents, placed in exclusion proceedings, and instead of remaining in Mexico and waiting for his exclusion hearing to be scheduled, entered the United States by taking a bus and wading across the Rio Grande River.³¹ The court found that allowing those who entered without inspection to benefit from *Fleuti* would undermine “a

²³ See *Selimi v. INS*, 312 F.3d 854, 860 (7th Cir. 2002).

²⁴ *Id.*

²⁵ *Palatian v. INS*, 502 F.2d 1091, 1093 (9th Cir. 1974).

²⁶ *Catholic Social Servs., Inc. v. Meese*, 685 F. Supp. 1149, 1158-59 (E.D. Cal. 1988) (citing *Git Foo Wong v. INS*, 358 F.2d 151, 153-54 (9th Cir. 1966)).

²⁷ *De Gallardo v. INS*, 624 F.2d 85, 87 (9th Cir. 1980).

²⁸ *Id.*

²⁹ *Gutierrez v. Ilchert*, 682 F. Supp. 467, 468, 474 (N.D. Cal. 1988) (emphasis in original).

³⁰ *Id.*

³¹ See *Leal-Rodriguez v. INS*, 990 F.2d 939, 942 (7th Cir. 1993).

fundamental policy of immigration law.”³² Similarly, the Third Circuit found that an individual who falsely presented himself as a U.S. citizen on at least three occasions to gain re-entry to the United States could not be considered “innocent” under *Fleuti*.³³

Do courts consider an individual’s age at the time of an absence from the United States?

Yes. The Ninth Circuit held that a person’s status as a minor was a “relevant circumstance” and that a 16 year old did not interrupt his continuous residence when, at the instruction of his foster parents, he remained in Canada for six months to assist their daughter in caring for an ill family member.³⁴ The court reasoned that the petitioner was “under the dominion and control of his foster parents, and that his journey to Canada was the result of his foster parents’ order and not an exercise of his own volition.”³⁵ In a decision issued just days before the Supreme Court decided *Fleuti*, the BIA found that a permanent resident had not interrupted his continuous residence despite a three year absence from the United States because when he left the country at 16 years old, he was in the custody of his stepfather who moved the family to Germany during a tour of duty in the U.S. Army.³⁶

What are the implications of the *Fleuti* doctrine for DACA requesters who have traveled outside the United States?

Recalling *Fleuti* and its progeny, USCIS’s DACA guidance indicates that the agency will look closely at a traveler’s intention, which must be “reasonably calculated to accomplish the purpose for the absence.”³⁷ Where DACA requesters traveled with their parents at a very young age, they may not have had the requisite intent to meaningfully interrupt their residence. Older DACA requesters who traveled independently may also be deemed to have made “brief, casual and innocent” absences if they left the United States for a finite period of time, did not break the law, and ultimately intended to return. As a result, evidence submitted by requesters should carefully document the purpose of any trip outside the country.³⁸

Courts also have looked to the ameliorative intent of Congress when analyzing how to interpret the *Fleuti* doctrine in different statutory contexts.³⁹ Given that the stated purpose of the DACA

³² *Id.* at 947.

³³ See *Bufalino v. INS*, 473 F.2d 728, 731 (3d Cir. 1973) (reasoning that a false claim of citizenship “frustrates a major policy of our immigration law”).

³⁴ *Toon-Ming Wong v. INS*, 363 F.2d 234, 235-36 (9th Cir. 1966).

³⁵ *Id.* at 235.

³⁶ See *Matter of Bauer*, 10 I. & N. Dec. 304, 308 (BIA 1963).

³⁷ USCIS FAQ at 9.

³⁸ See USCIS [Instructions for Consideration of Deferred Action for Childhood Arrivals](#) (updated September 14, 2012) at 6.

³⁹ See e.g., *Yanez-Jacquez v. INS*, 440 F.2d 701, 703 (5th Cir. 1971) (“[T]he general purpose of Congress in enacting § 101(a)(13) [was] to ameliorate the severe effects of the strict ‘entry’ doctrine.”) (citing *Fleuti*, 374 U.S. at 461); see also *Gutierrez v. Ilchert*, 682 F. Supp. 467, 473-74 (N.D. Cal. 1988) (given the purpose of the IRCA’s legalization program, the *Fleuti* language in the statute “should be implemented in a liberal and generous fashion”) (citations omitted).

initiative is to defer enforcement action against hundreds of thousands of young immigrants, it is hoped that USCIS will take a similarly generous approach in determining whether a DACA requester's absence from the United States was "brief, casual and innocent."



AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY¹

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**INSPECTION AND ENTRY AT A PORT OF ENTRY:
WHEN IS THERE AN ADMISSION?**

By the Legal Action Center²

The concept of an admission to the United States is critical to U.S. immigration law. Whether a noncitizen has been admitted can determine eligibility for immigration relief, such as adjustment of status or a waiver, the procedural rules that may apply in removal proceedings, and even the grounds of removal to which a person may be subject. In fact, the concept is so important that the term “admission” – or a variation of it – appears hundreds of times throughout the Immigration and Nationality Act (INA) and the regulations. Despite a statutory definition of admission,³ the term does not carry the same meaning in all contexts and has given rise to litigation over the meaning of the term in different contexts.

This practice advisory focuses on when an admission occurs at a port of entry and will address three very specific, but frequently encountered situations:

- 1) When a noncitizen is “waved through” a port of entry by an immigration inspector who asks the noncitizen no questions;

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² LAC Senior Attorney Mary Kenney authored this practice advisory.

³ The INA, as amended by the Illegal Immigration and Immigrant Reform Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), defines the terms “admission” and “admitted,” with respect to a noncitizen, as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A). Additionally, the definition makes clear that a person who is paroled under INA § 212(d)(5) or permitted to land temporarily as a noncitizen crew member is not considered to have been admitted, and a returning lawful permanent resident will not be regarded as seeking admission unless one of six enumerated circumstances exist. INA §§ 101(a)(13)(B) and (C).

- 2) When a noncitizen gains entry into the United States at a port of entry by misrepresenting his or her legal status or using false documents, other than a false claim to U.S. citizenship; and
- 3) When a noncitizen gains entry into the United States at a port of entry by making a false claim to U.S. citizenship, either verbally or with false documents.

With respect to each situation, the practice advisory will address whether an admission has occurred; what the noncitizen's status is upon entry; and what possible immigration consequences there are to such an entry. The practice advisory also includes a section discussing these issues relative to DACA applications.

I. ENTRY AFTER BEING “WAVED THROUGH” BY AN INSPECTOR

Has a noncitizen been admitted if he or she is “waved” through at a port of entry without being asked any questions?

Yes. A noncitizen who physically presents him or herself for inspection, makes no false claim to U.S. citizenship, and is permitted to enter the United States, has been inspected and admitted, even if the inspecting officer asks no questions. Such an individual has not made an entry without inspection (EWI). *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980).

It is not uncommon for an individual to be “waved” through inspection at a port of entry; that is, allowed to enter without being asked any questions by the inspecting officer.⁴ For example, in *Matter of Areguillin*, the noncitizen testified that she was a passenger in a car. Ms. Areguillin, who had no entry documents on her, was not questioned and volunteered no information. After questioning only the driver, the inspecting agent allowed the car to enter.

The respondent later married a U.S. citizen. The issue in her subsequent deportation proceeding was whether her entry was an “admission” for purposes of adjustment of status pursuant to INA § 245(a).⁵ The Board of Immigration Appeals (Board or BIA) held that a noncitizen is:

- “Inspected” when she physically presents herself for questioning and makes no false claim to U.S. citizenship,⁶ even if she volunteers no information and is asked no questions; and

⁴ That “wave throughs” occur with some frequency is supported by the testimony of Richard M. Stana of the Government Accountability Office to the House of Representative’s Committee on Homeland Security, entitled “Border Security: Despite Progress, Weakness in Traveler Inspections Exist at Our Nation’s Ports of Entry,” January 3, 2008 (<http://www.gao.gov/assets/120/118716.pdf>). This report can be useful to support a claim that an individual was waved through a port of entry when the client’s testimony is the only evidence of the entry.

⁵ To be eligible for adjustment of status under INA § 245(a), an applicant must have been “inspected and admitted or paroled” into the United States.

⁶ See section 3 below for a discussion of the consequences of a false claim to U.S. citizenship.

- “Admitted” when the officer communicates to the applicant that she is not inadmissible; this communication has occurred if the officer permits the applicant to enter the United States.

The Board found that the facts alleged by the respondent indicated that she had been inspected and admitted for purposes of adjustment of status.

The Board subsequently reaffirmed *Matter of Areguillin* in *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010). There, the Board considered whether the definition of the terms “admitted” and “admission” – which Congress adopted years after the Board’s decision in *Matter of Areguillin* – conflicted with the Board’s earlier holding. See INA § 101(a)(13)(A) (defining “admission” and “admitted” as being “the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer”). The Board found that the statutory requirement of a “lawful entry” requires only an entry that is procedurally regular rather than a substantively lawful entry. Consequently, the Board in *Matter of Quilantan* concluded that the admission recognized in *Matter of Areguillin* – which was procedurally regular – was consistent with the statutory definition of the term “admission.”

Thus, under *Matter of Areguillin* and *Matter of Quilantan*, noncitizens who present themselves for inspection at the border, who do not make a false claim to U.S. citizenship, and who are allowed to enter the United States – even if not questioned by an immigration officer and even if they do not have valid entry documents – have been “admitted.”⁷ These individuals have not “entered without inspection.”

Does a noncitizen without entry documents who is “waved through” inspection and allowed to enter the United States gain lawful status upon admission? If not, is there a benefit to having been admitted?

⁷ Several courts of appeals agree that the terms “admitted” and “admission” require only procedural – not substantive – compliance. See *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008); *Martinez v. Attorney General*, 693 F.3d 408, 409, 415 (3d Cir. 2012); *Borrego v. Mukasey*, 539 F.3d 689, 693 (7th Cir. 2008) (holding that a respondent who was allowed to enter based on misrepresentations and was inadmissible at entry had nonetheless been “admitted”); *Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097-99 (9th Cir. 2010); but see *Ramsey v. U.S. INS*, 14 F.3d 206, 211 n.6 (4th Cir. 1994) (distinguishing *Matter of Areguillin* where the facts involved an intentional misrepresentation). Note, however, that in the reinstatement context, three courts have rejected the argument that a procedurally regular entry is a legal entry. *Cordova-Soto v. Holder*, 659 F.3d 1029, 1033-34 (10th Cir. 2011) (finding that *Matter of Quilantan* did not apply to a procedurally regular – but substantively unlawful – reentry for purposes of the reinstatement of removal provision); *Tamayo-Tamayo v. Holder*, 709 F.3d 795 (9th Cir. 2013) (Stating that “nothing suggests that Congress intended the procedural definition to apply to the phrase ‘reentered the United States illegally’” in the reinstatement provision.); *Beekhan v. Holder*, 634 F.3d 723 (2d Cir. 2011) (finding that the knowing use of another’s passport to reenter was an illegal reentry under the reinstatement provision, without discussing the definition of “admission”). For more on this topic, see the LAC’s advisory “Reinstatement of Removal,” <http://www.legalactioncenter.org/practice-advisories-topic#enforcement>.

Although a noncitizen without valid entry documents has been admitted to the United States if he or she was “waved through” by an immigration inspector, he or she does not gain lawful immigrant or nonimmigrant status following this admission. Thus, upon admission, the individual is present in the United States without lawful status and subject to removal under the deportability charge INA § 237(a)(1)(A) (inadmissible at the time of entry).

Nonetheless, because such a person was admitted, he or she may be eligible for immigration benefits in the future. For example, a noncitizen who subsequently marries a U.S. citizen or has a U.S. citizen child who turns 21, would be eligible to adjust to lawful permanent resident status under INA § 245(a). An undocumented noncitizen who entered without inspection can only adjust status – even if married to a U.S. citizen or the parent of an adult U.S. citizen – if he or she meets the much more restrictive requirements of INA § 245(i).⁸

Additionally, should a person who is waved through later be placed in removal proceedings, he or she must be charged with a deportation ground – which applies to noncitizens who are “in and admitted to the United States,” INA § 237 – as opposed to grounds of inadmissibility.⁹ Noncitizens who have been admitted and are charged under the deportation grounds have somewhat greater procedural rights in removal proceedings, *see* INA § 240(c)(3) (placing the burden of proof of deportability on the government).

II. ENTRY GAINED UPON FRAUD OR MISREPRESENTATION (OTHER THAN FALSE CLAIM TO CITIZENSHIP)

Has a noncitizen been admitted if he or she gains entry by fraud or misrepresentation (other than a false claim to U.S. citizenship)?

The majority of circuit courts and the Board treat a noncitizen who has been inspected and allowed to enter as someone who has been admitted even if the admission was gained through fraud, misrepresentation or the use of false documents. Several courts have dealt with the issue explicitly. For example, in *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008), the Second Circuit considered whether the petitioner was “present in the United States without being admitted” in violation of INA § 212(a)(6)(C)(i), because she had entered the United States on a visa obtained through fraud or misrepresentation. Relying on INA § 101(a)(13)(A), the court concluded that the petitioner had in fact been “admitted” when she entered on a fraudulent visa because she had entered after inspection and authorization. The court reasoned “[t]he manner in which she procured her admission rendered her inadmissible at the time of entry . . . but does not change the fact that she was, indeed, *admitted*.” *Id.* (emphasis added).¹⁰

⁸ Among other requirements for § 245(i) eligibility, the underlying visa petition or labor certification must have been filed prior to May 1, 2001.

⁹ *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), and *Matter of Guang Li Fu*, 23 I&N Dec. 985 (BIA 2006), are both examples of this.

¹⁰ Other cases reaching this same result include: *Martinez v. Attorney General*, 693 F.3d 408, 409 (3d Cir. 2012) (“‘admission’ as an lawful permanent resident (‘LPR’) in Section 212(h) refers to a procedurally regular entry, not a substantively compliant one”); *Borrego v. Mukasey*, 539 F.3d 689, 692-93 (7th Cir. 2008) (admission obtained through misrepresentation still constitutes an “admission”); *Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097 (9th Cir. 2010)

This result is consistent with the statutory structure. The grounds of deportation apply only to noncitizens who are “in and admitted to the United States.” INA § 237(a).¹¹ As *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008), *rev’d on other grounds*, *Federiso v. Holder*, 605 F.3d 695 (9th Cir. 2010), and *Matter of Guang Li Fu*, 23 I&N Dec. 985 (BIA 2006) reflect, one ground of deportation – INA § 237(a)(1)(A) – specifically contemplates the admission of noncitizens who are inadmissible at the time of entry. Additionally, INA § 237(a)(1)(H) provides a waiver of deportation for someone found deportable for being inadmissible at the time of admission. Neither of these two provisions would exist if a noncitizen who gained entry at inspection through misrepresentation was not, as a matter of law, considered to have been admitted. *Accord Matter of Quilantan*, 25 I&N Dec. at 292 (noting that an interpretation of “admitted” as requiring substantive compliance would “effectively render null section 237(a)(1)(H)”).

As a result, there are numerous cases involving a claim of misrepresentation in which the government charged the noncitizen under INA § 237(a)(1)(A), the *deportation* ground for being inadmissible at the time of entry. *See, e.g., Hoxha v. Gonzales*, 446 F.3d 210, 211, 214 (1st Cir. 2006) (false passports); *Shtaro v. Gonzales*, 435 F.3d 711, 713 (7th Cir. 2006) (fraudulent document); *Aden v. Ashcroft*, 396 F.3d 966, 967 (8th Cir. 2005) (fraudulent documents); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157 (9th Cir. 2005) (misrepresentation of marital status); *Alim v. Gonzales*, 446 F.3d 1239, 1242-43 (11th Cir. 2006) (use of another person’s passport and visa); *see also Matter of Federiso*, 24 I&N Dec. at 661-62 (misrepresentation of marital status) and *Guang Li Fu, supra* (failure to reveal the death of petitioning relative).

What are the consequences of an entry that is based upon fraud or misrepresentation?

Any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks, has sought, or has procured any benefit under the INA, is inadmissible. INA § 212(a)(6)(C)(i). Thus a noncitizen who was admitted based upon a misrepresentation could be charged in removal proceedings as deportable under INA § 237(a)(1)(A) for being inadmissible at the time of entry. A defense to this ground of inadmissibility – and thus to the deportation ground for being inadmissible at entry on this basis – is that the statement was not a knowing and deliberate misrepresentation. *See, e.g., Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979) (recognizing that a noncitizen must know that the statement is false); *Espinoza-Espinoza v. INS*,

(finding it “clear that Congress intended to define admission in procedural, rather than substantive, terms”); *but see Ramsey v. U.S. INS*, 14 F.3d 206, 211 n.6 (4th Cir. 1994) (distinguishing *Matter of Areguillin* where the noncitizen made statements intended to mislead the immigration inspector).

¹¹ In contrast, inadmissibility grounds are charged against those who are “ineligible to receive visas and ineligible to be admitted to the United States.” INA § 212(a). As the Second Circuit has explained:

An alien’s prior “admission” *vel non* is also dispositive in determining which particular “charge” of removability is appropriate to his removal proceedings. An alien who is “in and admitted to the United States,” is considered potentially *deportable* and is therefore subject to a charge of deportability. 8 U.S.C. § 1227(a); *id.* § 1229a(a). By contrast, an alien who is not in the United States pursuant to a prior admission is considered potentially *inadmissible* and is therefore subject to a charge of “inadmissibility[.]” *Ibragimov v. Gonzales*, 476 F.3d 125, 131 (2d Cir. 2007).

554 F.2d 921, 925 (9th Cir. 1977) (requiring that the statement must be made with knowledge of its falsity). Intent to deceive is not necessary so long as the individual knew that the information was false. See, e.g., *Mwongera v. INS*, 187 F.3d 323, 330 (3d Cir. 1999) (finding inadmissibility ground met by fraud or willful misrepresentation; the latter is satisfied by a finding that the misrepresentation was deliberate and voluntary).

A “fraud waiver” under INA § 212(i) may cure some entries based on fraud or misrepresentation. The waiver is available to a noncitizen who: 1) is the spouse or son or daughter of a U.S. citizen or an LPR; and 2) can demonstrate that the denial of admission would result in extreme hardship to this relative. In VAWA self-petitioner cases, the self-petitioner, a United States citizen, LPR or qualified relative may demonstrate the necessary extreme hardship.

III. ENTRY GAINED UPON A FALSE CLAIM TO U.S. CITIZENSHIP

Has a noncitizen been admitted if he or she gains entry by making a false claim to U.S. citizenship?

No. Unlike other fraud and misrepresentations, a noncitizen who gains entry by making a false claim to U.S. citizenship is treated as if he or she was not inspected at all; that is, his or her entry is treated as if it is an “entry without inspection.”

In *Reid v. INS*, 95 S. Ct. 1164, 1168 (1975), the Supreme Court held that a noncitizen who enters the U.S. by falsely claiming to be a U.S. citizen has so “significantly frustrated” the process for inspecting incoming noncitizens that he is deportable as having entered without inspection. The Court reasoned that the process for inspecting citizens is more perfunctory than that for inspecting noncitizens and that there are mechanisms in place for immigration authorities to track immigrants – but not U.S. citizens – who enter the United States. The Court concluded that a noncitizen “who enters by claiming to be a citizen has effectively put himself in a quite different position from other admitted [noncitizens], one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected.” *Id.* (internal citation omitted). As a consequence, an entry based upon a knowing false claim to U.S. citizenship is treated as an entry without inspection.

What are the immigration consequences of a false claim to U.S. citizenship made while seeking entry ?

A noncitizen who is found to have made a false claim to U.S. citizenship for any purpose or benefit under the INA or any other federal or state law is permanently inadmissible to the United States. INA § 212(a)(6)(C)(ii)(I).¹² It is well settled that obtaining entry into the United States at a port of entry by means of a false claim to U.S. citizenship is a “benefit” under the Act. See *Jamieson v. Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) (citing *Reid v. INS*, 420 U.S. at 624-25; *Kalejs v. INS*, 10 F.3d 441, 446 (7th Cir. 1993)). Consequently, such an entry, if established,

¹² Although INA § 212(a)(6)(C)(ii)(I) is much broader in its application than false claims to U.S. citizenship made to an immigration inspector at a port of entry, this is the only context that is addressed in this practice advisory. Note too, that there is a parallel ground of deportation found at INA § 237(a)(3)(D)(i), which applies to false claims to U.S. citizenship made by noncitizens who are “in and admitted to the United States.” Because the focus of this practice advisory is on port of entry issues, the focus here is on the inadmissibility ground.

would render the noncitizen inadmissible under INA § 212(a)(6)(C)(ii)(I) unless a defense to the inadmissibility exists (see discussion of defenses below). There is no waiver for this ground of inadmissibility.¹³

This ground of inadmissibility applies to false claims to U.S. citizenship made on or after September 30, 1996, the enactment date of IIRIRA in which § 212(a)(6)(C)(ii)(I) was included as a separate ground of inadmissibility. See Appendix 74.8, USCIS Adjudicator's Field Manual (<http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-19231/0-0-0-32896.html>). Prior to this, false claims to U.S. citizenship were covered under the general inadmissibility ground for misrepresentation, for which a waiver is available under INA § 212(i) (see section II, above). For false claims that were made before September 30, 1996, and that are not considered to be continuing,¹⁴ a § 212(i) waiver is available for those eligible. (See section II, above).

What defenses may be available to counter a charge of inadmissibility for a false claim to citizenship?¹⁵

- **The individual was a child when he or she made a false claim to U.S. citizenship.**

The age of a child is a relevant factor to consider with respect to the defense of a false claim to U.S. citizenship. To date, neither the Board nor a federal court has issued a precedent decision on whether a minor has the legal capacity or state of mind to make a false claim to U.S. citizenship. In a case involving an unaccompanied fifteen year old, the Eighth Circuit chastised the Board for not resolving this issue and remanded the case with instructions that the Board clarify the standard it was using. *Sandoval v. Holder*, 641 F.3d 982, 983 (8th Cir. 2011). The court noted that, should the Board ultimately apply a blanket rule finding all children subject to § 212(a)(6)(C)(ii) regardless of age and circumstances, on further appeal the court would have to “wrestle with the implications of applying the ‘drastic measure’ of a permanent admissibility bar to each child regardless of her capacity to comprehend the wrongfulness of her action.” *Id.* at 987 (citation omitted).

Notably, in *Sandoval*, the government attorney conceded at oral argument that § 212(a)(6)(C)(ii) “would not apply to an eight-year-old child whose parents armed her with a fraudulent birth certificate and instructed her to say she was a United States citizen if asked by the officer.” *Id.*

¹³ There is one limited exception to this inadmissibility ground: a noncitizen who makes a false claim to U.S. citizenship will not be found to be inadmissible if his or her natural or adoptive parents are or were U.S. citizens, the noncitizen permanently resided in the U.S. prior to age 16, and the noncitizen reasonably believed at the time of making the false claim that he or she was a U.S. citizen. INA § 212(a)(6)(C)(ii)(II). A parallel exception exists for the deportation ground. See INA § 237(a)(3)(D)(ii).

¹⁴ For example, a false claim made in the context of an employment application might be considered “continuing” if the noncitizen remained in the job beyond September 30, 1996.

¹⁵ Note that these defenses are to the charge that the person is inadmissible based upon having made a false claim to citizenship. They do not change the fact that the noncitizen has not been admitted to the U.S. due to the false claim and is thus considered to have entered without inspection.

This concession is consistent with reports that we have heard of young children – generally under 10 – not being found inadmissible for false claims to U.S. citizenship. The more difficult cases involve pre-teen and teenage children, although arguments still exist that they do not have the legal or mental capacity to make a false claim to U.S. citizenship.

Reports have circulated that USCIS is considering a new policy with respect to false claims of U.S. citizenship by children. See AILA InfoNet Doc. No. 12091949 (posted Sep. 19, 2012). To date, nothing has been issued.

- **The noncitizen honestly believed he or she was a U.S. citizen.**

Pre-1996 false claims: Prior to IIRIRA, only false claims to citizenship that were made willingly and knowingly rendered a noncitizen inadmissible. *Matter of Wang*, 11 I&N Dec. 712 (BIA 1966). The Board had held that a noncitizen who honestly believed he was a citizen at the time of entry would not be deportable for a knowing false claim to citizenship; moreover, unlike a noncitizen who has made a knowing false claim, one who was admitted upon the honest but mistaken belief that he was a U.S. citizen would be found to have been “inspected” within the meaning of the immigration laws. *Matter of Wang*, 11 I&N Dec. 712 (BIA 1966).

Post-1996 false claims: Unlike pre-1996 false claims, for which the inadmissibility ground is INA § 212(a)(6)(C)(i), the statutory language in INA § 212(a)(6)(C)(ii)(I) does not contain an element of willfulness. Thus, the statute is written in terms of strict liability. However, USCIS instructs its adjudicators that for a claim to be “falsely” made, a noncitizen must “knowingly” misrepresent the fact that he or she was not a citizen of the U.S. See USCIS Adjudicator’s Field Manual, § 40.6.2(c)(2)(B)(i).

There are no precedent BIA decisions addressing whether INA § 212(a)(6)(C)(ii)(I) should be read to include an element of intent. In at least one unpublished decision, however, the BIA reversed an immigration judge who ordered the noncitizen removed for a false claim to U.S. citizenship, noting that “[i]t has long been settled that a false claim of United States citizenship must be knowing and willful for immigration purposes and that an alien who honestly believed he/she was a United States citizen at the time of entry has not made a false claim to United States citizenship.” *In Re: Alma Delia Contreras*, 2005 WL 952460 (BIA April 14, 2005). Because both the noncitizen and the government stipulated that she honestly believed that she was a U.S. citizen at the time her claim was made, the BIA found that she was not inadmissible under INA § 212(a)(6)(C)(ii)(I). *Id.*; but see *In Re: Ahed Salah Shibli*, 2008 WL 5025279 (BIA Oct. 29, 2008) (“intent is not relevant in determining inadmissibility for having made a false claim of United States citizenship”).

- **The noncitizen retracted the claim in a timely manner.**

In pre-1996 cases, the BIA had long recognized that a timely retraction of a false or fraudulent claim – including a false claim of U.S. citizenship – has the effect of withdrawing the claim. See, e.g., *Matter of R – R* –, 3 I&N Dec. 823 (BIA 1949) (holding that the respondent was not inadmissible for perjury when he timely retracted his false claim of citizenship); *Matter of M* –, 9 I&N Dec. 118 (BIA 1960) (involving timely retraction of a false claim of lawful residence). For a retraction to be “timely,” it must be “voluntary and without delay.” *Matter of Namio*, 14 I. &

N. Dec. 412, 414 (BIA 1973). A retraction will not satisfy this standard if it is “not made until it appeared that the disclosure of the falsity of the statements was imminent.” *Id.*

USCIS explicitly recognizes a timely retraction as a defense to a charge of inadmissibility under INA § 212(a)(6)(C)(ii)(I). See USCIS Adjudicator’s Field Manual, § 40.6.2(c)(2)(C)(viii). While there are no precedent Board decisions on whether this defense applies to the post-IIRIRA false claim provisions, at least two unreported decisions recognize the defense. See *In re Marrakchi*, 2003 WL 23216757 (BIA September 29, 2003) (relying on *Matter of R – R* – and finding the noncitizen *not* inadmissible under INA § 212(a)(6)(C)(ii) due to timely retraction of his false claim to citizenship); *In re Valadez-Munoz*, 2006 WL 1558823 (BIA April 12, 2006) (rejecting an immigration judge’s characterization of the timely retraction doctrine as “antiquated” but finding that respondent had not timely retracted his false claim to citizenship), *aff’d Valadez-Munoz v. Holder*, 623 F.3d 1304 (9th Cir. 2010); but see *In re Cerda Duarte*, 2007 WL 416832 (BIA Jan. 24, 2007) (finding that, even if the timely retraction doctrine applies to INA § 212(a)(C)(ii), it should not be allowed in a border case in which an unquestioned false claim to citizenship could lead to the noncitizen being “waved through” and admitted).

What impact do any of the three types of entries discussed above have on a DACA application?

Each of the three entry situations discussed in this practice advisory involves an issue of inadmissibility. Although inadmissibility may result in adverse immigration consequences, inadmissibility does not bar eligibility for Deferred Action for Childhood Arrivals (DACA).

Additionally, as discussed, the immigration consequences of a false claim to U.S. citizenship made after September 30, 1996 are extremely serious. There is no waiver available and, absent a defense, a noncitizen who is found to have made such a claim will be permanently inadmissible. Consequently, it is critical that a DACA applicant who has made such a claim understand the potential immigration consequences, the risks involved in applying for DACA, and if a decision is made to go forward with a DACA application, how to present information on the application.

When applying for DACA and the related employment authorization document (EAD), noncitizens must answer questions about the manner of their initial entry into the United States, their immigration status at the time of their entry, and their immigration status at the time of their application. Thus, individuals who initially entered in any of the three ways discussed in this practice advisory will have to report information related to this entry. As a result, applicants must remain aware of future immigration benefits for which they might become eligible or future adverse immigration consequences that they might face. Regardless, applicants may conclude that the adverse facts will not be cured by not applying and the benefits of deferred action may be seen to outweigh the risks.

Noncitizens who are “admitted” to the United States have more options with respect to possible future immigration benefits than individuals who entered without inspection. Thus, it is important not to misclassify an entry as being an “entry without inspection” if it was actually – or even possibly – an admission. Additionally, because the entry may have been years ago and/or may have been when the DACA applicant was very young, his or her memory of what took place may be incomplete. In order to preserve the ability to bring future claims to which the

applicant might be entitled, and to minimize any conflict with future statements, one answer to question 15 (“Status at Entry”) on the DACA application that would be accurate for all three situations is the drop-down selection “no lawful status.”

With respect to questions 14 (“Manner of Last Entry”)¹⁶ and 15 (“Current Immigration Status”) on the EAD application, an applicant could accurately answer “no lawful status” with respect to all three situations.

¹⁶ Question 14 on the EAD application refers to the most recent entry that the applicant has made, whereas question 15 on the DACA application refers to the initial entry. Therefore, the answer to question 14 on the EAD application may be different from that on the DACA application if the noncitizen made a trip abroad following his or her initial entry.



PRACTICE ADVISORY¹

December 21, 2012

RETURN TO THE UNITED STATES AFTER PREVAILING ON A PETITION FOR REVIEW OR MOTION TO REOPEN OR RECONSIDER

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¹ Copyright (c) 2012, National Immigration Project of the National Lawyers Guild; the American Immigration Council, and the Immigrant Rights Clinic, a clinic of Washington Square Legal Services at New York University School of Law (the views herein represent those of the clinic and not necessarily of the law school). The authors of this practice advisory are Trina Realmuto, Jordan Wells, Alina Das, and Beth Werlin.

This advisory is not a substitute for individual legal advice and decision-making supplied by a lawyer familiar with a client’s case. Readers are cautioned to check for cases and legal developments.

I. INTRODUCTION

This practice advisory contains practical and legal suggestions for individuals seeking to return to the United States after they have prevailed on a petition for review or an administrative motion to reopen or reconsider to the immigration court or Board of Immigration Appeals (“BIA”). This advisory begins with an overview of relevant developments over the past few years, including the government’s issuance of a return directive in February 2012. It then covers administrative steps to try to obtain return under the directive. Finally, it summarizes potential litigation options if the government refuses to facilitate or unreasonably delays return, and strategies for avoiding in absentia orders in administrative proceedings while pursuing return. The end of the advisory includes a sample email to initiate return and a list of links to the documents referenced herein.

Notwithstanding the return directive, arranging return continues to be a haphazard process—even for individuals who fit squarely within the categories of noncitizens that the Department of Homeland Security (“DHS”) acknowledges may return.² Attorneys regularly report demoralizing combinations of intransigence, confusion, and lack of coordination on the part of the agencies involved in facilitating returns. Given the significant impediments attorneys report with this process, successful post-departure pro se litigants stand little to no chance of navigating the legal and bureaucratic obstacles to returning to the United States.

II. BACKGROUND

Practitioners long have reported that there appeared to be no policy for bringing their clients back to the United States after they prevailed in the courts. It thus came as a surprise in 2008, when the Office of the Solicitor General (“OSG”) represented to the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009), that the government had a “policy and practice” of providing “effective relief” to noncitizens who prevail in their cases after being removed, by facilitating their return.³ In its opinion, the Court relied on this representation in concluding that, for a stay of removal, “the burden of removal alone cannot constitute the requisite irreparable injury.”⁴ Immigration advocates’ surprise morphed into suspicion. This led them to file Freedom of Information Act (“FOIA”) requests for the alleged policy, and when the agencies failed to turn over records, they filed a lawsuit against DHS, the Department of Justice (“DOJ”), and the

² See [ICE Policy Directive Number 11061.1](#) (Feb. 24, 2012).

³ Brief for Respondent at 44, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681).

⁴ See *Nken*, 556 U.S. at 435 (citing Brief for Respondent at 44).

Department of State (“DOS”).⁵ The FOIA lawsuit revealed that the OSG had misrepresented the existence of a return policy to the Supreme Court.⁶

In the wake of these revelations, DHS rushed to demonstrate to the Supreme Court and lower courts that they subsequently had put an effective return policy in place. On February 24, 2012, Immigration and Customs Enforcement (“ICE”) issued a [directive](#) purporting to “describe[] existing ICE policy”—although notably the directive does not reference any pre-existing policies. Then in April 2012, ICE issued guidance in the form of [Frequently Asked Questions](#) (“FAQ”) regarding implementation of the February 2012 “policy.”⁷ At the same time, Secretary of State Clinton sent a hurried cable to embassies and consular offices, instructing them to refer return inquiries to ICE and process parole notifications for individuals whom DHS determines merit return.⁸

With the purported “policy” barely in place, on April 24, 2012, the OSG sent a letter to the Supreme Court, acknowledging its incorrect representations in *Nken*. In the letter, the OSG urged the Court not to revisit the portion of its opinion that relied on those representations, averring that “[t]he government does not believe that any action by this Court is required,” given its client-agency’s recent announcements.⁹ Since the OSG submitted its letter, attorneys in DOJ’s Office of Immigration Litigation have been submitting the return directive to courts considering requests for stays of removal orders, in support of the position that deportation does not result in irreparable harm.

⁵ Complaint at 1, *Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t. of Homeland Sec.*, No. 11-CV-3235 (S.D.N.Y. filed May 12, 2011). The plaintiffs are the National Immigration Project of the National Lawyers Guild (NIPNLG), the American Civil Liberties Union, the Immigrant Defense Project, the Boston College Post- Deportation Human Rights Project, and Professor Rachel Rosenbloom. The New York University School of Law Immigrant Rights Clinic represents plaintiffs.

⁶ See [Nat’l Immigration Project of the Nat’l. Lawyers Guild v. U.S. Dep’t. of Homeland Sec.](#), 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012). Case documents, case updates, and the documents the government disclosed through the litigation and to the Supreme Court in *Nken* are available on the [NIPNLG website](#).

⁷ [U.S. Immigration and Customs Enforcement, Frequently Asked Questions about ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens \(2012\)](#).

⁸ The cable is attached as appendix E to the OSG’s letter to the Supreme Court in *Nken* and is available on the NIPNLG website.

⁹ [Letter](#) from Michael R. Dreeben, Deputy Solicitor General, to Hon. William K. Suter, Clerk of the Supreme Court (Apr. 24, 2012). Several immigration groups that had appeared as *amici curiae* in *Nken* responded with a letter asking the Court to “withdraw[] the parts of its *Nken* opinion that relied on representations that the government now acknowledges were inaccurate.” [Letter](#) from Paul R.Q. Wolfson and Adam Raviv to Hon. William K. Suter, Clerk of the Supreme Court (May 4, 2012). As of this writing, only the OSG’s letter—not the letter from *Nken*’s amici—was acknowledged as received by the Court. See [Nken v. Holder, No. 08-681](#).

In May 2012, the NYU Immigrant Rights Clinic, the National Immigration Project/NLG, Boston College Post Deportation Human Rights Project, and the American Immigration Council issued a practice advisory that identifies some of the major flaws in the ICE return policy and provides arguments for satisfying the “irreparable harm” component of the stay-of-removal analysis.¹⁰

III. ICE’S POLICY DIRECTIVE

ICE’s policy [directive](#), announced in the wake of the FOIA litigation and implemented haphazardly, falls far short of providing fairness to prevailing litigants who have overcome the difficulties of litigating from abroad—challenges often created by DHS’ decision to pursue removal before the case has run its course. As discussed in further detail below, the directive addresses the return only of certain individuals who prevail on a petition for review (“PFR”), in particular, lawful permanent residents (“LPRs”) and others whose presence ICE considers “necessary.” By its terms, the directive is extremely narrow in scope and provides little guidance to individuals seeking return. It is important to understand the many aspects in which it falls short:

- **Non-Binding and Lacks the Force of Law.** DHS has indicated that it does not intend this policy to bind agency employees or carry the force of law. The directive explicitly states that it “does not apply to bargaining unit employees” and “is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party.”¹¹
- **Subject to Change or Revocation at Any Time.** By issuing a mere statement of policy, DHS may change its position on returns at any time.¹² DHS did not publish the directive

¹⁰ See [Seeking a Judicial Stay of Removal in the Court of Appeals: Standard, Implications of ICE’s Return Policy and the OSG’s Misrepresentation to the Supreme Court, and Sample Stay Motion \(May 25, 2012\)](#).

¹¹ Moreover, DHS should have satisfied notice-and-comment requirements under the APA, 5 U.S.C. § 553, because the directive substantively affects the people it regulates. While policy statements are exempt from notice-and-comment requirements, § 553(b)(A), legislative rules carrying the force of law are not. See *General Electric Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (“If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA’s legislative rulemaking procedures.”). In any event, the directive would likely fall short of notice-and-comment requirements of the APA, because it fails to provide “sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking.” *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (“It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal interpretations.”).

¹² See, e.g., *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm. We

in the Federal Register, as required by the APA, 5 U.S.C. § 552(a)(1)(D), and the agency retains full discretion to revoke the policy directive at any time.

- **Limited coverage.** The directive only covers noncitizens who prevail on PFRs. It does not cover noncitizens who prevail on administrative motions to reopen or reconsider before an immigration judge (“IJ”) or the BIA.
- **Subject to ICE’s Unfettered Discretion.** The directive states that ICE will facilitate return only where:
 - i. *The court, by vacating or reversing the removal order, restores the noncitizen to LPR status.* Practitioners continue to report that, despite the fact that the policy is clear on this point, ICE nevertheless has refused to facilitate return in this situation. Some practitioners have had to file a federal court lawsuit to obtain a proper response.
 - ii. *ICE deems, in its sole, unfettered discretion, that a non-LPR’s “presence is necessary for continued administrative removal proceedings.”* There is little guidance on when ICE will deem a person’s presence necessary at her or his hearing. ICE routinely takes the position that it need not consider returning someone whose case is remanded to the BIA for further action by the court of appeals unless and until the BIA rules on the pending matter. Furthermore, ICE often takes the position that return is unnecessary when an immigration court hearing may take place by video or by phone.
 - iii. *On remand, the person ultimately obtains relief, allowing her or him to reside in the U.S. lawfully.* This describes a very limited set of people—essentially, those who have overcome all of the obstacles and won their case while abroad.¹³
- **“Extraordinary Circumstances” Exception Undefined.** The directive states that ICE will facilitate return, in the limited instances described above, “[a]bsent extraordinary

thus have said that policy statements are binding on neither the public, nor the agency. The primary distinction between a substantive rule—really any rule—and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position.”) (internal citations omitted).

¹³ Respondents forced to proceed from abroad often face problems such as limited communication with their counsel, difficulty presenting and reviewing evidence, and technological malfunctions or failures. Although the FAQ states that a person may participate in immigration hearings from abroad, there is no indication that a system is in place to facilitate videoconferencing from abroad; Secretary Clinton’s cable to consular offices, *see supra* n.8, does not contain any instruction on facilitating videoconferencing.

Worse still, practitioners have reported that, where clients were unable to appear in person, IJs have closed cases or considered issuing in absentia orders. *See* Part VI, *infra*, for further discussion of removal proceeding strategies where the respondent is stranded abroad.

circumstances.” The FAQ states that these circumstances “include, but are *not limited to*, situations where the return of an alien presents serious national security considerations or serious adverse foreign policy considerations.” (emphasis added). This nebulous definition delegates wide discretion to ICE and opens the door to manipulation.

- **Lack of Pre-Return Detention Determination.** The directive notes only that it “may detain” a noncitizen upon return. ICE’s refusal to make a custody determination prior to return, even for noncitizens who were not previously detained or who complied with a voluntary departure order, is unsettling. Knowing whether one will be detained is crucial to an individual weighing the risks and rewards of return and considering the timing of her or his return.
- **Failure to Provide Proof of Pre-Removal Status.** The directive states that ICE regards a returned noncitizen as having the immigration status that she or he had, if any, prior to the entry of the removal order. The FAQ states that ICE will not treat a returning noncitizen as an “arriving alien” unless she or he was charged as an “arriving alien” prior to removal. Nonetheless, ICE continues to fail to provide returning noncitizens with proof that they are returning with their pre-removal status. For example, ICE has refused to return LPRs their LPR cards so that they may use them to travel back to the United States. And once an LPR has returned, practitioners report that United States Citizenship and Immigration Services (“USCIS”) has denied the person’s I-90 application to replace her or his LPR card. Practitioners have had to resort to federal court actions to spur the agencies to act properly in regard to these issues.
- **Facilitation of Return through Parole.** The directive states that ICE will, “if warranted, parole the alien into the United States.” To the extent that ICE is paroling in returning noncitizens who were *not* deemed “arriving aliens” prior to their removal order, this statement seems to be at odds with the FAQ’s promise that ICE will not treat returning individuals as “arriving aliens.” Parolees are subject to grounds of inadmissibility under § 212(a) and detention without a bond hearing, *see* 8 C.F.R. § 1003.19(h)(2)(i)(B). Issues associated with the manner of entry are discussed below in Part IV.C.
- **Cost-Prohibitive.** The directive states that “[f]acilitating an alien’s return does not necessarily include funding the alien’s travel via commercial carrier to the United States or making flight arrangements for the alien.” In practice, ICE generally refuses to pay for return transportation and returning noncitizens must pay their own way.¹⁴ Moreover, since the transportation document that ICE or DOS issues (*see* Part IV.C) may be valid for only a week or less, the cost of a flight on such short notice can be exorbitant. Additionally, in most cases, it is necessary to retain a lawyer to navigate the return

¹⁴ ICE has paid for travel, however, in instances where a court has ordered that the agency produce the person on a short timeframe, or where the person was unlawfully removed in violation of a stay order. It is advisable to make a written request for payment of travel costs to the ICE Public Advocate. In addition, consider requesting that ICE cover travel as alternative relief when seeking a stay of removal.

process and, if necessary, file a federal court action to compel return. This additional expense also may prevent a noncitizen from returning to the United States.

- **Dependent on Documentation.** The directive states that individuals returning by air or sea must have “a valid passport or equivalent documentation” and that persons returning by land must have “appropriate identity documentation, which could include a passport or other government-issued documents.” For lower income and indigent individuals and those who fear persecution in their countries of origin, this requirement may prohibit return altogether.

In sum, the lack of an adequate return policy in the PFR context, the lack of any policy in the administrative-motions context, the problems associated with parole, and the myriad practical obstacles to return all present significant challenges to prevailing litigants.

IV. NAVIGATING THE EXISTING RETURN PROCESS

The return process needs an overhaul, both in terms of policy and practice. In the meantime, the advice in this section of the practice advisory may help individuals navigate the vagaries of the current limited, ad hoc process. Although the process of return continues to be cumbersome and disorganized, some common occurrences and best practices have emerged.

The ICE directive only covers noncitizens who prevail on PFRs, but individuals whose administrative motions have been granted can follow the steps outlined below. Indeed, some practitioners have succeeded in obtaining return for clients in this situation.

A. Contact Client and Collect Relevant Information

The first step for attorneys in arranging return is communicating with the client abroad to inform her or him of the court’s decision and verify that she or he wishes to return to the United States. Timing and detention issues are important factors to consider in making this decision.

Timing

An individual who prevails on a PFR need not wait for the mandate to issue for the court’s order to take effect.¹⁵ Unless and until the court of appeals reverses, amends, or vacates its decision, the government is bound by, and must follow, the court’s existing decision.¹⁶

¹⁵ Unless the government files a petition for rehearing or receives an extension of time for seeking rehearing, or the court stays the mandate, typically pending a petition for a writ of certiorari, the mandate will issue fifty-two days after the issuance of a decision entering judgment. Fed. R. App. P. 40(a)(1), 41(b).

¹⁶ See *Wedbush, Noble, Cooke, Inc. v. Securities and Exchange Commission*, 714 F.2d 923, 924 (9th Cir. 1983) (“even though the mandate has not yet issued . . . the judgment filed by the panel in that case . . . is nevertheless final for such purposes as stare decisis . . . unless it is withdrawn by the court”); *Vo Van Chau et al. v. Department of State*, 891 F. Supp. 650, 654 (D.D.C. 1995) (“the District Court is bound by the principle of stare decisis to ‘abide by a recent decision of one panel of [the Court of Appeals] unless the panel has withdrawn the opinion or the

An individual who prevails on an administrative motion for reopening or reconsideration also can initiate return immediately. If an immigration judge granted the motion and DHS appealed the grant, DHS may refuse to return the person while the BIA appeal is pending.

Although one can initiate the process of return immediately, the possibility of detention upon return may affect when one decides to initiate the process.

Detention

The FAQ states that “[y]ou may be detained for further immigration proceedings upon your return depending on the circumstances of your case and ICE’s assessment of whether you are subject to mandatory detention under the immigration laws or should otherwise be detained.”¹⁷ ICE generally has detained returning noncitizens who were detained prior to their removal.¹⁸ They have refused, however, to promise that noncitizens who were *not* detained prior to their removal will be afforded the same custody status upon their return. If feasible, a noncitizen facing a likelihood of detention upon return might consider pursuing her or his case from abroad to the extent possible, and only return once she or he is required to be present (e.g., for an individual hearing before an IJ). If ICE detains a noncitizen upon her or his return, INA § 236 should continue to govern the detention, unless another detention provision governed the person’s custody status prior to removal or departure. Importantly, DHS should not treat returning noncitizens as arriving aliens—whether for custody purposes or any other purpose—unless they were arriving aliens prior to their departure or deportation from the United States.

Collecting relevant information and documentation

In order to arrange return, the existing policy requires individuals to provide certain documentation and information, which is specified in the sample letter at the end of this advisory, and includes the following: passport number and expiration date; the address and telephone number for the place where the person intends to live upon return; the closest U.S. consulate where the person can obtain necessary paperwork; and the anticipated port of entry (airport or border entry point).¹⁹ The individual returning to the United States must have a valid passport or equivalent travel document to return to the United States.

court en banc has overruled it”) (quoting *Association of Civilian Technicians, Montana Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985)).

¹⁷ See *supra* n.7.

¹⁸ If the Court of Appeals orders proceedings terminated, then ICE should not detain the noncitizen at all.

¹⁹ To determine the nearest land border, consult this [list](http://cbp.gov/xp/cgov/toolbox/ports/) of U.S. ports of entry: <http://cbp.gov/xp/cgov/toolbox/ports/>, last visited: December 21, 2012.

B. Contact and Follow Up with the ICE Public Advocate

The FAQ directs attorneys or litigants to contact the ICE Public Advocate, who is tasked with finding out internally whether ICE (presumably, the Office of Chief Counsel) believes that Enforcement and Removal Operations (“ERO”) should facilitate a person’s return.²⁰ In the case of a successful PFR, it makes sense also to copy the Office of Immigration Litigation attorney who litigated the PFR on this communication, as that person has a particular interest in the prompt resolution of the case. Practitioners report that the ICE Public Advocate’s responses often are nonresponsive or delayed, and in some instances, there is no response at all. One should persist with follow-up communications to obtain an adequate response.

The Public Advocate may refer a return inquiry to a regional point of contact, who will perform the same function. That person is likely to be an ERO officer in the office that was responsible for the individual’s initial deportation. If ICE agrees that a person can return, the regional point of contact is tasked with coordinating the return.

C. Mechanics of ICE-Facilitated Return

If ICE agrees a noncitizen may return, the next step is for the regional point of contact to coordinate the person’s ability to do so. There are additional bureaucratic and logistical hurdles at this stage. Even in situations where ICE agrees to facilitate return, practitioners report a significant lack of coordination within and among ICE, DOS, and Customs and Border Protection (“CBP”). As discussed above, ICE generally has refused to return LPRs their LPR cards so that they may use them to travel back to the United States. And once an LPR has returned, USCIS has denied the person’s I-90 application to replace her or his LPR card. If USCIS refuses to issue the card, consider asking the ICE Public Advocate to communicate with her sister agency to ensure that USCIS issues the card. If this effort fails, consider evaluating federal court options.

According to the directive, ICE is supposed to engage in activities that would allow the person to travel to the United States. The directive specifically mentions issuance of a Boarding Letter (also known as a “transportation letter”) to permit commercial air travel and parole upon arrival at a U.S. port of entry.

Transportation Letters

In nearly all cases it is advisable to request issuance of a transportation letter, which generally is obtained from the nearest U.S. embassy or consulate. This document allows a returning noncitizen to board a commercial airplane or boat to come to the United States. Airlines will not permit passengers to board international flights without proper travel documents. Transportation letters are addressed to passenger transportation companies and supervisory immigration inspectors at the intending port of entry. The letters generally state that the letter holder is considered properly documented to travel to the United States and assure the carrier that it will not be subject to liability for transporting the person.

²⁰ The Public Advocate may be contacted at EROPublicAdvocate@ice.dhs.gov and (202) 732-3100. A sample email is provided at the end of this advisory.

An individual must present a valid passport or equivalent documentation to obtain the transportation letter. The person who issues the transportation letter may be a consular employee, an ICE attaché, or a USCIS officer stationed overseas. Practitioners have reported confusion and delay among consular officials and miscommunication between them and ICE. Persistence with ICE is the best approach to overcome this problem, in the absence of a more systemic change to the current process.

Parole

The directive states returning noncitizens will have the immigration status that they had, if any, prior to the entry of the removal order, and the FAQ provides that “[b]ecause ICE regards you as returning to your prior status, ICE will not treat you as an arriving alien unless you had been charged as an arriving alien prior to removal.” Nonetheless, the ICE directive refers to parole as a mechanism for return, without specifying that parole would only be appropriate for those who DHS deemed arriving aliens prior to their removal order. To the extent that both the FAQ and directive suggest that parole would be a proper mechanism for return for individuals who were not arriving aliens when they were deported, such a policy has serious, negative consequences.

First, there is no guarantee that CBP will allow the person back into the United States. CBP instructions on parole clearly provide that border officials can override a prior decision to grant parole.²¹

Second, parole does not constitute an admission, *see* INA § 212(d)(5), and parolees remain subject to grounds of inadmissibility under § 212(a) after passing into the United States.

Third, parolees are subject to detention without a bond hearing. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (“[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to . . . [a]rriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act.”).

Fourth, parole is temporary, lasting only as long ICE authorizes. In some cases, the grant of parole has been for less than a month, despite the fact that the individual’s remanded proceedings may last much longer. Parolees in this situation must request that ICE renew their parole, and may have to make further renewal requests as parole expiration dates approach.

In addition, there may be unpredictable adverse consequences of entering on parole. For example, if the return policy is rescinded or substantially revised in the future, it may be difficult to convince an immigration officer 10 years from now that the person returned under the policy with her or his pre-removal status.²² Given these consequences, we strongly encourage individuals to request a transportation letter or use a valid LPR card (if possible).

²¹ [CBP Directive No. 3340-043, at 5 \(The Exercise of Discretionary Authority\) \(Sept. 3, 2008\)](#).

²² Note also that immigration forms often will ask for the applicant’s “manner of last entry” into the United States. Immigration forms may ask for an applicant’s “manner of last entry,” *see, e.g.*, Application for Employment Authorization, *available at* <http://www.uscis.gov/files/form/i-765.pdf>, and thus the agency would likely assume that a person who entered on parole was an arriving alien.

If ICE insists on facilitating return via parole and the individual agrees to return in that manner, one can attempt to minimize the potential consequences by requesting that ICE or CBP annotate the parole document, I-94, and/or the person's passport to reflect entry in pre-removal status. Keep in mind that when a person is being paroled in, ICE generally instructs CBP to parole the client in at a specific port of entry during a specific window of time under INA § 212(d)(5). ICE may assign a parole reference number to an individual. Again, all returning noncitizens must also possess a valid passport or equivalent documentation.

V. FEDERAL COURT OPTIONS

A. Overview

1. Litigation Challenges to Address ICE's Refusal to Respect a Federal or Administrative Court Order

Even in the wake of its policy directive, ICE still routinely fails to facilitate the return of individuals after they prevail in federal and administrative courts. Such failures underscore a fundamental lack of respect for administrative and court orders. If ICE expressly refuses to facilitate return or constructively refuses (e.g., is non-responsive), litigation options may be considered.

Any ICE refusal to return someone who has prevailed on a petition for review arguably constitutes a refusal to comply with the circuit court's order granting the petition for review. In cases where the court's order restores LPR status, ICE's refusal to facilitate return also violates its own policy directive. Likewise, ICE's refusal to return someone who prevails on an administrative motion constitutes a refusal to comply with an immigration judge or BIA order granting reopening or reconsideration.

There is no meaningful distinction between prevailing on a petition for review and prevailing on an administrative motion. The statutory right to judicial review, 8 U.S.C. § 1252(a), would be meaningless if a petitioner could not benefit from a favorable Article III court decision. Similarly, the statutory rights to reconsideration and reopening, 8 U.S.C. §§ 1229a(c)(6)&(7),²³

²³ In *Dada v. Mukasey*, the Supreme Court held that "[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition." 554 U.S. 1, 18 (2008). Further, the Court admonished any interpretation that would "nullify a procedure so intrinsic a part of the legislative scheme." *Dada*, 554 U.S. at 18-19. See also *Kucana v. Holder*, 130 S. Ct. 827, 834, 838-39 (2010) (protecting judicial review of motions to reopen in light of the importance of such motions).

Of particular relevance here, despite the agency's attempts to bar motions filed or adjudicated after a noncitizen is removed or departs from the United States, see 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), the nine courts to consider the issue have rejected the validity of the so-called "departure bar" with respect to motions filed pursuant to statutory authority. See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011);

and regulatory rights to reopening sua sponte, 8 C.F.R. §§ 1003.23 and 1003.2(a), would be meaningless if a respondent could not benefit from a favorable immigration court or BIA decision. Moreover, the effect on the removal order is the same regardless whether a circuit court grants a PFR or the immigration court or BIA grants reopening: the final removal order is vacated and the person is restored to pre-removal status.²⁴

The various avenues for bringing litigation challenges in these contexts are discussed below.

2. Create a Paper Trail!

Even if merely contemplating filing litigation to compel return, we strongly advise keeping detailed notes of all conversations and written correspondence related to return. If the only evidence of ICE's refusal to return the client is oral, such notes may form the basis of a sworn declaration from a person with personal knowledge, attesting to the conversation.²⁵ While attorneys generally should avoid becoming witnesses for their clients, alternative evidence of ICE's refusal to facilitate return may not be available.

B. Where and What to File

Deciding to litigate leads to the questions “where and what do I file?” These questions do not have definitive answers, but in most cases, a complaint in the district court having jurisdiction over the ICE office responsible for facilitating return is the most appropriate action. Motions and mandamus actions in the courts of appeals also may provide opportunities for redress in some cases.

Contreras-Bocanegra v. Holder, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

²⁴ When the BIA reopens a case, the removal order is vacated. *Nken*, 556 U.S. at 430 n.1. See also *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818-19 (10th Cir. 2012) (en banc). Furthermore, the removal proceedings are reinstated. *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”). Thus, the person is restored to pre-removal status. See *Nken*, 556 U.S. at 435 (stating that persons who prevail on their petition for review “can be afforded effective relief by facilitation of their return, along with *restoration of the immigration status they had upon removal*”) (emphasis added); Return Policy, at 1 (“ICE will regard the returned alien as having reverted to the immigration status she or he held, if any, prior to the entry of the removal order . . .”). See also *Matter of Lok*, 18 I&N Dec. 101, 105-06 (BIA 1981) *aff'd*, 681 F.2d 107 (2d Cir. 1982).

²⁵ Declarations attesting to return efforts or ICE's position should be scrupulously accurate. The tone of such declarations should be detached and written to provide the court with information supporting the facts on which the motion is based. Declarations should not overstate the facts or give personal opinions about actions of government actors or opposing counsel. An unprofessional declaration could undermine the motion.

1. Complaint for Declaratory and Injunctive Relief (District Court)

District courts regularly review declaratory judgment and injunctive relief actions and, therefore, are arguably the most suitable forum for filing an action to compel return.²⁶

A district court action can name several defendants, in their official capacities, including, but not limited to, the Secretary of DHS, the Director of ICE, the Field Office Director of the local ICE office, the Chief Counsel of the local ICE office, and the ICE Public Advocate. *See generally* 5 U.S.C. §§ 702-703 (Administrative Procedure Act). At a minimum, we suggest naming the DHS Secretary.

A district court complaint may allege jurisdiction to review ICE's refusal to facilitate return under 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (Administrative Procedure Act);²⁷ 28 U.S.C. §§ 2201 and 2202 (declaratory relief); 28 U.S.C. § 1361 (mandamus); and 28 U.S.C. § 1651 (All Writs Act).

The federal venue statute, 28 U.S.C. § 1391, governs where the complaint may be filed. Generally, venue will lie in the district where ICE "resides," *see* 28 U.S.C. § 1391(b)(1), and/or where a substantial part of the events giving rise to ICE's refusal to facilitate return occurred, *see* 28 U.S.C. § 1391(b)(2).

There are at least three claims a district court action seeking to compel return may raise.

Administrative Procedure Act Claims

First, ICE's refusal to return the person arguably violates the APA. As an initial matter, it satisfies the APA's judicial review requirement that there be a "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Under the APA, a person may ask the court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). A person may also challenge ICE's refusal to return her or him as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," and "in excess of statutory . . . authority, or limitations or short of statutory right," 5 U.S.C. § 706(2)(A)-(C). Further, to the extent ICE defies subpoenas or procedures required by the immigration court, a person may challenge ICE as acting "without observance of procedure required by law," 5 U.S.C. § 706(2)(D).

Constitutional and Statutory Due Process Claims

²⁶ For sample district court complaints, please contact Trina Realmuto at trina@nipnlg.org

²⁷ The APA, 5 U.S.C. §§ 701 et seq., does not independently grant subject matter jurisdiction to the federal courts, *see Califano v. Sanders*, 430 U.S. 99 (1977), but final agency action is available through federal question jurisdiction. Moreover, the APA does waive sovereign immunity in actions against the government for injunctive relief, which is necessary for the court to exercise its jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471 (1994). Thus, the APA can be listed in the jurisdictional section of a complaint.

Second, ICE's refusal to facilitate return arguably violates the Fifth Amendment's Due Process Clause and a person's statutory rights in removal proceedings, including his right to be present at one's own removal proceeding under INA § 240(b)(2). *See also* INA § 240(b)(4)(B) ("the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's behalf, and to cross-examine witnesses presented by the Government . . ."). An individual outside of the United States is substantially hindered in his ability to testify, present witnesses and evidence, consult with his attorneys, and cross-examine the government's witnesses and examine its evidence.

Mandamus

Finally, the complaint might include a claim that ICE's refusal to facilitate return warrants injunctive relief in the form of a writ of mandamus compelling ICE to perform its ministerial duty of returning the person. In order for a court to grant mandamus relief, the person must show that: (a) she or he has a clear right to the relief requested; (b) the defendant has a clear duty to perform the act in question; and (c) no other adequate remedy is available. *See, e.g., Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002).

The end of the complaint should request the relief sought from the district court. We suggest asking the district court to: (a) accept jurisdiction over the action; (b) declare defendants' refusal to facilitate the plaintiff's return to the United States to violate the Immigration and Nationality Act, the Fifth Amendment's Due Process Clause, and the Administrative Procedure Act; (c) order defendants to immediately facilitate plaintiff's prompt return to the United States – either pursuant to Federal Rule of Civil Procedure 65, pursuant to a writ of mandamus or pursuant to the court's inherent powers under 28 U.S.C. § 1651 and Article III; (d) grant attorneys' fees and costs under 28 U.S.C. § 2412, 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and any other relevant authority; and (e) grant such other and further relief as the court deems just and proper under the circumstances.

2. Motions Requesting Return (Circuit Court)

In cases where the court of appeals already has exercised its jurisdiction over the case, for example, in a petition for review or district court appeal, the circuit court should continue to have jurisdiction to entertain motions related to the main case, e.g., a motion asking the court to order the person's return. *See* Federal Rule of Appellate Procedure 27(a)(1) ("An application for an order or other relief is made by motion unless otherwise provided by these rules"). There is no particular name for such a motion, but some ideas include: motion to enforce court's order, motion to order respondent to cause petitioner's return to the United States, and motion for ancillary relief to enforce court's order. In extreme situations, some attorneys also have filed contempt motions for refusal to comply with the court's order.

3. Mandamus (Circuit Court)

Mandamus is appropriate to maintain the integrity of an earlier court decision.²⁸ If ICE flouts a circuit court (or district court) decision by refusing to return a petitioner to the United States for execution of that decision, the circuit court arguably has the authority and the duty to preserve the effectiveness of its earlier decision by exercising mandamus jurisdiction.

The Ninth Circuit decision in *Ramon-Sepulveda v. Immigration & Naturalization Service* is an example of a successful circuit court mandamus action. 824 F.2d 749 (9th Cir. 1987). In that case, the Ninth Circuit issued a writ of mandamus to preserve the effect of its prior decision to grant a noncitizen's petition for review. In the prior decision, the court held that an immigration judge cannot reopen deportation proceedings where the evidence of alienage (a birth certificate) on which reopening was based was not "newly discovered." *Id.* at 750. Following that decision, the Immigration and Naturalization Service ("INS") initiated new deportation proceedings based solely on the *same* birth certificate the Ninth Circuit found could not be used to reopen proceedings. *Id.* Petitioner then filed a mandamus action directly with the court of appeals, arguing that INS' initiation of new proceedings violated the Ninth Circuit's earlier decision. The court agreed and issued a writ of mandamus, stating "[i]t is our mandate that the INS flouts. We have the authority and the duty to preserve the effectiveness of our earlier judgment." *Id.* at 751.

VI. SUGGESTED STRATEGIES FOR AVOIDING IN ABSENTIA ORDERS IN REMOVAL PROCEEDINGS FOR RESPONDENTS STRANDED ABROAD

In many cases, practitioners find themselves facing an upcoming immigration court hearing for a respondent whom ICE has refused to return. This is especially trying in cases where the BIA or an immigration judge has granted a motion to reopen or reconsider. ICE takes the position that the return policy does not apply to this situation.

In these situations, practitioners should consider the following immigration court strategies, all of which are intended to avoid an in absentia order pursuant to INA § 240(b)(5) while they pursue administrative and federal court options to secure the client's return.

²⁸ *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999) ("[Federal courts] have not only the power, but also a duty to enforce our prior mandate to prevent evasion") (citation omitted); *Oswald v. McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980) ("Mandamus is appropriate to review compliance with discretionary standards and nondiscretionary commands set forth in an earlier opinion concerning the parties"); *American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982) ("[W]e hold that we have jurisdiction to enforce our prior mandate. Having the power, we also have the duty to clarify the mandate and to direct future compliance with it by mandamus"); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (mandamus appropriate to correct violations of "the letter or spirit" of previous judicial mandate) (internal citations omitted); *see also Miguel v. McCarl*, 291 U.S. 442, 451-52 (1934) (holding that an act involving some discretion can still be compelled by mandamus to conform to applicable governing statutes).

- Seek a continuance of the hearing pursuant to 8 C.F.R. § 1003.29. An immigration judge must assess whether a respondent demonstrates “good cause” for requesting a continuance. Where ICE has refused to return the client, arguably good cause is shown.
- Ask the immigration judge for a subpoena pursuant to INA § 240(b)(1), 8 C.F.R. § 1003.35. Immigration judges have the authority to issue subpoenas for the “attendance of witnesses and presentation of evidence.” INA § 240(b)(1). Thus, the judge may issue a subpoena against DHS to produce respondent to be a witness and to present evidence at his or her hearing.
- Obtain the client’s consent to proceed in her or his absence pursuant to INA § 240(b)(2)(A)(iii). In limited situations, the client’s presence may not be necessary for a master calendar hearing to take place if, for example, the judge is simply setting the date for an application to be filed and/or setting a hearing date.
- Move for administrative closure pursuant to *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). In *Matter of Avetisyan*, the BIA held that immigration judges may administratively close removal proceedings, even if one of the parties objects. Administrative closure may not be a suitable option as ICE may be even less inclined to return respondents whose cases have been administratively closed. Moreover, if simultaneously pursuing federal court litigation to compel return, having a forthcoming hearing date by which the person must return is strategically helpful.
- Build the record! If the immigration judge seems inclined to issue a ruling that is not in the respondent’s best interest (e.g., in absentia order or administrative closure) because ICE refuses to bring the client back, it is imperative that counsel object to the immigration judge’s ruling to preserve any and all appeal issues on the record. As noted above, ICE’s refusal to facilitate return arguably also violates the Fifth Amendment’s Due Process Clause and a person’s statutory rights in removal proceedings, including the right to be present at one’s own removal proceeding under INA § 240(b)(2). *See also* INA § 240(b)(4)(B) (“the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s behalf, and to cross-examine witnesses presented by the Government . . .”). An individual outside of the United States is substantially hindered in his ability to testify, present witnesses and evidence, consult with his attorneys, and cross-examine the government’s witnesses and examine its evidence.

CONCLUSION

ICE’s current return “policy”—a product of the embarrassing revelation that, contrary to the OSG’s representations to the Supreme Court, the government lacked a “policy and practice” of providing “effective relief” to individuals who prevail in their cases—fails on several accounts. The return policy is incomplete and vests unfettered discretion in the party responsible for removal in the first place. The directive does not cover noncitizens who prevail on administrative motions before an IJ or the BIA. Moreover, ICE refuses return to noncitizens who prevail on PFRs whenever it deems their presence unnecessary.

Even in the respects that it may seem complete on paper, the process repeatedly breaks down. An incredible lack of coordination within and among the relevant agencies plagues the process. Frustrated practitioners have found that their only hope for obtaining an appropriate response is by filing a complaint in federal district court. The policy needs a dramatic expansion and overhaul and better agreement and coordination among the various immigration agencies involved.

Nonetheless, practitioners whose clients are considering seeking return to the United States should contact the ICE Public Advocate, to see if the agency will agree to facilitate return and to begin making arrangements. If that process fails to yield return, practitioners are advised to consider litigation options.

Contact us

Practitioners are constantly confronting new and complicated obstacles in seeking the return of their clients. Please contact the National Immigration Project at trina@nipnlg.org or the American Immigration Council at clearinghouse@immcouncil.org if you would like help strategizing around these situations.

Sample Email to ICE ERO Public Advocate

To: EROPublicAdvocate@ice.dhs.gov

Dear Public Advocate:

I am an attorney in [CITY, STATE], and my firm represents an individual ([NAME], A#_____) who is currently in [CITY, COUNTRY]. [If applicable: [NAME] has a hearing before the [LOCATION] Immigration Court on [DATE]]. I am writing to seek your assistance in returning [NAME] to the United States [in advance of that hearing / in an expeditious manner]. I understand that one of your responsibilities is to facilitate the return of individuals such as [NAME], who have prevailed in their immigration cases after having been removed.

On [DATE], [NAME] was removed based on [DESCRIBE BASIS FOR ORDER OF REMOVAL]. Subsequently, [DESCRIBE NATURE OF PROCEEDINGS SINCE THEN]. On [DATE], [COURT/BIA/IJ] granted [NAME]'s [motion for reopening/rehearing or Petition for Review]. A copy of the decision is attached to this email. [If applicable: In addition to rescinding the prior, defective removal order, the decision specifically orders that [NAME] be permitted to enter the U.S. to attend her/his hearing on DATE].

[For cases involving returning LPRs who prevail on PFRs, consider adding: As your agency acknowledged in its Feb. 24, 2012 directive, when a PFR is granted, the “alien will once again, in contemplation of law, be an LPR even though removal proceedings may still be pending before EOIR on remand.” *See also Matter of Lok*, 18 I&N Dec. 101, 106 (BIA 1981).]

OR

[For cases involving returning LPRs who prevail on motions to reopen, consider adding: When a case is reopened, the removal order is vacated. *Nken v. Holder*, 556 U.S. 418 (2009). Reopening restores the person to her/his status prior to the removal order, i.e., lawful permanent resident. *See Matter of Lok*, 18 I&N Dec. 101, 106 (BIA 1981) (holding that LPR status terminates when there is a final order, but that “reversal on the merits of that deportability finding by an appellate court or administratively upon a motion for reopening or reconsideration” can restore lawful permanent resident status”).]

Accordingly, [NAME] must be [if applicable: restored to her/his pre-removal status] and allowed to pursue [RELIEF]. I respectfully request your assistance in facilitating her/his return to the United States so that s/he may be restored to this status.

[If applicable: Furthermore, I note that the Court/BIA/IJ specifically ordered that [NAME] be permitted to enter the United States for her/his calendar hearing on [DATE]. Therefore, if [NAME] is not permitted to enter the United States for this purpose, your agency will have failed to comply with the Judge's/IJ's order. Although I hope this does not occur, such a failure will force my office to consider other actions, including whether to file an action in federal court seeking to compel compliance with the order.]

I am also hereby supplying the follow information: [If applicable: the federal court case #]; [NAME]'s passport # and expiration date; the address and telephone # at the place where [NAME] intends to live upon her/his return; the closest U.S. consulate where s/he can go to obtain necessary paperwork; and her/his anticipated port of entry.

I appreciate your prompt assistance with this matter. If you have any questions, or require any further documentation, please contact me immediately.

Sincerely,

[Attorney Name]

APPENDIX

Web Addresses for Documents Referenced in this Advisory (in order of reference)

- ICE Policy Directive Number 11061.1 (Feb. 24, 2012), *available at* http://nationalimmigrationproject.org/legalresources/ICE_Return_Policy_Memo_Feb_2012.pdf.
- National Immigration Project of the National Lawyers Guild, et al., *Seeking a Judicial Stay of Removal in the Court Of Appeals: Standard, Implications Of Ice's Return Policy and the OSG's Misrepresentation to the Supreme Court, and Sample Stay Motion* (May 2012), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Seeking_a_Judicial_Stay_of_Removal_May2012.pdf.
- *Nat'l Immigration Project of the Nat'l. Lawyers Guild v. U.S. Dep't. of Homeland Sec.*, 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012), *available at* <http://nationalimmigrationproject.org/legalresources/8-SJ-memo-order-final.pdf>.
- Letter from Michael R. Dreeben, Deputy Solicitor General, to Hon. William K. Suter, Clerk of the Supreme Court (Apr. 24, 2012), *available at* [nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG Letter to Supreme Court, Including Attachments - April 24 2012.pdf](http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG_Letter_to_Supreme_Court_Including_Attachments_-_April_24_2012.pdf)
- Letter from Paul R.Q. Wolfson and Adam Raviv to Hon. William K. Suter, Clerk of the Supreme Court (May 4, 2012), *available at* [nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Amici Letter to the Supreme Court in Nken - May 4 2012.pdf](http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Amici_Letter_to_the_Supreme_Court_in_Nken_-_May_4_2012.pdf).
- U.S. Immigration and Customs Enforcement, Frequently Asked Questions about ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (2012), *available at* <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/faq.htm>.
- *Nken v. Holder*, No. 08-681, *available at* <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-681.htm>.
- CBP Directive No. 3340-043, at 5 (The Exercise of Discretionary Authority) (Sept. 3, 2008), *available at* http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/CBP%20Parole%20Directive%20%28Partially%20Redacted%29%20-%20Sept%203%202008.pdf.

Case documents, case updates, and the documents the government disclosed through the FOIA litigation and to the Supreme Court in *Nken* are available on the NIPNLG website at <http://nationalimmigrationproject.org/legalresources.htm#nipnlg>.



PRACTICE ADVISORY¹
November 2, 2012

**CHALLENGING *MATTER OF E-R-M-F- & A-S-M-*:
WARRANTLESS ARRESTS AND THE TIMING OF RIGHT TO COUNSEL ADVISALS**

By the Legal Action Center²

By regulation, certain noncitizens arrested without a warrant must be provided with advisals regarding their rights following arrest. 8 C.F.R. § 287.3(c).³ Individuals must be informed of the reasons for their arrest and their right to representation at no expense to the government. In addition, the examining officer must tell individuals that anything they say may be used against them in subsequent proceedings and must provide them with a list of free legal service providers.

In *Matter of E-R-M-F- & A-S-M-*, the Board of Immigration Appeals (BIA or Board) severely undermined the protections provided by § 287.3(c). The BIA held that immigration officers are required to provide § 287.3(c) advisals only after an individual arrested without a warrant is placed in formal proceedings by the filing of a Notice to Appear (Form I-862) (NTA) with the immigration court.⁴ Thus, according to the Board, the advisals need not be given prior to a post-arrest examination.

There are compelling arguments that *E-R-M-F-* was wrongly decided. This practice advisory highlights the flaws in the BIA's decision and suggests strategies for challenging the BIA's reading of § 287.3(c) and moving to suppress any evidence obtained after a warrantless arrest but prior to receiving the required advisals. The American Immigration Council's Legal Action Center is participating as *amicus curiae* in the appeal of *E-R-M-F-* currently pending before the Ninth Circuit Court of Appeals. The LAC is interested in hearing about other ongoing cases involving the timing of the 8 C.F.R. § 287.3(c) advisals. Please contact the LAC at clearinghouse@immcouncil.org if you have such a case.

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² Kristin Macleod-Ball was the principal author of this practice advisory. Questions should be directed to clearinghouse@immcouncil.org.

³ The full text of 8 C.F.R. § 287.3 is attached as an appendix.

⁴ See 25 I. & N. Dec. 580, 584–85 (BIA 2011).

1. What Were the Facts and Holding of *Matter of E-R-M-F- & A-S-M-*?

In *Matter of E-R-M-F- & A-S-M-*, the respondent, a lawful permanent resident, was arrested after applying for admission at the border.⁵ He was referred to secondary inspection and questioned by immigration officials. An NTA was issued on the day of his arrest, but was not filed with the immigration court until more than a month later. The record did not indicate that respondent was provided with 8 C.F.R. § 287.3(c) advisals before or during his post-arrest examination. As a result, the respondent sought to prevent the use of statements obtained during the examination in his removal proceedings.⁶

The BIA held that because immigration officers are not required to provide 8 C.F.R. § 287.3(c) advisals until after an NTA is filed, the statements could be admitted. The Board reasoned that the plain language of § 287.3(c) – namely, the phrase “placed in formal proceedings”⁷ – determined not only who would receive advisals but also the timing of the advisals. Further, the Board found that the regulation’s history supported its reading.⁸ The BIA also relied upon *Samayoa-Martinez v. Holder*, a 2009 decision in which the Ninth Circuit reached the same conclusion regarding the timing of the advisals in § 287.3(c).⁹

2. Why Was *Matter of E-R-M-F- & A-S-M-* Wrongly Decided?

The BIA misinterpreted the plain language, history, and purpose of 8 C.F.R. § 287.3(c).

A. The Board’s Decision Relied on One Phrase of § 287.3(c) in Isolation.

Although the BIA stated that it had relied on the plain language of the regulation, its analysis is limited to just one phrase in one sentence of § 287.3(c): “placed in formal proceedings.” Yet that phrase does not expressly reference *when* the advisals must occur. A reading of the regulation as a whole makes clear that the phrase “placed in removal proceedings” defines *who* receives advisals and not *when* those warnings take place.

⁵ *Matter of E-R-M-F- & A-S-M-* originally included another respondent. However, proceedings against her were terminated, and DHS withdrew its appeal of the termination prior to the BIA decision. See 25 I. & N. Dec. at 582.

⁶ Evidence may be suppressed where it was obtained in violation of a regulation that was intended to benefit noncitizens if the violation prejudiced interests of a noncitizen who should have been protected by the regulation. See *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 327–29 (BIA 1980).

⁷ 25 I. & N. Dec. at 583–84.

⁸ The Board found that older versions of § 287.3(c) initially made no mention of formal proceedings and later directed that advisals be given “[a]fter the examining officer has determined that formal proceedings . . . will be instituted.” See *Matter of E-R-M-F- & A-S-M-*, 25 I. & N. Dec. at 584 (quoting 8 C.F.R. § 287.3 (1980)); see also 32 Fed. Reg. 6,260, 6,260 (Apr. 21, 1967); 44 Fed. Reg. 4,651, 4,564 (Jan. 23, 1979). In 1997, language referring to citizens “placed in formal proceedings” was added. See *Matter of E-R-M-F- & A-S-M-*, 25 I. & N. Dec. at 584 (citing 62 Fed. Reg. 10,312, 10,390 (Mar. 6, 1997)).

⁹ 558 F.3d 897, 901–02 (9th Cir. 2009).

Further, the BIA mischaracterized why the phrase was added to § 287.3(c). While the Board stated that the 1997 amendments to the regulation, which added “placed in formal proceedings,” “change[d] the timing of the required advisals,”¹⁰ there is no indication that that is what the Department of Justice (DOJ) intended. Rather, according to the DOJ, the amendments to § 287.3(c) were meant to clarify the procedures that apply to individuals “placed in formal proceedings,” by contrast with individuals subject to expedited removal.¹¹

The BIA’s stated reliance on plain language also is belied by federal court decisions which read § 287.3(c) in a contradictory manner. *E-R-M-F-* relied upon the Ninth Circuit’s holding in *Samayoa*, but did not mention that two other courts of appeals previously assumed that advisals must take place prior to questioning. In *Singh v. Mukasey*, the Second Circuit reversed the denial of a motion to suppress, relying on factors including an apparent failure to provide § 287.3(c) advisals at the time of a custodial interrogation.¹² Likewise, also in the context of a motion to suppress, the Eighth Circuit assumed that § 287.3(c) advisals must be provided at the time of custodial interviews following warrantless arrests.¹³

B. The Board’s Decision Ignored Relevant Language in the Remainder of § 287.3(c).

By focusing solely on the phrase “placed in formal proceedings,” the Board disregarded language in § 287.3(c) that is rendered illogical if examining officers are not required to give the advisals until after the filing of an NTA with the immigration court. Specifically, the following provisions in § 287.3(c) make it clear that the advisals must be provided prior to a post-arrest examination:

- The regulation requires notification of “the reason for [a noncitizen’s] arrest,” thus suggesting some proximity between the time of the arrest and the notification. Yet, weeks or months could pass before the NTA is filed and the person is notified of the reason for the arrest.¹⁴
- The regulation specifies that the “examining officer” must provide certain advisals. However, under *E-R-M-F-* the advisals need not be provided until long after the examining officer’s involvement in the case has ended. In fact, the

¹⁰ *Matter of E-R-M-F- & A-S-M-*, 25 I. & N. Dec. at 584.

¹¹ See 62 Fed. Reg. 444, 452 (Jan. 3, 1997).

¹² The court noted that the administrative record did not clearly establish that the respondent had received § 287.3(c) advisals and that an immigration officer “could not specifically remember anyone informing [the respondent] of his rights, at least not until after a ‘few hours had already gone by.’” *Singh v. Mukasey*, 553 F.3d 207, 215–16 (2d Cir. 2009).

¹³ *Puc-Ruiz v. Holder*, 629 F.3d 771, 781 (8th Cir. 2010). The *Puc-Ruiz* court ultimately upheld the denial of the noncitizen’s motion to suppress for lack of prejudice. *Id.*

¹⁴ 8 C.F.R. § 287.8(c)(2)(iii) also requires that noncitizens be provided with the reason for their arrest, at the time of their arrest, but only if it is “practical and safe to do so.” Thus, the § 287.3(c) advisals may be the first time a person learns of the reason for his or her arrest.

noncitizen might not receive the advisals until he or she has been transferred to another location or released from custody.

- Section 287.3(c) requires immigration officials to tell noncitizens that their statements may be used against them in “a subsequent proceeding.” However, once proceedings have been initiated, they are by definition *not* subsequent.

C. *The Board’s Reading of § 287.3(c) Does Not Further the Purpose of the Regulation.*

Additionally, the Board in *E-R-M-F-* stakes out a position at odds with the apparent purpose of 8 C.F.R. § 287.3(c). The Department of Justice adopted the advisal requirement less than one year after the Supreme Court decided *Miranda v. Arizona*.¹⁵ While the Department of Justice did not expressly state its purpose in doing so, the timing suggests that it intended to notify arrestees of their rights¹⁶ and to ensure the admissibility of evidence obtained following such notifications. The Board’s interpretation of the regulation does not further these goals. If the advisals were given prior to examination, they could assist immigration courts in determining the admissibility of certain confessions alleged by respondents to be coerced or involuntary.¹⁷ Under the timing outlined by *E-R-M-F-*, however, § 287.3(c) would be irrelevant to such assessments. In fact, it is unclear what purpose the regulation serves if the BIA’s decision stands.

3. How Can Attorneys Challenge the Failure to Provide 8 C.F.R. § 287.3(c) Advisals Prior to Examination?

Although the BIA stated in *Matter of E-R-M-F- & A-S-M-* that § 287.3(c) advisals are not required before the initiation of formal removal proceedings, it is important to preserve the claim that the immigration officer failed to provide advisals prior to examination. Should a respondent fail to raise a claim or object to the admissibility of evidence in immigration court, the BIA may find that the claim has been waived.¹⁸ Further, failure to exhaust administrative remedies will bar

¹⁵ Compare *Miranda v. Arizona*, 384 U.S. 436 (1966) (decided June 13, 1966), with 32 Fed. Reg. 6,260, 6,260 (Apr. 21, 1967).

¹⁶ See, e.g., 8 C.F.R. § 292.5(b) (right to counsel); see also *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006) (“By regulation, [noncitizens do] have a right to be represented by counsel at examinations by immigration officers”); *Matter of Sandoval*, 17 I. & N. Dec. 70, 83 n.23 (BIA 1979) (recognizing “the inadmissibility of evidence obtained in violation of a respondent’s privilege against self-incrimination”) (citation omitted); *infra*, Question 6.

¹⁷ See, e.g., *Navia-Duran v. INS*, 568 F.2d 803, 810 (1st Cir. 1977) (“If the INS had complied with [§ 287.3(c)] . . . [then] the atmosphere of coercion would have vanished”); *Matter of Garcia-Flores*, 17 I. & N. Dec. at 327 (“[T]he failure to comply with [§ 287.3(c)] . . . would be relevant in assessing any question of voluntariness.”).

¹⁸ See, e.g., *Torres de la Cruz v. Maurer*, 483 F.3d 1013, 1022 (10th Cir. 2007) (“The BIA has held that matters not raised before an IJ are not preserved on appeal.” (citations omitted)); *Matter of J-Y-C-*, 24 I. & N. Dec. 260, 261 n.1 (BIA 2007) (finding that, because a claim was not raised before the immigration court, “it is not appropriate for [the BIA] to consider it for the first time on appeal”); *Matter of Edwards*, 20 I. & N. Dec. 191, 196 n.4 (BIA 1990) (noting that it is not

federal court review,¹⁹ including review of claims related to improper use of evidence that were not properly raised before the BIA.²⁰

In order to object to the admission of evidence or statements obtained in the absence of § 287.3(c) advisals, attorneys may wish to file a motion to suppress based on the violation of 8 C.F.R. § 287.3(c), and, within 30 days of a denial of an order of removal, a Notice of Appeal to the BIA. For a more information on motions to suppress, see AIC's [Motions to Suppress in Removal Proceedings: A General Overview](#) Practice Advisory.²¹ The BIA's decision may be challenged in the court of appeals through a Petition for Review (PFR). For a detailed discussion of how to file a PFR, see the LAC's [How to File a Petition for Review](#) Practice Advisory.

4. How Should You Frame Your Arguments in a Petition for Review?

Although courts give substantial deference to the BIA's interpretations of the agency's immigration regulations,²² deference is not warranted when the language of a regulation is

proper to object to the admissibility of evidence before the BIA where the respondent did not do so before the immigration court).

¹⁹ INA § 242(d)(1) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right . . .").

²⁰ See, e.g., *Castro v. Att'y Gen. of the U.S.*, 671 F.3d 356, 365 (3d Cir. 2012) (noting that the court lacks jurisdiction to consider claim that evidence was improperly admitted where the issue was not raised before the IJ or the BIA); *Melnitsenko v. Mukasey*, 517 F.3d 42, 47 (2d Cir. 2007) (declining to review argument that evidence should be suppressed due to widespread Fourth Amendment violations where respondent had only argued egregious violations before the BIA); *Ramani v. Ashcroft*, 378 F.3d 554, 558–59 (6th Cir. 2004) (holding that the court lacks jurisdiction to consider claim that an IJ improperly relied on evidence not admitted into the record because petitioner failed to raise the claim before the BIA); see also *Matul-Hernandez v. Holder*, 685 F.3d 707, 713 (8th Cir. 2012) ("We have consistently held that we may not consider an issue that a petitioner has failed to raise before the BIA."); *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) ("To satisfy § 1252(d)(1), an alien must present the *same specific legal theory* to the BIA before he or she may advance it in court."); *Zeqiri v. Mukasey*, 529 F.3d 364, 369 (7th Cir. 2008) ("Courts have almost universally interpreted § 1252(d)(1) to require that specific legal issues be presented to the Board for its consideration."). Several courts of appeals have held that the exhaustion requirement does not have equitable exceptions, especially in light of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), but a discussion of these issues is beyond the scope of this practice advisory.

²¹ The majority of the practice advisory discusses issues related to motions to suppress evidence based on violations of the Fourth Amendment or the Due Process Clause of the Fifth Amendment, but see pages 9 – 10 for information regarding motions to suppress based on regulatory violations and pages 25 – 28 for general information about how to file motions to suppress.

²² See, e.g., *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011 (9th Cir. 2006); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006); see also *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (finding that an agency interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotations and citations omitted).

unambiguous.²³ Deference also is not merited for interpretations of even ambiguously worded regulations where the agency's interpretation is not reasonable.²⁴ Noncitizens may argue that courts should not defer to the BIA's interpretation of 8 C.F.R. § 287.3(c) in *E-R-M-F-* because it is contrary to the plain language, purpose, and context of the regulation and in the alternative, is unreasonable. The discussion above ("Why Was *Matter of E-R-M-F- & A-S-M-* Wrongly Decided?") can be used to support these arguments.

5. Will These Arguments Apply to Interrogations at Ports of Entry?

The arguments set forth above apply where there has been a warrantless *arrest*. However, these arguments are complicated by other immigration regulations and by recent case law, especially in the Ninth Circuit, when a warrantless arrest takes place at a port of entry.

8 C.F.R. 292.5(b) affords noncitizens the right to counsel in immigration examinations but states that the regulation will not "be construed to provide any applicant for admission in either primary or secondary inspection the right to representation...." In a recent decision, *Gonzaga-Ortega v. Holder*, the Ninth Circuit relied on this language to conclude that a petitioner did not have a right to counsel at secondary inspection and thus that the inspecting officer did not violate § 292.5 by obtaining a statement without providing the petitioner access to an attorney.²⁵

However, neither § 292.5 nor the *Gonzaga-Ortega* court addresses § 287.3(c) – providing for *notice of* the right to counsel, as opposed to the right to counsel itself.²⁶ Furthermore, for port of entry cases, it is important to note the potential distinction between secondary inspection and warrantless arrest. The Ninth Circuit has found that individuals may be placed under warrantless arrest after referral to secondary inspection but prior to making statements to immigration officials.²⁷ Thus, in challenging the failure to provide § 287.3(c) advisals, it is important to assert

²³ See *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Restrepo v. McElroy*, 369 F.3d 627, 638–39 n.19 (2d Cir. 2004).

²⁴ See *Auer*, 519 U.S. at 461 (agency is not owed deference where interpretation is "plainly erroneous or inconsistent with the regulation") (internal citations and quotation omitted); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150–51 (1991) (agency interpretation is owed deference "so long as it is reasonable") (internal quotations and citations omitted).

²⁵ 2012 U.S. App. LEXIS 19329, at *8, *17 (9th Cir. Sept. 14, 2012). Note that not all courts of appeals have addressed these issues and that petitioners may wish to argue for a different interpretation of § 292.5(b) outside of the Ninth Circuit.

²⁶ Confusingly, a recent Third Circuit decision, *Oliva-Ramos v. Att'y Gen. of the U.S.*, appears to have conflated these two regulations. The court echoes the Board's reasoning in *E-R-M-F-* regarding the timing of § 287.3(c) advisals, but applies the argument in the context of analyzing whether ICE officers violated § 292.5(b). 2012 U.S. App. LEXIS 19219, *75–*77 (3d Cir. Oct. 13, 2012). Further, the court expressly notes that the petitioner had failed to appeal his § 287.3(c) claims. *Id.* at *77 n.28.

²⁷ *De Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047, 1051 (9th Cir. 2008). Although the Board indicated in *E-R-M-F-* that referral to secondary does not *always* constitute an arrest, see 25 I. & N. Dec. 580, 585 n.5, the Board did not suggest that immigration officers *never* make

that the noncitizen was under warrantless arrest, and not merely in secondary inspection, at the time of making any inculpatory statements.²⁸ Attorneys with cases involving failure to provide § 287.3(c) advisals at ports of entry may contact the LAC at clearinghouse@immcouncil.org with questions about how to address secondary inspection issues.

6. Regardless of the BIA’s Holding, Do Noncitizens Have a Right to Be Accompanied by a Legal Representative During Examinations and Interviews by Federal Immigration Officials?

Matter of E-R-M-F- & A-S-M- addressed the right to receive *notice* of certain rights, but did not address the underlying rights themselves. Other legal authorities, however, do address the right to counsel. Specifically, the Administrative Procedure Act (APA) provides the right to counsel when individuals are “compelled to appear” before an agency or its representative,²⁹ which should include post-arrest examination by immigration officials.³⁰ DHS regulations also provide the right to counsel in immigration examinations.³¹ Violation of agency regulations can serve as the basis for a motion to suppress evidence or termination of removal proceedings.³²

Finally, the right to counsel is protected by the Due Process Clause of the Fifth Amendment. Involuntary or coerced statements may be suppressed in immigration proceedings if violations of due process occurred in the course of obtaining them.³³ If an immigration officer interferes with

warrantless arrests of individuals referred to secondary inspection. The *Gonzaga-Ortega* court did not address the issue of warrantless arrest.

²⁸ Respondents may support this assertion with evidence regarding whether a “reasonable person would have believed he was . . . free to leave” at the time of interrogation. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Mendenhall standard is reflected in agency regulations stating that an arrest has *not* occurred “as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.” 8 C.F.R. § 287.8(b)(1). *See also De Rodriguez-Echeverria*, 534 F.3d at 1051 (finding that an individual detained by immigration officials “in a locked room overnight and made to remove her shoes and belt” was under arrest).

²⁹ 5 U.S.C. § 555(b).

³⁰ Although the hearing provisions of the APA – Sections 5, 7 and 8 – do not apply to removal proceedings, *see Marcello v. Bonds*, 349 U.S. 302, 306-07, 310 (1955) (holding that the INA superseded hearing provisions of the APA), 5 U.S.C. § 555(b) is in Section 6 of the APA.

³¹ *See* 8 C.F.R. § 292.5(b). Significantly, however, the regulation indicates that there is no right to counsel at primary or secondary inspection. *See supra*, Question 5. Further, Legacy INS had internal guidance providing for access to counsel in post-arrest examinations. *See* INS Examinations Handbook (1988) at I-75, I-76. It is unclear whether ICE still deems this guidance binding.

³² *See Matter of Garcia-Flores*, 17 I. & N. Dec. at 327–29 (holding suppression of evidence or termination of proceedings to be appropriate remedies for regulatory violations). *See also* AIC’s [Motions to Suppress in Removal Proceedings: A General Overview](#) Practice Advisory, at 9–10.

³³ *See, e.g., Navia-Duran v. INS*, 568 F.2d 803, 810–11 (1st Cir.1977); *Bong Youn Choy v. Barber*, 279 F.2d 642, 647 (9th Cir.1960) (excluding a statement “not voluntarily given” as a

an individual's attempt to confer with counsel after arrest, it may provide evidence of coercion and thus render subsequent statements inadmissible.³⁴ Thus, regardless of the holding in *E-R-M-F-*, if a noncitizen affirmatively requests access to counsel in a post-arrest examination and such request is denied, he or she may be able to challenge the admissibility of statements made during the examination.³⁵

violation of due process). *See also* AIC's [Motions to Suppress in Removal Proceedings: A General Overview](#) Practice Advisory, at 21–24.

³⁴ *See, e.g., Lopez-Gabriel v. Holder*, 653 F.3d 683, 687 (8th Cir. 2011) (stating “interference with [the] right to counsel” is an “indicia of coercion” that may suggest statements were made involuntarily); *Matter of Garcia*, 17 I. & N. Dec. 319, 320–21 (BIA 1980) (terminating proceedings where evidence was obtained after respondent's requests to contact counsel were ignored).

³⁵ *See, e.g., Matter of Garcia*, 17 I. & N. Dec. at 320; *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980) (noting that “interference with any attempt by the respondent to exercise his rights” could be evidence of coercion in a motion to suppress evidence).

APPENDIX

8 C.F.R. § 287.3 Disposition of cases of aliens arrested without warrant.

(a) *Examination.* An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien.

(b) *Determination of proceedings.* If the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry in accordance with 8 CFR parts 235, 239, or 240, order the alien removed as provided for in section 235(b)(1) of the Act and §235.3(b) of this chapter, or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case.

(c) *Notifications and information.* Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized under §292.2 of this chapter or 8 CFR 1292.2 that are located in the district where the hearing will be held. The examining officer shall note on Form I-862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

(d) *Custody procedures.* Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued.

[62 FR 10390, Mar. 6, 1997, as amended at 66 FR 48335, Sept. 20, 2001; 68 FR 35276, June 13, 2003]

PRACTICE ADVISORY¹

June 12, 2012

***DENT V. HOLDER* AND STRATEGIES FOR OBTAINING DOCUMENTS FROM THE
GOVERNMENT DURING REMOVAL PROCEEDINGS**

In *Dent v. Holder*,² the Ninth Circuit found that the Immigration and Nationality Act (INA) requires the government to turn over copies of documents in a respondent's Alien File (A-file) in cases where removability is contested.³ Significantly, the court held that the respondent's access to his or her records is not conditioned on filing a request under the Freedom of Information Act (FOIA). This groundbreaking decision is rooted in a statutory interpretation of INA §240(c)(2)(B) – “the mandatory access law.” This provision states that where a respondent in removal proceedings must establish lawful presence in the United States, he or she “shall have access” to the “visa or entry document” and any other records and documents “pertaining to the alien’s admission or presence in the United States.” The court’s reasoning in *Dent* suggests that the government must routinely produce A-files in removal proceedings.

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The LAC thanks Professor Betsy Ginsberg and law students Brittany Brown, Vanessa Dell, and Sarah Efronson of Cardozo Law’s Immigration Justice Clinic and volunteer lawyer Aliza Hochman Bloom for their significant contributions to this advisory. The LAC also is grateful to Stephen Manning for his valuable input.

² 627 F.3d 365 (9th Cir. 2010).

³ An A-file is a compilation of documents that the Department of Homeland Security (DHS) maintains for noncitizens. See Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge, 72 Fed. Reg. 9017, 9018 (February 28, 2007). An A-file documents a noncitizen’s interactions with the immigration agencies, namely U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and the former Immigration and Naturalization Service. See *id.* The A-file typically contains all of a noncitizen’s official records regarding immigration status, including applications for immigration status, citizenship, or relief, and includes both documents submitted by the noncitizen as well as any investigations, statements, correspondence, and memoranda created by the agencies. It also may include other identifying documents, such as birth certificates.

This Practice Advisory discusses the Ninth Circuit’s *Dent v. Holder* decision and the benefits of obtaining documents pursuant to the mandatory access law rather than through FOIA. The advisory then offers suggestions and strategies for making document requests pursuant to the mandatory access law and due process, both in the Ninth Circuit, where *Dent* is binding authority, as well as outside the Ninth Circuit.

I. Facts, Holding, and Implementation of *Dent v. Holder*

A. Case Background

The petitioner, Sazar Dent, first came to the United States with his adoptive mother in 1981 when he was 14 years old. Decades later, ICE initiated removal proceedings against him based on his criminal convictions. Dent claimed that he was a U.S. citizen, but was unable to produce the documentation the immigration judge (IJ) requested, and the IJ ordered him removed. On appeal to the Board of Immigration Appeals (BIA), Dent asked for assistance in obtaining documents related to his citizenship claim. The government did not turn over any documents, and the BIA affirmed the removal order.

In 2008, Dent was arrested for illegal reentry and in defense claimed that he did not know the BIA had ordered him removed. The government conceded inadequate notice and dismissed the indictment for illegal reentry. Then, through his criminal counsel, Dent petitioned the BIA to reissue its removal decision so that he could timely file a petition for review. The BIA reissued its decision, and Dent sought judicial review in the Ninth Circuit.

Before the Ninth Circuit, Dent again maintained that he was a naturalized citizen and thus could not be removed from the U.S. The government disputed Dent’s citizenship claim and the citizenship of his adoptive mother. It was later discovered that Dent’s A-file contained a naturalization application that his mother had submitted on his behalf in 1982 and a copy that Dent himself submitted in 1986. Neither the IJ nor the BIA was aware of these documents when they issued decisions ordering Dent’s removal.

Dent further argued that pursuant to INA § 240(c)(2)(B) and constitutional due process, he was entitled to all documents in DHS’s possession that were relevant to his citizenship claim.⁴ The government maintained that it had no obligation to produce a respondent’s A-file, even during ongoing proceedings, and that respondents must make FOIA requests to obtain their A-files.⁵

⁴ Brief of the Petitioner at 32-43, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (No. 09-71987).

⁵ Brief of the Respondent at 39-40, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (No. 09-71987) (“In essence, Petitioner’s due process arguments amount to an attempt to use this petition for review as a proxy for a Freedom of Information Act (‘FOIA’) request, a remedy that was also available, and which he apparently ignored.”).

B. The Ninth Circuit's Holding

The Ninth Circuit held that INA § 240(c)(2)(B) is a “mandatory access law,” which entitled Dent to a copy of his A-file.⁶ The court rejected the government’s arguments that Dent must obtain his A-file through a FOIA request pursuant to 8 C.F.R. § 103.21 (2002),⁷ and that its dissemination of records through the FOIA process comports with the requirements of § 240(c)(2)(B). The court explained that the FOIA provision was general and “[i]f it applied to removal proceedings, a serious due process problem would arise, because FOIA requests often take a very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed.”⁸ Further, if the FOIA regulations entitled a noncitizen in removal proceedings to his or her A-file, but denied actual access because of delay, that “would indeed be unconstitutional.”⁹

Because the government failed to give Dent the documents in his A-file, the court found that he was denied the opportunity to fairly litigate his citizenship claim as a defense to removal, and that “[p]rejudice here is plain, because the A-file, when it is fully examined and this case

⁶ INA 240(c)(2)(B) provides:

(2) Burden on alien. In the proceeding the alien has the burden of establishing – (A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(Emphasis added.)

⁷ This provision sets forth the procedure for seeking access to government records about oneself by submitting a request to the Freedom of Information/Privacy Act Officer. 8 C.F.R. § 103.21 (2011). On November 28, 2011, DHS removed this provision from the regulations. See 76 Fed. Reg. 53764, 53771, 53782 (Aug. 29, 2011). The current DHS policies for filing Freedom of Information/Privacy Act requests are set forth in 6 C.F.R. § 5.21.

⁸ *Dent*, 627 F.3d at 374. The court also rejected the government’s argument that the court should defer to *Matter of Duran*, in which the Board of Immigration Appeals (BIA) upheld the denial of a subpoena for government documents because the noncitizen did not show that he had submitted a FOIA request. *Matter of Duran*, 20 I&N Dec. 1 (BIA 1989). The court determined it did not have to address *Duran* given that *Duran* involved discretionary relief under INA § 212(c) and because the BIA’s decision predated the “shall have access” statute at issue. *Dent*, 627 F.3d at 375.

⁹ *Id.* at 374.

adjudicated on all the facts, may show that Dent is a naturalized citizen of the United States.”¹⁰ The Ninth Circuit vacated Dent’s removal order and remanded to the district court for determination of his citizenship claim.¹¹ Following the decision, the government filed a petition for panel rehearing, which the court denied.¹²

C. ICE’s Implementation of Dent

At a meeting between the American Immigration Lawyers Association (AILA) and ICE in April 2011, AILA representatives asked what steps ICE Chief Counsel had taken to comply with the agency’s statutory obligations following *Dent*.¹³ ICE responded that it will follow *Dent* only in the Ninth Circuit,¹⁴ as it believes that FOIA is the appropriate mechanism for obtaining documents in a noncitizen’s A-file, and if counsel requests the file through FOIA during removal proceedings, the processing will be expedited. ICE emphasized its interest in protecting certain information and the built-in protections under FOIA, but nevertheless stated that “[e]veryone is very cognizant of the *Dent* case and . . . we are asking everyone around the country to utilize the ‘rule of reason.’”¹⁵ Additionally, an Associate Legal Advisor with ICE’s Office of Principal Legal Advisor stated that the government’s approach to responding to *Dent* requests is to tell attorneys outside of the Ninth Circuit to “use FOIA, use PD [prosecutorial discretion], we don’t give up everything in the A file, i.e., confidential information or if the alien already admits or concedes removability.”¹⁶

¹⁰ *Id.*

¹¹ *Id.* at 376. Ordinarily, upon deciding that a noncitizen was denied a fair hearing in removal proceedings, the court would remand the case to the BIA. In *Dent*, however, the court found a genuine issue of material fact existed regarding Dent’s citizenship; thus, pursuant to INA § 242(b)(5)(B), it transferred the case to district court for a hearing on his citizenship claim.

¹² Order Den. Respondent’s Pet. for Reh’g, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2011) (No. 09-71987) (March 2, 2011).

¹³ *AILA/ICE Liaison Minutes (4/14/11)*, AILA Info Doc. No. 11051260 available at <http://aila.org/content/default.aspx?docid=35365>.

¹⁴ Even within the Ninth Circuit, ICE is not always responding to document requests submitted under *Dent* and has construed *Dent* narrowly. According to information collected by the Immigration Justice Clinic at Benjamin N. Cardozo School of Law, a DHS trial attorney was overheard complaining (successfully) to the IJ that he did not have sufficient time to comply with a *Dent* request. On another occasion, a DHS attorney said *Dent* compliance would be achieved through a FOIA request, indicating that DHS policy has not changed since *Dent*. Further, an attorney in California asked an IJ to request that DHS provide a copy of the A-file pursuant to *Dent*. DHS informed counsel that the government lacked resources to copy the entire A-file, but offered to provide specific documents and referred counsel to the FOIA process. See October 5, 2011 document obtained from the Office of Principal Legal Advisor describing a current development in a case in which opposing counsel filed a writ of mandamus in federal court based on *Dent* (on file with Benjamin N. Cardozo School of Law’s Immigration Justice Clinic).

¹⁵ *Id.*

¹⁶ Email from Associate Legal Advisor at the Office of Principal Legal Advisor with the subject line “RE: Draft Guidance – Dent Based Requests outside the 9th” (May 24, 2011, 12:57 p.m.)

II. Benefits of Obtaining Documents from DHS under the Mandatory Access Rule as Opposed to a FOIA Request

A. Timeliness – FOIA Requests Often Take Too Long to be Effective

The FOIA process is often too slow to be useful to respondents in removal proceedings. The length of time it takes to process an A-file request is particularly troubling in detained cases since asking for continuances requires that the respondent spend more time in detention.

In 2007, cognizant of the problem of delayed FOIA responses, USCIS implemented a “fast track,” also known as “Track Three” or the “Notice to Appear Track,” to expedite FOIA requests submitted by individuals in removal proceedings.¹⁷ However, “fast track” FOIA processing has not resolved the problem. First, not all individuals in removal proceedings qualify for Track Three processing. Specifically, Track Three is not available to respondents with final orders of removal, respondents with a pending BIA appeal, and respondents who failed to appear for a scheduled hearing.¹⁸ Second, even “fast track” processing often is untimely – the average processing time (as of June 4, 2012) is 41 business days¹⁹ – and some IJs may deny a continuance to await FOIA processing.

As the *Dent* court explained, even after the implementation of Track Three, FOIA requests often take a “very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed.”²⁰ Therefore, the court concluded that it would be unconstitutional if a noncitizen in removal proceedings was entitled to his A-file, but the mechanism denied him access until it was too late.

(on file with Benjamin N. Cardozo School of Law’s Immigration Justice Clinic). The Cardozo Immigration Justice Clinic obtained this document through a FOIA request to ICE asking for information regarding the interpretation of *Dent*.

¹⁷ See Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge, 72 Fed. Reg. 9017 (Feb. 28, 2007).

¹⁸ *Id.* at 9018. Track Three only “allow[s] for accelerated access to the Alien-File (A-file) for those individuals who have been served with a charging document and have been scheduled for a hearing before an immigration judge as a result.” *Id.* at 9017-18.

¹⁹ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, DHS, FOIA Request Status Check & Average Processing Times (last visited June 8, 2012), available at <http://www.uscis.gov/portal/site/uscis/menuitem.8d416137d08f80a2b1935610748191a0/?vgnnextoid=f3a2ba87c7a29110VgnVCM1000004718190aRCRD&vgnnextchannel=f3a2ba87c7a29110VgnVCM1000004718190aRCRD>. The processing times fluctuate significantly and have often been much longer than 41 days.

As of June 4, 2012, FOIA requests for A-files that do not qualify for “fast track” processing take an average of 130 business days for Track One, simple requests, and 145 business days for Track Two, complex requests. See *id.*

²⁰ *Dent*, 627 F.3d at 374.

B. Breadth of Production – FOIA’s Extensive Statutory Exemptions

The category of records the government can withhold pursuant to the mandatory access law, INA §240(c)(2)(B), is narrower than the records that the government may withhold under the FOIA exemptions. Section 240(c)(2)(B) provides that the government may withhold only documents that are “considered by the Attorney General to be confidential.”

By contrast, FOIA permits the agency to withhold information requested based on any of nine different categories of exemptions.²¹ Although FOIA exemptions are not mandatory²²—even if a document arguably falls under one of these exemptions the agency may still choose to disclose it to the requesting individual—the government often reads the exemptions broadly and regularly withholds numerous records and/or turns over heavily redacted records.

There is no indication that the FOIA exemptions should be read into the mandatory access law.²³ The *Dent* court found that the FOIA regulations are general and govern all records requests, whereas INA § 240(c)(2)(B) specifically relates to document access for respondents in removal proceedings. While some of the FOIA exemptions may overlap with the confidentiality clause in INA § 240(c)(2)(B), particularly in light of the agency’s broad interpretation of the exemptions, respondents may receive more documents with fewer redactions under INA § 240(c)(2)(B) than under FOIA.

C. Burden on Individuals Requesting Documents

The mandatory access rule says that information about the respondent’s visa and other documents *shall be provided*, thus placing an affirmative obligation on the agency to produce information. By contrast, the FOIA process requires individuals to make a request for the documents they want. The government then determines what documents it deems responsive to an individual’s request. Further, the FOIA process may be more burdensome for the requesting individual – especially if he or she is unrepresented – and a less efficient means than the direct production of a respondent’s A-file by DHS counsel.

²¹ FOIA exemptions allow the government to withhold information related to national defense and foreign policy secrets, internal personnel rules, records that are otherwise exempt under statute, trade secrets, commercial information, financial information, intra-and inter-agency memoranda, personnel and medical files when disclosure would constitute an invasion of privacy, records compiled for law enforcement purposes, records related to regulation or supervision of financial institutions, and certain geological data. See 5 U.S.C. § 552(b)(1)-(9).

²² *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (“Congress did not design the FOIA exemptions to be mandatory bars to disclosure.”).

²³ In at least one case, DHS maintained that the mandatory access law encompasses the FOIA exemptions. The IJ in this case (which arose in the Ninth Circuit) rejected the government’s argument and ordered DHS to produce the documents that would have otherwise been withheld. The government indicated it would file an interlocutory appeal to the BIA regarding the IJ’s order. Cardozo’s Immigration Justice Clinic obtained this information through a FOIA request asking for information and documents addressing the government’s interpretation of *Dent* and the mandatory access law.

D. Disclosing Alienage

The FOIA request form (Form G-639) asks for the applicant's place of birth and thus poses the additional problem of disclosing alienage in cases where the respondent is contesting removability.²⁴ The mandatory access rule does not condition disclosure of documents on whether the respondent has identified a country of birth.

E. Judicial Efficiency

Finally, the goals of administrative and judicial efficiency also favor document production under the mandatory access law. In *Dent*, the IJ did not have access to all the documents in the respondent's A-file and thus missed a potentially dispositive citizenship claim. The Ninth Circuit lamented "that a proceeding ... without the benefit of the documents in the government's file on Dent invited error."²⁵

Similarly, in a recent Third Circuit case, the respondent asked to supplement the record with documentary evidence, obtained through a FOIA request, that showed he was admitted into the U.S. earlier than DHS alleged.²⁶ The case did not address the mandatory access law or *Dent*. However, the court commented that it was "strange" the government had information in its possession, but "did not provide this information to [the respondent] or the IJ at the time the former asserted his correct admission date, and instead forced him to seek out the documents through a FOIA request."²⁷ The court added that "[t]his resulted in unnecessary delay, an additional written decision by the BIA, and an additional appeal to us" and concluded that the court "expect[s] that the Government will respond (and quickly) in the future with such information in similar circumstances."²⁸

III. Arguments that *Dent v. Holder*, INA § 240(c)(2)(B), and Due Process Require the Government to Produce A-files and Other Documents

Dent is binding legal authority within the Ninth Circuit. However, with no contrary law in other circuits, practitioners may request A-files and other documents in cases outside the Ninth Circuit. And, even in the Ninth Circuit, the government may be required to turn over

²⁴ See Form G-639, Freedom of Information/Privacy Act Request available at <http://www.uscis.gov/files/form/g-639.pdf>; see also 8 C.F.R. § 103.21(a) (directing requester to identify his or her "date and place of birth"). Noncitizens may either decline to write their country of birth on Form G-639 or write "the government alleges he was born in [X country]." The government typically provides the A-file even where the requester does not identify the country of birth.

²⁵ *Dent*, 627 F.3d at 372.

²⁶ *Totimeh v. A.G.*, 666 F.3d 109, 112-13 (3d Cir. 2012).

²⁷ *Id.* at 112 n.3.

²⁸ *Id.*

documents in situations beyond those described in INA § 240(c)(2)(B) and beyond the facts of *Dent*.²⁹ These may include:

- documents that are related to issues other than a person’s “admission or presence” and/or are relevant to an application for relief from removal;
- documents related to eligibility for relief even where the person was not admitted;
- documents that are relevant to the removal proceedings, but are not contained in the A-file.

The following arguments may be used to obtain documents outside the FOIA process. Additionally, practitioners should continue to make FOIA requests and, whenever applicable, should request “fast track” processing.³⁰ The reason for this is twofold. First, FOIA requests may result in document production where *Dent* requests fail. Second, documentation of FOIA processing delays or incomplete responses may help persuade an IJ to grant a *Dent* motion. To that end, *Dent* motions (described in section IV of this advisory) should include copies of FOIA requests and government responses. Where the government has not turned over documents requested pursuant to *Dent* and/or through FOIA, counsel may ask the IJ to grant a continuance until the government grants access to relevant documents.³¹

A. *Where a Noncitizen is Contesting Removability, INA § 240(c)(2)(B) Mandates that the Government Turn Over Documents Related to the Noncitizen’s Entry and Presence in the United States.*

The plain language of INA § 240(c)(2)(B) mandates that the government turn over visa, entry documents, or other records and documents “pertaining to the alien’s admission or presence in the United States” in all instances where a respondent (1) has been admitted to the United States and (2) is contesting removability. Therefore, in this situation, practitioners may argue for document production based on the plain language of the INA and may cite *Dent* as binding or persuasive authority.

²⁹ In a 2011 district court case, the government refused to hand over documents crucial to the noncitizen’s naturalization application, prompting the judge to cite *Dent* in his opinion. *Hajro v. U.S.*, No. 08-1350-PSG, 2011 U.S. Dist. LEXIS 117964, *47-48 n.107 (N.D. Cal. 2011). The decision noted that, as in *Dent*, injustice may occur where the government fails to share determinative documents. *Id.*

³⁰ See USCIS FOIA Request Guide, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=34139c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextoid=34139c7755cb9010VgnVCM10000045f3d6a1RCRD>, for specific guidelines.

³¹ See 8 C.F.R. § 1003.29 (“The Immigration Judge may grant a motion for continuance for good cause shown.”).

B. Where Removability is Not Being Contested, Due Process Requires the Government to Turn Over Relevant Documents in Its Possession.

Although the *Dent* Court based its decision on INA § 240(c)(2)(B), it nonetheless discussed due process concerns, and the right to a full and fair hearing informed the decision. Therefore, as discussed below, there may be viable due process arguments for obtaining documents from the government. We caution that it generally is difficult to succeed on a due process claim, and practitioners should consider whether there are statutory or regulatory arguments that can be made first.

Where a respondent's case arguably falls within the mandatory access law, he or she also may argue that document production is required based on due process considerations. This is especially important because the mandatory access law only requires production of documents related to admission and presence, but there may be other relevant documents in the government's possession.³²

Furthermore, due process may require the government to produce documents even where the mandatory access law is not applicable. For example, respondents seeking admission and/or applying for immigration relief may be deprived of a full and fair hearing without access to relevant documents in the government's possession. Practitioners should make clear, however, that they are challenging a procedural flaw in the initial proceeding, not the failure to grant or consider relief, as some courts have rejected due process challenges where noncitizens applied for discretionary forms of relief, finding that noncitizens do not have a constitutionally protected liberty interest in such relief. *See, e.g., U.S. v. Torres*, 383 F.3d 92, 104-06 (3d Cir. 2004) (holding no fundamental unfairness in failing to consider an alien for 212(c) relief) (citing cases in other circuits). Violations of procedural due process, "which are predicated on the right to full and fair hearing, are not affected by the nature of the relief sought." *Fernandez v. Gonzales*, 439 F.3d 592, 602 n.8 (9th Cir. 2006). *But see Assaad v. Ashcroft*, 378 F.3d 471, 475-76 (5th Cir. 2004).

Noncitizens in removal proceedings are protected by the Fifth Amendment guarantee of due process.³³ Even those seeking admission must have an "opportunity to be heard upon the questions involving his right to be and remain in the United States' before being deported."³⁴ A

³² Notably, however, the *Dent* Court presumes that the government must produce the entire A-file under INA § 240(c)(2)(B). *See Dent*, 627 F.3d at 374-75 (making several references to furnishing the "A-file"). However, in an unpublished decision, the BIA said that an IJ's order to produce the entire A-file exceeded the scope of INA § 240(c)(2)(B). *See In re: Cuevas*, A095-282-946, 2012 WL 1951058 (BIA May 7, 2012).

³³ *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903)); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985).

³⁴ *Rusu v. INS*, 296 F.3d 316, 322 & n.8 (4th Cir. 2002) (quoting *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903)); *see also Cinapian v. Holder*, 567 F.3d 1067, 1073-74 (9th Cir. 2009).

“meaningful opportunity to be heard” includes a “reasonable opportunity” to present evidence.³⁵ The immigration statute and regulations further ensure that noncitizens facing removal are afforded due process.³⁶

In order to establish that a noncitizen was deprived of due process, he or she must establish prejudice. This means demonstrating that his or her “rights were violated in a manner so as potentially to affect the outcome of the proceedings.”³⁷ Thus, to the extent possible, practitioners should indicate what documents are needed and why their absence will be prejudicial.

Admittedly, without having the contents of a respondent’s A-file, an attorney may have difficulty explaining the impact of not having certain documents. In fact, in *Dent*, the government argued that Dent’s due process claim should be rejected because the documents he requested would not conclusively establish citizenship.³⁸ However, the court rejected this high threshold, and instead found that “[p]rejudice here is plain, because the A-file, when it is fully examined and this case adjudicated on all the facts, may show that Dent is a naturalized citizen of the United States.”³⁹

Pre-*Dent* case law also supports a reasonable approach to assessing the effect of not having documents. In a 2006 case, the Ninth Circuit held that an immigration judge had violated a noncitizen’s due process rights by failing to order the government to produce a voluntary departure form that *may* have been useful to his defense against removal.⁴⁰ Post-*Dent*, the Ninth Circuit granted a petition for review in another case and vacated the agency’s adverse credibility

³⁵ *Hussain v. Gonzales*, 424 F.3d 622, 626 (7th Cir. 2005) (citation omitted). Practitioners should check their circuit’s case law on due process violations relating to a noncitizen’s right to fully and fairly present a defense to removal.

³⁶ INA § 240(b)(4)(B) (providing that noncitizens have a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses); see also 8 C.F.R. § 1240.10(a)(4).

³⁷ *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926 (9th Cir. 2007) (internal quotations omitted). See also *United States v. Charleswell*, 456 F.3d 347, 362 (3d Cir. 2006); *Rusu v. INS*, 296 F.3d 316, 320-1 (4th Cir. 2002) (finding “prejudice requires a reasonable likelihood that the result would have been different if the error in the deportation proceeding had not occurred”); *Alimi v. Gonzales*, 489 F.3d 829, 834 (7th Cir. 2007) (holding that a person must show “the error likely affected the result of the proceedings”); *Lapaix v. AG*, 605 F.3d 1138, 1143 (11th Cir. 2010) (holding that a noncitizen “must demonstrate that, in the absence of the alleged violations, the outcome of the proceeding would have been different”) (citation omitted).

³⁸ Brief of the Respondent at 34-39, *Dent v. Holder*, 267 F.3d 365 (9th Cir. 2010) (No. 09-7187).

³⁹ *Dent*, 627 F.3d at 374.

⁴⁰ *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 621 (9th Cir. 2006). But see *Sedrakyan v. Gonzales*, 237 Fed. Appx. 76, *81-82 (6th Cir. 2007) (unpublished) (denying due process claim that IJ failed to locate lost documents and ignored other documents because the noncitizen “provided no proffer to the BIA of what those documents might be, the information that might be contained in the documents, or otherwise explain how the documents that the IJ purportedly ignored would have impacted her case”).

and frivolous application findings largely because the government had failed to provide the petitioner with letters that he had sought for purposes of his defense.⁴¹ Comparing the case to *Dent*, the court explained that because the IJ had confirmed that the original letters would have been probative of the petitioner's truthfulness, the IJ's denial of a continuance in order to obtain such documents constituted an abuse of discretion.⁴²

C. All Claims Should Be Raised at Each Step in the Proceeding to Comply with the Exhaustion Requirement of INA § 242(d)(1).

Under INA § 242(d)(1), a respondent generally must exhaust a claim before raising it with the court of appeals. The courts sometimes reach different conclusions about how fully a person must raise an issue before an agency to satisfy the exhaustion requirement. At a minimum, a respondent should argue to the IJ and BIA that the proceedings did not comport with the statutory requirements of INA § 240(c)(2)(B) and/or due process because he or she was deprived of access to documents.

D. Under Both the INA and Due Process, ICE Should Produce the A-file in Removal Proceedings Without a Request.

In *Dent*, the Ninth Circuit explicitly states that it is *not* holding that the due process right to a full and fair hearing is conditioned upon the respondent's request for the A-file. In fact, the court notes that it is "unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when facts call for it."⁴³ This acknowledgement is critical because of the large number of noncitizens in removal proceedings appearing *pro se*.⁴⁴ In immigration court, "when the alien appears *pro se*, it is the IJ's duty to 'fully develop the record.'"⁴⁵ The government can facilitate this task by routinely providing the entire A-file and all other relevant documents in its possession when an NTA is filed.

IV. Steps to Obtain Documents Following *Dent*

This section describes steps to make document requests and motions for production of documents. Given exhaustion requirements, it is important to document all such efforts in order to preserve administrative and judicial review, if necessary.

⁴¹ *Singh v. Holder*, 405 Fed. Appx. 193 (9th Cir. Dec. 7, 2010) (unpublished).

⁴² *Id.* at *194.

⁴³ *Dent*, 627 F.3d at 375.

⁴⁴ According to the Executive Office for Immigration Review, 49% of noncitizens in removal proceedings appeared *pro se* in 2011. Dep't. of Justice, *FY 2011 Statistical Year Book*, fig. 9 at 25 (2011) available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

⁴⁵ *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (quoting *Jacinto v. INS*, 208 F.3d 725, 733-34 (9th Cir. 2000)).

A. Informal Request

Some respondents have successfully obtained documents by making an informal request to DHS counsel for particular documents or for the entire A-file. The request may be for specific documents or any documents subject to mandatory disclosure under INA § 240(c)(2)(B). Noncitizens should consider documenting their requests by sending them in writing and saving copies of email correspondence, fax transmission reports, or return-receipt cards for letters sent through the mail. Such documentation may be submitted in support of a formal motion filed later if the informal request is ignored or denied.

B. Motion

If requests to DHS counsel are only partially satisfied or ignored, respondents may file a *Dent* motion with the IJ. The motion may request that the IJ order production of the A-file and/or any requested documents and that the IJ's decision on the motion be in writing. The motion should cite the mandatory access law, *Dent*, and due process as the bases for the document request. Documentation of prior requests and responses (if any) should be submitted in support of the motion.

C. Subpoena

In addition to filing a *Dent* motion, respondents also should consider requesting a subpoena. IJs “have the exclusive jurisdiction to issue subpoenas . . . for the production of . . . documentary evidence. . . . An Immigration judge may issue a subpoena upon his or her own volition or upon application of the Service or the alien.”⁴⁶ However, many IJs are reluctant to issue subpoenas, and as a result, subpoenas are granted infrequently.⁴⁷ Nonetheless, particularly outside of the Ninth Circuit – where *Dent* is not binding and ICE has indicated that it will not abide by the Ninth Circuit's interpretation of INA § 240(c)(2)(B) – subpoenas may be an effective method of obtaining documents.

The subpoena regulation requires the requesting party to make a “diligent effort” to furnish evidence,⁴⁸ so it is important to attach documentation to the request regarding the steps already taken to obtain the documents. The party requesting the subpoena also must explain what he or she “expects to prove by such . . . documentary evidence.”⁴⁹ If an IJ refuses to grant a subpoena, the respondent may raise this issue on appeal to the BIA and then in a petition for review.

⁴⁶ 8 C.F.R. § 1003.35(b)(1).

⁴⁷ Thus, there may be strategic reasons for not requesting a subpoena at the same time a *Dent* motion is filed. Practitioners should take into account local immigration court practices when considering whether to request a subpoena.

⁴⁸ 8 C.F.R. § 1003.35(b)(2).

⁴⁹ *Id.*

D. Appeal

Where non-disclosure of documents affected or may have affected a respondent's removal case, he or she may raise this issue on appeal to the BIA and then in a petition for review in the court of appeals.



**IMMIGRANT RIGHTS CLINIC
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PRACTICE ADVISORY¹

May 25, 2012

SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS: STANDARD, IMPLICATIONS OF ICE'S RETURN POLICY AND THE OSG'S MISPRESENTATION TO THE SUPREME COURT, AND SAMPLE STAY MOTION

I. INTRODUCTION

Filing a petition for review of a removal order does not automatically stay the petitioner's removal from the United States. INA § 242(b)(3), 8 U.S.C. § 1252(b)(3). However, the courts of appeals may issue a judicial stay of removal to prevent U.S. Immigration and Customs Enforcement (ICE) officers from deporting a person while his/her petition for review is pending before the court. In *Nken v. Holder*, 556 U.S. 418, 434 (2009), the Supreme Court instructed courts to adjudicate stay motions by applying the "traditional" standard for a stay.

This advisory begins with background information regarding stay requests, including when an immigration agency order becomes final and how to file a stay motion. See pages 2-5. Next, it discusses the legal standard for stay motions as set forth in *Nken*. See pages 5-7. Lastly, it addresses the implications on stay motions of the U.S. Immigration and Customs Enforcement (ICE) return policy and of the Office of the Solicitor General's (OSG) misrepresentations to the Supreme Court regarding the government's ability to return successful litigants. See pages 8-14.

¹ Copyright (c) 2012, National Immigration Project of the National Lawyers Guild, Boston College Post Deportation Human Rights Project and Immigrant Rights Clinic, Washington Square Legal Services, New York University School of Law, and the American Immigration Council. The authors of this practice advisory are Trina Realmuto, Jessica Chicco, Nancy Morawetz, and Beth Werlin.

This practice advisory is intended for lawyers and is *not* a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

The advisory also includes a sample stay motion containing legal arguments for litigants in stay litigation. It also contains a template declaration in support of a stay motion. See pages 36-38. Finally, the advisory contains an appendix detailing local rules and procedures of circuit courts.

This practice advisory does not address stay requests submitted to the immigration agencies or to a district court, nor does it address requests under the All Writs Act.

Please contact us: The authors of this advisory would like to hear about how the courts are deciding stay motions and the government's position on the return policy. Please email trina@nationalimmigrationproject.org and jessica.chicco@bc.edu with information about your cases. Also, the sample stay motion and sample declaration are available as Word documents upon request.

II. BACKGROUND INFORMATION

A. When to File a Stay Motion with a Court of Appeals

Once an order of removal becomes administratively final, the Department of Homeland Security (DHS), acting through its component agency U.S. Immigration and Customs Enforcement (ICE), immediately may remove the individual. Significantly, there is no automatic stay of removal during the 30-day period for filing a petition for review. Moreover, the mere filing of a stay motion does not temporarily stay removal until the court adjudicates the motion except in the *Ninth and Second Circuits*. In these circuits, the filing of a stay motion temporarily stays removal until the motion is adjudicated.² (Similarly, filing a petition for review or stay motion does not toll the period for a motion to reopen or reconsider with the BIA.³)

Even though a person may be removed immediately after the order becomes final, it may not always be advisable to file a stay motion right away. For example, if the individual is not detained, filing a stay motion may prompt ICE to arrest and detain him or her. Of course, ICE could arrest and detain a noncitizen with a final order at any time, even if a stay motion is not filed. Counsel must consider this risk as well as local ICE practices when deciding whether and when to file a stay motion.

² In the Ninth Circuit, the filing of a stay motion automatically confers a temporary stay by operation of law. *Deleon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); General Order 6.4(c)(1) (General Orders of the Ninth Circuit Court of Appeals).

The Second Circuit has entered into an *informal* agreement with DHS: upon notification by the court that a stay motion has been filed, DHS will not remove the noncitizen until the court adjudicates the stay motion. See Matthew L. Guadagno, Nuts and Bolts in Presenting Petitions for Review to the U.S. Court of Appeals for the Second Circuit, p. 12, New York County Lawyers' Association, *Litigating Immigration Cases in the Second Circuit* (Feb. 9, 2011). Significantly, however, this agreement is *not in writing* and, therefore, its enforceability is questionable. See additional information in Appendix.

³ See *Keo Chan v. Gonzales*, 413 F.3d 161, 162 (1st Cir. 2005) (issuance of a stay of removal does not toll motion to reopen deadline); *Randhawa v. Gonzales*, 474 F.3d 918, 922 (6th Cir. 2007) (filing of petition for review does not toll motion to reopen deadline).

In deciding when to file the stay motion, it is important to consult the statutory and regulatory provisions that specify when a removal order becomes final. Keep in mind that both DHS and the Executive Office for Immigration Review (EOIR) – which includes immigration judges and the Board of Immigration Appeals (BIA) – have authority to issue orders of removal, depending on the circumstances.

Relevant here, an *EOIR-issued order of removal* becomes final upon the BIA’s dismissal of the appeal or upon overstaying the voluntary departure period granted by the BIA.⁴ When a *DHS-issued order* becomes final depends on the type of order and whether the person has a fear of return to his or her country of origin. The following DHS removal orders generally are reviewable in the courts of appeals.⁵

Reinstatement Order. DHS may remove an individual following the entry of a *reinstatement order* pursuant to INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), unless the person is referred for a reasonable fear interview, *see* 8 C.F.R. §§ 241.8(e), 208.31. If an asylum officer, or an immigration judge reviewing the asylum officer’s decision at the noncitizen’s request, determines that the person has a reasonable fear of persecution or torture, DHS may not remove the person until the conclusion of proceedings to determine whether removal must be withheld or deferred, including any appeal of the immigration judge’s decision to the BIA. 8 C.F.R. §§ 208.31(e)-(g); 1208.31(e)-(g); 8 C.F.R. §§ 208.2(c)(2), 1208.2(c)(2). If the asylum officer, or an immigration judge reviewing the asylum officer’s decision at the noncitizen’s request, determines the person has not established a reasonable fear of persecution or torture, DHS may then remove the person. 8 C.F.R. §§ 208.31(f), (g)(1); 1208.31(f), (g)(1).

Removal Orders Against Non LPRS with Aggravated Felonies. DHS may issue a removal order against *non-lawful permanent residents with aggravated felony convictions* pursuant to INA § 238(b), 8 U.S.C. § 1228(b). In this situation, however, DHS is prevented from physically deporting the person “until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review” INA § 238(b)(3), 8 U.S.C. § 1228(b)(3); 8 C.F.R. § 238.1(f)(1). Further, if the

⁴ The regulations address final orders of removal and provide an order of removal shall become final: (1) upon an immigration judge’s order if the noncitizen waives his or her right to appeal to BIA (including a stipulated order of removal by which the noncitizen automatically waives appeal pursuant to 8 C.F.R. § 1003.25(b)); (2) upon expiration of the 30-day period for filing a BIA appeal if the right to appeal is reserved but no appeal is timely filed; (3) upon the BIA’s dismissal of the appeal; (4) if the case is certified to the BIA or the Attorney General, upon the subsequent order; (5) upon an immigration judge’s order of removal in absentia; (6) where the immigration judge grants voluntary departure, upon overstay of the voluntary departure period or failure to timely post the required bond; or (7) where the immigration judge grants voluntary departure and the noncitizen appeals to the BIA, upon the BIA’s order of removal or overstay of the voluntary departure period granted by the BIA. 8 C.F.R. §§ 241.1; 1241.1.

⁵ DHS also may issue an *expedited removal order* pursuant to INA § 235(b), 8 U.S.C. § 1225(b). However, the statute precludes judicial review of these orders in the courts of appeal so a stay motion generally is not appropriate. INA § 242(e)(1), 8 U.S.C. § 1242(e)(1).

individual requests withholding of removal, DHS must refer the case for a reasonable fear interview. 8 C.F.R. §§ 238.1(f)(3); 208.31. See paragraph above discussing when DHS may deport someone who has a reasonable fear interview.

Removal Order under the Visa Waiver Program. DHS also may issue and execute a removal order against an individual who entered on the *visa waiver program* unless the individual requests an asylum-only hearing before an immigration judge. INA § 217(b), 8 U.S.C. § 1187(b), 8 C.F.R. § 217.4(b).

B. How to File a Stay Motion

A stay motion is filed with the court of appeals with jurisdiction over the petition for review of the removal order. INA § 242(b)(2); 8 U.S.C. § 1252(b)(2). Practitioners may file the motion concurrently with a petition for review or after a petition for review has been filed.⁶ There is no fee for filing a motion for stay of removal (however, the filing fee for a petition for review is \$ 450 unless the court waives it). A sample stay motion is provided at the end of this advisory.

The procedural vehicle for a stay request is a motion. Motions are governed by Federal Rule of Appellate Procedure (FRAP) 27 and corresponding local rules and internal operating procedures.⁷ Unless otherwise set forth by local rules, the government has 10 days to file an opposition to the motion, and the movant has 7 days to file a reply. FRAP 27(a)(3), (4). Given the importance of obtaining a stay for an individual and his/her family, counsel generally should not forego reply briefing.

Some circuits' local rules require that the motion inform the court of the position of opposing counsel (see the Appendix for more information about local rules). Even where it is not required, attorneys should contact the Department of Justice, Office of Immigration Litigation (OIL) to obtain the Attorney General's position on the stay motion. Often the OIL attorney will not take a position on the motion. If an OIL attorney has not entered an appearance yet, counsel can contact the OIL appellate division at (202) 616-4900. A court of appeals is more likely to grant an unopposed stay motion.

In general, stay motions should be detailed and well documented and should brief all the relevant factors, as explained more in the sample motion. If an attorney did not represent the noncitizen below and is preparing the stay motion in the absence of a complete administrative record, he or she may consider filing a skeletal stay motion and informing the court that he or she intends to supplement the motion with additional information and supporting documentation as soon as it is

⁶ See American Immigration Council, *How to File a Petition for Review* (February 2011), available at www.legalactioncenter.org/sites/default/files/lac_pa_041706.pdf.

⁷ Although FRAP 18 says “[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order,” some courts already have held that doing so is not required in immigration cases. See, e.g., *Alimi v. Ashcroft*, 391 F.3d 888, 893 (7th Cir. 2004) (finding that there is no obligation to request a stay with the BIA); *Sofinet v. DHS*, 188 F.3d 703, 706-07 (7th Cir. 1999) (same). Requesting an agency stay often is not logistically possible and generally is impracticable.

possible to obtain the record. Check local rules for time limitations and procedure for submitting supplementary information. ***Attorneys may wish to create template skeletal motions for use in an emergency before the need to file a stay request arises.***

The Appendix at the end of this advisory sets forth relevant local rules and procedures with regard to stay motions, including emergency stay motions, and provides contact information for the courts of appeals. A detailed discussion of specific local rules and procedures is beyond the scope of this advisory.

C. Stay Adjudications and Violations

If the court of appeals grants a stay motion, the stay is valid until the mandate issues. *See, e.g., Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004). Note that the filing of a petition for panel or en banc rehearing stays issuance of the mandate until the court decides the petition. FRAP 41(d)(1).

If the court of appeals denies the stay and DHS deports the person, the court still has authority to adjudicate the petition for review. In other words, neither the stay denial nor the person's deportation cuts off the circuit court's jurisdiction to adjudicate the petition.⁸ If the court of appeals denies the stay, an individual could ask the Supreme Court for a stay.⁹ However, the Court rarely grants such requests.

If the court grants a stay and DHS nevertheless deports the person, ICE generally is more willing to facilitate and pay for return and, if not, counsel could pursue federal court remedies to compel return. Even if ICE returns the person, counsel may consider remedies under the Federal Tort Claims Act or *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

III. LEGAL STANDARD FOR STAY MOTIONS

The Supreme Court's decision in *Nken v. Holder* governs stay motions. 556 U.S. 418 (2009). As discussed below, DHS' brief in *Nken* and the Supreme Court's opinion rely on the existence of a return policy for noncitizens who successfully litigate their petitions for review. Subsequent developments about the alleged return policy and DHS' new return policy, as well as their implications on stay motions are discussed in the next section and incorporated in the sample stay motion.

⁸ In 1996, Congress repealed the post-departure bar to petitions for review, formerly found at INA § 106(a), 8 U.S.C. § 1005a. Section 306(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546.

⁹ In *Nken*, the Court treated Mr. Nken's stay request as a petition for a writ of certiorari, pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10. *Nken v. Mukasey*, 555 U.S. 1042 (2008) (granting certiorari). *See also* Supreme Court Rule 11 (allowing for petitions for writ of certiorari to review cases in which a court has not yet entered a final judgment).

A. The Solicitor General's Representations to the Supreme Court in *Nken*

The Supreme Court granted certiorari in *Nken v. Holder* to determine whether a court of appeals should adjudicate stay requests by weighing “traditional” stay standards or requiring “clear and convincing evidence” that the removal order “is prohibited as a matter of law” pursuant to INA § 242(f)(2), 8 U.S.C. § 1252(f)(2). At the time of the decision, eight circuits applied the “traditional” stay criteria and two circuits applied the more stringent “clear and convincing” standard.¹⁰

To assist the Court in evaluating the issue, a group of organizations filed a brief as amici curiae in support of the petitioner in *Nken*.¹¹ The amici brief explained that “in practice it is extremely difficult for an alien to return once he has been deported, even if his petition for review has been successful. There is no class of visa or other formal reentry mechanism available to aliens who have been previously removed but have successfully challenged their removal orders.”¹²

In its responsive briefing, the Office of the Solicitor General (OSG) claimed that “[b]y policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens’ return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.”¹³

Based on this representation, the OSG’s brief argued that courts should apply the “clear and convincing evidence” standard in adjudicating stays since individuals could pursue their immigration cases from abroad and would be able to return to the United States if they prevailed.

B. The Supreme Court’s Decision in *Nken* and the Standard for a Stay

The Court in *Nken* rejected the OSG argument that the “clear and convincing evidence” standard of 8 U.S.C. § 1252(f)(2) applies to stay motions. Rather, the Court instructed courts to apply the

¹⁰ Compare *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Mohammad v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172-76 (5th Cir. 2005); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Andrieu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc) with *Weng v. U.S. Att’y General*, 287 F.3d 1335, 1337-38 (11th Cir. 2002); *Ngarurih v. Ashcroft*, 371 F.3d 182, 195 (4th Cir. 2004).

¹¹ See Amicus Brief of American Immigration Lawyers Association, Catholic Legal Services, Florida Immigrant Advocacy Center, Hebrew Immigrant Aid Society, National Immigrant Justice Center, National Immigration Law Center, Public Counsel, and World Relief for Petitioner in *Nken v. Holder*, 556 U.S. 418 (2009) (hereinafter Amici Brief), located at 2008 WL 5409461 (U.S.) (Appellate Brief), also available at: http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_681_PetitionerAmCu8ImmigrantAidOrgs.authcheckdam.pdf.

¹² Amici Brief at 28-29.

¹³ Brief for Respondent at 44, *Nken v. Holder*, 556 U.S. 418 (2009).

“traditional” standard for a stay. Under this standard, the court considers the following four factors:

- (1) whether the stay applicant has made a strong showing that he/she is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

Nken, 566 U.S. at 434. The Supreme Court went on to discuss the traditional stay factors in greater detail.¹⁴ The *Nken* Court explained that “[t]he first two factors are most critical.” *Id.* With respect to the first factor—likelihood of success on the merits—the chance of success must be “better than negligible,” and more than a “mere possibility of relief” is required. *Id.* (internal quotations and citations omitted).

With respect to the second factor, the Court acknowledged that removal is a “serious burden” but concluded “it is not categorically irreparable.” *Nken*, 566 U.S. at 435. Significantly, in reaching this conclusion, the Court credited, cited and relied on the OSG’s representation that the government had a “policy and practice” of facilitating the return of previously removed noncitizens.

It is accordingly plain that the burden of removal alone cannot constitute the requisite irreparable injury. Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. See Brief for Respondent 44.

Nken, 566 U.S. at 435.

The Court in *Nken* found that the last two factors, injury to other parties in the litigation and the public interest, merge in immigration cases because the government is both the opposing litigant and public interest representative. Although the Court recognized a public interest “in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm,” the Court also recognized a public interest “in prompt execution of removal orders.” *Nken*, 566 U.S. at 436. The Court further stated that courts “cannot simply assume that ‘[o]rdinarily, the balance of hardships will weigh heavily in the applicant’s favor.’” *Id.* (citation omitted).

¹⁴ The Court granted certiorari to address the appropriate stay standard, and thus, the *application* of this standard was outside the scope of the question presented. As such, the parties did not provide substantive briefing on how courts should apply the “traditional” test in the removal, and arguably, the Supreme Court’s discussion of the application of the stay factors is dicta.

IV. IMPLICATIONS OF ICE'S RETURN POLICY AND THE OSG'S MISPRESENTATION TO THE SUPREME COURT ON STAY MOTIONS

Prior to the Supreme Court's decision in *Nken*, practitioners reported that there appeared to be no policy for bringing their clients back to the United States after prevailing on a petition for review. Many practitioners encountered practical and legal difficulties in arranging for a client's return, which, in many cases, took months to facilitate.

Since the Supreme Court's decision in *Nken*, various lower courts have relied on the language in the Court's decision that persons who prevail on their petition for review "can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." *Nken*, 556 U.S. at 435. Among other things, courts have cited this language to deny stay motions.¹⁵

In May 2011, immigrant rights advocates filed a Freedom of Information Act lawsuit against DHS, the Department of Justice (DOJ) and the Department of State (DOS) alleging that the agencies failed to adequately respond to a request for records related to the government's asserted "policy and practice" of facilitating the return of individuals who successfully challenge their removal orders from outside the country. The case is *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y. filed May 12, 2011).¹⁶

This litigation triggered the developments detailed below, including the OSG's admission to the Supreme Court that it misrepresented the existence of a return policy and DHS' simultaneous effort to minimize the impact of this error by belatedly issuing a return directive. These developments are significant to stay motions because the courts of appeals may continue to rely on the Supreme Court's statement that deportation is not "categorically irreparable" harm, which was largely based on the OSG's misrepresentation that the government can redress wrongful removal through return. Accordingly, through stay motion litigation, counsel can inform the court of these post-*Nken* developments, discuss their legal implications, and address the limitations of DHS' new return policy and its implication in the particular client's case.

(The following information detailing these developments and the sample stay motion at the end of this advisory are intended to assist counsel with satisfying the second stay factor, i.e., showing that deportation will result in irreparable harm.

¹⁵ See, e.g., *Lezama-Garcia v. Holder*, 666 F.3d 518, 537-38 (9th Cir. 2011); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 & n.3 (5th Cir. 2010); *Villajin v. Mukasey*, No. CV 08-0839, 2009 WL 1459210, at *4 (D. Ariz., May 26, 2009). See also *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (granting stay, but noting that "[*Nken*] rais[ed] the irreparable harm threshold"); *Maldonado-Padilla v. Holder*, 651 F.3d 325, 327 (2d Cir. 2011) (denying stay and citing *Nken* for the proposition that removal is not "categorically irreparable").

¹⁶ The plaintiffs are: the National Immigration Project of the National Lawyers Guild, the American Civil Liberties Union, the Immigrant Defense Project, the Boston College Post-Deportation Human Rights Project, and Professor Rachel Rosenbloom. The New York University School of Law Immigrant Rights Clinic represents plaintiffs.

Case documents, case updates, and the documents the government disclosed through the litigation and to the Supreme Court in *Nken* are located at:
<http://nationalimmigrationproject.org/legalresources.htm#nipnlg>.

A. ICE's Return "Policy" Directive and FAQ

On February 24, 2012, ICE issued a [directive](#) (ICE Policy Directive Number 11061.1) addressing the return of certain individuals who prevail on a petition for review,¹⁷ including lawful permanent residents and others whose presence ICE considers "necessary." Although the directive claims to "describe[] existing ICE policy," it does not reference any pre-existing policies or indicate that it is superseding any other directive.

On April 23, 2012, ICE posted to its website a "[Frequently Asked Questions](#)" (FAQ) page regarding the new policy directive. Importantly, the FAQ provides that ICE will restore people to their pre-removal status and will not charge people as "arriving aliens" unless they were charged as such prior to their removal. In addition, the FAQ designates the ICE Public Advocate as the first point of contact in initiating return.

The FAQ also reveals significant limitations and problems with the policy, including:

- **DHS has unfettered discretion over the return of non-LPRs.** ICE will facilitate only the return of persons who were previously lawful permanent residents or whose "presence is necessary for continued administrative removal proceedings." Thus, unless the court's order restores the person to lawful permanent resident status, ICE has absolute discretion to determine whether and how to facilitate return. As such, it will leave scores of individuals without access to return, including those who have their asylum or other status restored. Further, if not returned, the individual risks having the immigration judge administratively close proceedings or order removal in absentia under INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5), thereby effectively rendering judicial review meaningless and denying all relief.¹⁸
- **Teleconferencing/videoconferencing is not a workable solution.** The FAQ also states that return may not be necessary because U.S. embassies and most courts have videoconferencing equipment, and therefore, a person may participate in an immigration court hearing by video or by phone. This is not a workable solution for a variety of reasons, including, but not limited to, little or no ability for individuals to communicate with their counsel, problems presenting and reviewing evidence, and

¹⁷ The "policy" does not extend to noncitizens who prevail on administrative motions to reopen or reconsider before an immigration judge or the Board of Immigration Appeals.

¹⁸ For example, in the case of Sergio Omar Beldorati (A97-927-591), after the Eleventh Circuit remanded the case for consideration of whether Mr. Beldorati suffered past persecution (*Beldorati v. U.S. Atty. Gen.*, 228 Fed. Appx. 952 (11th Cir. 2007)), the immigration judge stated that further action "is meaningless as respondent's stay of removal was denied by 11th Circuit and the respondent has been removed," and administratively closed the proceedings. See p. 19 of OSG and DHS email communications.

technological malfunctions and/or failure.¹⁹ There also is no indication that a system is in place to facilitate the use of videoconferencing or teleconferencing from abroad. An April 24, 2012 cable from DHS to the Department of State requests that consular officers process parole notifications for individuals whom DHS determines merit return.²⁰ Notably, however, the cable does not contain any information on facilitating teleconferencing or videoconferencing.

- **Insufficient notice of return policy.** Individuals abroad have no way of knowing about the return policy. To date, the State Department has not posted information about the policy on U.S. embassy and consulate websites.²¹ DHS has developed a form letter notifying individuals who are being removed that ICE may facilitate their return if they prevail on a petition for review and providing contact information for the Public Advocate.²² However, this notification mechanism does not reach those who already have been removed and may be seeking to return. It also is written only in English and, therefore, people with limited English proficiency may not understand it.
- **Lack of agency coordination.** The April 24, 2012 cable from DHS to the Department of State only informs consular officers whom to notify if contacted by a lawful permanent resident or noncitizen seeking to return. It remains unclear whether people must pay a processing fee or how the person would arrange to meet with a consular officer. Also, the FAQ provides that ICE will arrange for issuance of appropriate transportation documents, including a transportation/boarding letter for individuals returning by air. However, even if ICE provides parole and the State Department provides a transportation letter, there is no guarantee that Customs and Border Protection (CBP) will admit the person back into the United States. CBP instructions on parole clearly provide that border officials can override a prior decision to grant parole. CBP Directive No. 3340-043, at 5 (The Exercise of Discretionary Authority) (Sept. 3, 2008).²³
- **Financially and practically burdensome.** Noncitizens generally must cover transportation and associated return costs. In the past, ICE has required individuals to

¹⁹ A 2005 report by the Legal Assistance Foundation of Metropolitan Chicago and Appleseed highlighted these technological problems. The report is available at: http://chicagoappleseed.org/uploads/view/49/download:1/videoconfreport_080205.pdf.

²⁰ The cable is attached as appendix E to the OSG's letter to the Supreme Court in *Nken*, available at: <http://nationalimmigrationproject.org/legalresources.htm#nipnlg>.

²¹ See, e.g., website of the U.S. Embassy in Santo Domingo, Dominican Republic, located at <http://santodomingo.usembassy.gov/>.

²² The form letter is attached as appendix C to the OSG's letter to the Supreme Court, available at <http://nationalimmigrationproject.org/legalresources.htm#nipnlg>.

²³ Counsel may cite the directive as Exhibit FF to Plaintiffs' Third Motion for Summary Judgment (filed May 11, 2012) in *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y.). It is located at: http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/CBP%20Parole%20Directive%20%28Partially%20Redacted%29%20-%20Sept%203%202008.pdf.

purchase expensive open-date airline tickets to accommodate uncertainties about when ICE might obtain the documents authorizing travel and entry. Furthermore, the FAQ says that persons returning by air or sea must have “a valid passport or equivalent documentation” and that persons returning by land must have “appropriate identity documentation, which could include a passport or other government-issued documents.” For lower income and indigent individuals and those who fear persecution in their countries of origin, the expense of returning and/or documentation requirements may prohibit return altogether.

The significant problems with the new and untested return policy highlight the fact that removal will continue to result in irreparable harm. Therefore, practitioners should argue in their stay motion that this flawed return policy does not provide any new or additional reasons to deny a stay motion.

B. The OSG’s Misrepresentation to the Supreme Court

1. The OSG and DHS Email Communications

Through FOIA litigation, the court ordered the government to release [emails](#) between OSG and DHS attorneys written and exchanged in the course of drafting the government’s brief and preparing for oral argument in *Nken*. See *Nat’l Imm. Project v. U.S. Dep’t of Homeland Sec.*, ___F. Supp.2d ___, 2012 WL 375515 (S.D.N.Y. Feb. 7, 2012; Feb. 24, 2012). These emails discuss the basis for the government’s alleged “policy and practice” of returning noncitizens who win their petitions for review.

The emails make it clear that the government’s then current procedures for facilitating return were informal and incomplete and a far cry from a “policy and practice” of returning all individuals, as the OSG asserted in its Supreme Court brief. The emails identify serious limitations that would pose challenges for individuals who seek to return, as reflected in the following statements:

- “[W]e generally handle [these cases] on a by-request basis. But, anytime the BIA decision is vacated, I would believe the alien could ask to come back to the US to have the former status restored.” OSG and DHS Emails, at 6.
- “As we all know there is no statute that directly addresses the issue, and given that CBP [Customs and Border Protection] will not simply let the person pass through inspection based upon the pfr [Petition for Review] grant, we have relied on parole under section 212(d)(5). I don’t believe that ICE has established a ‘procedure’ per se, but has handled them on a case by case basis. The process is generally that ICE grants the parole and sends a cable to the consulate or embassy nearest to the alien with instructions to issue a travel document/boarding letter to the alien. The alien must supply his/her own transportation to the U.S., and if the alien was in detention prior to deportation, the alien is returned to detention upon arrival at the POE [Port of Entry].” OSG and DHS Emails, at 7.

In addition, the emails reveal that DHS had expressed, and the OSG had been made aware, that there were circumstances in which DHS “would not contemplate return” of an individual for further proceedings after prevailing on a petition for review. These circumstances included the case of Mr. Nken.²⁴ The emails also included a chart appearing to list cases of petitioners outside the United States who were successful in litigation. The chart demonstrates that DHS was not facilitating the return of successful litigants to the United States even where their cases were remanded to the immigration courts for hearings. In at least one instance, an immigration judge closed the proceedings rather than hold a new hearing on the merits, even where the case had been remanded for a determination of whether the noncitizen had suffered past persecution. In another case, the immigration judge proceeded without the individual present, determining that further testimony was not needed. In a third case, ICE had not returned the individual even though more than a year had passed since the case was remanded to the immigration judge. Indeed, the chart DHS provided to the Solicitor General’s Office did not identify *any* case in which the person deported already had been returned to attend the proceedings on remand.

Although one OSG attorney expressed some doubts about the accuracy of the intended statement to the Supreme Court, noting “we don’t want to open ourselves up to trouble,” the final representation in its brief did not reflect the qualifications or reservations expressed by DHS. OSG and DHS Emails, at 8.

2. The OSG’s Letter to the Supreme Court

On April 24, 2012, the OSG submitted to the Supreme Court a six-page [letter](#) with six attachments “in order to clarify and correct” the misleading statement in its brief in *Nken*. Pointing to declarations attached to the complaint in *National Immigration Project et al. v. DHS*, as well as various agency documents obtained during the course of that lawsuit, the OSG admitted the following:

- “In light of those materials, the government is not confident that the process for returning removed aliens, either at the time the brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied. The government therefore believes that it is appropriate both to correct its prior statement to this Court and to take steps going forward to ensure that aliens who prevail on judicial review are able to timely return to the United States.”
- “[W]ithout providing additional detail about the government’s approach to effectuating return and restoring status, the statement that relief was accorded ‘[b]y policy and practice’ suggested a more formal and structured process than existed at the time. The government should have provided a more complete and precise explanation.”
- “[Significant impediments in returning] stemmed in part from the absence of a written, standardized process for facilitating return; the resulting uncertainty in how to achieve that objective in field offices, U.S. embassies and consulates, and other

²⁴ See OSG and DHS Emails, at 1 (email from DHS setting forth circumstances in which DHS would not return Mr. Nken even if he prevailed on his petition for review).

agencies involved in the process; and the lack of clear or publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings.”

Despite the OSG’s admission that it may have fallen short in its “special obligation to provide this Court with reliable and accurate information at all times,” the OSG continued to represent that the problem only was the regularity of its practices and not the gap between the policy stated in the e-mails and the policy as described to the Court. In fact, the emails on their face included many exceptions to return, including possibly the return of Mr. Nken.

3. Amici Curiae Letter to the Supreme Court

In response to the OSG’s April 24, 2012 letter to the Supreme Court, the amici curiae in *Nken* submitted a [letter](#) on May 4, 2012, asking the Court to modify the *Nken* opinion to correct the flaw in its analysis. Specifically, amici asked the Court to “consider amending its *Nken* opinion to delete the sections that relied on the government’s now-withdrawn representations regarding its support for the return of previously removed noncitizens.” Amici Letter at 3. The letter states that action by the Court is necessary to adequately remedy the prior misrepresentation, explaining that lower courts have relied on the incorrect statements in *Nken* to deny stay motion and identifying problems with ICE’s discretion over the policy. The letter further points out that the OSG’s assurances are not binding on future administrations and do not purport to commit to a legally binding policy.

C. Implications on the “Irreparable Harm” Factor for Stay Motions

In *Nken*, the Court stated that the first two factors in the “traditional” test for a stay matter most. *Nken*, 566 U.S. at 434. Thus, the second factor, whether the person will suffer “irreparable harm” if deported, is critical to stay motions. In addressing this factor, counsel may wish to make the following arguments in the stay motion.

1. Circuit Courts Cannot Rely on the Supreme Court’s Language on Irreparable Harm

The *Nken* Court stated that deportation “is not categorically irreparable.” *Nken*, 566 U.S. at 435. In making this statement, the Court credited the OSG’s representation that the government may remedy wrongful deportation through return and restoration of status. *Id.* We now know that the Supreme Court’s statement was based on incorrect information. Therefore, regardless whether the Supreme Court amends its decision, circuit courts should not rely on this statement and should evaluate irreparable harm without regard to it. Further, the Supreme Court’s more detailed discussion of the “traditional” stay factors (see Part IV of the opinion, 566 U.S. at 434-36), may constitute dicta because application of the test was outside the scope of the question presented, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (granting certiorari), and the parties did not brief application of the “traditional” test.

Counsel may wish to cite any pre-*Nken* case law relevant to the irreparable harm analysis.

2. Circuit Courts Should Not Rely on DHS' Return Policy in Assessing Irreparable Harm

The new ICE policy directive on return is untested, non-binding, dependent on cooperation and coordination with other agencies, imposes costs on the winning party and, on its own terms, does not assure that ICE will return the person and restore prior status. For these reasons, among others, the circuit courts should not rely on the policy in assessing irreparable harm.

Further, ICE's post-*Nken* return "policy" *does not* provide any *new or additional* reason to deny a stay motion. Because courts already were deciding some stay motions based on the representation made to the Supreme Court in *Nken*, even if ICE's return policy were adequate, it does not require the circuit court to give the government's position any additional weight when assessing the second factor for a stay.

D. Supplemental Authorities in Ongoing Litigation

Counsel should be aware that in cases where the stay motion and response already have been submitted to the court, the Office of Immigration Litigation (OIL) is filing letters pursuant to Federal Rule of Appellate Procedure 28(j). The letters suggest that the new return policy eliminates prior obstacles to return. A sample 28(j) letter response is available at: <http://nationalimmigrationproject.org/legalresources.htm#nipnlg>.

SAMPLE STAY MOTION

Attorneys are advised to research applicable circuit court case law and understand local ICE practices in order to modify this sample motion accordingly.

If the person is not detained, filing a stay motion may prompt ICE to arrest the person.
Of course, ICE could arrest the person even if a stay motion is not filed.
Counsel must consider these possibilities as well as local ICE practices.

No. XX-XXXX

**IN THE UNITED STATES COURT OF APPEALS
FOR THE _____CIRCUIT**

**ALICIA LEE
A 123-456-789,**

Petitioner,

v.

**ERIC H. HOLDER, JR.
U.S. Attorney General,**

Respondent.

PETITIONER’S MOTION FOR [EMERGENCY] STAY OF REMOVAL

CUSTODY STATUS: [DETAINED or NOT DETAINED]

**Attorney Name
Organization/Law Firm
Street Address
City, State Zip
Tel. (XXX) XXX-XXXX**

Attorney for Petitioner

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule ____, Petitioner, Alicia Lee (“Ms. Lee”), through her undersigned counsel, moves the Court to stay her removal during the pendency of her petition for review.

[Insert suggested text A or B as applicable]

[Suggested text A] Ms. Lee is subject to deportation at any time. Officials of Immigration and Customs Enforcement (ICE) has not disclosed the date or time of her deportation.

[Suggested text B] According to officials of Immigration and Customs Enforcement (ICE), unless this Court grants the instant motion, ICE will deport Ms. Lee to ____ on or about _____.

Ms. Lee seeks an emergency stay to permit her to remain in the country while the Court considers her petition for review of the decision of the [insert as applicable: Board of Immigration Appeals or Department of Homeland Security] [insert applicable text: finding her removable under § __ of the Immigration and Nationality Act (INA), 8 U.S.C. § __, denying her applications for _____ and ordering her removed]. ICE is detaining Ms. Lee at _____.

POSITION OF RESPONDENT

Petitioner, through counsel, contacted the Office of Immigration Litigation, counsel for Respondent in immigration-related petitions for review. Respondent through counsel, _____, indicated that he [insert applicable text: takes no position on this motion; opposes this motion; does not oppose this motion].

STATEMENT OF FACTS AND OF THE CASE²⁵

NOTE TO COUNSEL: As the Court does not have any information about the case other than the agency's decision, **we strongly advise counsel to attach key exhibits to support the facts and procedural history.** Examples of key documentation may include: the relevant relief application/s and any accompanying declarations, the immigration judge's decision, the Board's decision, the hearing transcript, Notice of Appeal to the Board, Notice to Appear.

Where possible, we also strongly advise attaching a new client declaration addressing the *Nken* factors (see Sample Declaration) and letters of support from U.S. citizen or lawful permanent resident family, friends, religious and community leaders, etc.

The more evidence that supports or corroborates the arguments in the stay motion, the better the chance the court will rule favorably on the stay.

Statements of facts and procedural history are highly individualized. Counsel is advised to include a detailed recitation of facts along with a citation to the attachment that supports each statement. This section generally should conclude with a brief synopsis of the agency's decision. Two examples follow.

Example A:

On _____, 2012, Ms. Lee filed a motion to reopen, alleging that the ineffective assistance of two previous attorneys prevented her from reasonably

²⁵ Respondent has not yet filed the Administrative Record in this case. Federal Rules of Appellate Procedure 16 and 17. Therefore, the citations in this section are to the Record before [insert as applicable: the Immigration Court and the Board of Immigration Appeals and/or the Department of Homeland Security] and the Petitioner's Declaration, attached hereto as Exhibit A.

presenting her claim for asylum, withholding of removal, and protection under the Convention Against Torture. On ____, 2012, the Board denied Ms. Lee's motion to reopen. See Exhibit ____ (BIA Decision). The Board held that Ms. Lee failed to demonstrate that prior counsel's assistance was ineffective. *Id.* On ____, 2012, Ms. Lee timely petitioned this Court for review of the Board's decision and herein requests that the Court stay her removal during the pendency of that petition.

Example B:

On ____, ICE issued a Notice of Intent to Reinstate Prior Order against Ms. Lee. Exhibit ____ (Form I-861). The notice charged her with removability under 8 U.S.C. § 1231(a)(5) for allegedly having been deported in 1998 based on an order of removal and allegedly having illegally reentering the United States on or after September 1, 1999. Exhibit ____ (Form I-861). Ms. Lee contested the charges. *Id.* The ICE officer refused to reconsider his determination and ICE issued a final reinstatement order against Ms. Lee on _____. Ms. Lee timely petitioned this Court for review of ICE's decision and herein requests that the Court stay her removal during the pendency of that petition.

ARGUMENT

Adjudication of a motion for stay of removal requires the Court to consider four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably

injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009). See also [insert relevant pre-*Nken* or post-*Nken* circuit court decision].²⁶ While “not a matter of right,” courts may grant stays in the “exercise of judicial discretion” based on “the circumstances of the particular case.” *Nken*, 556 U.S. at 433 (internal quotations and citation omitted).

Ms. Lee satisfies these requirements.

I. MS. LEE IS LIKELY TO SUCCEED ON THE MERITS OF HER PETITION FOR REVIEW.

Counsel should make concise and well-supported legal arguments as to why the court is likely to grant the petition for review. This requires analyzing the agency’s decision and making arguments (supported by case law) to show why the agency’s decision was erroneous.

This task is more challenging where the attorney did not represent the person below and does not have the complete record. In this situation, counsel could

²⁶ [Pre-*Nken* cases adopting the traditional stay criteria include: *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Mohammad v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172-76 (5th Cir. 2005); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Andrieu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc).]

Post-*Nken*, most circuit court stay decisions available online are unfavorable, with the notable exception of the Ninth Circuit’s decision in *Leiva-Perez v. Holder*. 640 F.3d 962 (9th Cir. 2011). In *Leiva-Perez*, the Ninth Circuit granted the stay but noted that “[*Nken*] rais[ed] the irreparable harm threshold.” *Id.* at 965. The Second Circuit published a decision denying a stay and citing *Nken* for the proposition that removal is not “categorically irreparable.” *Maldonado-Padilla v. Holder*, 651 F.3d 325, 327 (2d Cir. 2011). Counsel should research applicable circuit court case law as the law in this area is developing].

inform the court that he/she intends to supplement the stay motion after receipt of additional parts of the record.

If another circuit court favorably decided the issues in the case, this is a strong argument that the petition has satisfied this factor, even if other circuits have disagreed.

The absence of a published circuit court decision on a novel issue of law, however, does not suggest that success on the merits of the petition is unlikely. Such an implication would conflict with the need for “individualized judgments” in stay adjudications, *Nken*, 556 U.S. at 434-35, by categorically preventing noncitizens who raise novel legal claims from ever satisfying the first stay factor.

Counsel should consider making the headings in this section represent each of the arguments for granting the petition for review. Some heading examples follow:

- * Petitioner Has Made a Strong Showing of Likely Success on the Merits Because the BIA Failed to Follow Its Precedent.
- *. The BIA Erred in Finding that *Matter of* _____ Applies Retroactively to Ms. Lee’s Case.
- *. The Failure of Prior Counsel to Investigate the Reasons Ms. Lee Feared Return to _____ Falls Far Below the Standards of Competent Representation.
- * Petitioner Has Made a Strong Showing of Likely Success on the Merits Because the BIA Erred When It Failed to Consider Petitioner’s Argument that the IJ Had Not Made a Clear Credibility Determination.
- * The BIA Erred in Finding Ms. Lee’s Motion Untimely Because the Ineffective Assistance of Ms. Lee’s Prior Counsel Equitably Tolls the 90-Day Filing Deadline for a Motion to Reopen.
- * Petitioner Has Made a Strong Showing of Likely Success on the Merits Because the BIA Erred As a Matter of Law By Failing to Consider All Relevant Evidence of _____.

- * Petitioner Has Made a Strong Showing of Likely Success on the Merits Because Substantial Evidence Does Not Support the Adverse Credibility Finding.
- * Petitioner Has Made a Strong Showing of Likely Success on the Merits Because 8 U.S.C. § 1231(a)(5) Does Not Apply Retroactively to Individuals Who Filed Adjustment Applications Before April 1, 1997.

II. MS. LEE WILL BE IRREPARABLY INJURED ABSENT A STAY.

- A. **Forced Deportation to _____ Would Irreparably Harm Ms. Lee’s [insert as applicable: Mental and Physical Health, Separate Her from Her U.S. Citizen / Lawful Permanent Resident Family, and Subject Her to Further Persecution / Torture by ____].**

[Note to counsel: the content of this section may vary depending on the types of claims raised in the petition and the types of potential harm.]

A showing of irreparable injury is “dependent upon the circumstances of the particular case.” *Nken*, 556 U.S. at 433 (internal quotations and citation omitted).

Ms. Lee would suffer irreparable injury if forced to return to _____, [insert as applicable: where she previously suffered persecution, where she has not lived since the age of ____ and has no family members, where she will be separated from her U.S. citizen / lawful permanent resident husband and [#] of U.S. citizen children]. If Ms. Lee is deported, she faces further [persecution / torture] at the hands of _____, which clearly amounts to irreparable harm. Exhibit ____ (Declaration of Alicia Lee). Moreover, Ms. Lee, who suffers from _____ and takes _____ medicine daily, and has been hospitalized in the past, will suffer

greatly if she is removed to ____ where quality medical care is less accessible. See *id.*

B. The Court Should Not Rely on the Supreme Court’s Statement that Deportation is Not “Categorically Irreparable” Harm Because the Court’s Statement Was Based On a Misrepresentation Provided By the Office of the Solicitor General.

If Ms. Lee is deported prematurely, any eventual victory on the merits of her petition likely will ring hollow because ICE has no reliable, fair, or binding policy to ensure Ms. Lee’s return to the United States if this Court ultimately grants her petition for review. In *Nken*, the Supreme Court stated that the burden of wrongful removal—while “serious”—is not “categorically irreparable” as a matter of law. *Nken*, 566 U.S. at 435. At least one court has interpreted this language to as “raising the irreparable harm threshold.” *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011). Accord *Maldonado-Padilla v. Holder*, 651 F.3d 325, 327 (2d Cir. 2011) (denying stay and citing *Nken* for the proposition that removal is not “categorically irreparable”).

In making this statement, however, the Court credited, cited and relied on the Solicitor General’s assurance that individuals “who prevail can be afforded effective relief by facilitation of their return along with restoration of the immigration status they had upon removal.” *Id. citing* Brief for Respondent 44.²⁷

²⁷ The Solicitor General’s Brief states:

The Supreme Court reasoned that any wrongful removal could be and would be properly redressed—making the average litigant fully whole.

Recent developments demonstrate that the Supreme Court was misled by the Solicitor General’s representation. On February 7, 2012 and February 24, 2012, U.S. District Court Judge Jed S. Rakoff ordered the release of the email communications that formed the basis for this statement. *See Nat’l Imm. Project v. U.S. Dep’t of Homeland Sec.*, ___ F. Supp. 2d ___, 2012 WL 375515, at *1 (S.D.N.Y. Feb. 7, 2012; Feb. 24, 2012) (“When the Solicitor General of the United States makes a representation to the Supreme Court, trustworthiness is presumed. Here, however, . . . it seems the Government’s lawyers were engaged in a bit of a shuffle”); at *9 (“Like a flatworm cut in half that returns as two flatworms, this case just gets curiouser and curiouser”). These emails evidence opinions about an informal, incomplete and inconsistent procedure for facilitating return of only some individuals, a far cry from a “policy and practice” of returning all individuals who prevail on a petition for review. *See* Exhibit ___ (Email communications between OSG and DHS attorneys). To coincide with the ordered release of the

By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens’ return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.

2009 WL 45980, *44 (U.S.) (Appellate Brief).

emails, on April 24, 2012, the Office of the Solicitor General submitted to the Supreme Court a six-page letter with attachments “in order to clarify and correct” misleading statement in its brief in *Nken*. See Exhibit ____ at 1 (OSG Letter to the Supreme Court).

Despite the OSG’s admissions that its brief implied the existence of an actual return policy and that it may have fallen short in its “special obligation to provide [the] Court with reliable and accurate information at all times,” the OSG informed the Supreme Court that it need not take any action because, following U.S. District Court Judge’s Rakoff’s decision in *Nat’l Imm. Project v. U.S. Dep’t of Homeland Sec.*, on February 24, 2012, DHS issued a “policy” regarding returns. See ICE Policy Directive 11061.1, appendix B to Exhibit ____ (OSG Letter to the Supreme Court).²⁸ The OSG’s letter asserted, “In stay litigation going forward, where the government contends that removal alone does not constitute irreparable harm, it will submit to the lower courts the procedures to facilitate return described above.” Exhibit ____ at 5 (OSG Letter to the Supreme Court). Ms. Lee submits that this new policy is untested and, on its face, is inadequate to avoid irreparable harm. See § B.2, *infra*. However, even if it were adequate, the Supreme Court’s

²⁸ On April 23, 2012, a day before the Solicitor General’s Office alerted the Supreme Court to its misrepresentation, ICE posted to its website a “Frequently Asked Questions” (FAQ) page on return of individuals pursuant to the directive. The FAQ is located at: <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/faq.htm>.

prior conclusion (that removal is not “categorically irreparable”) is not binding because the Court credited, cited and relied on false information in reaching it.

In response to the OSG’s April 24, 2012 letter, the group of organizations that filed a brief as amici curiae in support of Mr. Nken asked the Court to correct the relevant passage in its opinion. See Exhibit ____ (Amici Letter to the Supreme Court). The letter states that action by the Court is necessary to adequately remedy the prior representation, explaining that lower courts – [insert if applicable: including this Court²⁹] – have relied, and other courts may well rely in the future, on the incorrect statements in *Nken*, and identifying problems with ICE’s discretion over the policy. See Exhibit ____ (Amici Letter to the Supreme Court). The letter also states that the OSG’s assurances are not binding on future administrations and do not purport to commit a binding policy, and the emails evidence that ICE does not facilitate return of all noncitizens who are successful in their removal proceedings. *Id.*

Given the Solicitor General’s prior misrepresentation, and for all the reasons set forth herein and in the attached letter from Amici Curiae in *Nken*, Ms. Lee urges this Court not to rely on the Supreme Court’s statement that deportation is

²⁹ [Case examples include: *Lezama-Garcia v. Holder*, 666 F.3d 518, 537-538 (9th Cir. 2011); *Maldonado-Padilla v. Holder*, 651 F.3d 325, 328 (2d Cir. 2011); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 & n.3 (5th Cir. 2010); *Dhillon v. Mayorkas*, No. C-10-0723, 2010 WL 1338132, at *11 (N.D.Cal., Apr. 5, 2010); *Villajin v. Mukasey*, No. CV 08-0839, 2009 WL 1459210, at *4 (D. Ariz., May 26, 2009).]

not a “categorically irreparable” harm. As Respondent must acknowledge, this part of the *Nken* decision is based on a misleading statement. Therefore, this Court should evaluate the facts of the irreparable harm Ms. Lee faces if deported without regard to the Supreme Court’s discussion of this factor.

C. THE COURT SHOULD NOT RELY ON ICE’S RETURN “POLICY” IN ASSESSING IRREPARABLE HARM

1. ICE’s New “Policy” Is Untested, Non-Binding, Dependent on the Acquiescence of Other Agencies, and Imposes Costs On Successful Litigants.

Respondent cannot assert that the government has an effective practice in place for returning immigrants who succeed on their petitions for review. *See* Exhibit ___ at 3-4 (OSG Letter to the Supreme Court) (admitting of lack of a return practice). Instead, the government has taken the position that a new policy, announced together with the admission of the lack of any tested prior practice, now obviates the need for a stay of removal to prevent irreparable harm. Exhibit ___ at 5 (OSG Letter to the Supreme Court). In essence, Respondent asks this Court to trust the government to do what it clearly has not done in the past. But courts have long recognized that they should be wary of claims that a new policy removes a past problem. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (finding that mere voluntary cessation of activities does not moot a case because the defendant is free to return to his old ways); *U.S. v. W.T. Grant*,

345 U.S. 629, 632 n.5 (1953) (noting that courts should “beware of efforts to defeat injunctive relief by protestations of repentance and reform”).

The new practices are not formal, are untested, depend on coordination among many agencies, and require Ms. Lee to bear the cost of removal even if she wins. Moreover, the new “policy” is not binding. It was not issued via regulations and does not have the force of law. There is nothing to stop the current administration or a future administration from changing this new policy in a way that would leave Ms. Lee stranded abroad after she wins her case.

The new practices have yet to be tested in any meaningful way. ICE only announced the new policy in a February 24, 2012 directive and did not publicly announce its plan for implementing until filing the letter with the Supreme Court in *Nken* on April 24, 2012. See Appendix B to Exhibit __ (OSG Letter to the Supreme Court). Furthermore, the new practices pertain primarily to ICE, a single unit of the Department of Homeland Security. Actual return, however, will depend on coordination with several agencies, any one of which could effectively defeat the promise of return. For example, Customs and Border Protection (CBP) has the power, at the border, to override a prior grant of parole. Exhibit __ (CBP Directive No. 3340-043, at 5) (The Exercise of Discretionary Authority) (Sept. 3, 2008). To Petitioner’s knowledge, nothing in any CBP materials actually contemplates return

following a successful petition for review. Instead parole procedures are designed for other types of cases, making problems in return all the more likely.

Similarly, return for anyone who lives in a noncontiguous country requires a transportation boarding letter issued by the Department of State. FAQ about ICE Policy Directive Number 11061.1, appendix D to Exhibit __ (OSG Letter to the Supreme Court). But other than a cable indicating that there may now be people seeking return, there is nothing currently in the Foreign Affairs Manual (FAM), the guidebook for State Department employees, that contemplates issuing a transportation boarding letter to a person who succeeds on an appeal of a removal order. Furthermore, **to date**, the State Department has not posted information about the policy on U.S. embassy and consulate websites.³⁰ It also remains unclear whether people must pay a processing fee or how the person would arrange to meet with a consular officer.

[Modify text as appropriate] ICE's new "policy" also puts the monetary cost of removal on the winning party. Such monetary costs are in themselves a form of irreparable harm, especially for immigrants who have been detained, kept from working, have expended resources on an appeal, and have been deported to a country where their earnings are limited. These costs can be especially high where individuals may be forced to purchase an open-date ticket because of uncertainties

³⁰ See, e.g., website of the U.S. Embassy in Santo Domingo, Dominican Republic, located at <http://santodomingo.usembassy.gov/>.

related to when they may be able to obtain the documents authorizing travel and entry. In Ms. Lee’s case, the estimated cost is \$ _____. See Exhibit ____ (airline pricing information from expedia.com).

2. On its Own Terms, ICE’s “Policy” Does Not Assure that ICE Will Return Petitioner to this Country and Restore Her Status If She is Deported.

[Note to counsel: If Petitioner was an LPR, and the court’s order may restore LPR status, counsel may need to modify the paragraphs indicated below because ICE’s “policy” does confer discretionary authority to deny returning LPRs unless there are “exceptional circumstances” (including, but not limited to, individuals who present serious national security or adverse foreign policy considerations)].

That ICE now has a return “policy” does not ensure that Ms. Lee can return to the United States if this Court grants her petition for review. [This paragraph is not applicable to LPRs] The post-*Nken* return “policy” does not ensure that ICE would facilitate Ms. Lee’s return to the United States if she prevails on her petition. Under the “policy,” ICE facilitates *only* the return of persons who were previously lawful permanent residents or whose “presence is necessary for continued administrative removal proceedings,” and for only those who can afford to pay. Appendix B to Exhibit ____ (OSG Letter to the Supreme Court). Thus, as Ms. Lee was not previously a lawful permanent resident, ICE will have absolute, unfettered discretion to determine whether and how to facilitate her return. For Ms. Lee, and many individuals like [insert: her / him], this discretion ultimately renders return dependent on a favorable ICE determination that presence is

necessary, not on a favorable court outcome. As such, Ms. Lee's return rests in the hands of ICE. Further, if Ms. Lee's case is remanded and she is not returned, she risks having the immigration judge administratively close proceedings or order removal in absentia order pursuant to 8 U.S.C. § 1229a(b)(5), thereby effectively rendering this Court's review meaningless and denying her all relief.

[This paragraph is not applicable to LPRs] Additionally, ICE's suggested use of teleconferencing and videoconferencing from U.S. embassies and consulates abroad is not a workable solution for a variety of due process reasons, including, but not limited to, little or no ability for individuals to communicate with their counsel, problematic presentation of evidence, and technological malfunctions and/or failure, as highlighted in a 2005 report by the Legal Assistance Foundation of Metropolitan Chicago and Appleseed.³¹ There also is no indication that a system is in place to facilitate the use of videoconferencing or teleconferencing from abroad. An April 24, 2012 cable from DHS to the Department of State requests that consular officers process parole notifications for individuals who DHS determines merit return. Appendix E to Exhibit ____ (Office of the Solicitor General Letter to the Supreme Court). However, the cable lacks any information on facilitating teleconferencing or videoconferencing.

³¹ The report is available at: http://chicagoappleseed.org/uploads/view/49/download:1/videoconfreport_080205.pdf.

The “policy” also conditions return on possession of a valid foreign passport without exception. For Ms. Lee, and other lower income and indigent individuals, as well as others including asylum seekers in hiding in their countries of origin, those who have fled to another country, or those who lack the language skills to work in the country to which they have been removed, these requirements may financially and practically prohibit her return altogether. See Exhibit ____ (Declaration of Ms. Lee) and Exhibits ____-____ [cite and attach evidence of financial hardship].

In sum, if Ms. Lee is removed prior to adjudication of her petition for review, ICE’s “policy” provides *zero guarantee* that ICE would facilitate her return, that CBP will permit her to enter the country, that her [or his] family could afford return, or that she can even obtain the requisite passport and travel documentation to return. The supposed remedy of “facilitation of return” is a chimera. A merits decision in Ms. Lee’s favor will be empty if Ms. Lee has no means to return to the United States.

III. THE ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE RESPONDENT NOR BE CONTRARY TO THE PUBLIC INTEREST.

The Court in *Nken* found that the last two stay factors, injury to other parties in the litigation and the public interest, merge in immigration cases because the government is both the opposing litigant and public interest representative. *Nken*,

556 U.S. at 435. The Court further noted that the interests of the government and the public in the “prompt execution of removal orders” is heightened where “the alien is particularly dangerous,” or “has substantially prolonged his stay by abusing the process provided to him.” *Nken*, 566 U.S. at 436 (citations omitted). Here, neither these factors nor any other factors exist to suggest the government has any interest in Ms. Lee’s removal beyond the general interest noted in *Nken*.

Explain here why client is not a threat to the community and/or not particularly dangerous, including, as applicable, such information as: client’s age; employment; health; medical infirmities; adherence to conditions of release; nature of crime (if non-violent); tax payments; religious attendance; community service; close relationship with family members; etc. **Attach and cite to exhibits that show the petitioner’s character as not dangerous and highlight his or her positive qualities.**

The *Nken* Court also recognized the “public interest in preventing aliens from being wrongfully removed,” which must weigh heavily in the Court’s consideration. *See Nken*, 566 U.S. at 436. Respondent cannot make any particularized showing that granting Ms. Lee a stay of removal would substantially injure the government or conflict with the public interest preventing a wrongful removal, such that the third and fourth *Nken* factors would outweigh the hardship Ms. Lee would face if removed.

CONCLUSION

Based on the foregoing, Ms. Lee respectfully requests that the Court grant this motion for a stay of removal pending resolution of the instant petition for review.

Dated: _____

Respectfully Submitted,

/s/ Attorney Name

Attorney Name

Organization/Law Firm

Street Address

City, State Zip

Tel. (XXX) XXX-XXXX

Attorney for Petitioner

SAMPLE, NON-EXHAUSTIVE LIST OF EXHIBITS

- A. Declaration of Petitioner, Alicia Lee. See Sample Motion.
- B. BIA [or DHS] Decision, dated _____.
- C. Notice to Appear, dated _____.
- D. Immigration Judge Decision, dated _____.
- E. Transcript of Removal Proceedings Before the Immigration Court.
- F. Application for _____, dated _____.
- G. Letter from Jonathan Lee, Petitioner's U.S. citizen husband, dated _____.
- H. Naturalization Certificate of Jonathan Lee, evidencing U.S. citizenship.
- I. Letter from Shelia Lee, Petitioner's U.S. citizen daughter, age 9, dated _____.
- J. Copy of Birth Certificate of Shelia Lee, evidencing birth in the United States.
- N. Information from expedia.com indicating estimated cost of return airline ticket from _____ to _____ as \$ ____.
- O. Letter from _____, Supervisor at Made-Up Company, Petitioner's employer, dated _____.
- P. Letter from Reverend Pierre Dubois, St. Joseph's Parish, dated _____.
- Q. Letter from Christine Shepard, Petitioner's friend, dated _____.
- R. Email communications between the Office of the Solicitor General and Department of Homeland Security attorneys about the government's alleged "policy and practice" of returning noncitizens who win their petitions for review.
- S. April 24, 2012 letter with and accompanying appendixes, from the Office of the Solicitor General to the Supreme Court in *Nken v. Holder*, 566 U.S. 418 (2009), informing the Court of misrepresentation regarding the

government's policy and practice of returning noncitizens to the United States. Appendices include:

- (A) *Nken* Supreme Court decision;
 - (B) ICE's February 24, 2012 Policy Directive;
 - (C) Notice to Removed Aliens Who May Be Seeking Judicial Review;
 - (D) April 24, 2012 ICE FAQ;
 - (E) April 24, 2012 Department of State cable to consular posts;
 - (F) Second Circuit's order, dated April 5, 2012 in *Li v. Holder*, Case No. 12-120-ag.
- T. May 4, 2012 letter from Amici Curiae in *Nken v. Holder*, asking the Court to modify the *Nken* opinion to correct the flaws in its analysis based on the government's misrepresentation.
- U. CBP Directive No. 3340-043 (The Exercise of Discretionary Authority) (Sept. 3, 2008), providing that border officials can override a prior decision to grant parole.

[SAMPLE DECLARATION IN SUPPORT OF STAY MOTION]

DECLARATION OF _____

I, _____, submit this declaration in support of my Motion for Stay of Removal and hereby affirm and state:

1. My name is _____. [PROVIDE BRIEF HISTORY OF CASE, TYPE OF RELIEF SOUGHT, AND OVERVIEW OF EQUITIES (FAMILY IN THE U.S., U.S. CITIZEN CHILDREN/SPOUSE, ETC.)].
2. It is my understanding that because the Board of Immigration Appeals has dismissed my appeal, Immigration and Customs Enforcement can try to deport me at any time even though I have filed an appeal with this Court. [IF CURRENTLY IN CUSTODY OR IF REMOVAL HAS BEEN SCHEDULED OR IS IMMINENT, PROVIDE THAT INFORMATION].
3. [IF INDIVIDUAL IS AN ASYLUM SEEKER, DISCUSS IN MORE DETAIL THE ONGOING RISKS OF PERSECUTION IF REMOVED].
4. My deportation would cause significant hardship to me and my family. [WHAT IS FAMILY'S CURRENT FINANCIAL SITUATION? HOW WOULD IT BE AFFECTED BY INDIVIDUAL'S REMOVAL? IS INDIVIDUAL PRIMARY BREADWINNER OR CARETAKER? HISTORY OF STEADY EMPLOYMENT? INDICATE IF REPRESENTED PRO BONO].
5. If deported to _____, I would not be able to work, or if I found work the pay would not be enough to allow me to continue supporting my family. [WOULD INDIVIDUAL BE ABLE TO WORK? IF ASYLUM SEEKER, WOULD BE FORCED TO REMAIN IN HIDING AND THEREFORE UNABLE TO WORK? HIGH UNEMPLOYMENT RATE

IN COUNTRY OF REMOVAL? NO NETWORK? NO JOB OPPORTUNITIES IN TRAINED FIELD? DOES INDIVIDUAL HAVE FAMILY IN COUNTRY OF REMOVAL THAT S/HE CAN RELY ON? WOULD FAMILY IN THE U.S. BE FORCED INTO POSITION TO REQUEST BENEFITS?]

6. [DISCUSS FACTS RELEVANT TO SEPARATION FROM FAMILY – DO ANY CHILDREN HAVE SPECIAL NEEDS? HOW WILL SEPARATION DURING APPEAL AFFECT ANY CHILDREN INVOLVED?
7. My attorney informed me that the government has stated that if I win my appeal after I have been deported I would be responsible for securing a passport and would also be financially responsible for my travel to the United States. Because of my financial situation, this would make it extremely difficult, if not impossible, for me to return even after I win my appeal.
8. If deported, I would not have the financial means to arrange for my return to the United States and to pay for a plane ticket back to the United States. [HOW FAR WOULD INDIVIDUAL BE FROM U.S. EMBASSY? HOW DIFFICULT/EXPENSIVE WOULD IT BE TO TRAVEL TO THE EMBASSY TO OBTAIN NECESSARY DOCUMENTS?] The average cost of a one way ticket from _____ to _____ is \$ _____. Further, if immigration will not be able to give me significant advance notice of the exact date on which I will be allowed to travel, I will have to purchase an open-ended ticket. These kinds of tickets are even more expensive, costing about \$ _____.
9. It would also be difficult for me to obtain a new passport. [IF ASYLUM SEEKER, EXPLAIN ANY RISKS ASSOCIATED WITH SEEKING

TRAVEL DOCUMENT FROM THE GOVERNMENT. WOULD IT BE LOGISTICALLY DIFFICULT OR PROHIBITIVELY EXPENSIVE?]

10.If allowed to remain in the United States during the pendency of my appeal, I will continue to be a productive member of society. [DISCUSS STRENGTH OF FAMILY TIES, EMPLOYMENT, COMMUNITY TIES, LACK OF CRIMINAL HISTORY OR RECORD OF REHABILITATION IF APPLICABLE. IF NOT IN CUSTODY, POINT OUT THAT CONTINUED PRESENCE IS AT NO COST TO THE GOVERNMENT].

I declare under the penalties of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____

NAME

CERTIFICATE OF SERVICE

I hereby certify that on _____ (1) I electronically filed the foregoing Motion for [Emergency] Stay and Supporting Exhibits with the United States Court of Appeals for the _____ Circuit by using the appellate CM/ECF system; and (2) mailed the same by Federal Express to the Office of Immigration Litigation, U.S. Department of Justice, P.O. Box 878, Ben Franklin Station, Washington D.C. 20044.

This Motion for [Emergency] Stay and Supporting Exhibits also will be transmitted to the Office of Immigration Litigation by facsimile or email on _____.

Dated: _____

Respectfully Submitted,

/s/ Attorney Name

Attorney Name

Organization/Law Firm

Street Address

City, State Zip

Tel. (XXX) XXX-XXXX

Attorney for Petitioner

APPENDIX

CIRCUIT SPECIFIC INFORMATION

Practitioners should become familiar with the Federal Rules of Appellate Procedure, corresponding local circuit court rules, and local internal operating procedures. In particular, practitioners should review Rules 27, 18, and 8, and corresponding local rules and practices. These are posted on each circuit court's website.

First Circuit Court of Appeals

Jurisdiction: Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico

Mailing Address: 1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210
(617) 748-9057

Website: www.ca1.uscourts.gov

Relevant Local Rule: Local Rule 27.0(b) sets forth procedures for emergency stay motions.

Emergency Stay Information: Counsel should contact Clerk's office at earliest opportunity to make special arrangements, and would likely be referred to attorney who is reviewing cases for the day. Clerk can be reached Mondays through Fridays from 8:30am to 5:00pm at (617) 748-9057.

Second Circuit Court of Appeals

Jurisdiction: Connecticut, Vermont, New York

Mailing Address: Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007
(212) 857-8500

Website: www.ca2.uscourts.gov

Relevant Local Rule: Motion must state party has notified opposing counsel, opposing counsel's position, and whether opposing counsel intends to file a response. (Local Rule 27.1(b)).

Emergency Stay Information: Emergency motion must be preceded by as much advance notice as possible to the clerk and opposing counsel; be labeled "Emergency Motion"; state the nature of the emergency and the harm that will be suffered if the motion is not granted; and state the date by which the court must act. (Local Rule 27.1(d)).

Additional Information: The Second Circuit has entered into an informal and unwritten agreement with DHS, known as the Forbearance Policy, by which the government agrees that once it is informed by the court that a stay motion has been filed, the noncitizen will not be removed until the stay motion is adjudicated. Counsel should contact the court to verify whether the agreement is still in place.

Third Circuit Court of Appeals

Jurisdiction: Pennsylvania, New Jersey and Delaware

Mailing Address: 21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790
(215) 597-2995

Website: www.ca3.uscourts.gov

Relevant Local Rule: If opinion should be included, and failure to do so is ground for dismissal of the motion. (Local Rule 18.1). Uncontested motions must be certified as uncontested by counsel, and are not automatically granted. (Local Rule 27.3).

Emergency Stay Information: Where motion requires expedited consideration, a response will be due within 7 days, with 3 days for a reply. To the extent possible, clerk must be given advance notice by phone that an emergency motion will be filed. (Local Rule 27.2).

Fourth Circuit Court of Appeals

Jurisdiction: Maryland, North Carolina, South Carolina, Virginia, and West Virginia

Mailing Address: 1100 East Main Street
Richmond, VA 23219
(804) 916-2700

Website: www.ca4.uscourts.gov

Relevant Local Rule: Motion should include statement that counsel for other party has been informed of intended filing and indicate whether motion is opposed and whether other party intends to file a response. (Local Rule 27(a)).

Emergency Stay Information: Must file motion electronically after petition for review has been filed. If this is not possible, call the clerk's office for special arrangements.

Fifth Circuit Court of Appeals

Jurisdiction: Louisiana, Texas and Mississippi

Mailing Address: 600 S. Maestri Place
New Orleans, LA 70130-3408
(504) 310-7700

Website: www.ca5.uscourts.gov

Relevant Local Rule: Party must contact other party and state in the motion whether an opposition will be filed. (Local Rule 27.4).

Emergency Stay Information: Emergency motions must be preceded by a call to the clerk's office and to opposing counsel. Fax or electronic submission may be permitted by the clerk, but if so, a copy also must be filed either by hand delivery or by mail. Emergency motions should be labeled "Emergency Motion," state the nature of the emergency and irreparable harm, and provide the date by which action is believed to be necessary. (Local Rule 27.3). The court will consider an emergency stay motion only where there is a scheduled removal date and the noncitizen is in custody. (Local Rule 27.3.1).

Sixth Circuit Court of Appeals

Jurisdiction: Michigan, Ohio, Kentucky and Tennessee
Mailing Address: 540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202
(513) 564-7000
Website: www.ca6.uscourts.gov
Relevant Local Rule: Counsel may file a paper copy of the motion if the motion accompanies a petition for review. (Local Rule 18).
Emergency Stay Information: All motions, including emergency motions, must be filed with clerk's office in Cincinnati. If regular filing procedures cannot be followed, counsel should contact clerk's office by phone to seek guidance. (Local Rule 27). Counsel should notify clerk at earliest possible time that an emergency motion may be filed. (I.O.P. 27).

Seventh Circuit Court of Appeals

Jurisdiction: Illinois, Indiana, and Wisconsin
Mailing Address: U.S. Court of Appeals
Room 2722
219 S. Dearborn Street
Chicago, IL 60604
(312) 435-5850
Website: www.ca7.uscourts.gov
Emergency Stay Information: Counsel should notify clerk during business hours that an emergency motion may be filed. Electronic filings may not be read and acted on outside business hours unless arrangements have been made. (Circuit Rule 27).

Eighth Circuit Court of Appeals

Jurisdiction: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota
Mailing Address: Thomas F. Eagleton Courthouse
Room 24.329
111 South 10th Street
St. Louis, MO 63102
(314) 244-2400
OR
Room 500 Federal Court Building
316 North Robert Street
St. Paul, MN 55101
(651) 848-1300
Website: www.ca8.uscourts.gov
Emergency Stay Information: Internal Operating Procedures state that counsel should call the clerk for emergency motions, and that a conference call can sometimes be used to present an emergency stay request.

Ninth Circuit Court of Appeals

Jurisdiction: California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the Northern Mariana Islands

Mailing Address: P.O. Box 193939
San Francisco, CA 94119-3939
Overnight mailing: 95 Seventh Street
San Francisco, CA 94103
(415) 355-8000

Website: www.ca9.uscourts.gov

Emergency Stay Information: Practitioners may leave a message at the emergency 24-hour phone number (415) 355-8000. Calls are recorded and monitored by the motions attorney. (Circuit Advisory Committee Note to Rule 27-3(2)). If action on motion is needed within 21 days, notify clerk and opposing counsel of emergency motion and label motion “Emergency Motion Under Circuit Rule 27-3” (Circuit Rule 27-3. See rule for additional requirements.) When it is necessary to notify the court of an emergency outside of standard office hours, practitioners should call (415) 355-8509. (General Order 6.4(c)(1)).

Additional Information: The filing of a stay motion temporarily stays removal until further order of the court. *Deleon v. INS*, 115 F.3d 643 (9th Cir. 1997); General Order 6.4(c)(1) (General Orders of the Ninth Circuit Court of Appeals). A stay motion may be supplemented within 14 days of filing the initial motion. (General Order 6.4(c)(2))

Tenth Circuit Court of Appeals

Jurisdiction: Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming

Mailing Address: The Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257
(303) 844-3157

Website: www.ca10.uscourts.gov

Relevant Local Rule: Stay motion also must include a copy of the transcript from the IJ’s ruling and copies of IJ and BIA decisions. (Local Rule 8.2(A)(5)). Motion must state opposing party’s position or explain why party was unable to obtain opposing party’s position. (Local Rule 17.3(C)).

Emergency Stay Information: A motion requiring a ruling within 48 hours must be marked “EMERGENCY” and must state reason it was not filed earlier, date of underlying order with time and date it becomes effective, and phone numbers and emails for all counsel of record.

Eleventh Circuit Court of Appeals

Jurisdiction: Alabama, Florida and Georgia

Mailing Address: 56 Forsyth St.
Atlanta, GA 30303
(404) 335-6100

Website: www.ca11.uscourts.gov

Relevant Local Rule: Motion should include copy of orders below (Circuit Rule 8-1, 18-1, 27-1(a)(3)), and must include proof of service on all parties, including those appearing below (Circuit Rule 27-1(a)(3), Internal Operating Procedures). A motion should contain information about prior actions of the court or whether a similar application for relief has been made (Circuit Rule 27-1(a)(4)).

Emergency Stay Information: Motion will be treated as emergency only if the motion will be moot unless ruled upon within 7 days. Motion must be labeled as “Emergency Motion” and state nature of emergency and date by which action is necessary. Counsel must notify opposing counsel by phone and may contact clerk by phone to discuss forthcoming motion. Counsel may file motion outside normal business hours only if motion will be moot unless ruled upon before noon of the next business day. (Circuit Rule 27-1(b)).



PRACTICE ADVISORY¹
April 5, 2012

**VARTELAS v. HOLDER: IMPLICATIONS FOR LPRs WHO TAKE BRIEF TRIPS
ABROAD AND OTHER POTENTIAL FAVORABLE IMPACTS**

INTRODUCTION

Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) took effect on April 1, 1997, lawful permanent residents (LPRs) with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was brief, casual and innocent. *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). After IIRIRA, however, the Board of Immigration Appeals (BIA) determined that the new law eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998) (en banc) (interpreting INA § 101(a)(13)(C)(v), added by IIRIRA).

On March 28, in *Vartelas v. Holder*, the Supreme Court held that the *Fleuti* doctrine still applies to LPRs with pre-IIRIRA convictions who travel abroad. *See Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012).² The Court did not reach the question of the continued viability of the *Fleuti* doctrine for LPRs with post-IIRIRA convictions. Under its retroactivity jurisprudence, the Court found that the legal regime in force at the time of a person's pre-IIRIRA conviction governs. As a result of the Supreme Court's decision, Mr. Vartelas' removal proceedings should be terminated on remand. This decision directly impacts other LPRs with pre-IIRIRA convictions who have been placed, or are at risk of being placed, in removal proceedings after a brief trip abroad.

Beyond that context, the decision also provides support for arguments against retroactive application of other immigration provisions, such as the government's application of IIRIRA's repeal of § 212(c) relief to individuals with pre-IIRIRA *trial* convictions. In addition, the decision lends support for a broad reading of a criminal defense lawyer's duty under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

¹ This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

The authors of this Practice Advisory are Manny Vargas, Nancy Morawetz, Trina Realmuto, Dan Kesselbrenner, and Beth Werlin.

² The citations to *Vartelas* used throughout this practice advisory (Op. at ___) refer to the slip opinion, located at <http://www.supremecourt.gov/opinions/11pdf/10-1211.pdf>.

This advisory describes (1) the Court’s decision in *Vartelas*; (2) its potential impact on LPRs who take brief trips abroad; (3) suggested steps that lawyers (or immigrants themselves) may take immediately in pending or already concluded removal proceedings involving such individuals; and (4) some of the other potential favorable impacts of the decision.

* * *

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SAMPLES

I. THE SUPREME COURT’S DECISION IN *VARTELAS*

A. The Vartelas Holding: *Fleuti* Lives On for LPRs with Pre-IIRIRA Convictions Who Take Brief Trips Abroad

Mr. Vartelas, an LPR originally admitted to the United States as a student in 1979, pleaded guilty in 1994 to the offense of conspiring to make a counterfeit security. Under the legal regime in place at the time of his conviction, an LPR like Mr. Vartelas would not be charged with inadmissibility (then excludability) upon his return from a brief trip abroad. The immigration statute provided an exception for LPRs if their “departure to a foreign port or place . . . was not intended or reasonably to be expected by [them]....” INA § 101(a)(13) (1988 ed.). In 1963, the Supreme Court had interpreted this provision to mean that Congress did not intend to exclude long-time residents upon their return from “innocent, casual, and brief excursion[s] . . . outside this country’s borders.” *Fleuti*, 374 U.S. at 462.

In 1996, Congress enacted IIRIRA, which amended the immigration statute to provide that an LPR “shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has committed an offense identified in section 212(a)(2) [criminal inadmissibility grounds] . . .” INA § 101(a)(13)(C)(v) (added by IIRIRA, Pub. L. No. 104-208, § 301, 110 Stat. 3009, 575 (1996)). The BIA read this amendment as eliminating the *Fleuti* exception for an LPR who takes a brief, casual and innocent trip abroad. See *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998) (en banc).

In January 2003, Mr. Vartelas returned from a week-long trip to Greece and an immigration officer determined he was “seeking an admission” and charged him with being inadmissible based on a “crime involving moral turpitude,” namely, his 1994 conviction for conspiring to make a counterfeit security. The BIA and the United States Court of Appeals for the Second Circuit concluded that IIRIRA’s new admission provision applied retroactively to Mr. Vartelas. The Second Circuit reasoned that Mr. Vartelas had not relied on the prior legal regime at the time he “committed” his offense. See *Vartelas v. Holder*, 620 F.3d 108, 118-20 (2d Cir. 2010). Significantly, the Second Circuit’s decision conflicted with prior decisions from the Fourth and Ninth Circuits. See *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004); *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007). The Supreme Court granted Mr. Vartelas’ petition for certiorari to resolve the circuit split, and ultimately reversed the Second Circuit.

The Court began its analysis by noting the presumption against retroactive legislation, “under which courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity.” Op. at 7 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 263 (1994)). Since the government conceded that there was no unambiguous directive, the Court proceeded to the question of whether application of IIRIRA to Mr. Vartelas “would have retroactive effect” that Congress did not authorize. Op. at 8 (citing *Landgraf*, 511 U.S. at 280).

The Court concluded that there was impermissible retroactive effect, finding that the application of INA § 101(a)(13)(C)(v) to Mr. Vartelas would attach “a new disability” to conduct completed well before the provision’s enactment. Op. at 9. The Court stated:

Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a “new

disability.” Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Id. Significantly, the Supreme Court expressly rejected the Second Circuit’s conclusion that Mr. Vartelas could not demonstrate impermissible retroactive effect because he could not show reliance on prior law when he “committed” his offense. The Court stated:

As the Government acknowledges, “th[is] Court has not required a party challenging the application of a statute to show [he relied on prior law] in structuring his conduct.” Brief for Respondent 25–26. . . . The essential inquiry, as stated in *Landgraf*, 511 U. S., at 269–270, is “whether the new provision attaches new legal consequences to events completed before its enactment.” That is just what occurred here.

Op. at 14-15.

Even though the Court made clear that a showing of reliance is not necessary, the Court found that Mr. Vartelas likely relied on the immigration law as it existed at the time of his conviction. Op. at 15. The Court observed that a showing of reliance or likelihood of reliance on prior law “strengthens the case for reading a newly enacted law prospectively.” Op. at 15 (citing *Olatunji*, 387 F.3d at 393) (discussing *INS v. St. Cyr*, 533 U.S. 289, 321 (2001)). The Court concluded that *Fleuti* continues to govern Mr. Vartelas’ brief trip abroad.

B. *Fleuti* May Survive Even for LPRs With Post-IIRIRA Convictions

In an important footnote, the Supreme Court acknowledged the BIA’s decision *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998), holding that IIRIRA eliminated the *Fleuti* doctrine. Op. at 3-4, n.2. However, the Court took no position on the BIA’s decision, stating: “Vartelas does not challenge the ruling in *Collado-Munoz*. We therefore assume, but do not decide, that IIRIRA’s amendments to [INA § 101(a)(13)] abrogated *Fleuti*.” *Id.* This footnote leaves open the issue of whether IIRIRA in fact eliminated the *Fleuti* doctrine. For briefing on the argument that IIRIRA did not eliminate it, see the Brief of the American Immigration Lawyers Association as Amicus Curiae in Support of Petitioner, *Vartelas v. Holder*, 565 U.S. ____ (2012) (No. 10-1211) (March 28, 2012), located at <http://www.aila.org/content/default.aspx?docid=37804>. See also *Richardson v. Reno*, 994 F. Supp. 1466, 1471 (S.D. Fla. 1998), *rev’d and vacated on other grounds*, 162 F.2d 1338 (11th Cir. 1998); *Matter of Collado-Munoz*, 21 I&N Dec. at 1067-68 (Rosenberg, dissenting).

II. IMPACT OF VARTELAS ON LPRs WHO TAKE BRIEF TRIPS ABROAD

A. How Does Vartelas Affect the Immigration Consequences of Pre-IIRIRA Convictions?

1. LPRs with pre-IIRIRA convictions that fall within inadmissibility grounds but not deportability grounds

Under *Vartelas*, LPRs with pre-IIRIRA convictions that fall within a ground of inadmissibility but not a ground of deportability cannot be charged with being inadmissible and cannot be placed in removal proceedings unless they fall outside the scope of *Fleuti* (i.e., the trip fails the brief, casual and innocent test). Two common examples of such LPRs are:

(1) Persons who have a single conviction for marijuana possession of 30 grams or less. Such a conviction triggers inadmissibility under INA § 212(a)(2)(A)(i)(II) but not deportability, *see* INA § 237(a)(2)(B)(i).

(2) Persons who have a single conviction that is a crime involving moral turpitude if the offense was committed more than five years after admission. Such a conviction triggers inadmissibility under INA § 212(a)(2)(A)(i)(I) unless the conviction falls into the petty offense exception, *see* INA § 212(a)(2)(A)(ii)(II), but would not trigger deportability, *see* INA § 237(a)(2)(A)(i)-(ii).

If the Department of Homeland Security (DHS) erroneously initiates removal proceedings based on a pre-IIRIRA conviction that falls within an inadmissibility ground but not a deportability ground, it is appropriate to move to terminate such proceeding under *Vartelas*. Importantly, even if an LPR is charged with several inadmissibility grounds, none can stand unless the person is properly “regarded as seeking an admission” (i.e., unless INA § 101(a)(13)(C) applies). For example, if an LPR is charged with a noncriminal ground of inadmissibility (such as misrepresentation) and criminal inadmissibility, the entire case should be terminated if the criminal inadmissibility is based on a pre-IIRIRA conviction and the travel fits within the *Fleuti* exception.

Further, practitioners may want to provide LPR clients with pre-IIRIRA convictions with a letter asserting that under *Vartelas*, the *Fleuti* doctrine still applies. The letter also may explain the nature of the trip abroad and that the departure was brief, casual and innocent. In addition, practitioners may want to advise their clients about the scope of the *Fleuti* exception and the risk that DHS will initiate removal proceedings if the agency determines the travel does not fit within the exception.

2. LPRs with pre-IIRIRA convictions that do not fall within inadmissibility grounds but do fall within deportability grounds (or fall within both inadmissibility and deportability grounds)

In *Vartelas*, the Petitioner's conviction fell within a ground of inadmissibility, but not a ground of deportability. As such, the Court did not address whether DHS can initiate proceedings against returning LPRs with convictions that do not fall into inadmissibility grounds but do fall into deportability grounds (or convictions that fall into both inadmissibility and deportability grounds). These individuals continue to face the significant possibility that upon return, DHS will issue a Notice to Appear charging grounds of deportability. See *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976). Any inspection at the border increases the risk of scrutiny of the individual's criminal record for possible deportability charges, even if the individual is admissible.

However, even if DHS initiates removal proceedings based on a pre-IIRIRA conviction that renders the person deportable, *Vartelas* makes clear that this person cannot be "regarded as seeking an admission" – and thus is not an "arriving alien," 8 C.F.R. § 1.1(q) – if the travel was brief, casual and innocent. This is significant because the government takes the position that "arriving aliens" are not eligible for bond hearings. 8 C.F.R. § 1003.19(h)(2)(i)(B). Persons who are *not* arriving aliens can seek a bond redetermination before an immigration judge, see INA § 236(a), unless the person is subject to mandatory detention under INA § 236(c).³

Moreover, because such an LPR is not an "arriving alien," the individual should be permitted to return to the United States and may be eligible for prosecutorial discretion in connection with the decision whether to place him or her into removal proceedings. Prosecutorial discretion is seemingly appropriate because many offenses that would make a person deportable, but not inadmissible, are relatively minor offenses. These include, for example, a minor shoplifting offense that qualifies for the petty offense exception for the crime involving moral turpitude inadmissibility ground, see INA § 212(a)(2)(A)(ii)(II), but that renders the person deportable if committed within five years of admission, see INA § 237(a)(2)(A)(i)(I).

B. How does *Vartelas* Affect Eligibility for Citizenship?

³ Note that the mandatory detention provision only applies to persons released from custody on or after October 8, 1998. See IIRIRA § 303(b)(2). For those released from criminal custody after that date, DHS maintains that the person is subject to mandatory detention if the conviction falls within one of the categories set forth in INA § 236(c)(1). See *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). Individuals held under the mandatory detention provision may challenge their detention if the conviction is not properly classified as one that falls into the mandatory detention grounds. In addition, many individuals have successfully challenged mandatory detention where they were not taken into immigration custody immediately after release from past criminal custody. See, e.g., *Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009) ("[P]etitioner's detention was not authorized by 8 U.S.C. § 1226(c) [INA § 236(c)] because petitioner was released from incarceration nearly eighteen months prior to his immigration detention").

In some cases, citizenship examiners have taken the position that an LPR who traveled after a conviction should not have been permitted to return (without applying for admission), and therefore is not eligible for citizenship. *Vartelas* forecloses this contention if the LPR's conviction predated IIRIRA and their trip falls within the *Fleuti* doctrine.

C. Does *Vartelas* Distinguish Between Trial and Plea Convictions?

No, *Vartelas* does not distinguish between persons who took their case to trial and those who pled guilty. The Supreme Court found that applying IIRIRA to Mr. Vartelas would attach a new disability based on past events ("offense, plea and conviction"), Op. at 2. See also Op. at 11 (noting that the retroactive application of the statute imposes a new disability based on "his conviction"); *id.* at 12 (distinguishing *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006) and finding that "a pre-IIRIRA crime he was 'helpless to undo,'" triggered his arrest); *id.* at 13 (the "new disability rested ... on a single crime committed years before IIRIRA's enactment."). Thus, *Vartelas* applies regardless whether there was a trial or plea.

III. SUGGESTED STRATEGIES FOR LPRs PLACED IN REMOVAL PROCEEDINGS AFTER BRIEF TRIPS ABROAD.

This section offers strategies to consider for LPRs whose cases are affected by *Vartelas*. Attached to the end of this advisory are sample motions and a Rule 28(j) letter that may assist practitioners in implementing these strategies.

A. LPRs in Pending Removal Cases

An LPR with a pre-IIRIRA criminal conviction who DHS charged with inadmissibility following a departure from the country should consider filing a motion to terminate with the immigration judge. The motion should explain that: (1) DHS erroneously classified the LPR as seeking an admission under INA § 101(a)(13)(C)(v) and that the LPR cannot be charged with a ground of inadmissibility under INA § 212(a); (2) under *Vartelas*, the *Fleuti* doctrine (not INA § 101(a)(13)(C)(v)) governs cases where the person has pre-IIRIRA convictions; and (3) the person's departure meets the *Fleuti* standard ("innocent, casual and brief"). (See Sample A.) If the case is pending before the BIA, the LPR can file a motion to remand to the immigration judge for purposes of considering whether termination under *Vartelas* is warranted. (See Sample B.)

Note, however, that if an LPR has a criminal offense that falls within the grounds of deportability (INA § 237(a)(2)), DHS may attempt to amend the Notice to Appear to lodge a charge of deportability. See 8 C.F.R. § 1240.10(e). See *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976).

B. LPRs with Final Orders

An LPR who filed a petition for review challenging a final order should consider pursuing *both* the suggested strategy for court of appeals cases and an administrative motion.

Pending Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand the case to the BIA under *Vartelas*. The Department of Justice attorney may consent to such a motion. If briefing is ongoing, the opening brief and/or the reply brief should address *Vartelas*. If briefing is complete, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) (“28(j) Letter”) informing the court of *Vartelas* and its relevance to the case. (See Sample D.)

Denied Petition for Review. If the court of appeals denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the mandate. (See Sample E.) If the court has issued the mandate, the person may file a motion to recall (withdraw) the mandate. (See Sample E.) Through the motion, the person should ask the court to reconsider its prior decision in light of *Vartelas* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court’s judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court’s judgment, and remand for further consideration in light of *Vartelas*.

Administrative Motion to Reconsider or Reopen. Regardless whether an individual sought judicial review, she or he may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case).⁴ As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely filed.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. See INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i). (See Sample C.) If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Vartelas*, i.e., by April 27, 2012 or by June 26, 2012, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Vartelas* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision in *Vartelas* or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.⁵

⁴ There are strong arguments that fundamental changes in the law warrant reconsideration because they are “errors of law” in the prior decision. See INA § 240(c)(6)(C).

⁵ Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA’s denial of a *sua sponte* motion. See *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App’x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko*

Importantly, some LPRs may not benefit from filing an administrative motion. Specifically, if the pre-IIRIRA conviction falls within a ground of deportability, DHS may attempt to amend the Notice to Appear with a charge of deportability.

C. LPRs who are Outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." See *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1761 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate (see Sample E) and then grants a petition for review, DHS should facilitate the petitioner's return to the United States as a lawful permanent resident.⁶

LPRs outside the United States who are considering filing administrative motions should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), will pose an additional obstacle to obtaining relief. The BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions. See *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). To date, seven courts of appeals have invalidated the bar. See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011) (same); *Contreras-Bocanegra v. Holder*, No. 10-9500, -- F.3d --, 2012 U.S. App. LEXIS 1964 (10th Cir. Jan. 30, 2012) (en banc). If filing a motion to reconsider or reopen in the Fifth, Eighth, or Eleventh Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen statute or impermissibly contracts the BIA's jurisdiction. Thus, it is advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening as the post departure bar litigation has not been as successful in the *sua sponte* context.

v. INS, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

⁶ See ICE Policy 11061.1, Facilitating the Return to the United States if Certain Lawfully Removed Aliens, located at http://www.nationalimmigrationproject.org/legalresources/ICE_Return_Policy_Memo_Feb_2012.pdf.

See, e.g., *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.⁷

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nationalimmigrationproject.org or Beth Werlin at bwlerlin@immcouncil.org.

IV. OTHER POTENTIAL FAVORABLE IMPACTS OF *VARTELAS*

The Supreme Court's decision in *Vartelas* also has important implications for challenges to the retroactive application of other immigration provisions and provides support for a broad reading of the criminal defense lawyer's duty under *Padilla v. Kentucky*. This section presents a brief preliminary analysis of some of the potential implications and arguments.

A. Support for Challenges to Retroactive Application of Other Immigration Provisions

1. The Court's discussion of why reliance is not necessary to establish that a law is impermissibly retroactive.

Vartelas has important implications for challenging the retroactive application of other immigration provisions, especially where courts previously have rejected such challenges because the person had not shown reliance on the prior law.

First, *Vartelas* notes that the Court has never required a party to show specific reliance on prior law to invoke the presumption against retroactivity, Op. at 14, and that the presumption applies equally when the relevant conduct is "morally reprehensible or illegal." *Id.* at 14 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 283 (1994)). The Court emphasizes that the "operative presumption . . . is that Congress intends its law to govern prospectively only." *Id.* at 15. As the Court explains "[i]t is a strange 'presumption' . . . that arises only on . . . a showing [of] actual reliance." *Id.* (quoting *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (2004) (rejecting the plea/trial distinction in the context of § 212(c) relief)). Thus, the Court concludes that the key issue is whether the "new provision attaches new legal consequences to events completed before its enactment." That is just what occurred here." *Id.* (quoting *Landgraf*, 511 U.S. at 269-70).⁸

⁷ For additional information on the departure bar regulations, see AIC and NIPNLG's Practice Advisory, "Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues," (March 14, 2012) located at http://www.nationalimmigrationproject.org/legalresources/cd_3-14-2012-Departure-Bar-Practice-Advisory.pdf and http://www.legalactioncenter.org/sites/default/files/departure_bar_practice_advisory.pdf.

⁸ Nonetheless, the Court finds that "in any event" Mr. Vartelas likely relied on then-existing immigration law. Op. at 15. It noted that "[a]lthough not a necessary predicate for invoking the antiretroactivity principle, the likelihood of reliance on prior law strengthens the case for reading a new law prospectively." *Id.*

Indeed, the Court describes the Second Circuit’s “treating reliance as essential” as a “misperception.” *Id.* at 16. In rejecting the lower court’s improper emphasis on reliance, the Court notes that the Second Circuit “homed in on the words ‘committed an offense’ in § 1101(a)(13)(C)(v) in determining that the change IIRIRA wrought had no retroactive effect.” *Id.* at 14. The Second Circuit thus concluded, “[i]t could border on the absurd . . . to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration laws.” *Op.* at 14. But, as the Supreme Court held, this reasoning is “flawed.” *Id.* The Supreme Court’s rejection of the Second Circuit’s analysis is especially noteworthy because numerous other circuit courts have adopted similar flawed reasoning (even using the same language). *See, e.g., Laquerre v. Reno*, 164 F. 3d 1035, 1041 (7th Cir. 1998), *cert. denied*, 528 U. S. 1153 (2000) (first use of the “border on the absurd” language); *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F. 3d 1116 (9th Cir. 2002); *Domond v. INS*, 244 F. 3d 81 (2d Cir. 2001); *Jurado-Gutierrez v. Greene*, 190 F. 3d 1135 (10th Cir. 1999), *cert. denied sub nom., Palaganas-Suarez v. Greene*, 529 U.S. 1041 (2000).

Finally, the Supreme Court notes that the case against retroactivity is stronger where, as in *Vartelas*, the retroactive application of a new law renders a person removable, though they would otherwise not be removable. *See Op.* at 16 (suggesting that Mr. Vartelas’ case is even easier than in the case of *INS v. St. Cyr*, 533 U.S. 289, 321 (2001), where relief eligibility rather than deportability was at issue). Nonetheless, its overall doctrinal reasoning either overrules or undermines circuit court case law requiring some showing of reliance.

2. *Vartelas* supports reexamination of circuit court retroactivity precedents.

The Supreme Court’s rejection of a reliance requirement is significant because much of the current circuit court case law presumes that proof of reliance, either on an individual-specific or categorical basis, is required to show that a law is retroactive. Over the past ten years, many courts have affirmed the retroactive application of new laws in situations where a person went to trial rather than plead guilty, or where the issue turned on conduct (such as commission of an offense), rather than a calculated decision (such as a plea). The following are some examples of the contexts where circuit courts have determined or suggested that some showing of reliance is necessary before application of the presumption against retroactive legislation:

- **Whether former INA § 212(c) relief for long-time LPRs is available to persons who went to trial prior to AEDPA and IIRIRA.** *See, e.g., Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010); *Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010); *Ferguson v. U.S. Atty. Gen.*, 563 F.3d 1254 (11th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 2299 (2010); *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), *petition for reh’g denied*, 2003 U.S. App. LEXIS 14474; *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002).
- **Whether § 212(c) relief is available to persons whose conduct preceded AEDPA and IIRIRA.** *See, e.g., Domond v. INS*, 244 F.3d 81, 86 (2d Cir. 2001) (holding that

the repeal of § 212(c) relief could be applied in a case where only the criminal conduct and not the conviction preceded the repeal because “it cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation.”).

- **Whether the LPR cancellation of removal clock stop rule applies to persons whose convictions or conduct preceded IIRIRA.** See, e.g., *Zuluaga-Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008) (finding no impermissible retroactive effect absent a showing of reliance on prior law); *Valencia-Alvarez v. Gonzales*, 469 F. 3d 1319 (9th Cir. 2006).

Because *Vartelas* squarely rejects any conclusion or suggestion that reliance is required to demonstrate an impermissible retroactive effect, the holdings in these cases are susceptible to challenge.

B. Support for a Broad Reading of the Criminal Defense Lawyer’s Duty Under *Padilla v. Kentucky*

Vartelas also has potential implications for noncitizens with claims that their criminal defense lawyer did not provide effective assistance of counsel. In *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), the Supreme Court held that effective assistance of counsel includes advising a noncitizen defendant about the immigration consequences of a guilty plea. The test for ineffective assistance requires a defendant to show both deficient performance and that the defendant suffered prejudice from counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). The *Padilla* Court, however, did not precisely define the exact scope of defense counsel’s duty.⁹ Since *Padilla*, certain commentators take the view that under *Padilla* defense counsel has an affirmative obligation in every case to research the law and to mitigate harm in those cases where the defendant wanted to avoid adverse immigration consequences.¹⁰

The very recent Supreme Court decisions issued in *Lafler v. Cooper*, No. 10–209, 565 U.S. ___ (March 21, 2012), and its companion case *Missouri v. Frye*, No. 10–444, 565 U.S. ___ (March 21, 2012), reaffirm that defense counsel’s duty to provide effective assistance includes plea-bargaining advice even where the defendant may have otherwise received a fair trial.¹¹ Regarding the prejudice prong of *Strickland*, the Court in *Frye* recognized that a defendant could

⁹ The issue of prejudice was not before the *Padilla* Court.

¹⁰ See Nash, Lindsay C., *Considering the Scope of Advisal Duties Under Padilla*, 33 Cardozo L. Rev. 101 (November 5, 2011); A *Defending Immigrants Partnership* Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*, April 6, 2010 (revised April 9, 2010), located at http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf.

¹¹ See NIP and IDP Practice Advisory, “Implications of *Lafler v. Cooper* on Retroactive Application of *Padilla v. Kentucky*” (April 4, 2012), located at http://www.nationalimmigrationproject.org/legalresources/cd_pa_lafler_practice_advisory_final_revised_4.4.2012.pdf.

demonstrate prejudice without stating that she would have gone to trial had she received correct advice, which was the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985). See *Frye*, Op. at 11. In *Frye*, the Court said: “*Hill* does not, however, provide the *sole* means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations.” *Id.*

A week after issuing *Frye* and *Lafler*, the Court in *Vartelas* commented that:

Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas’ case, *e.g.*, possession of counterfeit securities—or exercise a right to trial.

Op. at 16 n.10.

Although footnote 10 does not expressly cite to *Padilla*, the language in the footnote supports the view that the scope of defense counsel’s obligation includes investigating the availability of alternative pleas. In addition, the footnote together with *Frye* suggests that a defendant can establish prejudice to satisfy the second prong in *Strickland* by demonstrating that the defendant would have rejected the disposition and sought an alternative and obtainable plea to avoid adverse immigration consequences. Post-conviction counsel should keep in mind that a defendant has no right to receive a specific plea offer. *Frye*, Op. at 12. What remains a vital argument, however, is that, but for defense counsel’s ineffective assistance, defendant could have received a plea that would have avoided adverse immigration consequences.

Footnote 10 also indicates that defense counsel must provide advice regarding grounds of inadmissibility. In *Padilla*, the Court refers throughout to advice regarding “deportation.” By suggesting that Mr. Vartelas would have pled to a crime that would not have resulted in his “excludability,” the Court suggests that defense counsel must provide advice regarding more than the deportation consequences of an offense, but the inadmissibility consequences as well.¹² *Vartelas*, Op. at 16 n.10.

Finally, the Court identified possession of counterfeit securities, codified at 18 U.S.C. § 474, as an offense that would not involve moral turpitude. *Id.* In so doing, the Court added a rare measure of relative safety to a plea. If faced with a charge that a conviction under 18 U.S.C. § 474 constitutes a crime involving moral turpitude, practitioners should cite to footnote 10 in *Vartelas*.

¹² The Court repeats the link between *Padilla* and § 212(c) relief, which confirms that defense counsel must provide advice about eligibility for relief too. *Vartelas*, Op. at 16 n. 9

SAMPLE MOTIONS

(Excluding Certificates of Service)

- A: Sample Motion to Terminate** if removal case is pending before an immigration judge.
- B: Sample Motion to Remand** if an appeal is pending at the BIA.
- C: Sample Motion to Reconsider** if it has been 30 days or less since the BIA's decision. [Note: this sample may be modified to request reconsideration by an Immigration Judge]
- D: Sample letter pursuant to Federal Rule of Appellate Procedure 28(j)** if a petition for review is currently pending in the court of appeals and briefing has been completed.
- E: Sample Motion to Stay (or Recall) the Mandate** if the court of appeals dismissed the petition for review.

SAMPLE A

Motion to Terminate Removal Proceeding with the Immigration Judge

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

_____, _____

In the Matter of:	)	
	)	
_____	)	A Number: _____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO TERMINATE PROCEEDINGS IN LIGHT OF *VARTELAS* v. *HOLDER*

I. INTRODUCTION

Respondent hereby moves the Court to terminate his case in light of the Supreme Court's recent decision in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012). Under this decision, the Department of Homeland Security (DHS) cannot classify a lawful permanent resident (LPR) whose departure was "innocent, casual and brief" as seeking admission under § 101(a)(13)(C)(v) of the Immigration and Nationality Act (INA) based on a conviction before April 1, 1997. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. As a result, these LPR's are not subject to the grounds of inadmissibility under INA § 212(a). The Court reasoned that application of § 101(a)(13)(C)(v)¹³ would have impermissible

¹³ Section 101(a)(13)(C)(v) states:

retroactive effect if applied to these individuals because, at the time of their conviction, they could travel abroad without jeopardizing their LPR status. *See Vartelas*, 2012 U.S. LEXIS 2540 at *9-10 *discussing Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

In the instant case, DHS classified Respondent, a lawful permanent resident, as seeking admission pursuant to INA § 101(a)(13)(C)(v) after returning to the United States from a trip abroad. DHS then charged Respondent with inadmissibility under INA § 212(a)(2)(____). The Supreme Court’s decision in *Vartelas* renders DHS’ classification and charge of inadmissibility erroneous because Respondent’s departure was “innocent, casual, and brief.” Therefore, the Court should terminate removal proceedings against Respondent.

II. STATEMENT OF RELEVANT FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. On ___, Respondent departed the United States. Upon return, the DHS classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v) and charged Respondent with inadmissibility under INA § 212(a)(2)(____) for having been convicted of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

III. ARGUMENT

A. DHS ERRONEOUSLY CLASSIFIED RESPONDENT AS SEEKING ADMISSION PURSUANT TO INA § 101(a)(13)(C)(v).

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

...

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, ...

Prior to April 1, 1997, LPRs with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was “brief, casual and innocent.” See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). This commonly is referred to as the “*Fleuti* doctrine.”

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended INA § 101(a)(13)(C)(v), which allows immigration authorities to classify LPRs as seeking admission if they have committed an offense identified in INA § 212(a)(2). The Board of Immigration Appeals took the position that amended § 101(a)(13) eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. See *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998). In *Vartelas*, the Supreme Court held that INA § 101(a)(13)(C)(v) does not apply retroactively to LPRs, like Mr. Vartelas, who committed an offense prior to IIRIRA. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v) would attach “a new disability” to conduct completed well before the provision’s enactment. *Id.* The Court stated:

Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a “new disability.” Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas’ trip abroad. *Vartelas*, 2012 U.S. LEXIS 2540 at *34.

Like the petitioner in *Vartelas*, Respondent is an LPR who DHS classifies as “seeking an admission” pursuant to INA § 101(a)(13)(C)(v) based on an alleged commission of an offense identified in INA § 212(a)(2) prior to April 1, 1997. Under the Supreme Court’s decision in

Vartelas, DHS's classification of Respondent as "seeking an admission" is impermissibly retroactive. The pre-IIRIRA legal regime, including the *Fleuti* doctrine, continues to govern Respondent's trip abroad.

B. THE COURT SHOULD TERMINATE REMOVAL PROCEEDINGS BECAUSE RESPONDENT'S DEPARTURE WAS "INNOCENT, CASUAL AND BRIEF."

Under the pre-IIRIRA law in effect at the time Respondent allegedly committed the criminal offense, a lawful permanent resident would not be deemed to be an alien seeking admission if "his departure to a foreign port or place... was not intended or reasonably to be expected by him...." See former INA § 101(a)(13) (1995). In *Fleuti*, the Supreme Court held that departures are "not intended" when they are "innocent, casual, and brief" trips abroad. *Fleuti*, 374 U.S. at 461-62. The Court further stated that the intent exception to former § 101(a)(13) means "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Fleuti*, 374 U.S. at 462.

In *Fleuti*, the Court looked at three factors in determining that the lawful permanent resident in that case did not "enter" the United States after his trip to Mexico: (1) the length of the trip; (2) the purpose of the trip; and (3) the necessity of travel documents. *Fleuti*, 374 U.S. at 462. The Court held that these factors were instructive, although not exhaustive, when considering whether a lawful permanent resident displayed an intention to depart the United States. *Id.* The Court indicated that courts might develop additional factors "by the gradual process of judicial inclusion and exclusion." *Fleuti*, 374 U.S. at 462.

Prior to IIRIRA, the Board of Immigration Appeals (BIA) and courts of appeals developed case law addressing the *Fleuti* factors. See, e.g., *Matter of Guimaraes*, 10 I&N Dec.

529, 531 (BIA 1954) (holding that intention not to disrupt permanent residence status alone is not determinative in the *Fleuti* analysis, but is one factor to consider); *Molina v. Sewell*, 983 F.2d

676, 679-80 (5th Cir. 1993) (finding that LPR had not made an “entry” as a matter of law due to the existence of pending deportation proceedings at the time of departure; rejecting BIA’s contrary decision in *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (BIA 1967)); *Lozano-Giron v. INS*, 506 F.2d 1073, 1077-78 (7th Cir. 1974) (considering length of permanent residency, whether family lives with LPR, whether LPR owns a business or a home in the United States, and “the nature of the environment to which he would be deported, and his relation to that environment”); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1362-63 (9th Cir. 1995) (considering whether absence was temporary by design and limited in duration, whether the purpose of the absence was to accomplish an object not contrary to immigration laws, and whether the absence was occasional or if absences occurred with regularity).¹⁴

Respondent’s case falls within the *Fleuti* doctrine because his trip to _____ was “innocent, casual, and brief” and not “meaningfully interruptive” of his lawful permanent resident status. *Fleuti*, 374 U.S. at 462. Respondent’s trip lasted ____ days. The primary purpose of the trip was to ____ [state purpose of trip]. Respondent indicated his intent to return to the United States in several ways. For example, at the time of departure, Respondent already had purchased a return ticket to the United States. In addition, _____[indicate other evidence of an intent to return]. [If applicable: Respondent owns a home [and/or] business in the United States]. Respondent’s family, including [his/her] _____[insert family members] reside in the United States. [Insert information explaining family, work and community ties to the United States].

¹⁴ [Optional: if purpose of the trip possibly involved illegal activity] Innocence is a complicated factor. *Compare Yanez-Jacquez v. INS*, 440 F.2d 701, 704 (5th Cir. 1971) (holding that return following less than 24 hour trip to Mexico was not an entry even though the trip was not “innocent” because it was for an illegal purpose) *with Matter of Contreras*, 18 I&N Dec. 30, 32 (BIA 1981) (finding return after 3 hour trip to Mexico constituted an “entry” where the primary purpose if the trip was illegal).

In sum, Respondent's trip was "innocent, casual and brief" and, therefore, falls within the *Fleuti* doctrine. Accordingly, Respondent is not subject to the grounds of inadmissibility pursuant to INA § 212(a)(2)(____) and the Court should terminate the instant removal proceedings.

IV. CONCLUSION

In light of the Supreme Court's decision in *Vartelas v. Holder*, DHS erroneously classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v). Respondent's case is governed by the *Fleuti* doctrine. The Court should find that Respondent's trip was "innocent, casual, and brief" and terminate removal proceedings.

Dated: _____

Respectfully submitted,

Motion to Remand from BIA to Immigration Judge

If there are facts in the record indicating the person’s trip was “innocent, casual and brief,” practitioners should consider modifying this sample brief to ask the Board to terminate proceedings (rather than remand the case to the immigration

[illegible]

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of the Immigration and Nationality Act (INA) based on a conviction before April 1, 1997. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. As a result, these LPR's are not subject to the grounds of inadmissibility under INA § 212(a). The Court reasoned that application of § 101(a)(13)(C)(v)¹⁵ would have impermissible retroactive effect if applied to these individuals because, at the time of their conviction, they could travel abroad without jeopardizing their LPR status. See *Vartelas*, 2012 U.S. LEXIS 2540 at *9-10 discussing *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

In the instant case, DHS classified Respondent, a lawful permanent resident, as “seeking an admission” pursuant to INA § 101(a)(13)(C)(v) after returning to the United States from a trip abroad. DHS then charged Respondent with inadmissibility under INA § 212(a)(2)(____). The Supreme Court’s decision in *Vartelas* means that the pre-IIRIRA legal regime applies to Respondent. Therefore, the Board should remand this case to the Immigration Judge to determine whether Respondent’s departure was “innocent, casual and brief.”

II. STATEMENT OF RELEVANT FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. On ____, Respondent departed the United States. Upon return, the DHS classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v) and charged Respondent with inadmissibility

¹⁵ Section 101(a)(13)(C)(v) states:
(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
...
(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, ...

under INA § 212(a)(2)(____) for having been convicted of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

On ___, the Immigration Judge ordered Respondent removed from the United States.
Respondent timely appealed.

III. ARGUMENT

A. DHS ERRONEOUSLY CLASSIFIED RESPONDENT AS SEEKING ADMISSION PURSUANT TO INA § 101(a)(13)(C)(v).

Prior to April 1, 1997, LPRs with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was “brief, casual and innocent.” *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). This commonly is referred to as the “*Fleuti* doctrine.”

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended INA § 101(a)(13)(C)(v), which allows immigration authorities to classify LPRs as seeking admission if they have committed an offense identified in INA § 212(a)(2). The Board of Immigration Appeals took the position that amended § 101(a)(13) eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998). In *Vartelas*, the Supreme Court held that INA § 101(a)(13)(C)(v) does not apply retroactively to LPRs, like Mr. Vartelas, who committed an offense prior to IIRIRA. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v) would attach “a new disability” to conduct completed well before the provision’s enactment. *Id.* The Court stated:

Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a “new disability.” Once able to journey abroad to fulfill religious obligations, attend funerals

and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas' trip abroad. *Vartelas*, 2012 U.S. LEXIS 2540 at *34.

Like the petitioner in *Vartelas*, Respondent is an LPR who DHS classifies as "seeking an admission" pursuant to INA § 101(a)(13)(C)(v) based on an alleged commission of an offense identified in INA § 212(a)(2) prior to April 1, 1997. Under the Supreme Court's decision in *Vartelas*, DHS's classification of Respondent as "seeking an admission" is impermissibly retroactive. The pre-IIRIRA legal regime, including the *Fleuti* doctrine, continues to govern Respondent's trip abroad.

B. THE BOARD SHOULD REMAND THIS CASE TO THE IMMIGRATION JUDGE TO DETERMINE WHETHER RESPONDENT'S DEPARTURE WAS "INNOCENT, CASUAL AND BRIEF."

The Immigration Judge in this case did not determine whether Respondent's departure was "innocent, casual and brief" during the course of Respondent's removal proceedings. The Board "will not engage in factfinding in the course of deciding appeals." 8 C.F.R. § 1003.1(d)(3)(iv). Because assessing whether Respondent's trip falls under the *Fleuti* doctrine requires fact finding, the Board should remand this case to the Immigration Judge to make that assessment. If the Immigration Judge determines that Respondent's trip was "innocent, casual and brief," Respondent is not subject to the grounds of inadmissibility pursuant to INA § 212(a)(2)(___), and the Immigration Judge should terminate removal proceedings.

IV. CONCLUSION

In light of the Supreme Court's decision in *Vartelas v. Holder*, DHS erroneously classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v). Respondent's case is governed by the *Fleuti* doctrine. Respondent respectfully requests that the Board remand

this case to the Immigration Judge to determine whether Respondent's departure was "innocent, casual and brief."

Dated: _____

Respectfully submitted,

SAMPLE C

Motion to Reconsider with the BIA

[Note: this sample may be modified to request reconsideration by an Immigration Judge]

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

If there are facts in the record indicating the person's trip was "innocent, casual and brief," practitioners should consider modifying this sample brief to ask the Board to terminate proceedings (rather than remand the case to the immigration court).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
_____	)	A Number: _____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO RECONSIDER IN LIGHT OF *VARTELAS v. HOLDER*

I. INTRODUCTION

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby seeks reconsideration of this case in light of the Supreme Court's recent decision in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012). Under this decision, the Department of Homeland Security (DHS) cannot classify a lawful permanent resident (LPR) whose departure was "innocent, casual and brief" as seeking admission under § 101(a)(13)(C)(v) of the Immigration and Nationality Act (INA) based

on a conviction before April 1, 1997. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. As a result, these LPR's are not subject to the grounds of inadmissibility under INA § 212(a). The Court reasoned that application of § 101(a)(13)(C)(v)¹⁶ would have impermissible retroactive effect if applied to these individuals because, at the time of their conviction, they could travel abroad without jeopardizing their LPR status. *See Vartelas*, 2012 U.S. LEXIS 2540 at *9-10 discussing *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

In the instant case, DHS classified Respondent, a lawful permanent resident, as “seeking admission” pursuant to INA § 101(a)(13)(C)(v) after returning to the United States from a trip abroad. DHS then charged Respondent with inadmissibility under INA § 212(a)(2)(___). The Supreme Court’s decision in *Vartelas* means that the pre-IIRIRA legal regime applies to Respondent. Therefore, the Board should reconsider its decision and remand this case to the Immigration Judge to determine whether Respondent’s departure was “innocent, casual and brief.”

II. RELEVANT STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. On ____, Respondent departed the United States. Upon return, the Department of Homeland Security (DHS) classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v) and charged Respondent with inadmissibility under INA § 212(a)(2)(___) for having been convicted

¹⁶ Section 101(a)(13)(C)(v) states:
(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
...
(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, ...

of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

On ___, the Immigration Judge ordered Respondent removed from the United States. Respondent timely appealed. This Board affirmed the IJ's decision on _____.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

[Note: if filing a motion to reconsider or reopen before the Immigration Judge, the applicable regulation is 8 C.F.R. § 1003.23(b)(1)(i)]

(1) the validity of the removal order [has been or is OR has not and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is:

_____. The proceeding took place on: _____.

The outcome is as follows _____.

(2) The validity of the removal order [has not been and is not OR has been and is] the subject of a judicial proceeding.

(3) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. [If applicable] The current status of this proceeding is: _____.

(4) Respondent [is OR is not] currently the subject of any pending criminal prosecution. [If applicable] The current status of this prosecution is _____.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. § 1003.2(b)(2).

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.2(b)(2), or as soon as practicable after finding out about the decision. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (holding that statutory administrative appeal deadline is a procedural, not jurisdictional, rule); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must “exercise reasonable diligence in investigating and bringing the claim”) (internal quotation omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded “no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence...”); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired”) (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) (“...[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier”) (citations omitted); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that “all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim”) (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) holding that BIA must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *but see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding, in case pre-dating *Henderson*, motion to reopen deadline “jurisdictional and mandatory”). The Supreme Court issued its decision in *Vartelas* on March 28, 2012. Respondent is filing this motion as soon as practicable after the Supreme Court’s ruling.

[Consider adding paragraph below if the person has not been removed and the statutory motion deadline has elapsed].

In the alternative, Respondent seeks *sua sponte* reconsideration pursuant to 8 C.F.R. § 1003.2(a) based on a fundamental change in law. The Board has held that an “exceptional situations” standard applies when adjudicating a *sua sponte* motion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional circumstance. *See, e.g., Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (declining to reopen or reconsider *sua sponte* where case law represented only “incremental development” of the law); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of “refugee” warranted *sua sponte* reopening); *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002) (due to passage of time, BIA withdrew from its “policy” announced in *Matter of X-G-W-*).

IV. **ARGUMENT**

A. **THE BOARD SHOULD RECONSIDER ITS DECISION IN LIGHT OF THE SUPREME COURT’S DECISION IN *VARTELAS* v. *HOLDER* BECAUSE DHS ERRONEOUSLY CLASSIFIED RESPONDENT AS SEEKING ADMISSION PURSUANT TO INA § 101(a)(13)(C)(v).**

Prior to April 1, 1997, LPRs with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was “brief, casual and innocent.” *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). This commonly is referred to as the “*Fleuti* doctrine.”

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended INA § 101(a)(13)(C)(v), which allows immigration authorities to classify LPRs as seeking admission if they have committed an offense identified in INA §

212(a)(2). The Board of Immigration Appeals took the position that amended § 101(a)(13) eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. See *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998). In *Vartelas*, the Supreme Court held that INA § 101(a)(13)(C)(v) does not apply retroactively to LPRs, like Mr. Vartelas, who committed an offense prior to IIRIRA. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v) would attach “a new disability” to conduct completed well before the provision’s enactment. *Id.* The Court stated:

Beyond genuine doubt, we note, the restraint §101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a “new disability.” Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas’ trip abroad. *Vartelas*, 2012 U.S. LEXIS 2540 at *34.

Like the petitioner in *Vartelas*, Respondent is an LPR who DHS classifies as “seeking an admission” pursuant to INA § 101(a)(13)(C)(v) based on an alleged commission of an offense identified in INA § 212(a)(2) prior to April 1, 1997. Under the Supreme Court’s decision in *Vartelas*, DHS’s classification of Respondent as “seeking an admission” is impermissibly retroactive. The pre-IIRIRA legal regime, including the *Fleuti* doctrine, continues to govern Respondent’s trip abroad.

B. THE BOARD SHOULD REMAND THIS CASE TO THE IMMIGRATION JUDGE TO DETERMINE WHETHER RESPONDENT’S DEPARTURE WAS “INNOCENT, CASUAL AND BRIEF.”

The Immigration Judge in this case did not determine whether Respondent’s departure was “innocent, casual and brief” during the course of Respondent’s removal proceedings. The

Board “will not engage in factfinding in the course of deciding appeals.” 8 C.F.R. § 1003.1(d)(3)(iv). Because assessing whether Respondent’s trip falls under the *Fleuit* doctrine requires fact finding, the Board should remand this case to the Immigration Judge to make that assessment. If the Immigration Judge determines that Respondent’s trip was “innocent, casual and brief,” Respondent is not subject to the grounds of inadmissibility pursuant to INA § 212(a)(2)(____) and the Immigration Judge should terminate removal proceedings.

V. CONCLUSION

The Supreme Court’s decision in *Vartelas v. Holder* is a fundamental change in the law that nullifies the Board’s decision in this case. Respondent respectfully requests the Board reconsider its decision and remand the case to the Immigration Judge to determine whether Respondent’s trip abroad was “innocent, brief and casual.”

Dated: _____

Respectfully submitted,

SAMPLE D

Letter pursuant to Federal Rule of Appellate Procedure 28(j)
(Pursuant to the rule, the body of the letter must not exceed 350 words)

This letter is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. It is not intended as, nor does it constitute, legal

Clerk of the Court
U.S. Court of Appeals for the _____ Circuit
ADDRESS

Re: _____ v. _____
Case No. _____

Dear Clerk of the Court:

Pursuant to Federal Rule of Appellate Procedure 28(j), Petitioner submits *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540 (March 28, 2012).

In *Vartelas*, the Supreme Court held that 8 U.S.C. § 1101(a)(13)(C)(v) does not apply retroactively to lawful permanent residents convicted of a crime before April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Rather, the pre-IIRIRA regime applies to these individuals. Under the pre-IIRIRA regime, lawful permanent residents who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was “innocent, casual and brief.” *Vartelas*, 2012 U.S. LEXIS 2540 at *9-13, *34 discussing *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

Vartelas is applicable to this case because _____.
Vartelas supports the position in Petitioner’s brief at pages _____ that the instant petition for review should be granted.

Respectfully submitted,

cc:
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

SAMPLE E

Motion to Stay or Recall the Mandate at Court of Appeals

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case. It is not intended as, nor does it constitute, legal advice.

IN THE UNITED STATES COURT OF APPEALS

FOR THE _____ CIRCUIT

_____) Case No. _____
Petitioner,)
)
)
)

v.)
Eric H. Holder, Jr., Attorney General,)
Respondent.)
_____)

**MOTION TO STAY [OR RECALL] THE MANDATE IN LIGHT OF THE SUPREME
COURT’S DECISION IN *VARTELAS* v. *HOLDER***

I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 27 and 41 [and INSERT ANY APPLICABLE LOCAL RULE], Petitioner moves this Court to stay [or recall] the mandate in this case in light of the Supreme Court's recent decision in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012).

II. RELEVANT PROCEDURAL HISTORY

Petitioner became a lawful permanent resident on _____. On ___, Petitioner departed the United States. Upon return, the Department of Homeland Security (DHS) classified Petitioner as seeking admission pursuant to 8 U.S.C. § 1101(a)(13)(C)(v) and charged Petitioner with inadmissibility under 8 U.S.C. § 1182 (a)(2)(____) for having been convicted of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

On ___, an immigration judge ordered Petitioner removed from the United States. On _____, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision.

Petitioner then filed a petition for review of the BIA's decision with this Court. On _____, this Court [dismissed OR denied] the petition for review, affirming the BIA's decision. The Court's decision relied on [then binding circuit case law OR Board precedent]. [Insert applicable circuit case/s: *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010); *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998) (en banc)]. The mandate either is [set to issue on _____] OR has issued on _____].

The Supreme Court's decision in *Vartelas* was issued on March 28, 2012. Petitioner is filing this motion as soon as practicable following the Court's decision.

III. ARGUMENT

The Court should stay or recall the mandate in light of the Supreme Court’s decision in *Vartelas*. In *Vartelas*, the Supreme Court held that 8 U.S.C. § 1101(a)(13)(C)(v) does not apply retroactively to lawful permanent residents convicted of a crime before April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. The Court further held that the pre-IIRIRA regime applies to these individuals. Under the pre-IIRIRA regime, lawful permanent residents who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was “innocent, casual and brief.” See *Vartelas*, 2012 U.S. LEXIS 2540 at *9-*13 and *34 discussing *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (known as the *Fleuti* doctrine).

The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v) would attach “a new disability” to conduct done well before the provision’s enactment. *Id.* The Court stated:

Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a “new disability.” Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas’ trip abroad. *Vartelas*, 2012 U.S. LEXIS 2540 at *34.

Vartelas is applicable in this case because _____
_____. The Court’s decision in *Vartelas* nullifies the Board’s decision.

Thus, a recall of the mandate is warranted in order to prevent injustice and to allow Petitioner to demonstrate that his departure was “innocent, casual and brief” and that, therefore, Petitioner was erroneously charged with being inadmissible.

Insert discussion of:

Relevant circuit law regarding stay or recall of the mandate; and

Petitioner's equities:

[if deported: how Petitioner has been affected by unlawful removal order]

OR

[if not deported: how Petitioner will be affected by deportation]

IV. POSITION OF OPPOSING COUNSEL

Undersigned counsel contacted _____, counsel for Respondent. _____ indicated that Respondent [opposes OR does not oppose OR takes no position on] the instant motion.

V. CONCLUSION

For the foregoing reasons, this Court should [recall the mandate OR stay the mandate] and reconsider the instant petition for review. In accordance with the Supreme Court's decision in *Vartelas v. Holder*, the Court should reverse the BIA's decision and remand the case for further proceedings.

Dated: _____

Respectfully submitted,



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**Departure Bar to Motions to Reopen and Reconsider:
Legal Overview and Related Issues¹**

By Beth Werlin and Trina Realmuto

March 14, 2012

Introduction

This advisory discusses the so-called “departure bar” regulations. 8 C.F.R. §§ 1003.2(d), and 1003.23(b)(1). Relying on these regulations, the Board of Immigration Appeals (BIA or Board) and the Immigration Courts have refused to adjudicate motions filed by individuals who have departed the United States. This advisory addresses the legal background of the departure bar and the arguments adopted by circuit courts that have rejected or upheld the bar.

The advisory also addresses two issues related to the departure bar and litigation for those who have departed: (1) the departure bar regulation governing departure during the pendency of a BIA appeal, 8 C.F.R. § 1003.4, and (2) returning to the United States after a post departure motion (or appeal) is granted.²

Background

Dating back to 1952, the immigration regulations have included a “departure bar” – a provision that attempts to bar a person from pursuing a motion to reopen or a motion to reconsider after he or she has departed the United States. The current regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), bar motions before the Board of Immigration Appeals and the Immigration Courts, respectively. Specifically, the regulations provide:

¹ Copyright (c) 2012, American Immigration Council and National Immigration Project of the National Lawyers Guild. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice provided by a lawyer familiar with a client’s case. Counsel are advised to independently confirm whether the law in their circuit has changed since the date of this advisory.

² The Post-Deportation Human Rights Clinic at Boston College also has issued an advisory, [Post-Departure Motions to Reopen or Reconsider](#), that provides background on the different types of motions and discusses in detail the BIA and circuit court case law on the departure bar.

A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.2(d). *See also* 8 C.F.R. § 1003.23(b)(1).

From the outset, the BIA has understood the departure bar as a limitation on its jurisdiction. *See Matter of G-y B-*, 6 I&N Dec. 159 (BIA 1954). In a 2008 decision, the BIA upheld the departure bar regulation and reaffirmed its belief that it lacks jurisdiction over motions post departure. *See Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). The following year, the BIA stepped back from this position and concluded that immigration judges have jurisdiction to review certain motions filed by individuals outside the United States. *See Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009). Specifically, it held that the departure bar does not preclude an immigration judge from adjudicating a motion to reopen an in absentia order based on lack of notice. *See id.*; *see also Contreras-Rodriguez v. Gonzales*, 462 F.3d 1314 (11th Cir. 2006) (reaching same conclusion).

Importantly, when the BIA first adopted the departure bar, motions to reopen and reconsider were regulatory procedures. Not until 1996 did Congress codify the right to file a motion to reopen and a motion to reconsider. *See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. No. 104-208, 110 Stat. 3009, § 304 (Sept. 30, 1996); *see also Dada v. Mukasey*, 554 U.S. 1, 14 (2008) (“It must be noted, though, that the Act transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien”).

Beginning in 2007, seven circuit courts have found that the departure bar is unlawful. In all seven cases, the courts considered the validity of the departure bar with respect to a *statutory* motion to reopen or reconsider, meaning a motion filed pursuant to the statutory right to file a motion to reopen or reconsider under INA §§ 240(c)(6) or (7). In contrast, as discussed below, some courts have considered and upheld the departure bar with respect to a *sua sponte* motion, i.e., a motion filed pursuant to the agency’s regulatory authority to reopen or reconsider a case at any time. *See* 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(a).

Bases for Invalidating the Post Departure Regulation

Courts striking the departure bar regulation have concluded that the regulation either: (1) conflicts with the motion to reopen statute; or (2) constitutes an impermissible exercise of the agency’s jurisdiction. In finding that the regulation conflicts with the motion statute, four courts have applied the Supreme Court’s decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which generally governs challenges to

the validity of an agency regulation. *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, No. 10-9500, -- F.3d --, 2012 U.S. App. LEXIS 1964 (10th Cir. Jan. 30, 2012) (en banc). These courts have found that the departure bar regulation conflicts with the plain language of the motion statute, which contains no such bar, and that application of statutory construction rules reinforces this plain text reading. These courts also have relied on the Supreme Court's construction of the motion to reopen statute in *Dada v. Mukasey*, 554 U.S. 1 (2008), and reaffirmed in *Kucana v. Holder*, 130 S. Ct. 827 (2010). In *Dada*, the Supreme Court noted that in IIRIRA, Congress took the significant step of codifying the motion to reopen. *Dada*, 554 U.S. at 14. Further, the Supreme Court held that the government may not infringe on the "important safeguard" of a motion to reopen absent explicit limiting language in the statute. *Dada*, 554 U.S. at 18.

Three courts of appeals have taken a different approach, concluding that the Board's refusal to exercise its congressionally-delegated jurisdiction conflicts with the Supreme Court's decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009). *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010). These courts have reasoned that Congress delegated the authority to adjudicate *all* motions to immigration judges and the Board of Immigration Appeals and that, therefore, the agency cannot refuse to adjudicate a subset of motions (i.e. post departure motions) on jurisdictional grounds.

If you have a case in a circuit court that has not ruled on the validity of the departure bar, please contact the authors of this advisory at clearinghouse@immcouncil.org.

Sua Sponte Reopening or Reconsideration

As noted above, the cases finding the departure bar unlawful all arose in the context of motions to reopen or reconsider filed pursuant to the motion statutes, INA §§ 240(c)(6) and (7), and the courts relied upon these statutory provisions in their analyses. Many motions to reopen or reconsider, however, are filed out of time, and ask that the immigration judge or the BIA exercise sua sponte authority to reopen or reconsider a decision. See 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(a). Two circuit courts have found that the departure bar is lawful with respect to sua sponte motions. *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009).

The Ninth Circuit is the only court to indicate that the departure bar is not lawful based on reasoning that applies regardless whether the motion is filed pursuant to the motion statute or the sua sponte regulation. In *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007), the court interpreted the departure bar regulation as applicable only where a person filed the motion while still in proceedings (i.e., before he or she departed) and not when the motion is filed after the departure. However, subsequent to *Lin* and *Reynoso-Cisneros*, the Board issued *Matter*

of *Armendarez*, in which it rejected the Ninth Circuit's interpretation and said that it would decline to follow these decisions even in the Ninth Circuit. *Matter of Armendarez*, 24 I&N Dec. at 653 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). The Ninth Circuit has yet to revisit *Lin* and *Reynoso-Cisneros* following *Matter of Armendarez*.

Although most courts have not decided whether the departure bar is lawful with respect to sua sponte motions, given the adverse case law in the Second and Fifth Circuits and the uncertain future of *Lin* and *Reynoso-Cisneros*, individuals who are outside the 90 or 30 day filing windows, may want to consider whether the motion statute may nonetheless protect their motion. For example, there are several exceptions to the filing deadline including motions seeking to reopen and rescind an in absentia removal order, INA § 240(c)(7)(C)(iii), and motions seeking reopening to apply for asylum, INA § 240(c)(7)(C)(ii). Furthermore, most courts also recognize that the filing deadline is subject to equitable tolling. See, e.g., *Harchenko v. INS*, 379 F.3d 405, 410 (6th Cir. 2004); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001). In this situation, individuals may wish to seek sua sponte reopening in the alternative, i.e. only if the immigration judge or BIA rejects the argument that the motion is statutory.

Inapplicability of the Departure Bar Where the Basis of the Underlying Conviction is Vacated

Prior to finding the departure bar unlawful, the Ninth Circuit held that the departure bar does not apply where the underlying removal order was not "legally executed." See *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981). The court said that a removal order is not legally executed where a criminal court subsequently vacates a conviction that constituted a "key part" of the order. See *id.*; *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990).

Although no other courts have addressed this issue explicitly, several courts have considered a related issue: whether the pre-IIRIRA departure bar to *judicial review* (see former INA 106(c), repealed by IIRIRA § 306(b)) applied where the deportation was not "legally executed." Three courts indicated that § 106(c) did not apply in this context while three courts suggested otherwise. See *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984); *Newton v. INS*, 622 F.2d 1193, 1195 (3d Cir. 1980) (citing *Mendez* with approval). But see *Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990) (rejecting *Mendez*); *Baez v. INS*, 41 F.3d 19, 23-24 (1st Cir. 1994) (same); *Roldan v. Racette*, 984 F.2d 85, 90 (10th Cir. 1993) (same); *Saadi v. INS*, 912 F.2d 428 (10th Cir. 1990).

Related Issues:

Departure Bar to BIA Appeals

In addition to the departure bar to motions to reopen or reconsider, the immigration regulations also attempt to bar individuals from pursuing an administrative appeal with

the BIA after departing the United States. By regulation, “departure from the United States . . . prior to the taking of an appeal from a decision in his or her case, shall constitute a waiver of his or her right to appeal.” 8 C.F.R. § 1003.3(e). Further:

Departure from the United States . . . subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.

8 C.F.R. § 1003.4. The BIA interprets 8 C.F.R. § 1003.4 as jurisdictional. *See Matter of Armendarez*, 24 I&N Dec. at 652.

DHS generally cannot execute a removal order during the thirty day period to file a BIA appeal and during the pendency of the appeal. 8 C.F.R. § 1003.6(a). However, there are instances where DHS unlawfully deports a person during these time periods. In addition, DHS may deport a person (lawfully) while he or she is appealing an immigration judge’s denial of a motion to reopen or reconsider. *See* 8 C.F.R. § 1003.6(b). In these situations, the Board generally applies the departure bar to conclude that it lacks jurisdiction over the appeal. The Sixth Circuit is the only circuit to consider the applicability of the bar where DHS deports a person, and has reversed the Board. *See Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009). The court found that to allow the government to cut off the right to appeal by deporting a person would be a “perversion of the administrative process.” *Id.* at 245.

Other courts have found the regulation lawful and applied it in other situations where the person was not physically deported by DHS. *See Long v. Gonzales*, 420 F.3d 516 (5th Cir. 2005) (applying departure bar where petitioner unwittingly left the United States when on a sightseeing trip); *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835 (9th Cir. 2003) (applying departure bar to “brief, casual, and innocent” departures); *but see Martinez-De Bojorquez v. Ashcroft*, 365 F.3d 800, 803 (9th Cir. 2004) (finding due process violation where person not given notice of the departure bar). However, no court has considered the Board’s characterization of 8 C.F.R. §§ 1003.3(e) and 1003.4 as jurisdictional and assessed whether such characterization conflicts with the Supreme Court’s decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).

Returning to the United States after the BIA or IJ Grants a Post Departure Motion

In circuits where the departure bar is invalid, individuals outside the United States who have prevailed on a post departure motion still may face legal and practical obstacles to pursuing their immigration cases. Until 2012, the government had no actual policy for returning successful litigants to the United States.³ Even though the Office of Solicitor

³ Complaint, *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y. May 12, 2011), at

General (OSG) indicated to the Supreme Court a policy existed, litigation has revealed that the OSG may have misled the Court.⁴

In August 2011, the Department of Homeland Security made public a 2008 Memorandum of Agreement (MOA) between U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection, which indicates that ICE is responsible for considering parole requests made by noncitizens “in removal proceedings or who have final removal orders . . . regardless of whether [he or she] is within or outside of the U.S.”⁵ However, parole generally is an inadequate vehicle for return for many reasons. Parole depends entirely on a favorable exercise of ICE discretion, i.e., it does not depend on a favorable court decision. In addition, among other reasons, parole also does not guarantee the person is returned to the status he or she held before removal and also does not protect against new inadmissibility charges.

In February 2012, ICE issued a memorandum purporting to contain its current “policy” for facilitating the return of persons who were deported during the pendency of a petition for review and who subsequently prevailed in litigation.⁶ Although the memorandum indicates that “ICE will regard the returned alien as having reverted to the immigration status he or she held, if any, prior to the entry of the removal order,” it also contains several loopholes, ambiguities and gaps in coverage.⁷ Most notably, for purposes of this advisory, the policy does not apply to persons abroad who prevail on a motion to reopen or reconsider. Nevertheless, practitioners can argue that ICE similarly should engage in facilitating the return of successful motion litigants and, upon return, similarly should treat them as having their pre-deportation immigration status.

The lack of an adequate return policy in the petition for review context, the lack of any policy in the motions context and the problems associated with parole present significant challenges for attorneys. Moreover, without the assistance of counsel, successful post

http://nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf.

⁴ See February 7, 2012 Opinion and Order, *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y. May 12, 2011), at

<http://nationalimmigrationproject.org/legalresources/8-SJ-memo-order-final.pdf>.

⁵ Department of Homeland Security Memorandum of Agreement (Sept. 2008), located at <http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>.

⁶ U.S. Immigration and Customs Enforcement, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens* (Feb. 24, 2012), at http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf.

⁷ See Washington Square Legal Services, Press Release, *Scrambling to Cover Up a Possible Lie to the Supreme Court in Nken v. Holder, ICE Issues a New Memo Describing Policy that It Claimed Existed Years Ago* (March 9, 2002), at http://nationalimmigrationproject.org/press_releases/2012_03_09_Press_Release_9am.pdf.

departure litigants stand little to no chance of returning to the United States. Practitioners facing these problems should contact the authors of this article by emailing trina@nationalimmigrationproject.org or clearinghouse@immcouncil.org to discuss return strategy.⁸ (In addition, practitioners may wish to raise this concern in stay applications as a factor contributing to the irreparable harm a person will suffer if removed.⁹)

⁸ A related practice advisory on return strategy in general is available on the American Immigration Council's website at: http://www.legalactioncenter.org/sites/default/files/lac_pa_11607.pdf.

⁹ For a further explanation of this issue, see the NYU Immigrant Rights Clinic summary, *Barriers to Return After Successfully Challenging a Removal Order from Outside the U.S.* at http://nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_Summary.pdf.

PRACTICE ADVISORY¹
Updated: February 13, 2012

DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION

By The Legal Action Center and Alexsa Alonzo²

Over the last several months, the Department of Homeland Security (DHS) has made a series of announcements regarding its intent to eliminate low priority cases from the immigration court dockets and instead focus on its highest immigration enforcement priorities—national security, public safety, border security, and the integrity of our immigration system. First, on June 17, 2011, ICE Director John Morton issued two memoranda encouraging the expanded exercise of prosecutorial discretion in all phases of immigration enforcement.³ Subsequently, on August 18, 2011, DHS announced the establishment of a joint DHS-Department of Justice (DOJ) working group charged with reviewing the approximately 300,000 cases pending before the Executive Office for Immigration Review (EOIR) to identify candidates for administrative closure. Most recently, on November 17, 2011, DHS issued three documents detailing how the agency will implement the review process.

The November 17 documents describe new procedures DHS will use to implement its prosecutorial discretion policy as well as new standards and criteria to be used by ICE officials. At the same time, however, the November announcements also leave many questions unanswered about the scope and logistics of the review process. Additionally, some guidance included in the November documents is inconsistent with the June 17 memo. Accordingly, this practice advisory not only summarizes DHS's current policies on prosecutorial discretion but also explains some of the ambiguities and contradictions that the recent announcements have created.

OVERVIEW OF THE AUGUST AND NOVEMBER ANNOUNCEMENTS

August 18, 2011 Announcement. See [Napolitano Letter](#) and [Backgrounder](#).

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³ See [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#) and [Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs](#). For a detailed analysis of these memoranda, see the Legal Action Center's practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

In August, DHS announced the establishment of a high-level joint DHS-DOJ working group to review removal cases currently pending before the immigration courts, the Board of Immigration Appeals (BIA), and the federal courts of appeals. Removal cases identified as “low priority” will be administratively closed and the respondents may be eligible to apply for an employment authorization document (EAD) with USCIS. The working group also will initiate a case-by-case review to ensure that new cases placed in removal proceedings meet DHS’s enforcement priorities, and will issue guidance to prevent, on a case-by-case basis, low priority cases from entering the system. Additionally, the working group will issue department-wide guidance on prosecutorial discretion, including for respondents who already have final orders of removal.

November 17, 2011 Document, *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18 Announcement on Immigration Enforcement Priorities* (“[Next Steps Document](#)”).

This unattributed document describes ICE’s plans to implement the review process announced on August 18. First, it explains that the agency has launched a “comprehensive training program on the appropriate use of the June 17, 2011 Prosecutorial Discretion Memorandum.” The document describes the training as “scenario-based” and states that all ICE enforcement officers and attorneys will have completed the training by January 13, 2012.

Second, the document describes the launch of two pilot programs. The first (“Pilot 1”), is a nationwide fast-track review process running through January 13, 2012. The purpose of this pilot is to “prevent[] new low priority cases from clogging the immigration court dockets.” (emphasis added) As such, ICE attorneys are directed to review all “*incoming* cases in immigration court”⁴ (emphasis added) and all cases appearing on the master calendar docket using the Prosecutorial Discretion Memorandum⁵ and “a set of more focused criteria”⁶ to identify cases “most clearly eligible and ineligible for a favorable exercise of discretion.”

The second pilot (“Pilot 2”), set to run from December 4, 2011, to January 13, 2012, is intended to test processes for the systematic review of *all* cases pending in the immigration court. Unlike Pilot 1, Pilot 2 will be launched in only two jurisdictions (Baltimore and Denver). In this pilot program, a team of attorneys from ICE, USCIS, and CBP will review cases on the non-detained dockets in the two immigration courts. It is unclear whether the attorneys will be from local DHS offices or from elsewhere. The review will be based on the factors outlined in the June 17 memo, as well as “a set of more focused criteria.”⁷ During Pilot 2, EOIR will shift judges from the non-detained dockets in the Denver and Baltimore immigration courts to the detained dockets

⁴ Presumably “incoming cases in immigration court” refers to cases in which NTAs have been issued but not filed with EOIR.

⁵ The memo is not specified but presumably this is a reference to the June 17, 2011, memorandum issued by ICE Director John Morton, [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#). (“June 17 Memo”). It is unclear whether this also encompasses the second memo issued on June 17, 2011, focusing on victims, witnesses, and plaintiffs.

⁶ The focused criteria are not specified, but presumably this is a reference to the Guidance to ICE Attorneys discussed in this practice advisory.

⁷ It is unclear whether the criteria are the same as or different from the criteria in the Guidance to ICE Attorneys, discussed below.

to expedite the processing of detained cases.⁸ AILA members who practice in the Baltimore and Denver immigration courts should contact the local chapters for specific guidance relating to implementation of the pilot project.

Once both pilot projects end, DHS will assess the data and implement the processes on a nationwide basis. Importantly, during the duration of the pilot projects, ICE officers are not precluded from favorably exercising prosecutorial discretion in cases outside the pilot projects. Indeed, the memo specifically directs ICE employees to continue applying the full range of factors set forth in the June 17 memo during this pilot period.

**November 17, 2011 Memorandum from Principal Legal Advisor Peter Vincent,
Case-by-Case Review of Incoming and Certain Pending Cases (“OPLA memo”).**

This memorandum provides details about Pilot 1, the fast-track review of incoming cases and cases on the master calendar docket (described above). However, unlike the description of Pilot 1 contained in the *Next Steps Document* above, the categories of cases to be reviewed also includes non-detained cases with merits hearings scheduled through June 2012. The OPLA memo specifies that in conducting its review, each Office of the Chief Counsel (OCC) should focus on criteria from the June 17 memo and the *Guidance to ICE Attorneys* (“Guidance” described below).⁹ According to the OPLA memo, the criteria in the Guidance are intended to help attorneys identify those cases most likely eligible or ineligible for favorable discretion. The type of discretion contemplated is administrative closure.¹⁰

To implement the OPLA memo, each OCC is directed to immediately draft and implement a standard operating procedure (SOP) establishing a process for the review. Each SOP must be approved by headquarters¹¹ and must include several specified provisions, such as a supervisory review, a notice process in cases where OCC decides to exercise discretion, and a national security and public safety check. The OCC also must establish an electronic mailbox for receipt of additional documents from respondents, and establish a system to inform respondents when a favorable exercise of prosecutorial discretion has been made. (AILA members should keep in contact with their local chapter to learn the email address to which documentation can be sent.)

⁸ See Notice from Brenda L. Cook, Administrator for Baltimore Immigration Court, AILA InfoNet Doc. No. 11112963; Notice from Alec Revelle, Administrator for Denver Immigration Court, AILA InfoNet Doc. No. 11120169.

⁹ The OPLA memo also directs attorneys to consider the following memos: [Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#) (republished on March 2, 2011); [Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions](#) (August 20, 2010); and [Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs](#) (June 17, 2011). For a discussion of these memos, see the Legal Action Center’s practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

¹⁰ The memo explains that in other places in the OPLA memo and the Guidance to ICE Attorneys, case dismissal is also mentioned. It is unclear exactly what this reference to case dismissal means. Under existing policy, certain cases with applications or petitions for relief pending with USCIS may be entitled to have their cases dismissed and the memo could simply be referencing this. See [Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions](#) (August 20, 2010). It also is possible that the memo is referring to cases that fall within Pilot 1 in which an NTA is served but not filed yet.

¹¹ Reportedly, as of the date of this Practice Advisory, the SOP from the Denver ICE office is being reviewed by DHS headquarters. It is likely that this and other office’s SOPs will issue in the near future.

For cases where discretion is favorably exercised, the OCC is to file a joint motion for administrative closure or make an oral motion before the immigration court.

The OPLA memo also says that OPLA will issue a revised policy for the review of cases following the initial implementation period (from November 17, 2011, through January 13, 2012), incorporating any needed changes to the process. Finally, the memo notes that “at all stages of the immigration enforcement process, attorneys should consider . . . the full range of factors set forth in the [June 17 memo],” thus indicating that ICE attorneys are to continue to consider all cases for prosecutorial discretion, including those that do not fall within this fast-track review (Pilot 1).

November 17, 2011, *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review* (“[Guidance to ICE Attorneys](#)” or “Guidance”).

This unattributed document was likely an internal ICE document intended to accompany the OPLA memo as further instruction to OCC regarding the fast-track review process. The Guidance to ICE Attorneys is referenced in the OPLA memo and sets out focused criteria for exercising prosecutorial discretion through this process.¹² The Guidance divides cases into “enforcement priorities” and “not enforcement priorities.” Cases in the first category “should generally be pursued in an accelerated manner before EOIR.” By contrast, cases in the second category should be carefully considered for prosecutorial discretion.

According to the Guidance, the enforcement priorities include individuals with nearly any type of criminal conviction, without regard to how long ago the offense occurred or the circumstances of the crime. Individuals with *any* felony conviction or multiple misdemeanor convictions, as well as individuals with a *single misdemeanor violation* involving DUI, violence or threats, assault, or flight from the scene of an accident are all included in this category. Other misdemeanor convictions mentioned are those involving sexual abuse or exploitation, drug distribution or trafficking, or “other significant threat to public safety.” In addition to those with criminal convictions, this category also includes persons who entered without inspection or violated the terms of their visas during the last three years; are gang members/human rights violators or otherwise pose a “clear threat to public safety”; were previously removed from the country; committed immigration fraud; or “who otherwise has an egregious record of immigration violations.”

Cases that are “not enforcement priorities” include (1) current members or veterans of the military or the spouse or children of such members; (2) youths who have been in the United States for more than five years and have pursued educational opportunities in the United States; (3) individuals over 65 in the United States for 10 years or longer; (4) crime victims; (5) individuals who have been LPRs for 10 years or longer who have a single, “minor” conviction for a non-violent offense; (6) individuals with serious mental or physical conditions but only if

¹² The OPLA memo makes clear that this Guidance is to be used during the Pilot I fast track review of cases. Whether the guidance also is to be used in all other review of cases for prosecutorial discretion is unclear. The reference in the guidance to cases pending before the BIA would indicate a broader application than just the Pilot I fast track cases.

the condition “would require significant medical or detention resources”; and (7) individuals who have a “very long-term presence” in the United States, an immediate family member who is a U.S. citizen, have established compelling ties to the United States, and have made compelling contributions to the United States.

According to the Guidance, when an ICE attorney decides to exercise prosecutorial discretion, he or she must notify a supervisory charging official at CBP, USCIS, or ICE of the decision. If the supervisory official disagrees with the decision, the dispute is to be taken to the ICE Chief Counsel. If local resolution proves impossible, the matter is to be elevated to the Deputy Director of ICE.

Finally, the Guidance reminds ICE attorneys that decisions to exercise prosecutorial discretion are to be made on a case-by-case basis under the totality of the circumstances, and reaffirms that “the cornerstone for assessing whether prosecutorial discretion is appropriate in any circumstance” is the June 17 memo. Presumably, this paragraph refers to cases that do not fall within this fast-track review, such as cases with merits hearing after June 2012, cases which fall outside the criteria set forth in the Guidance for ICE Attorneys, and requests for motions to reopen. However, when and how these other reviews are to take place is unclear. This paragraph and other similar statements in the Next Steps Document and the OPLA Memo may engender confusion as the pilots move forward.

QUESTIONS AND ANSWERS

What are DHS’s enforcement priorities?

In the [June 17, 2011 memo](#) and a subsequent question and answer guide ([FAQ](#)) regarding the August 18 announcement, DHS explained that its enforcement priorities are national security, public safety, border security, and recent and repeat immigration law violators. These terms were not fully defined. However, the June 17 memo did explain that, while criminal history is a factor to be considered in all cases, “particular care and concern” is warranted only in those cases involving serious felons, repeat offenders, those with lengthy criminal records, or known gang members. Similarly, the June 17 memo explained that while past immigration history was a factor to be considered in all cases, “particular care and concern” is warranted only in cases of “egregious” immigration violators.

The documents issued on November 17 say that the June 17 memo sets forth the standard to be followed. Despite this, these documents contain contradictory information regarding how those with criminal histories or past immigration violations are to be considered. For example, the FAQ stated for the first time that DHS will have “zero tolerance” for those apprehended at the border and that removal cases involving recent border crossers will not be included in the review of cases carried out by the working group. The November Guidance goes one step further, stating that noncitizens who entered the country illegally or violated the terms of their admission *within the last three years* are deemed high priority. Because not all individuals who violated the terms of their admission within the last three years are either repeat immigration law violators or “egregious immigration violators,” this new guidance appears on its face to conflict with the June 17 memo. As a result, it is unclear to what extent an individual who entered illegally within

the last three years but who has compelling equities will be considered for prosecutorial discretion.

Similarly, the recent guidance conflicts with the June 17 memo by labeling “criminal aliens” as a high priority when the memo limits the high priority category to serious felons, repeat offenders and those with lengthy criminal histories. It is unclear to what extent an individual’s prior criminal history, no matter if minor or from the distant past, will preclude prosecutorial discretion from this point on.

What are low priority cases?

Under the June 17 memo, low priority cases are to be identified in accord with a list of factors that DHS should weigh in all cases. While the June 17 memo made clear that no category of cases will receive a blanket exercise of favorable prosecutorial discretion, the memo does identify categories of individuals who are to receive particular care and attention due to certain favorable factors. These include: veterans; long-time permanent residents; minors and the elderly; individuals who have been present since childhood; individual with serious disabilities or health issues; women who are nursing or pregnant; and victims of domestic violence or other serious crimes. In all cases, DHS is to weigh the totality of the circumstances. For a full discussion of the factors in the June 17 memo, see the LAC practice advisory, [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

The November Guidance states that the June 17 memo applies and that the totality of the circumstances should be considered in all cases. Despite these general statements, however, the Guidance appears to deem at least two categories of individuals “high priority” that were not identified in the June 17 memo as such: all individuals with a criminal history (apparently without regard to the severity of past crimes) and individuals who violated the terms of their admission within the last three years. It remains to be seen whether these become categorical designations such that DHS will not exercise prosecutorial discretion in any case that falls within them.

Is it possible for cases with criminal convictions to be considered low priority?

The June 17, 2011 memo makes clear that cases will be reviewed on a case-by-case basis and considered based on the totality of the circumstances presented in each individual case. There is no bright-line rule that would automatically disqualify any case. However, the memo does contain a list of negative factors that will be looked at with particular care. This list includes “serious felons, repeat offenders, and individuals with a lengthy criminal record of any kind,” as well as “known gang members.”

Nonetheless, the November Guidance lists as enforcement priorities any noncitizen with a felony conviction or multiple misdemeanor convictions, or a single misdemeanor conviction involving “violence, threats, or assault”; “sexual abuse or exploitation”; “driving under the influence of alcohol or drugs”; “flight from the scene of an accident”; “drug distribution or trafficking”; or “other significant threat to public safety.” The November Guidance thus includes as “high priority” cases unlikely to receive a favorable exercise of prosecutorial discretion many deportable offenses that would not be classified as such under the June 17 memo. As a

consequence, longtime LPRs whose cases might otherwise be considered “positive” might instead be deemed an enforcement priority based upon a prior criminal conviction. In cases such as this, attorneys should emphasize the positive factors in the case that are found in the June 17 memo and argue that the list of crimes in the November Guidance is not dispositive where favorable factors are strong.

What will happen to cases deemed low priority?

According to the August 18 announcement, all cases currently before the immigration courts and the BIA will be reviewed and those that are deemed low priority will be administratively closed. Removal cases currently pending in federal court also will be reviewed, and low priority cases will be considered for a favorable exercise of prosecutorial discretion, although it is not clear what this will be. The November 17 documents provide some explanation about how DHS will proceed with the review, and we anticipate that DHS will provide additional guidance in 2012 following the completion and assessment of the pilot projects. At this point, it is unclear whether DHS will forgo initiating removal proceedings in new cases that are identified as low priority, or whether proceedings will be initiated and then administratively closed.

For matters presently before USCIS, a memorandum released by the agency in early November provides additional guidance regarding the exercise of prosecutorial discretion in the referral of cases to immigration court through Notices to Appear.¹³

What is the difference between administrative closure and termination of proceedings?

Administrative closure is a procedural mechanism used to temporarily remove a case from the immigration court’s calendar. *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012). Until recently, Board precedent held that neither the Board nor an immigration judge could administratively close a case over a party’s objection. *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996). In *Matter of Avetisyan*, however, the Board overruled *Matter of Gutierrez* on this point, and instead held that the Board and immigration judges have the authority to administratively close a case over a party’s objection where it is “otherwise appropriate under the circumstances.” *Matter of Avetisyan*, 25 I&N Dec. at 690, 692-93, 697. In evaluating a request for administrative closure, the Board or immigration judge should consider all the relevant factors including, the reason for administrative closure; the basis of any opposition; the likelihood the respondent will succeed on any petition or application being pursued outside removal proceedings; the anticipated duration of the closure; the responsibility of either party for any delay; and the ultimate outcome of removal proceedings once the case is re-calendared. *Id.* at 696.

Matter of Avetisyan opens the door for a respondent to request administrative closure independent of an offer of prosecutorial discretion from the government. However, the reverse is also true. DHS could move for administrative closure even where a respondent refused an offer of prosecutorial discretion which suggested such closure. In opposition to such a government

¹³ See USCIS Policy Memorandum, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (Nov. 7, 2011), AILA InfoNet Doc. No. 11110830.

motion, a respondent could argue that it is never appropriate to administratively close a case where the respondent wishes to proceed with an application for relief.

A person whose case has been administratively closed remains in removal proceedings, and either party can request that the case be placed back on the court's calendar at any time. By contrast, termination of proceedings means that the case has ended and the respondent is no longer in removal proceedings. Upon termination, the individual will revert to the same status he or she was in prior to commencement of proceedings. If the government wants to place the individual back into removal proceedings after a case is terminated, it must file a new Notice to Appear (NTA).

Should an individual (other than an "arriving alien") whose case has been administratively closed eventually become eligible for adjustment of status, he or she must have the removal proceedings terminated to enable USCIS to exercise jurisdiction over the adjustment application.

Will individuals whose cases have been administratively closed receive EADs?

In its [FAQ](#) following the August 18 announcement, DHS stated, "Per longstanding federal law, individuals affected by an exercise of prosecutorial discretion will be able to request work authorization, including paying associated fees, and their requests will be separately considered by USCIS on a case-by-case basis."

The November 17 OPLA memo states that administrative closure is the primary form of prosecutorial discretion that will be exercised for incoming and certain pending cases. Despite what was said in the August 18 FAQ, DHS more recently has stated that those whose cases are administratively closed will only be able to apply for employment authorization documents (EAD) if they have an independent basis for work authorization (e.g., a pending adjustment or asylum application).

AILA and other advocates are seeking additional guidance on the issuance of EADs and are advocating for EAD eligibility for those without an independent basis for work authorization. Until further guidance is provided, those who do not have an independent basis to apply for work authorization should consider requesting deferred action, which does allow the recipient to apply for an EAD (8 C.F.R. § 274.12(c)(14)).

Importantly, the Guidance states that respondents with pending asylum applications who agree to administrative closure will have their asylum clock stop upon the filing of the joint request. Consequently, asylum applicants who have not met the 180-day waiting period for EAD eligibility may want to consider the impact of administrative closure on their eligibility for work authorization before they agree to any offer of this from DHS.

What should I be doing now?

With the exception of non-detained cases rescheduled by the Baltimore and Denver immigration courts, both removal proceedings and removals are expected to continue while the working group carries out its review. During this time, ICE attorneys and officers have been told to consider all cases in light of DHS enforcement priorities. Thus, you should continue to make

requests for prosecutorial discretion. Requests should be made in writing and include as much supporting documentation as possible, and should be sent to the email address established by the local ICE office to receive requests for prosecutorial discretion.¹⁴ (AILA members should keep in contact with their local chapter to learn the email address to which documentation can be sent.) For pending cases that will be subject to review, this will ensure that there is favorable information in the client's file when the working group review takes place. It does not appear that respondents or their attorneys will know in advance when the review of their cases will take place. To learn more about local implementation of the guidance, attorneys may wish to consult their local AILA chapters to arrange meetings with ICE officials in their jurisdiction.

Moreover, although the working group will conduct a systematic review of all pending cases, other avenues for requesting prosecutorial discretion remain open. ICE attorneys and officers still retain the authority to exercise prosecutorial discretion and now may be more amenable to exercising it favorably than in the past. Additionally, the announced review process does not include cases with final removal orders, so no systematic review of these cases is expected. For that reason, individual advocacy for prosecutorial discretion on behalf of these clients is all the more important.

You should also ensure that your clients understand that their obligations under the immigration laws remain the same. There has been much confusion and misinformation over the significance of the August and November announcements. It is important that your clients understand that the announcement is not an amnesty. For example, some individuals granted voluntary departure have been reported to believe that they no longer need to leave the country. This is simply wrong. The August and November announcements have no impact on an existing voluntary departure orders; anyone under such an order who fails to timely depart will face the consequences.¹⁵

Additionally, individuals should not seek to turn themselves into immigration authorities to obtain an EAD or otherwise test the extent to which DHS is favorably exercising prosecutorial discretion. As the DHS FAQ explains, such action carries a high risk that the individual will be placed in removal proceedings and may be ordered removed. For helpful guidance for clients, see [AILA Consumer Advisory](#).

What can I do to assist AILA and LAC in monitoring implementation of the new guidance?

In order to monitor how the new guidance is being implemented in the field, we need to hear your experiences with your local office. Please complete this [survey](#) and tell us about your cases. Doing so will help our ongoing liaison and advocacy efforts with DHS. Thank you!

¹⁴ For more on preparing a request for prosecutorial discretion, see [Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client](#).

¹⁵ For more on these consequences, see the Legal Action Center's practice advisory [Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart](#).

PRACTICE ADVISORY¹

December 16, 2011

IMPLICATIONS OF *JUDULANG V. HOLDER* FOR LPRs SEEKING § 212(c) RELIEF AND FOR OTHER INDIVIDUALS CHALLENGING ARBITRARY AGENCY POLICIES

INTRODUCTION

Before December 12, 2011, immigration judges and the Board of Immigration Appeals (BIA or Board) permitted lawful permanent residents (LPRs) to apply for § 212(c) relief only if the Department of Homeland Security (DHS) charged them with a ground of deportability that had a comparable ground of inadmissibility. This rule, referred to as the “comparable grounds test,” was announced in the 2005 decisions *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). Only one circuit court, the Second Circuit, had rejected the comparable grounds test.

On December 12, 2011, the Supreme Court unanimously rejected the Board’s rulings in *Matter of Blake* and *Matter of Brieva*. See *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).² The Court found the BIA’s comparable grounds test to be arbitrary and capricious. The decision has immediate implications for lawful permanent residents currently in removal proceedings with certain aggravated felony and other convictions preceding the enactment of AEDPA and IIRIRA in 1996, and provides grounds for seeking reopening of past removal orders involving such individuals. But beyond that context, the decision provides important new analytic tools for challenging arbitrary agency action in immigration cases more generally.

This advisory describes (1) the Court’s holding in *Judulang* and who is potentially affected; (2) steps that lawyers (or immigrants themselves) should take immediately in pending or already concluded removal proceedings involving such individuals; and (3) some other potential uses of the *Judulang* decision’s reasoning to challenge agency policy in removal cases.

¹ This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

The authors of this Practice Advisory are Manny Vargas, Nancy Morawetz, Trina Realmuto, Dan Kesselbrenner, and Beth Werlin.

² The citations to *Judulang* used throughout this practice advisory (Op. at __) refer to the slip opinion.

I. THE SUPREME COURT’S HOLDING IN *JUDULANG*

A. Rejection of *Blake* and *Brieva*

In *Matter of Blake* and *Matter of Brieva*, the BIA found that LPRs charged with deportability do not have a right to seek relief from deportation under former INA section 212(c) unless the charged ground of deportation is “substantially equivalent” to a ground of inadmissibility (formerly, exclusion). In both cases, the LPR had been charged under the “sexual abuse of a minor” (*Blake*) and “crime of violence” (*Brieva*) aggravated felony grounds. The BIA concluded that neither of these aggravated felony deportation categories had a comparable ground of inadmissibility so as to permit the LPR to apply for § 212(c) relief under the statutory counterpart rule set forth in 8 CFR § 1212.3(f)(5).

The Supreme Court in *Judulang* held that the BIA’s approach is “arbitrary and capricious” in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). This provision of the APA provides that a court reviewing an agency action shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .” The Court explained:

Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore. When reviewing an agency action, we must assess, among other matters, “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons.

Op. at 9-10 (citations omitted). The Court went on to find with respect to the BIA’s decisions in *Blake* and *Brieva*:

The BIA has flunked that test here. By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Op. at 10.

The Court explained that, if the government is going to limit § 212(c)’s scope, it must do so in some rational way. The Court found that the *Blake/Brieva* comparable grounds rule does not impose such a reasonable limitation, stating:

The comparable-grounds approach does not rest on any factors relevant to whether an alien (or any group of aliens) should be deported. It instead distinguishes among aliens—decides who should be eligible for discretionary relief and who should not—solely by comparing the metes and bounds of diverse statutory categories into which an alien falls.

The resulting Venn diagrams have no connection to the goals of the deportation process or the rational operation of the immigration laws.

Op. at 15. The Court elaborated:

Recall that the BIA asks whether the set of offenses in a particular deportation ground lines up with the set in an exclusion ground. But so what if it does? Does an alien charged with a particular deportation ground become more worthy of relief because that ground happens to match up with another? Or less worthy of relief because the ground does not? The comparison in no way changes the alien's prior offense or his other attributes and circumstances. So it is difficult to see why that comparison should matter. Each of these statutory grounds contains a slew of offenses. Whether each contains the same slew has nothing to do with whether a deportable alien whose prior conviction falls within both grounds merits the ability to seek a waiver.

Op. at 12.

In the end, the Court found that the BIA's approach "cannot pass muster under ordinary principles of administrative law" and remanded the case for further proceedings consistent with its opinion. Op. at 21. The Court's decision effectively overruled not only the BIA's decision, but also federal court decisions affirming the BIA's approach in virtually all circuits except the Second Circuit. *See, e.g., De La Rosa v. U.S. Atty. Gen.*, 579 F.3d 1327 (11th Cir. 2009) (affirming BIA and discussing circuit court decisions on this issue). *But see Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007) (sole circuit overruling BIA on this issue).

B. Issues for the Agency on Remand

The *Judulang* decision remands the case to the Ninth Circuit for "further proceedings consistent with this opinion." Op. at 21. That remand should lead to a straightforward reversal of the BIA and a remand to the agency in Mr. Judulang's case. At some point thereafter, whether in Mr. Judulang's case or in another case, the BIA should announce a new non-arbitrary and rational policy for determining when an LPR charged with deportability based on a pre-1996 conviction may apply for § 212(c) relief.

While the Supreme Court in *Judulang* did not set forth what the new policy for determining § 212(c) eligibility should be, the Court referenced the approach proposed by Mr. Judulang in his briefing. Under that approach any LPR whose conviction also falls within a ground of inadmissibility – such as the crime involving moral turpitude inadmissibility ground – would be eligible for § 212(c) relief. Under this approach, it does not matter whether the deportation ground at issue has a comparable ground of inadmissibility. This essentially is the approach adopted by the Second Circuit. *See Blake v. Carbone*, 489 F.3d. at 104 ("[E]ach petitioner, a deportable lawful permanent resident with an aggravated felony conviction, is eligible for a § 212(c) waiver if his or her particular aggravated felony offense could form the basis of exclusion under § 212(a) as a crime of moral turpitude."). While the Court did not explicitly endorse this approach in *Judulang*, it did comment: "Judulang's proposed approach asks immigration officials only to do what they have done for years in exclusion cases; that

means, for one thing, that officials can make use of substantial existing precedent governing whether a crime falls within a ground of exclusion.” Op. at 21.

Although *Judulang* suggests that the Court has not foreclosed all limits on § 212(c) relief, it is hard to envision an approach that the BIA could adopt that would exclude Mr. Judulang, or others like him from pursuing relief and yet pass muster under *Judulang*’s “arbitrary and capricious” standard. Moreover, the Court was clear that any limitation on § 212(c) relief must also be consistent with the Court’s prior decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that IIRIRA repeal of § 212(c) could not be applied retroactively to pre-IIRIRA guilty pleas). Op. at 21. *St. Cyr* has foreclosed any limitation that was not a restriction on relief that existed prior to § 212(c)’s repeal. It seems unlikely that the BIA could now devise a rule to limit § 212(c) relief that would not run afoul of one of these two Supreme Court opinions.³

C. Who is Potentially Affected

This section outlines the two principal categories of people affected or potentially affected by the Supreme Court’s specific holding:

1. Mr. Judulang and other individuals like him charged with deportability based on a pre-1996 guilty plea that also triggers inadmissibility.

Mr. Judulang is an LPR who was charged under a ground of deportability (aggravated felony “crime of violence”) that the BIA ruled was not comparable to any ground of inadmissibility even though his offense would have qualified as a “crime involving moral turpitude” under § 212(a). Mr. Judulang argued that, because he would have been able to seek § 212(c) relief if he had traveled abroad and been charged with inadmissibility, he therefore should also be found eligible to seek § 212(c) relief when charged with deportability based on the same offense.

As discussed above, while the Court did not explicitly endorse Mr. Judulang’s approach, it is hard to imagine any approach that the BIA could adopt “consistent with this [*Judulang*] opinion” and with the Court’s prior decision in *St. Cyr* that would exclude from § 212(c) eligibility Mr. Judulang, or anyone else who would similarly be able to pursue § 212(c) if charged with inadmissibility.

³ Were the BIA to adopt a new limitation on § 212(c) relief that did not exist pre-1996, it would be subject to attack as an impermissibly retroactive rule. For arguments on why such a retroactive rule would be impermissible, see pp. 38-44 of the petitioner’s brief in *Judulang*, available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-694_petitioner.authcheckdam.pdf.

2. Individuals charged with deportability based on a pre-1996 guilty plea that does not trigger inadmissibility (e.g., firearm offense).

Judulang also provides support for seeking § 212(c) relief for LPRs who are deportable but not inadmissible/excludable, such as LPRs with simple possession firearm convictions. The BIA has long held such individuals ineligible to seek § 212(c) relief. *See, e.g., Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979) (finding § 212(c) ineligibility for a firearm possession offense because the offense did not come within the grounds of excludability as a crime involving moral turpitude), *aff'd*, 624 F.2d 191 (9th Cir. 1980). But, in 1990, in *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991), the BIA itself recognized that excluding LPRs from 212(c) relief because the offense at issue did not fit within a ground of excludability would lead to incongruous results not in keeping with the spirit of the statute. *Id.* at 265 (“This limitation can result in the total unavailability of relief from deportation for longtime resident aliens who . . . may not have committed offenses nearly as serious as those of other aliens who are eligible for the section 212(c) waiver.”). The BIA found that § 212(c) may waive all grounds of deportability except those that related to subversives and war criminals, which were the only categories specifically excluded by the then text of § 212(c). *Id.* at 266. The BIA explained:

In reaching our decision today, we have been ever mindful of the fact that section 212(c) is, in essence, a forgiveness statute. It allows longtime lawful permanent residents to make a mistake, and to be forgiven for it in the immigration context, to keep his permanent resident status despite the mistake. It is a generous provision of the law and we believe that today’s action is fully in keeping with its generous spirit.

Id. at 269. However, then Attorney General Thornburgh overruled the BIA’s decision in *Hernandez-Casillas* and resumed the government’s policy of excluding from § 212(c) relief those LPRs whose offenses did not trigger excludability. *Id.* at 280-293.

In *Judulang*, the Court was highly critical of restrictions on § 212(c) relief that are unconnected to the basic immigration policy question of who should be deported. The Court repeatedly recognized the importance of linking restrictions on discretionary relief to the statute’s overall purpose. For example, it declared that “[b]y hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories – a matter irrelevant to the alien’s fitness to reside in this country – the BIA has failed to exercise its discretion in a reasoned manner.” *Op.* at 10. Although this comment was directed to the comparable grounds requirement, it could apply equally to a person who is denied relief because his or her conviction is not included in the grounds of inadmissibility. Like the BIA in *Hernandez-Casillas*, the Court noted that § 212(c), by its terms, was a very expansive form of relief – it provided for entry into the country unless the person was excludable on national security and international child abduction grounds. *Op.* at 16. This broadly designed form of relief provides no basis for disfavoring LPRs whose convictions do not trigger any grounds of inadmissibility over those whose convictions do.

Moreover, as the Court emphasized, “the BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or to the proper operation of the immigration system. A

method of disfavoring deportable aliens that bears no relationship to these matters – that neither focuses on nor relates to an alien’s fitness to remain in the country – is arbitrary and capricious.” Op. at 12. It is difficult to see how the denial of relief to those who are not even inadmissible could be seen as “focusing on or relating to an alien’s fitness to remain in the country.” Instead, it is an artifact of the very focus on statutory grounds that the Court concluded was arbitrary and capricious.

II WHAT SHOULD BE DONE IN CASES INVOLVING LPRs NOW IN PROCEEDINGS OR WHO WERE PREVIOUSLY DENIED § 212(c) RELIEF FROM DEPORTATION BASED ON *BLAKE* AND *BRIEVA* OR OTHER SIMILARLY ARBITRARY ANALYSIS

This section offers strategies to consider for LPRs whose cases are affected by *Judulang*. Attached to the end of this practice advisory are sample motions and a Rule 28(j) letter that provide additional guidance in implementing the strategies discussed below.

A. LPRs in Pending Removal Cases

Individuals who are in removal proceedings (either before the immigration court or on appeal at the BIA) may request § 212(c) relief under *Judulang*. If the case is on appeal at the BIA, the LPR may want to file a motion to remand to the immigration court for a § 212(c) hearing. (See Sample B.) By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

B. LPRs with Final Orders

Pending Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand to the Board under *Judulang*. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, *Judulang* can be addressed in the opening brief or the reply brief. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) (“28(j) Letter”) informing the court of *Judulang* and its relevance to the case. (See Sample D.)

Denied Petition for Review. If the petition for review already has been denied, but the mandate has not issued, a person may file a motion to stay the mandate. (See Sample E.) If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. (See Sample E.) The motion can ask the court to reconsider its prior decision in light of *Judulang* and remand the case to the Board. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court’s judgment (not mandate). The petition should request the Court to grant the petition, vacate the circuit court’s judgment, and remand for further consideration in light of *Judulang*.

Administrative Motion to Reconsider. Regardless whether a person sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the Board or the

immigration court (whichever entity last had jurisdiction over the case).⁴ As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may be increased where the motion is untimely filed.

If the deadline for filing a motion to reconsider or reopen has not elapsed, it is advisable to file the motion before the passage of 30 days from the order of removal, or, if 30 days have passed, before the 90 day motion to reopen deadline. See INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i). (See Samples A and C.) If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Judulang*, i.e., by January 11, 2012. Filing within 30 (or 90) days of the decision bolsters the argument that the statutory deadline should be equitably tolled.⁵

If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to alternatively request *sua sponte* reopening. Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA's denial of a *sua sponte* motion. See *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

C. LPRs who are Outside the United States

Individuals who are outside the United States have particularly challenging cases because of the regulatory departure bar. See 8 C.F.R. §§ 1003.2(d) and 1003.23(b). The BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions. See *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008).

As an initial matter, however, individuals who filed petitions for review of their removal orders may be in an easier position because there is no departure bar to judicial review. Thus, they may pursue their appeals from outside the United States and “those who prevail can be afforded effective relief by facilitation of their return.” See *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1761 (2009). Thus, if they are successful on a motion to stay or recall the mandate (see Sample E), they should be permitted to return to the United States for further proceedings. Unfortunately, the process for returning to the United States is not straightforward, and in many cases, the government is resistant to facilitate a person's return. See *American Immigration*

⁴ There are strong arguments that fundamental changes in the law warrant reconsideration because they are “errors of law” in the prior decision. See INA § 240(c)(6)(C).

⁵ There are arguments that the deadline for filing was equitably tolled until the Supreme Court issued its decision in *Judulang* or until some later date. In order to show due diligence under the equitable tolling doctrine, it may be beneficial to file within 30 days after *Judulang*.

Council Practice Advisory, *Return to the United States after Prevailing in Federal Court* (May 28, 2009). (Read about efforts to uncover the government's policies on return at [http://nationalimmigrationproject.org/legalresources/cd_NIP v. DHS FOIA Complaint Summary.pdf](http://nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_Summary.pdf).)

Individuals who are filing motions with the BIA or the immigration court should consider whether their relevant court of appeals has invalidated the departure bar regulations. To date, six courts of appeals have invalidated the bar. See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011) (same). The only circuit to uphold the regulation has granted rehearing *en banc*. *Contreras-Bocanegra v. Holder*, 629 F.3d 1170, 1172 (10th Cir. 2010) (rehearing *en banc* pending, argued Nov. 15, 2011). If filing a motion to reconsider or reopen in the Tenth, Fifth, Eighth, or Eleventh Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen statute or impermissibly contracts the BIA's jurisdiction. Thus, it is advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening as the post departure bar litigation has not been as successful in the *sua sponte* context. See, e.g., *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nationalimmigrationproject.org or Beth Werlin at bwerlin@immcouncil.org.

III. OTHER POTENTIAL CHALLENGES TO ARBITRARY OR IRRATIONAL REMOVAL POLICIES UNDER THE REASONING OF *JUDULANG*

In addition to reversing the BIA's § 212(c) comparable-grounds policy, *Judulang* has important implications for other challenges to both agency statutory interpretations and agency policies that do not stem from the statute. This section presents a brief preliminary analysis of the particular implications and uses of the Court's reasoning for such other challenges and is not meant to be a comprehensive review.

A. Arbitrary and Capricious Review under the APA

The *Judulang* Court embraced application of the Administrative Procedure Act’s review of arbitrary and capricious agency action. In particular, the Court applied 5 U.S.C. § 706(2)(A), which permits the Court to set aside agency action that is “arbitrary and capricious.” As the Court explained, an agency is required to engage in “reasoned decisionmaking.” Op. at 9. A court can review whether the decision was based on “a consideration of the relevant factors” and whether “there has been a clear error of judgment.” Op. at 10. That review requires looking at the quality of the agency’s reasoning (or lack thereof). The Court concluded that the BIA had “flunked the test” by conditioning an LPR’s right to remain in the country on a “chance correspondence between statutory categories.” Op. at 10.

APA review can be a powerful tool to reign in truly arbitrary policies. In some ways, APA review is similar to equal protection review. It allows the court to look at arbitrary distinctions and strike them down. But APA review is different in important ways. APA review looks at the reasons that the agency has provided, not reasons developed after the fact by the agency’s attorneys. It requires the agency to engage in the issues, consider relevant factors, and provide a reasoned explanation for what it is doing. And as the Court explained in *Judulang*, the agency must focus on the statutory scheme and implementing its purpose. An agency cannot simply say, for example, that it has an interest in cutting cost. As the *Judulang* Court explained, “[c]ost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy. (If it could, flipping coins would be a valid way to determine an alien’s eligibility for a waiver.)” Op. at 21.

The Court particularly objected to the way that the *Blake-Brieva* rule allowed deportation officers’ charging decisions to affect access to § 212(c) relief. It noted that the very same conviction could be charged as a crime involving moral turpitude or as an aggravated felony, and that the charging decision would dictate access to relief. The Court objected to a result where access to relief would turn on the “fortuity of an individual officials’ decision.” Op. at 15. This may have implications, for example, for other contexts where enormous authority has been devolved to individual officers (see subsection C, 3 below).

B. Arbitrary and Capricious Review under *Chevron*

Judulang rejected the government’s argument that it should defer to the Board’s comparable grounds policy under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But it nonetheless found that if it had applied *Chevron*, the agency policy would not pass step two. The Court explained that at step two the question is whether the agency policy is “arbitrary and capricious in substance.” Op. at 9 n.7 (citing cases). *Judulang*’s analysis of the arbitrariness of the comparable-grounds rule is therefore useful in any case challenging the reasonableness of an agency interpretation of a statute under step two of *Chevron*.

C. Examples of Individuals Beyond *Judulang*'s Specific Holding With Potential Challenges under the Court's Reasoning

1. Non-LPRs barred from any discretionary relief from removal due to DHS decision to place the individual in INA § 238(b) proceedings

Under INA § 238(b), a non-LPR who is charged as having an aggravated felony conviction can be placed in administrative removal proceedings in which many forms of relief, such as cancellation of removal and adjustment, are barred. But the very same people can be placed in removal proceedings in which these forms of relief are available. Courts have rejected equal protection challenges to this distinction. But the agency practice also can be challenged as arbitrary and capricious under the reasoning of *Judulang*.

In *Judulang*, the Court offered particularly harsh words for policies that allow deportation officers' charging decisions to determine whether relief is available. It recognized that a system that turns on the "fortuity of an individual officer's decision" is fundamentally flawed. The Court cited Judge Learned Hand's admonition that deportation decisions cannot be made into a "sport of chance." Op. at 15. The agency's practices on administrative removal are precisely such a chance system, in which one long-time immigrant may have an opportunity to seek adjustment while another will not, based solely on whether the deportation officer decided to issue an NTA or follow the procedures under INA § 238(b). Because that system is arbitrary and capricious, it cannot stand.

2. LPRs deemed ineligible for § 212(c) relief because their pre-1996 convictions were trial convictions

Judulang also has implications for other outstanding issues related to 212(c) eligibility. In many circuits, § 212(c) relief is restricted to LPRs who pled guilty, and not to those who may have relied on § 212(c) relief in connection with other decisions in their criminal cases, such as a decision to reject a plea and go to trial. See, e.g., *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010) (discussing circuit decisions). This distinction may be challenged as arbitrary and capricious under the reasoning of *Judulang*.

In *Judulang*, the Court rejected a rule that categorically excluded a group of deportable LPRs on grounds that bore no relationship to "the alien's fitness to remain in the country." Op. at 12. Categorical exclusion of trial conviction cases also bears no relationship to fitness to remain. Indeed, the agency has never claimed that it bore such a relationship. Instead, trial conviction cases have been excluded from relief on the ground that *St. Cyr* does not require that they be included. See, e.g., *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010). That logic is almost identical to the logic that led to the *Blake* decision. The agency had been ordered by a court to provide § 212(c) to some deportable immigrants and did not extend § 212(c) to others whom it deemed not covered by *St. Cyr*. But as the Court found in *Judulang*, agency practice cannot allow for distinctions that are arbitrary just because they grew out of an accommodation of case law. Instead, access to a critical form of relief must be based on a connection to the broader purpose of the statute and fitness to remain. Moreover, just as the comparable grounds test

lacked any connection to the text of the statute, the exclusion of trial convictions finds no basis whatsoever in the wording of § 212(c).

Practitioners should be cautioned, however, that these arguments require further development, and that the courts, particularly the ones that already have ruled adversely on this issue, may not be receptive to these arguments.

3. LPRs deemed ineligible for cancellation of removal based on a finding that their pre-1996 convictions triggered the residence requirement clock-stop rule

Judulang also has potential implications for issues related to eligibility for cancellation of removal under INA § 240A(a), which was enacted in IIRIRA to replace § 212(c) relief. IIRIRA provided that the seven years of residence required to be eligible to seek cancellation “shall be deemed to end . . . when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) . . .” See INA § 240A(d) (1). The BIA has applied this “clock-stop” or “stop-time” rule retroactively to pre-IIRIRA offenses. *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006). Some reviewing courts have applied a wooden retroactivity analysis in considering the applicability of the clock-stop rule to pre-IIRIRA offenses and have concluded that a provision based on conduct can never have a retroactive effect. On that basis, they have rejected any challenges to the BIA’s policy of applying the clock stop rule to convictions that pre-date IIRIRA. See, e.g., *Zuluaga-Martinez v. I.N.S.*, 523 F.3d 365 (2d Cir. 2008).

Judulang suggests a different way to challenge such applications of the clock stop rule. Whether analyzed under the APA or under step two of *Chevron*, the agency policy cannot be “arbitrary and capricious in substance.” Op. at 9 n.7. It is hard to imagine anything more arbitrary than the retroactive application of the clock-stop rule. In essence, the rule treats LPRs who entered the country on the same date, and who have the same convictions, differently based on the date the conviction took place. Thus, an LPR who committed his or her offense before 1996 when he or she may not yet have accumulated seven years of residence is barred, while another LPR who entered the country at the same time but committed his or her offense more recently after he or she accumulated seven years is not barred. Whatever logic that rule may have prospectively, when it might be said to notify a noncitizen that no relief will be available regardless of future residence, it is truly arbitrary as applied retroactively. Retroactive application means that those who had shown years of good behavior since 1996 are removed without any consideration of their “fitness to remain” while those with more recent convictions can have the “fitness” examined by an immigration judge. That rule, like the one in *Judulang*, should be found to “flunk the test” of arbitrary and capricious review.

SAMPLE MOTIONS

(Excluding Certificates of Service)

- A:** **If it has been 30 days or less since the immigration judge’s decision in your case,** consider filing this motion to reconsider with the immigration court.
- B:** **If an appeal is pending at the Board of Immigration Appeals,** consider filing this motion to remand with the Board of Immigration Appeals.
- C:** **If it has been 30 days or less since the Board of Immigration Appeals’ decision,** consider filing this motion to reconsider with the Board.
- D:** **If a petition for review is currently pending in the court of appeals and briefing has been completed,** consider filing this letter pursuant to Federal Rule of Appellate Procedure 28(j).
- E:** **If the court of appeals dismissed the petition for review,** consider filing a motion to stay or recall the mandate.

Motion to Reconsider with the Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

 $\begin{pmatrix} \vdots \\ \vdots \\ \vdots \\ \vdots \\ \vdots \\ \vdots \\ \vdots \end{pmatrix}$

A Number:

¹ The Court rejected the BIA's entire line of pre-2005 comparable ground cases. *Judulang*, 2011 U.S. LEXIS 9018 at *11 citing *Matter of Hernandez-Casillas*; 20 I&N Dec. 262, 287 (A.G.

Court rejected the Board's "comparable ground test," which permitted lawful permanent residents to apply for a § 212(c) waiver only if the Department of Homeland Security (DHS) charged them with a ground of deportability which had a comparable ground of inadmissibility. The Court found that the "comparable ground test" is arbitrary and capricious. *Judulang*, 2011 U.S. LEXIS 9018 at *40.

In the instant case, DHS charged Respondent, a lawful permanent resident with deportability under INA § _____. The Immigration Judge (IJ) found Respondent ineligible for § 212(c) relief based on the lack of a comparable ground of inadmissibility. The Supreme Court's decision in *Judulang* has nullified this basis of the Immigration Judge's decision. Therefore, the Court should reconsider its decision and allow Respondent to proceed with an application for § 212(c) relief.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Respondent with deportability under INA § _____ for having been _____.

On _____, the Immigration Judge pretermitted Respondent's application for relief from removal under former § 212(c) of the INA because, the Immigration Judge held, the charged ground of deportability is not comparable to a ground of inadmissibility. Thus, the Immigration Judge ordered Respondent removed on _____.

Pursuant to 8 C.F.R. § 1003.23(b)(i), Respondent declares that:

(1) the validity of the removal order [has been or is OR has not and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is:

1991); *In re Jimenez-Santillano*, 21 I&N Dec. 567, 571-72 (BIA 1996); *In re Esposito*, 21 I&N Dec. 1, 6-7 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603, 604-05 (BIA 1992).

_____. The proceeding took place on: _____.

The outcome is as follows _____.

(2) The validity of the removal order [has not been and is not OR has been and is] the subject of a judicial proceeding.

(3) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____.

(4) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. § 1003.23(b)(1).

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.23(b)(1), or as soon as practicable after finding out about the decision. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (holding that statutory administrative appeal deadline is a procedural, not jurisdictional, rule); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must “exercise reasonable diligence in investigating and bringing the claim”) (internal quotation omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded “no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence...”); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent

efforts, did not discover the injury until after the limitations period had expired”) (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) (“...[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier”) (citations omitted); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that “all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim”) (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) holding that BIA must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *but see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding, in case pre-dating *Henderson*, motion to reopen deadline “jurisdictional and mandatory”). The Supreme Court issued its decision in *Judulang* on December 12, 2011. Respondent is filing this motion as soon as practicable after the Supreme Court’s ruling.

[Consider adding paragraph below if the person has not been removed and the statutory motion deadline has elapsed].

In the alternative, Respondent seeks *sua sponte* reconsideration pursuant to 8 C.F.R. § 1003.23(b) based on a fundamental change in law. The Board has held that an “exceptional situations” standard applies when adjudicating a *sua sponte* motion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional circumstance. *See, e.g., Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (declining to reopen or reconsider *sua sponte* where case law represented only “incremental development” of the law); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of “refugee” warranted *sua*

sponte reopening); *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002) (due to passage of time, BIA withdrew from its “policy” announced in *Matter of X-G-W-*).

IV. ARGUMENT

In *Judulang*, the Supreme Court rejected the Board’s policy of pretermittting the § 212(c) applications of lawful permanent residents charged with deportability based on the “comparable ground test” set forth in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at *26. The Immigration Judge ordered his removal and the Board affirmed, holding that *Judulang* could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the “crime of violence” aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA’s decisions in *Matter of Blake* and *Matter of Brieva* were “arbitrary and capricious,” stating:

By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Like the petitioner in *Judulang*, Respondent was charged with and found removable based on a ground of deportability (_____) for which there is no comparable ground of inadmissibility. Thus, the Court erroneously pretermitted Respondent’s application for § 212(c) relief in violation of INA § 212(c) (1995). As *Judulang* represents a fundamental change in law,

the Court should reconsider the decision in this case. *Accord Matter of G-D-*, 22. I&N Dec. 1132, 1134 (BIA 1999) (noting that a fundamental change in law warrants reopening).

V. CONCLUSION

The Supreme Court's decision in *Judulang v. Holder* is a fundamental change in the law that nullifies the Immigration Judge's decision denying Respondent the opportunity to apply for § 212(c) relief. Respondent respectfully requests the Court reconsider its decision and schedule a § 212(c) hearing in Respondent's case.

Dated: _____

Respectfully submitted,

SAMPLE B

Motion to Remand from BIA to Immigration Judge

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
_____ ,	)	A Number: _____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

**MOTION TO REMAND TO THE IMMIGRATION JUDGE IN LIGHT OF
*JUDULANG v. HOLDER***

I. INTRODUCTION

Respondent hereby moves the Board of Immigration Appeals (BIA or Board) to remand this case in light of the Supreme Court's recent decision in *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).). In *Judulang*, the Supreme Court rejected the Board of Immigration Appeals' (BIA or Board) rulings in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S.

LEXIS 9018 at *11.² Specifically, the Court rejected the Board’s “comparable ground test,” which permitted lawful permanent residents to apply for a § 212(c) waiver only if the Department of Homeland Security (DHS) charged them with a ground of deportability which had a comparable ground of inadmissibility. The Court found that the “comparable ground test” is arbitrary and capricious. *Judulang*, 2011 U.S. LEXIS 9018 at *40.

In the instant case, DHS charged Respondent, a lawful permanent resident with deportability under INA § _____. The Immigration Judge (IJ) found Respondent ineligible for § 212(c) relief based on the lack of a comparable ground of inadmissibility. The Supreme Court’s decision in *Judulang* has nullified this basis of the Immigration Judge’s decision. Therefore, the Board should remand this case to the Immigration Judge to allow Respondent to proceed with an application for § 212(c) relief.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Respondent with deportability under INA § _____ for having been _____.

On _____, the Immigration Judge pretermitted Respondent’s application for relief from removal under former § 212(c) of the INA because, the Immigration Judge held, the charged ground of deportability is not comparable to a ground of inadmissibility. Thus, the Immigration Judge ordered Respondent removed on _____. Respondent is filing this motion as soon as practicable following the Supreme Court’s ruling.

² The Court rejected the BIA’s entire line of pre-2005 comparable ground cases. *Judulang*, 2011 U.S. LEXIS 9018 at *11 citing *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 287 (A.G. 1991); *In re Jimenez-Santillano*, 21 I&N Dec. 567, 571–72 (BIA 1996); *In re Esposito*, 21 I&N Dec. 1, 6–7 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603, 604-05 (BIA 1992).

III. ARGUMENT

In *Judulang*, the Supreme Court rejected the Board's policy of pretermittting the § 212(c) applications of lawful permanent residents charged with deportability based on the "comparable ground test" set forth in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at *26. The Immigration Judge ordered his removal and the Board affirmed, holding that *Judulang* could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the "crime of violence" aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA's decisions in *Matter of Blake* and *Matter of Brieva* were "arbitrary and capricious," stating:

By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Like the petitioner in *Judulang*, Respondent was charged with and found removable based on a ground of deportability (_____) for which there is no comparable ground of inadmissibility. Thus, the Court erroneously pretermitted Respondent's application for § 212(c) relief in violation of INA § 212(c) (1995). As *Judulang* represents a fundamental change in law, the Board should remand the decision in this case. *Accord Matter of G-D-*, 22. I. & N. Dec. 1132, 1134 (BIA 1999) (noting that a fundamental change in law warrants reopening).

IV. CONCLUSION

The Supreme Court's decision in *Judulang* is a fundamental change in the law that nullifies the Immigration Judge's decision denying Respondent the opportunity to apply for § 212(c) relief. Respondent respectfully requests that the Board remand this case to the Immigration Judge to schedule a § 212(c) hearing in Respondent's case.

Dated: _____

Respectfully submitted,

Motion to Reconsider with the BIA

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

$$\begin{array}{l}) \\ , \\) \\) \\) \\) \\) \\) \end{array}$$

A Number: _____

I. INTRODUCTION

407

2005). *Judulang*, 2011 U.S. LEXIS 9018 at *11.³ Specifically, the Court rejected the Board’s “comparable ground test,” which permitted lawful permanent residents to apply for a § 212(c) waiver only if the Department of Homeland Security (DHS) charged them with a ground of deportability which had a comparable ground of inadmissibility. The Court found that the “comparable ground test” is arbitrary and capricious. *Judulang*, 2011 U.S. LEXIS 9018 at *40.

In the instant case, DHS charged Respondent, a lawful permanent resident with deportability under INA § _____. The Immigration Judge (IJ) found Respondent ineligible for § 212(c) relief based on the lack of a comparable ground of inadmissibility. The Board affirmed the IJ’s decision on _____. The Supreme Court’s decision in *Judulang* has nullified this basis of the Board’s decision. Therefore, the Board should reconsider its decision and allow Respondent to proceed with an application for § 212(c) relief.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Respondent with deportability under INA § _____ for having been _____.

On _____, the Immigration Judge pretermitted Respondent’s application for relief from removal under former § 212(c) of the INA because the charged ground of deportability is not comparable to a ground of inadmissibility. This Board affirmed the IJ’s decision on _____.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

(1) the validity of the removal order [has been or is OR has not and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is:

³ The Court rejected the BIA’s entire line of pre-2005 comparable ground cases. *Judulang*, 2011 U.S. LEXIS 9018 at *11 citing *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 287 (A.G. 1991); *In re Jimenez-Santillano*, 21 I&N Dec. 567, 571–72 (BIA 1996); *In re Esposito*, 21 I&N Dec. 1, 6–7 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603, 604–05 (BIA 1992).

_____. The proceeding took place on: _____.

The outcome is as follows _____.

(2) The validity of the removal order [has not been and is not OR has been and is] the subject of a judicial proceeding.

(3) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____.

(4) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. § 1003.2(b)(2).

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.2(b)(2), or as soon as practicable after finding out about the decision. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (holding that statutory administrative appeal deadline is a procedural, not jurisdictional, rule); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must “exercise reasonable diligence in investigating and bringing the claim”) (internal quotation omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded “no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence...”); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent

efforts, did not discover the injury until after the limitations period had expired”) (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) (“...[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier”) (citations omitted); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that “all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim”) (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) holding that BIA must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *but see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding, in case pre-dating *Henderson*, motion to reopen deadline “jurisdictional and mandatory”). The Supreme Court issued its decision in *Judulang* on December 12, 2011. Respondent is filing this motion as soon as practicable after the Supreme Court’s ruling.

[Consider adding paragraph below if the person has not been removed and the statutory motion deadline has elapsed].

In the alternative, Respondent seeks *sua sponte* reconsideration pursuant to 8 C.F.R. § 1003.2(a) based on a fundamental change in law. The Board has held that an “exceptional situations” standard applies when adjudicating a *sua sponte* motion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional circumstance. *See, e.g., Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (declining to reopen or reconsider *sua sponte* where case law represented only “incremental development” of the law); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of “refugee” warranted *sua*

sponte reopening); *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002) (due to passage of time, BIA withdrew from its “policy” announced in *Matter of X-G-W-*).

IV. ARGUMENT

In *Judulang*, the Supreme Court rejected the Board’s policy of pretermitted the § 212(c) applications of lawful permanent residents charged with deportability based on the “comparable ground test” set forth in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at 26. The Immigration Judge ordered his removal and the Board affirmed, holding that *Judulang* could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the “crime of violence” aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA’s decisions in *Matter of Blake* and *Matter of Brieva* were “arbitrary and capricious,” stating:

By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Like the petitioner in *Judulang*, Respondent was charged with and found removable based on a ground of deportability (_____) for which there is no comparable ground of inadmissibility. Thus, the Court erroneously pretermitted Respondent’s application for § 212(c) relief in violation of INA § 212(c) (1995). As *Judulang* represents a fundamental change in law,

the Court should reconsider the decision in this case. *Accord Matter of G-D-*, 22. I&N Dec. 1132, 1134 (BIA 1999) (noting that a fundamental change in law warrants reopening).

V. CONCLUSION

The Supreme Court's decision in *Judulang v. Holder* is a fundamental change in the law that nullifies the Board's decision denying Respondent the opportunity to apply for § 212(c) relief. Respondent respectfully requests the Board reconsider its decision and remand the case to the immigration court for a § 212(c) hearing in Respondent's case.

Dated: _____

Respectfully submitted,

SAMPLE D

Letter pursuant to Federal Rule of Appellate Procedure 28(j)
(Pursuant to the rule, the body of the letter must not exceed 350 words)

This letter is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

Clerk of the Court
U.S. Court of Appeals for the _____ Circuit
ADDRESS

Re: _____ v. _____
Case No. _____

Dear Clerk of the Court:

Pursuant to Federal Rule of Appellate Procedure 28(j), Petitioner submits *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).

In *Judulang*, the Supreme Court rejected the Board of Immigration Appeals' (BIA) rulings in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). The Court found the BIA's comparable grounds test for § 212(c) relief is "arbitrary and capricious." 2011 U.S. LEXIS 9018 at *40.

Judulang is applicable to this case because _____

_____.
Judulang supports the position in Petitioner's brief at pages _____ that the instant petition for review should be granted.

Respectfully submitted,

cc: _____

Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

SAMPLE E

Motion to Stay or Recall the Mandate at Court of Appeals

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ____ CIRCUIT

_____	)	Case No. _____
	)	
Petitioner,	)	
	)	
v.	)	
	)	
Eric H. Holder, Jr., Attorney General,	)	
	)	
Respondent.	)	
_____	)	

**MOTION TO STAY OR RECALL THE MANDATE
IN LIGHT OF THE SUPREME COURT'S DECISION IN
*JUDULANG v. HOLDER***

I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 27 and 41 [and INSERT ANY APPLICABLE LOCAL RULE], Petitioner moves this Court to stay or recall the mandate in this case in light of the Supreme Court's recent decision in *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).

II. RELEVANT PROCEDURAL HISTORY

Petitioner became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Petitioner with deportability under § _____ of the Immigration and Nationality Act, 8 U.S.C. § _____, for having been _____.

On _____, the Board affirmed the immigration judge's decision in this case, which had pretermitted Petitioner's application for relief from removal under former § 212(c) of the INA because the charged ground of deportability is not comparable to a ground of inadmissibility under 8 U.S.C. § 1182. The Board's decision relies on [*Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) AND/OR *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005)].

Petitioner then filed a petition for review of the BIA's decision with this Court. On _____, this Court [dismissed OR denied] the petition for review, affirming the BIA's approach set forth in *Matter of Blake* AND/OR *Matter of*

Brieva. The Court’s decision relied on [then binding circuit case law OR Board precedent]. [Insert applicable circuit case/s: *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2042 (2009); *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007); *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008); *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc); *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) AND/OR *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005)]. The mandate either is [set to issue on ____ OR has issued on ____].

The Supreme Court’s unanimous decision in *Judulang* was issued on December 12, 2011. Petitioner is filing this motion as soon as practicable following the Court’s decision.

III. ARGUMENT

The Court should stay or recall the mandate in light of the Supreme Court’s decision in *Judulang*. In *Judulang*, the Supreme Court rejected the Board’s policy of preterminating the § 212(c) applications of lawful permanent residents charged with deportability based on the “comparable ground test” set forth in *Matter of*

Blake, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at 26. The Immigration Judge ordered his removal and the Board affirmed, holding that Judulang could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the “crime of violence” aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA’s decisions in *Matter of Blake* and *Matter of Brieva* were “arbitrary and capricious,” stating:

By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Judulang is applicable in this case because _____

_____.

The Court’s decision in *Judulang* nullifies the Board’s decision.

Thus, a recall of the mandate is warranted in order to prevent injustice and to allow Petitioner to exercise his right to apply for § 212(c) relief. [INSERT

DISCUSSION OF RELEVANT CIRCUIT LAW REGARDING RECALL OR
STAY OF THE MANDATE].

IV. POSITION OF OPPOSING COUNSEL

Undersigned counsel contacted _____, counsel for Respondent. _____
indicated that Respondent [opposes OR does not oppose OR takes no position] on
the instant motion.

V. CONCLUSION

For the foregoing reasons, this Court should [recall the mandate OR stay the
mandate] and reconsider the instant petition for review. In accordance with the
Supreme Court's decision in *Judulang v. Holder*, the Court should reverse the
BIA's decision and remand the case for further proceedings.

Dated: _____

Respectfully submitted,



PRACTICE ADVISORY¹
November 30, 2011

**REPRESENTING CLIENTS WITH MENTAL COMPETENCY ISSUES
UNDER *MATTER OF M-A-M***

**By The Legal Action Center and
The University of Houston Law Center Immigration Clinic²**

Until recently, attorneys and immigration judges had limited guidance about safeguards that might be available to ensure a fair hearing in immigration court for noncitizens with mental competency issues. As a result, many such individuals have been ordered deported without access to counsel or any assessment of their abilities. Others have languished in jail indefinitely while immigration judges delayed proceedings in the hope that they would find representation or that their conditions would improve. Extended stays in detention centers, however, have instead caused people's conditions to deteriorate, at times resulting in psychosis and catatonia. The lack of protections has even led to mistaken deportations of U.S. citizens who were unable to prove their nationalities without assistance.

In May 2011, the Board of Immigration Appeals (BIA) issued a precedent decision setting forth a framework for immigration judges to follow when hearing cases involving respondents with mental competency issues. See *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011).³ This practice

¹ Copyright © 2011 American Immigration Council. Click [here](#) for information on reprinting this practice advisory. This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

² The principal authors of this Practice Advisory were Melissa Crow, Director, Legal Action Center; Janet B. Beck, Clinical Assistant Professor, University of Houston Law Center Immigration Clinic; and Geoffrey A. Hoffman, Director and Clinical Associate Professor, University of Houston Law Center Immigration Clinic. The authors wish to acknowledge the assistance of Ahilan Arulanantham, Laura Belous, Karen Bower, Ira Burnim, R. Mark Frey, Jennifer Mathis, Sarah Mehta, Dr. Kristen Ochoa, Steven Schulman, and Judith Storandt who provided helpful comments on previous drafts. Special thanks go to LAC Law Fellow Kate Voigt for her excellent research assistance and to LAC Consultant Erin Hustings, whose shrewd insights and perseverance ultimately brought this project to fruition.

³ This practice advisory draws on the experience of Andrea Penedo, a third year law student in the University of Houston Law Center Immigration Clinic, and Catharine Yen, a 2011

advisory provides a detailed analysis of that decision — the first published decision from the BIA in nearly fifty years to provide substantive guidance on hearings involving respondents with mental disorders⁴ — and offers strategic advice on how to address issues that may arise in the context of representing such clients.

What statutory protections apply to respondents who lack mental competency?

Under the Immigration and Nationality Act (INA), the Attorney General “shall prescribe safeguards to protect the rights and privileges” of respondents for whom it is “impracticable” to be present at removal proceedings by reason of mental incompetency. INA § 240(b)(3). Some courts have construed this provision to protect incompetent respondents able to make a physical appearance, but unable to meaningfully participate without representation.⁵ Because competency issues may stem from both physical and psychological conditions, which give rise to a broad spectrum of capabilities and needs, the procedural safeguards required under INA § 240(b)(3) differ from case to case.

What do the applicable regulations say?

Of the extensive regulations that govern the conduct of removal proceedings, only a handful address the subject of mental competency. These include 8 C.F.R. § 103.5a(c)(2)(ii) (providing for service of a Notice to Appear upon the person with whom a mentally incompetent respondent resides); 8 C.F.R. § 1240.4 (providing that an attorney, legal representative, legal guardian, near relative, or friend may “appear on behalf of” a respondent whose mental incompetency makes it “impracticable” for him or her to “be present” at a hearing); 8 C.F.R. § 1003.25(a) (permitting an immigration judge to waive the presence of a mentally incompetent respondent who is represented by an individual from one of the preceding categories); 8 C.F.R. § 1240.10(c) (prohibiting an immigration judge from accepting an admission of removability from an incompetent respondent unless accompanied by an attorney, legal representative, near relative, legal guardian, or friend, and requiring a “hearing on the issues”). In each case, the regulations require immigration judges to determine whether a respondent is “incompetent” — without defining that term — but do not provide any meaningful guidance either for determining competency for particular purposes or for guaranteeing due process for a respondent who lacks competency to proceed.

graduate, who ably represented M-A-M- before the Board of Immigration Appeals. Ms. Penedo continues to represent him on remand.

⁴ The use of the term “mental disorder” in this practice advisory is consistent with the terminology used in the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) and encompasses cognitive, intellectual and psychiatric disabilities.

⁵ See, e.g., *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007) (“A mentally incompetent person, although physically present, is absent from the hearing for all practical purposes.”).

What additional guidance does *Matter of M-A-M-* provide?

In its precedential decision, *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals, for the first time, set forth a test for immigration judges to assess a respondent's ability to participate in a removal hearing. According to *M-A-M-*, the decisive factors are whether the respondent understands the nature and object of the proceedings, can consult with the attorney or representative (if there is one), and has a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses. 25 I&N Dec. at 479; *see also* INA § 240(b)(4)(B); 8 C.F.R. § 1240.10(a)(4). By way of example, the Board cited its own decision in *Matter of Sinclitico*, 15 I&N Dec. 320 (BIA 1975), which found the respondent incompetent to voluntarily surrender his U.S. citizenship based on his apparent inability to understand questions, medical evidence of schizophrenia, and testimony from his brother regarding his mental illness. 25 I&N Dec. at 481.

Indicia of Incompetency

Noting that a respondent is presumed to be competent, the Board explained that an immigration judge need not apply the *M-A-M-* test in the absence of any “indicia of mental incompetency.”⁶ 25 I&N Dec. at 477. Such indicia may derive from observations of the respondent's functioning and behavior by the immigration judge or either party, testimonial evidence, or documentation submitted as part of the record. *Id.* at 479. Potential indicators of serious mental disorders, which may give rise to competency issues, include difficulty communicating thoughts completely or coherently, perseveration, overly simplistic or concrete thinking, words or actions that do not make sense or suggest that the person is experiencing hallucinations or an altered version of reality, memory impairment, disorientation, an altered level of consciousness or wakefulness, or a high level of distraction, inattention or confusion.

Competence is often dynamic and contextual.⁷ Some respondents who cannot represent themselves in removal proceedings due to competency issues may still have the ability to consent to representation, to assist in their defense, or to stand trial. Moreover, the fact that an individual

⁶ In prior unpublished decisions, the BIA put the onus on respondents to prove their incompetence. *See, e.g., Matter of S-*, 2007 WL 2463933 (BIA Aug. 6, 2007) (removal proceedings comported with due process where respondent failed to raise past treatment for schizophrenia until after pleadings were taken, declined continuance to seek counsel, and offered no further evidence of incompetence); *Matter of E-*, 2003 WL 23269901 (BIA Dec. 4, 2003) (due process requirements satisfied where represented respondent offered no documentary or testimonial evidence of alleged incompetence); *Matter of V-*, 2006 WL 2008263 (BIA May 24, 2006) (no due process violation where respondent, who submitted detention medical records reflecting treatment for mental health issues for the first time on appeal, did not thereby prove inability to understand nature of proceedings or to participate in his defense). For a more comprehensive discussion of relevant precedent prior to *M-A-M-*, *see* Mimi E. Tsankov, [Incompetent Respondents in Removal Proceedings](#), EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION LAW ADVISOR, April 2009, at 1, 2-4.

⁷ *See Indiana v. Edwards*, 554 U.S. 164, 175 (2008) (noting that “[m]ental illness itself is not a unitary concept” and may manifest itself differently depending on the circumstances and individuals involved).

carries a mental health diagnosis or diagnosis of developmental disability or has been previously labeled “incompetent” does not mean that he or she is currently incompetent. Because mental competency may vary over time,⁸ the BIA instructed immigration judges to consider “indicia of incompetency” throughout the duration of removal proceedings. *Id.* at 480 (citing *Indiana v. Edwards*, 554 U.S. 164, 175 (2008)).

Measures to Assess Competency

When indicia of incompetency are present, an immigration judge must determine whether a respondent is sufficiently competent to proceed without safeguards. *Id.* at 479. Even if a respondent has been pronounced mentally competent, procedural safeguards may be necessary to ensure a fair hearing in immigration court if, for example, a respondent has a significant history of mental illness, is experiencing an acute aggravation of mental illness, or if the respondent’s condition has changed significantly since competency was determined. *Id.* at 480. By the same token, certain mental impairments would not necessarily preclude meaningful participation in immigration proceedings without safeguards. *Id.*

The BIA emphasized that measures needed to assess competency will vary from case to case. For example, an immigration judge could ask the respondent basic questions to assess his or her ability to understand the nature and object of the proceedings, grant a continuance to enable the parties to collect relevant documentary evidence, solicit testimony from family or close friends, or order a mental competency evaluation. *Id.* at 480-81. When the assessment has been completed, the immigration judge must articulate his or her reasoning and decision regarding the respondent’s competency on the record. *Id.* at 481.

Safeguards

If a respondent is not sufficiently competent to proceed with a hearing, immigration judges have discretion to apply appropriate safeguards. *Id.* at 481-82. The BIA listed the following available safeguards as “examples,” while noting that the list is not exhaustive:

- Legal representation;
- Identification and appearance of a family member or close friend who can assist the respondent and/or his legal representative;
- Docketing or managing the case to enable the respondent to obtain legal representation and/or medical treatment intended to restore competency;
- Participation of a guardian in the proceedings;⁹

⁸ Not all individuals with mental disorders will experience variations in condition or competency. Some mental conditions, such as intellectual disabilities and brain injuries, tend to produce more static deficits. See, e.g., Patricia A. Zapf and Ronald Roesch, *Future Directions in the Restoration of Competency to Stand Trial*, 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 43 (2011) (finding that one of the factors most strongly associated with inability to regain competency was “an irremediable cognitive disorder, such as mental retardation”).

⁹ Many disability rights advocates are troubled by the appointment of legal guardians, which may undermine an individual’s autonomy. Counsel should explore alternatives that allow the respondent to retain as much autonomy as possible, including whether a power of attorney or

- Continuance of the case for good cause shown;
- Closing the hearing to the public;
- Waiving the respondent's appearance;
- Assistance with the development of the record,¹⁰ including the examination and cross-examination of witnesses;
- Reserving appeal rights for the respondent.

Id. at 483.

Under what circumstances is administrative closure or termination of proceedings appropriate?

Where no conceivable procedural safeguards would ensure a fair hearing, *M-A-M-* permits administrative closure¹¹ — in effect, an indefinite stay of proceedings — pending the exploration of other options such as treatment.¹² Administrative closure does not lead automatically to release from detention. In some cases, enrollment in a treatment program may be necessary to secure the release of respondents whose removal is not being presently, actively pursued. In other cases, such as where a person has an intellectual disability or brain trauma and may not respond to treatment, administratively closing the case without an agreement ensuring release may lead to indefinite detention.

Although *M-A-M-* does not explicitly mention termination,¹³ some immigration judges have terminated proceedings in cases where the severity of the respondent's competency issues

appointment of a guardian ad litem would be sufficient, before seeking appointment of a full-fledged legal guardian.

¹⁰ Certain courts in some states, such as [Vermont](#), provide communication support services for parties who have cognitive or intellectual disabilities.

¹¹ Administrative closure is a procedural convenience used to remove a case temporarily from the immigration court's calendar or from the Board's docket; the removal proceeding remains pending yet inactive. A case cannot be administratively closed if both parties do not agree to the closure. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (1996). A respondent whose case has been administratively closed remains in removal proceedings. At any time, either party can file a Motion to Recalendar the case.

¹² 25 I&N Dec. at 483. See also 8 C.F.R. § 245.1(c)(8)(ii)(D); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK 116 (AILA 2010) (hereinafter, "IMMIGRATION JUDGE BENCHBOOK") (noting that "the Immigration Judge may wish to inquire of counsel whether issues of competency make this an appropriate case for administrative closure until the respondent can receive proper psychiatric care"), also available at <http://www.justice.gov/eoir/vll/benchbook/tools/MHI>.

¹³ Termination means that the case has ended and the respondent is no longer in removal proceedings. Upon termination, the individual will revert to the same status he or she was in prior to commencement of proceedings. To put an individual back into removal proceedings after a case has been terminated without prejudice, the government would have to file a new Notice to Appear.

precludes a fair hearing under any circumstances.¹⁴ This practice is consistent with the *Immigration Judge Benchbook*, which suggests that immigration judges consider “terminating cases where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards.” IMMIGRATION JUDGE BENCHBOOK at 120. To date, the BIA has not yet issued a published decision affirming or rejecting termination based on the inability to provide a fair hearing for a respondent with mental competency issues.¹⁵

What steps should an attorney take when the respondent appears to be mentally incompetent but there has been no such finding by the immigration judge?

1) *Gather as much evidence as possible to demonstrate that your client may not be competent. If you do not have enough time to collect this evidence before your next hearing, you should request a continuance.*

Relevant documentary evidence could include mental health reports or assessments; testimony from mental health professionals; prescriptions for psychotropic medication; school records regarding special education classes or individualized education programs; reports or letters from teachers, counselors, or social workers; evidence of participation in certain programs; evidence of services received by a state department for the developmentally disabled; applications for disability benefits; letters or testimony from friends, family members or defense counsel in prior criminal proceedings; criminal records or court-ordered treatment indicating that your client was found to be incompetent to stand trial or not guilty by reason of insanity; detention center medical records; and any detention incident reports indicating that your client picked up additional charges or was put into isolation because of mental illness. See 25 I&N Dec. at 479-81.¹⁶

Be sure to ask your client for a complete list of treating physicians, psychologists and other health professionals whom he or she has consulted over the years, as well as all hospitalizations, and records of any inpatient or outpatient commitment. Assuming your client agrees to let you request his or her medical records, these can be used to demonstrate incompetency.¹⁷ You may also want to inquire about other types of supportive services your client has received.

¹⁴ See, e.g., *Matter of L-T-* (Eloy Imm. Ct. Feb. 26, 2010) (unpublished), BIA appeal dismissed Nov. 8, 2010; *Matter of B-Z-* (Eloy Imm. Ct. Dec. 1, 2010) (unpublished), remanded by BIA June 1, 2011 for consideration of administrative closure as a potential safeguard in accordance with *M-A-M-*.

¹⁵ But see *Matter of Sinclitico*, 15 I&N Dec. 320, 323 (BIA 1975) (terminating deportation proceedings based on Board’s conclusion that respondent was incompetent to renounce U.S. citizenship when he had allegedly done so).

¹⁶ For additional recommendations about potential evidence of incompetency, see Tsankov, *Incompetent Respondents in Removal Proceedings*, *supra* note 6, at 18-19; Maria Baldini-Potermin, *Past Persecution, Mental Illness and Humanitarian Asylum: Creating the Record to Win the Claim*, 86 Interpreter Releases, No. 4, at 261, 265-66 (Jan. 26, 2009).

¹⁷ Federal law prohibits the release of medical records without a signed Health Insurance Portability and Accountability Act (HIPAA) release form. The form should be signed by the respondent if he or she is competent to do so or, alternatively, his or her legal guardian or another individual with a power of attorney that includes such authority. See 45 C.F.R. § 164.502(g).

Where possible, you should try to talk with family members, friends, coworkers, clergy, teachers, neighbors, landlords, facility staff and others about their observations of your client's behavior and any history of head trauma, cognitive impairment or treatment for any mental disorder. For example, a family member who indicates that her detained relative wrote an unintelligible letter or seemed disoriented during a routine phone conversation might be a strong witness, either in person or by declaration.

2) *Request production of records by DHS.*

M-A-M- obligates the Department of Homeland Security (DHS) to provide the court with any evidence in its possession bearing on the respondent's mental competency. *Id.* at 480. A written request to DHS, with a copy to the court, will serve to remind both of the agency's obligation. Given that *M-A-M-* requires DHS to produce only those documents bearing on a respondent's competency, you should also file a Track III Freedom of Information Act (FOIA) request with DHS to ensure that you get copies of all other documents in your client's A-file and medical file.

For clients detained in DHS facilities, you should send a separate FOIA request covering custodial and medical information, along with an ICE Privacy Waiver,¹⁸ to the ICE office responsible for your client's case, with a copy to the medical records office at the detention facility. A follow up call to the detention center can help to ensure that the request gets to the right person and that ICE produces your client's records in a timely manner.

You may be able to follow this procedure even if your client is detained in a facility that is managed by a DHS contractor. In many cases, DHS has custody over detention records that a contractor creates and maintains on its behalf.¹⁹ If not, you will have to submit your request for records directly to the contractor.

The *Immigration Judge Benchbook* indicates that an immigration judge may ask DHS to take other affirmative steps to gather evidence regarding a respondent's competency, including "contact[ing] those involved in prior criminal, civil, or administrative proceedings at which the respondent's mental health was at issue." IMMIGRATION JUDGE BENCHBOOK at 121. You should carefully consider whether to file a motion requesting these types of interventions, which may reveal information that could ultimately undermine your client's claims for relief.

3) *If necessary, move for a subpoena.*

Immigration judges have authority to subpoena records from DHS and other sources. See INA § 240(b)(1); 8 C.F.R. § 1003.35(b); 8 C.F.R. § 1287.4. Because subpoenas are rare in immigration court, you should file a Motion for Subpoena only after DHS, a DHS contractor, or some other entity has ignored, denied, or only partially complied with your request for records. If you file

¹⁸ The [ICE Privacy Waiver](#) is valid by default for 90 days, but your client or his or her legal guardian can specify a longer period of validity.

¹⁹ The most definitive way to determine whether DHS has custody over detention records in a facility managed by a DHS contractor is to review the terms of the applicable management contract, if available.

such a motion, you should attach written documentation of prior records requests, explain why the documents you seek are essential for a fair hearing, and reference DHS's burden of production under *M-A-M-*.

Records produced in response to a subpoena must be submitted to the immigration judge, who should then provide copies to the respondent's counsel. If questions arise regarding the completeness of records released by DHS or another entity, you can move to subpoena the custodian of records to testify about relevant recordkeeping practices and to produce relevant documents under his or her control. 8 C.F.R. § 1003.35(b)(1).

Bear in mind that DHS may not have copies of medical records created before a respondent entered DHS custody. Unless your client has copies of these records, you may need to submit HIPAA forms to each place where he or she received treatment.

4) *Arrange for a competency evaluation.*

A competency evaluation by a qualified expert can often constitute the best evidence of whether a given individual is competent to proceed at a removal hearing. *M-A-M-* mentions this possibility, see 25 I&N Dec. at 481 ("Another measure available to Immigration Judges is a mental competency evaluation"), but does not specify who should pay for the evaluation.

A mental health professional with the necessary credentials and experience can greatly enhance the credibility of any evaluation. Qualified experts include independent psychiatrists and psychologists, preferably with expertise in forensic practice. You should specifically request that the expert address the three prongs of the *M-A-M-* competency test, along with any issues needed to establish your client's eligibility for specific relief. The expert's current license and curriculum vitae should be submitted to the court with the evaluation.

If resources permit, you should obtain an independent competency evaluation. If your client is detained and you cannot find an expert with the requisite qualifications who is willing to travel to the detention facility, you can file a motion requesting that DHS transport the respondent to the expert's office.

Alternatively, you can file a motion compelling DHS to secure a competency evaluation by an independent evaluator, who should be provided with all available evidence of incompetency. Because DHS is a party to removal proceedings, any involvement by the agency in securing a competency evaluation creates a conflict of interest that undermines the integrity of the adjudicative process. Despite this conflict, anecdotally, many practitioners report that immigration judges have asked DHS to obtain mental health examinations of detained respondents and in at least one reported case, DHS arranged for a competency evaluation at the immigration judge's request. *Matter of J-F-F*, 23 I&N Dec. 912, 915 (AG 2006). If you have doubts about the adequacy of a competency evaluation conducted by a DHS contractor, you should retain an independent expert to review the evaluation.

An immigration judge also can order that the respondent be evaluated by the U.S. Public Health Service or any contract agency or individual charged with mental health services for detainees. IMMIGRATION JUDGE BENCHMARK at 123. This arrangement would similarly create a conflict of

interest if the Public Health Service employee was affiliated with ICE's Health Service Corps, which provides medical services at ICE field offices and detention centers.

Another possible option is to request that the immigration judge provide funds for and arrange a competency evaluation based on his or her obligation to ensure a fair hearing and the inherent conflict of interest created by any arrangement in which DHS either pays for or performs the evaluation of an individual whom it seeks to deport.

5) *Move for a competency hearing.*

Once you have gathered evidence of incompetency, you can move for a competency hearing. Before filing such a motion, you should confer with ICE's local Office of Chief Counsel to determine how they handle cases involving respondents with mental competency issues. Some offices may want to obtain their own competency evaluations, while others may be content to cross-examine the expert you select. By determining the norms in your jurisdiction as early as possible, you may be able to avoid unnecessary delays in your client's case.

If your motion for a competency hearing is granted and your client is physically able to testify, but is unable to comprehend your role or the nature and purpose of the proceedings, you should ask simple direct examination questions intended to demonstrate your client's lack of competence. For example:

- Who am I?
- Where are we?
- What is your understanding of why we are here?
- Are you willing to help me with your case?
- Who is opposing you in this case? Why?
- What is the immigration judge's role?
- What could happen to you if you do not win your case?
- Why are you in detention?

Memory may affect a respondent's ability to testify even if he or she is found competent. Thus, you should ask additional questions intended to establish your client's inability to remember key events:

- When was the last time you were in your home country?
- Have you ever been arrested? For what crimes?
- Were you convicted of any of these crimes?

- Are you married? What is your spouse's name?
- Do you have children/siblings? What are their names?
- Do you take any medications? Which ones?
- How long have you been in detention?

Depending on your client's circumstances, you may want to consider asking questions that reveal delusional thinking (which may require use of certain "trigger words"), deficits in intellectual ability, or impaired judgment.

You can also solicit testimony, whether oral or written, from the respondent's family members and/or close friends. Where relevant, you should consider providing a declaration regarding the respondent's inability to assist you with his or her case.

Can a mentally incompetent respondent consent to representation?

Where a respondent has severe competency issues, the process of obtaining his or her consent to representation may be difficult, if not impossible. Even if such a respondent signs a consent form, he or she may not fully understand the implications of doing so.

To make an initial determination regarding your client's ability to consent to representation, you can ask some basic questions. For example:

- Do you want to stay in the United States?
- Do you want me to help you do that?
- Can I help you in the courtroom?

For clients who are not fluent English speakers, you may need to rely on an interpreter who is well-versed in both your client's language and culture.²⁰ If you conclude that your client lacks competence to consent to representation, you should try to find out from family members or others if a legal guardian²¹ has ever been appointed to manage your client's affairs. If your client has a legal guardian, you must obtain the legal guardian's consent before undertaking representation of the client.

²⁰ Mental health interpreters receive specialized training to optimize communication in mental health settings (e.g. civil competency proceedings) for individuals who lack English proficiency. In addition to providing interpretation between English and the individual's native language, mental health interpreters are trained to be culturally competent in facilitating accurate communication. For more information regarding mental health interpreters, see The Center for Health and Health Care in Schools' [website](#).

²¹ A "legal guardian" has the authority and obligation to care for the person or property of another individual who is unable to do so, usually because of infancy, incapacity, or disability.

Unless applicable state ethical rules require explicit consent to representation, you may still be able to represent a client whose competency issues affect his or her ability to consent to representation. 8 C.F.R. § 1292.1(a)(1) and (a)(4) state, without reference to consent, that attorneys and accredited representatives are entitled to appear in immigration proceedings. By contrast, 8 C.F.R. § 1292.1(a)(3) limits the circumstances under which a “reputable individual” may appear in immigration court and specifies that it must be “at the request of the person entitled to representation.” Similarly, 8 C.F.R. § 1292.1(a)(5) permits the appearance of an accredited official “of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien’s consent.”

The foregoing distinction among different classes of individuals acting in a representative capacity is reasonable because attorneys and accredited representatives have the requisite expertise in immigration law to effectively accommodate and protect the interests of individuals with competency issues and are subject to disciplinary sanctions if they fail to do so. 8 C.F.R. § 1003.101(b), § 292.3(a)(2), § 1292.3(a)(2); BIA Rule 11.1 (“The Board has authority to impose disciplinary sanctions upon attorneys and accredited representatives who violate rules of professional conduct in practice before the Board, the Immigration Courts, and the Department of Homeland Security.”).

Notably, governing law in multiple circuits presumes that all detainees want the assistance of counsel, and requires those who wish to proceed without counsel to knowingly and voluntarily waive their right to do so. *See, e.g., Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (immigration judge’s failure to obtain a knowing and voluntary waiver constitutes “an effective denial of the right to counsel, which, ‘in the light of the administrative record,’ may be an abuse of discretion” rising to the level of a due process violation); *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979) (respondent’s waiver of right to counsel was not valid, knowing or voluntary where made without understanding of complexity of case or arguments in her favor; case remanded for new hearing since outcome might have been different with assistance of counsel); *Leslie v. Att’y Gen. of the United States*, 611 F.3d 171, 175, 182 (3d Cir. 2010) (finding putative waiver in absence of information about free and low-cost representation to constitute an effective denial of respondent’s right to counsel because not knowing or voluntary; case remanded for new hearing).

What if my client’s lack of competency prevents effective attorney-client communication?

In some cases, an attorney may, after initiating representation, determine that a client is unable to assist with his or her defense due to severe competency issues. As previously discussed, termination of removal proceedings may be appropriate if no conceivable safeguards would ensure a fair hearing.²² Alternatively, the attorney may request that the immigration judge appoint a guardian ad litem, who need not be an attorney. Under these circumstances, a guardian ad litem would help the attorney provide effective representation in removal proceedings by representing the respondent’s best interests.

Some disability rights advocates have expressed concern that the appointment of a guardian ad litem under these circumstances may compromise the respondent’s interests by encouraging an

²² See *supra* pages 5-6.

immigration judge to proceed with a case rather than terminating it. However, termination is a relatively infrequent outcome in immigration court. The appointment of a guardian ad litem is consistent with the Model Rules of Professional Conduct. These Rules explain that, when representing a client with diminished capacity who would otherwise be at risk of harm, an attorney “may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”²³

How can an attorney secure the appointment of a guardian ad litem for immigration court purposes?

Immigration judges arguably have the authority to grant motions for the appointment of a guardian ad litem pursuant to 8 C.F.R. § 1003.10(b), which authorizes them to take any action that is “appropriate and necessary” to resolve the cases before them.²⁴ While there are no reported cases on immigration judges appointing guardians ad litem for immigration court proceedings,²⁵ practitioners have had some success in persuading judges to exercise this authority. In some cases, rather than appointing a guardian ad litem, immigration judges have required counsel to have a state court order appointing a legal guardian before allowing that individual to represent a respondent’s interests in immigration court.

To protect the interests of respondents who lack competency to consent or object to the appearance of third parties on their behalf, immigration judges may (and indeed should) carefully examine the qualifications and motivations of individuals appearing as guardians ad litem.²⁶ Even in the absence of clear guidance as to the requisite qualifications of individuals acting as guardians ad litem, immigration judges likely have implicit authority to question their fitness under INA § 240(b)(3).

²³ MODEL RULES OF PROF’L CONDUCT [R. 1.14\(b\)](#).

²⁴ See IMMIGRATION JUDGE BENCHBOOK at 120 (“Immigration Judges should ... tak[e] any action consistent with their authorities under the Act and regulations.... [which] may include (1) granting multiple continuances, even sua sponte, to afford respondents time to (a) secure representation in the form of counsel or a guardian ad litem”), 121 (“Immigration Judges should assist in securing counsel and/or a guardian ad litem to the extent permissible.”).

²⁵ Cf. *Johns v. Dept. of Justice*, 624 F.2d 522, 523-24 (5th Cir. 1980) (ordering appointment of guardian ad litem for five-year-old child allegedly kidnapped by U.S. couple from Mexico shortly after birth and illegally brought into United States; both child and U.S. couple were represented by the same counsel, who could not be presumed to represent the child’s interests).

²⁶ See *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (explaining, in the habeas context, that “‘next friend’ standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another” as certain prerequisites must be met); *Vargas v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (finding mother successfully met prerequisites of “next friend” to a son when she presented evidence of his mental incapacity and demonstrated that she represented his “best interests”).

What if the immigration judge refuses to appoint a guardian ad litem?

If your efforts to secure the appointment of a guardian ad litem are unsuccessful, you may want to consider seeking a state court order appointing a legal guardian with broader authority to protect the respondent's interests. In addition to potentially jeopardizing a respondent's autonomy, this process can be complex and may not always be viable or efficient in the immigration context. Some states impose residency, citizenship or immigration documentation restrictions for the appointment of legal guardians by state courts. Even if a respondent is able to secure a legal guardian in state court, the guardianship order may not be effective if the respondent is transferred out of the state court's jurisdiction. Moreover, the state court appointment of a legal guardian requires the filing of a separate lawsuit and thus will further delay immigration court proceedings. For detained respondents, arrangements will also have to be made to transport the respondent to state court, which presents further logistical challenges.

Attorneys and guardians play distinct and potentially conflicting roles. An attorney helps a litigant to make more informed choices and acts only at the direction of the client. Where clients are unable to make decisions or communicate their preferences or goals, attorneys are ethically prohibited from substituting their own judgment.²⁷ By contrast, a guardian exercises decision-making authority in the place of a litigant who does not have the ability to make decisions alone. Given the different skills and obligations of guardians and attorneys, many federal courts have found that non-attorney legal guardians and guardians ad litem are not qualified to provide legal representation in non-immigration cases.²⁸

²⁷ See MODEL RULES OF PROF'L CONDUCT [R. 1.14\(a\)](#) (providing that a lawyer representing a client with diminished capacity "shall, as far as reasonably possible, maintain a normal client-lawyer relationship"); [R. 1.4\(a\)\(2\)](#) (requiring reasonable consultation with the client about the means by which his objectives are to be accomplished).

²⁸ See, e.g., *Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997) (holding that a minor could not be "represented" by a non-attorney acting as a guardian in a federal civil proceeding, and stating that "[i]t goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.") (internal citations omitted); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987) (noting that a non-attorney cannot appear as an attorney for other people); *Osei-Afriyie v. Medical College*, 937 F.2d 876, 882 (3d Cir. 1991) (noting that a father could not play the role of an attorney for his children); *Cheung v. Youth Orchestra Found. of Buffalo*, 906 F.2d 59, 61 (2d Cir. 1990) (noting that a parent must be represented when bringing an action on behalf of a child); see also *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972) (rejecting, in involuntary commitment context, the "state's contention that appointment of a guardian ad litem may displace a requirement of appointed counsel" and finding it "apparent...that appointment of a guardian ad litem cannot satisfy the constitutional requirement of representative counsel"), vacated and remanded on other grounds by *Schmidt v. Lessard*, 414 U.S. 473 (1974); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Haw. 1976) (noting that "[a]ppointment of a guardian ad litem is not a substitute for appointment of counsel"), rev'd in part on other grounds by *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980).

What steps can an attorney take to facilitate the release of a detained client?

Detained noncitizens may be held in facilities operated by DHS, state or local governments, or private companies.²⁹ Securing your client's release from detention is an important step towards helping him or her achieve the best possible state of mental health. Surveys of detained immigrants as well as general prison populations have consistently concluded that the mere fact of incarceration, even under favorable conditions, is detrimental to physical and mental well-being.³⁰

ICE's Office of Enforcement and Removal Operations (ERO) has authority over decisions regarding release from detention. Even if your client is subject to mandatory detention, you may want to approach ERO to explore options that may lead to release. For example, in appropriate cases where strong equities favor an individual's release, an ERO officer might agree to withdraw or cancel a Notice to Appear, thereby eliminating the legal basis for mandatory detention.

ERO is likely to be most receptive to requests for the release of individuals with mental disorders in cases where alternative housing, care and any needed treatment are available. Before approaching ERO, you should make every effort to secure such services for your client.³¹ Although certain nonprofit programs may be willing to assist anyone in need regardless of immigration status,³² most treatment programs — particularly residential treatment centers — are available only to persons who have health insurance or who are eligible for Medicaid or

²⁹ DHS is prohibited from removing a noncitizen from a mental health in-patient institution and assuming custody until a final order of removal has been issued and deportation is imminent. 8 C.F.R. § 1236.2(b).

³⁰ See, e.g., PHYSICIANS FOR HUMAN RIGHTS AND THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, [FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS](#) 5, 17 (2003); Jason Schnittker and Andrea John, [Enduring Stigma: The Long-Term Effects of Incarceration on Health](#), 48 J. OF HEALTH AND SOC. BEHAV. 115 (2007); Jason Schnittker, Michael Massoglia, and Christopher Uggen, [Out and Down: The Effects of Incarceration on Psychiatric Disorders and Disability](#), Table 1 (February 2011) (demonstrating heightened prevalence of mental disorders among people who have experienced incarceration) (unpublished article).

³¹ Your local Protection and Advocacy agency can help you determine your client's eligibility for government benefits and other programs. The Protection and Advocacy (P&A) System is a network of independent agencies in every state that provide, by federal mandate, legal representation and other advocacy services to protect the rights of persons with disabilities. Depending on their capacity, P&As may be able to provide additional assistance with your client's case. P&As are not required to inquire into the immigration status of those they serve, except as necessary to determine eligibility for particular services. For more information regarding the services provided by P&As, see [The Protection & Advocacy \(P&A\) System: An Overview for Immigration Attorneys](#).

³² In addition, some detention facilities have community reentry workers who assist incarcerated persons with mental illness in accessing supportive services in the community.

Medicare.³³ In cases where a client was participating in a treatment program prior to being detained by DHS, you may want to consider asking the program to reenroll the individual.

What steps can an attorney take to effect the transfer of a detained client to a facility closer to family or other support networks in a different state?

In cases where release is not possible, your client's psychological needs may warrant transfer to a different detention facility that provides better access to supportive services. Requests for transfer should be submitted directly to the ERO office with jurisdiction over the current detention facility. Local ERO officers have the authority to transfer detainees with advanced care needs to in-patient facilities in appropriate cases, and mental health service providers in detention centers are charged with making transfer recommendations when warranted.³⁴ Your request should clearly delineate the factors that necessitate your client's transfer, which may include the proximity of family members who could serve as witnesses at the hearing, the availability of a qualified mental health professional willing to perform a competency evaluation, the availability of treatment programs, or access to counsel.³⁵

Because ICE is responsible for transporting respondents back and forth from their hearings, the agency has an interest in minimizing costs by selecting a location in close proximity to the immigration court handling the case. Thus, attorneys may be able to increase the likelihood of transfer to a facility in a different state by moving for a change of venue to that state. Such a motion should be granted for "good cause" based on a balancing of relevant factors, including administrative convenience, expeditious treatment of the case, location of witnesses, and the cost of transporting witnesses or evidence to a new location. *See Matter of Rahman*, 20 I&N Dec. 480, 482-84 (BIA 1992); 8 C.F.R. § 1003.20. *M-A-M-* specifically notes that a motion to change venue may be granted to enable a respondent to be closer to family or available treatment programs. 25 I&N Dec. at 481. However, even if a change of venue is granted, ICE is not obligated to transfer your client to a detention facility in a different state. *See Matter of Rahman*, 20 I&N Dec. at 483-84.

³³ A noncitizen must be a "qualified alien" to be eligible for federal public benefits. 8 U.S.C. § 1611(a); *see also* 8 U.S.C. § 1641 (listing categories of "qualified aliens"). Certain "qualified alien" groups must accrue at least five years in a qualifying status before becoming eligible for Medicaid. 8 U.S.C. § 1613. For a general overview of immigrants' eligibility for public benefits, *see* NATIONAL IMMIGRATION LAW CENTER, GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS (4th ed. 2002), [Table 1: Overview of Immigrant Eligibility for Federal Programs](#), updated October 2011. Each state has its own guidelines for eligibility for public health benefits. 8 U.S.C. § 1612(b).

³⁴ *See* ICE, [2008 Operations Manual: ICE Performance Based National Detention Standards, Medical Care: Section \(V\)\(K\)\(3-4\); Transfer of Detainees: Section \(V\)\(A\)](#). Attorneys and their clients should carefully consider whether to request transfer to an in-patient facility, bearing in mind that such institutions vary widely in reputation and practice, and that any detainee transferred outside the mainstream detention system may be subject to restrictive conditions.

³⁵ For additional guidance regarding procedures for addressing special needs of immigration detainees, *see* Memorandum from John P. Torres, ICE Director regarding [Discretion in Cases of Extreme or Severe Medical Concern](#) (Dec. 11, 2006).

The *Immigration Court Practice Manual* sets forth the procedural requirements for filing a motion to change venue. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL ch. 5.10(c); *see also* 8 C.F.R. § 1003.20. Most significantly, a respondent is required to admit or deny the factual allegations and charges in the Notice to Appear before venue will be changed. However, as previously noted, the regulations prohibit an immigration judge from accepting an admission of removability from “an unrepresented respondent who is incompetent.” 8 C.F.R. § 1240.10(c). To the extent that competency issues prevent an attorney or other representative from effectively communicating with a client, the motion should be filed noting an exception to the pleading requirement.

How can a determination that a respondent lacks competency affect applications for relief?

Competency issues may affect both the likelihood and availability of relief.³⁶ Many immigration judges are hesitant to grant discretionary relief such as asylum or cancellation of removal to respondents with mental competency issues unless they are presented with some evidence that the respondent can manage, or be managed, in the community. For example, some immigration judges may require a treatment plan or assurances that the respondent will not pose a danger to self or others if relief is granted.

In the context of asylum or withholding of removal, the few reported decisions where respondents asserted mental illness as a basis for membership in a particular social group are not encouraging. *See, e.g., Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003) (43-year-old Jamaican citizen with a history of depression and attempted suicide failed to show that mentally ill Jamaicans, or mentally ill female Jamaicans, qualify as a particular social group for asylum purposes because they are not a “collection of people closely affiliated with each other, who are actuated by some common impulse or interest”). However, some unpublished decisions have reached the opposite conclusion. *See, e.g., Matter of X-* (BIA 2007) (unpublished) (characterizing respondent’s bipolar disorder as “a chronic psychiatric condition subject to treatment but not cure” and concluding that this condition “was an immutable characteristic” that could define a particular social group).³⁷

In cases where mental illness is the basis for seeking withholding or deferral of removal under the Convention Against Torture (CAT), the attorney should bear in mind the respondent’s heavy evidentiary burden. In *Matter of J-F-F-*, 23 I&N Dec. 912 (AG 2006), which preceded *M-A-M-*, the Attorney General overturned a prior grant of deferral of removal under CAT to a mentally ill Jamaican respondent. The decision held that the respondent’s eligibility for relief could not be established by stringing together a series of suppositions to show that it is more likely than not that torture would result. Rather, the evidence must establish that each step in the hypothetical chain of events is more likely than not to happen. The respondent in *J-F-F-* failed to establish

³⁶ A comprehensive discussion of particular forms of immigration relief is beyond the scope of this practice advisory. For more information, *see* CAPITAL AREA IMMIGRANTS’ RIGHTS COALITION, COOLEY GODWARD KRONISH LLP, [PRACTICE MANUAL FOR PRO BONO ATTORNEYS REPRESENTING DETAINED CLIENTS WITH MENTAL DISABILITIES IN IMMIGRATION COURT](#) 44 (May 2009) ([hereinafter, “CAIR PRACTICE MANUAL”]).

³⁷ Reprinted in [CAIR PRACTICE MANUAL](#), *supra* note 36, [Appendix 32](#).

that his behavior would consistently change when he was not taking his medication, that he could not obtain his medication in Jamaica, and that he would consequently end up in police custody and suffer torture by government actors. *Id.* at 919.

In seeking to establish the likelihood of future persecution in a client's country of origin, be sure to inquire about past persecution based on a mental disorder, possibly including forced hospitalizations or involuntary treatment. This will create the presumption of a well-founded fear of future persecution and shift the burden of proof to DHS. You should also submit documentation regarding treatment of people with mental disorders in your client's country of origin.³⁸ Local treatment providers may be willing to provide affidavits about available treatment options, access to medication, and your client's likely prognosis if forced to return, among other relevant factors.

Evidence of incompetency can also be used to explain a respondent's inability to provide credible and consistent testimony, which might otherwise be the basis for a denial of asylum, withholding of removal or relief under the CAT. *See Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997).

Even if a respondent is not competent to assist with her defense, an attorney can often use documents in the record to prove eligibility for certain types of relief. For example, with respect to cancellation of removal for a lawful permanent resident, the Notice to Appear may include the date of the grant of LPR status and whether the individual has been convicted of an aggravated felony. Government records may also show whether the respondent has been outside the country or can be presumed to have resided continuously in the United States for seven years since the grant of lawful permanent residency.

For noncitizens who are not lawful permanent residents, the evidentiary burden for cancellation is significantly higher. Even if the statutory requirements of ten years of physical presence, good moral character and the absence of certain types of criminal convictions can be easily established, the respondent must still prove that his removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, parent or child. INA § 240(b)(1)(D). Relevant factors might include the availability of appropriate care, medication or support services in the respondent's home country, the likelihood that qualifying relatives would be obligated to provide significant financial support or relocate, and the extreme anxiety that would result from separation.

Bear in mind that certain mental disorders could render your client inadmissible — and thus ineligible for adjustment of status — under INA § 212(a)(1)(A)(iii) (regarding noncitizens with a physical or mental disorder and associated harmful behavior). However, a waiver may be available under INA § 212 (g)(3) for all but the most serious conditions.³⁹

³⁸ Disability Rights International has published such documentation regarding twenty-two countries in Eastern Europe, the Middle East, and the Americas. You can find their reports at www.disabilityrightsintl.org.

³⁹ Regulations governing such waivers are set forth at 8 C.F.R. § 212.7(b).

What steps should be taken if the immigration judge denies relief?

If the immigration judge overlooked or accorded insufficient weight to “indicia of incompetency” and denied relief, you should appeal the decision to the BIA. In addition to challenging the denial of relief, you should request that the Board remand the case to enable the immigration judge to apply the framework articulated in *M-A-M-*.⁴⁰ You should argue that the immigration judge’s failure to assess competency and/or provide appropriate procedural safeguards violated the INA and prevented a fair hearing. The Legal Action Center is aware of several cases where the Board has granted remand under these circumstances.

In cases where a respondent was not competent to proceed *pro se* and lacked representation before the immigration court, the immigration judge’s failure to appoint counsel arguably violated due process.⁴¹ As *M-A-M-* notes, the INA requires that respondents in removal proceedings have a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses. *M-A-M-* at 479; INA § 240(b)(4)(B); see also 8 C.F.R. § 1240.10(a)(4). To carry out these tasks, an unrepresented respondent must be competent to understand and participate in the proceedings. Indeed, the *Immigration Judge Benchbook* notes that the Federal Rules of Civil Procedure “require that litigants deemed to have mental health issues have counsel and/or a guardian ad litem,” and that while the federal rules are not binding in immigration matters before EOIR, they should serve as a “guide for issues arising in deportation proceedings.” IMMIGRATION JUDGE BENCHBOOK at 117. At a minimum, individuals with serious competency issues need legal representation to facilitate a meaningful opportunity to be heard.⁴² However, representation alone may not be sufficient to ensure a fair hearing.⁴³

⁴⁰ Because the Board cannot engage in factfinding, “[a] party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceedings to the immigration judge.” 8 C.F.R. § 1003.1(d)(3)(iv).

⁴¹ See *U.S. ex rel. Shaw v. Van De Mark*, 3 F. Supp. 101, 103 (W.D.N.Y. 1933) (concluding that petitioner failed to receive a fair and impartial hearing that comported with “fundamental principles of justice” because petitioner was committed to a psychiatric hospital at the time of hearing, unrepresented by counsel or any other individual, and did not comprehend that she had a right to be represented by counsel); cf. *Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034, 1058 (C.D. Cal. 2010) (holding under section 504 of the Rehabilitation Act that detained respondents with serious mental disabilities were entitled to “Qualified Representatives” as a necessary accommodation in immigration proceedings). Cf. *In re Gault*, 387 U.S. 1 (1967) (finding that due process required appointment of counsel for indigent juvenile in civil delinquency proceedings).

⁴² Although the Board and numerous courts of appeals have allowed removal proceedings to go forward against incompetent respondents, the vast majority of these cases have involved individuals who were represented by counsel and benefited from certain other procedural protections. See, e.g., *Soobrian v. Attorney General of the United States*, 388 Fed. App’x. 182, 2010 U.S. App. LEXIS 15406 (3d Cir. 2010) (finding that petitioner’s due process rights were not violated because he was present at the hearing, represented by competent counsel, and his mother and an expert witness presented oral testimony on his behalf); *Nee Hao Wong v. INS*, 550

When confronted with due process arguments based on lack of representation, the government may argue that a respondent verbally waived the right to counsel. In cases involving respondents with serious competency issues, a waiver may be subject to challenge on the basis that it was neither knowing nor voluntary.⁴⁴ Indeed, the government itself has suggested that mental incompetence may undermine the validity of a waiver of counsel. *See, e.g., Ram v. Mukasey*, 529 F.3d 1238, 1242 (9th Cir. 2008) (quoting contention in government brief that respondent provided valid waiver because no evidence existed to suggest he was “unsophisticated, *incompetent*, or in any way confused”) (emphasis added).

If an incompetent respondent was “represented” in immigration court by someone other than an attorney or accredited representative, due process and regulatory arguments may still be possible on appeal. Such arguments are not negated by 8 C.F.R. § 1240.4, which seems to blur the line between a representative with expertise in immigration law and a guardian, relative or friend who appears on behalf of a respondent:

\$1240.4 Incompetent respondents. When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If

F.2d 521, 522-23 (9th Cir. 1977) (upholding petitioner’s order of deportation upon finding that the presence of numerous procedural protections, including representation by counsel and a state-appointed conservator who testified “fully” on petitioner’s behalf, rendered the hearing consistent with due process); *Matter of H-*, 6 I&N Dec. 358, 359-60 (BIA 1954) (finding that hearing comported with due process because the respondent was represented by counsel, a medical doctor appeared at the hearing “to protect the alien’s interests,” and the respondent answered questions “intelligently and rationally”). *Cf. Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (noting that “the statute and the regulation facially appear to require no procedural safeguards if an unrepresented, mentally incompetent alien is nevertheless able to be present at his removal proceeding”).

⁴³ Prior to *M-A-M-*, some courts considered the mere fact of legal representation to be a sufficient procedural safeguard to ensure a fair hearing. *See, e.g., Munoz-Monsalve v. Mukasey*, 551 F.3d 1 (1st Cir. 2008) (rejecting claim for competency determination by represented detainee where attorney did not raise competency issues before immigration judge and record did not reveal indicia of mental health problems); *Long-Gang Lin v. Holder*, 630 F.3d 536 (7th Cir. 2010) (denying petition for review on grounds that petitioner was represented by an attorney who failed to raise competency issues).

⁴⁴ *See, e.g., Matter of Gutierrez*, 16 I&N Dec. 226, 228 (BIA 1977) (requiring waivers of counsel to be “competently and understandingly made” and instructing immigration judges to consider a respondent’s “intelligence” and “ability to comprehend” in determining the validity of a waiver); *De Souza v. Barber*, 263 F.2d 470, 477 (9th Cir. 1959) (listing “intelligence, education, information, understanding and ability to comprehend” as factors to consider in determining whether a respondent knowingly waived counsel); *United States ex. rel. Shaw v. Van De Mark*, 3 F.Supp. 101, 102-03 (W.D.N.Y. 1933) (holding removal hearing not fair where unrepresented individual with serious mental disabilities verbally waived her right to counsel, because she “did not even have the mental capacity to understand that she was entitled to be represented at the hearing by counsel”).

such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

This regulation is ambiguous with respect to the role of a “near relative, or friend” who “appear[s] on behalf” of the respondent in this context. In particular, it is unclear whether the regulation contemplates that such individuals would be acting as attorneys, or instead providing some other form of assistance more akin to the tasks performed by a guardian.⁴⁵

While non-legal assistance may be helpful or even indispensable to respondents who lack competency, it cannot serve as a substitute for legal representation. The ABA Model Rules of Professional Conduct specifically distinguish the function of an attorney, who is tasked with representing a client in a legal capacity, from that of “family members or other persons,” who may exercise decision-making authority on behalf of a client with a mental disorder under particular circumstances.⁴⁶ Some sections of the immigration regulations make similar distinctions. *See, e.g.*, 8 C.F.R. § 103.2(a)(2) (permitting a legal guardian to sign an application or petition for a mentally incompetent person); 8 C.F.R. § 103.2(a)(3) (specifying that an applicant or petitioner may be represented by an attorney or BIA accredited representative).

The Departments of Justice and Homeland Security have promulgated comprehensive regulations governing the practice of immigration attorneys, *see* 8 C.F.R. § 292.3, § 1003.101-108, § 1292.3, the primary purpose of which is to protect noncitizens from practitioners unable to meet those standards. Professional Conduct for Practitioners — Rules and Procedures, 65 Fed. Reg. 39513, 39514 (June 27, 2000). Because guardians and other representatives acting in a non-legal capacity are not subject to this framework, it would be incongruous with these regulations to permit them to provide legal representation in immigration court. Under certain state bar rules, this type of representation might even constitute the unauthorized practice of law.

Prior “representation” at a removal hearing by a DHS custodian, which also appears to be permitted by 8 C.F.R. § 1240.4,⁴⁷ may also constitute grounds for appeal. In any immigration detention facility, the custodian is either employed by DHS or acting under contractual authority to detain on behalf of DHS, the very agency seeking the respondent’s removal. Under these circumstances, the appearance of a custodian as a representative for the respondent would create an irreconcilable conflict of interest, preclude the respondent from trusting the individual

⁴⁵ 8 C.F.R. § 1292.1(a)(3) and (5) raise similar questions regarding the proper roles of reputable individuals of good moral character and accredited officials in representing respondents. As discussed on pages 10-11, *supra*, such individuals are unlikely to have the requisite expertise to effectively represent respondents in removal proceedings and cannot be held accountable for unethical or unprofessional conduct. Moreover, representation by such individuals requires explicit consent, which may be difficult to obtain from a respondent with serious competency issues.

⁴⁶ Model Rules of Prof’l Conduct [R. 1.14 cmt.](#)

⁴⁷ Notably, 8 C.F.R. § 1240.43, which applies to proceedings commenced prior to April 1997, permits only a guardian, near relative or friend to appear on behalf of a mentally incompetent respondent.

appearing on his behalf, and thereby undermine the integrity of the judicial process.⁴⁸ Moreover, most custodial officers are not licensed to practice law and are not trained to identify and diagnose competency problems. Presumably for these reasons, the *Immigration Judge Benchbook* suggests that termination of proceedings on due process grounds may be appropriate where no one other than a DHS custodian is available to protect the interests of a severely incompetent detained respondent. See IMMIGRATION JUDGE BENCHBOOK at 121.

Could a client who lacks competency be eligible for a favorable exercise of prosecutorial discretion?

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion.

A memo issued by former ICE Director John P. Torres on December 11, 2006, entitled [*Discretion in Cases of Extreme or Severe Medical Concern*](#), emphasizes the importance of exercising prosecutorial discretion in cases involving noncitizens with severe medical conditions. Unless a noncitizen is subject to mandatory detention, the memo calls for case-by-case custody determinations “whenever a medical or psychiatric evaluation, diagnosis, treatment plan, or other documentation provided by the referring agency indicates the existence of extreme disease or an impairment that makes detention problematic and/or removal highly unlikely.” Among the examples of medical conditions that may warrant a favorable exercise of prosecutorial discretion, the memo lists “extreme mental retardation, mental illness, and mental incompetence.”

On June 17, 2011, ICE Director John Morton issued two new memoranda encouraging the expanded use of prosecutorial discretion in all phases of civil immigration enforcement.⁴⁹ This guidance specifies certain classes of individuals warranting “particular care,” which include those who are “seriously ill or disabled.” The guidance also includes an extensive list of other relevant factors to be considered, including “whether the person or the person’s spouse suffers from severe mental or physical illness.”⁵⁰ No one factor is decisive, and decisions on

⁴⁸ Cf. *In re Gault*, 387 U.S. at 35-36 (1967) (holding that a juvenile’s probation officer, who was also superintendent of the detention facility where the child was being held, could not serve as counsel for the child).

⁴⁹ Memorandum from John Morton, ICE Director, [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#) (June 17, 2011); Memorandum from John Morton, ICE Director, [Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs](#) (June 17, 2011).

⁵⁰ Similarly, a prior memorandum from ICE Director Morton regarding the agency’s enforcement priorities stated:

Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled

prosecutorial discretion are to be based on the totality of the circumstances, with the goal of advancing ICE's enforcement priorities, namely, national security, public safety, border security and the integrity of our immigration system.⁵¹

On August 18, 2011, the Obama Administration and DHS announced the establishment of a high-level joint DHS-DOJ working group charged with ensuring that government resources are focused on the immigration enforcement priorities identified in the Morton memoranda.⁵² Both *M-A-M-* and the Obama Administration's recent pronouncements on prosecutorial discretion support a reasonable resolution of cases involving respondents with mental competency issues.

On November 17, 2011 ICE's Principal Legal Advisor [directed](#) all ICE attorneys to begin a systematic review of immigration cases to determine whether pursuing removal would advance the Obama Administration's enforcement priorities. ICE also provided its attorneys with more [detailed guidance](#) about criteria for determining when it is appropriate to exercise prosecutorial discretion to close or dismiss a case. The guidance clearly states that a case involving an individual "who suffers from a serious mental or physical condition that would require significant medical or detention resources" is generally not an enforcement priority for DHS.

Conclusion

While representation of respondents with competency issues may pose significant challenges, the Board's decision in *M-A-M-* gives immigration attorneys a unique opportunity to engage in creative advocacy on behalf of their clients. By working to ensure that existing statutory and regulatory protections are meaningfully applied in the immigration context and ultimately expanded, the immigration bar will break new legal ground and positively impact the lives of vulnerable noncitizens and their loved ones.

Memorandum from John Morton, ICE Director, [Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#) (June 30, 2010).

⁵¹ For more information on how to seek a favorable exercise of prosecutorial discretion on behalf of your client, see the Legal Action Center's Practice Advisory, [Prosecutorial Discretion: How to Advocate for Your Client](#) (June 24, 2011).

⁵² For more information on the mandate of the DHS-DOJ working group, see the Legal Action Center's Practice Advisory, [DHS Review of Low-Priority Cases for Prosecutorial Discretion](#) (September 1, 2011).

PRACTICE ADVISORY¹

August 18, 2011

**MANDAMUS LITIGATION AGAINST DOL TO ADDRESS DELAYS IN
PREVAILING WAGE DETERMINATIONS AND LABOR CERTIFICATIONS**

by Kristen Harris, Megan Kludt and Mary Kenney²

This practice advisory addresses how to file a mandamus action in federal district court when the Department of Labor (DOL) has unreasonably delayed issuing a Prevailing Wage Determination (PWD) or adjudicating a labor certification application filed pursuant to the PERM (Program Electronic Review Management) regulations.

In recent years, practitioners have become adept at filing mandamus actions to compel the United States Citizenship and Immigration Services (USCIS) to make decisions on applications pending beyond reasonable processing times. Many of these actions met with success and courts have granted mandamus actions over long-delayed adjustment and naturalization applications.³ Through the hard work of local practitioners, there now is a body of case law addressing USCIS's duty to adjudicate applications filed pursuant to the INA. Moreover, the large number of mandamus suits filed to address delays in

¹ Copyright (c) 2010 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

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³ Note, however, that there is a split in authority within the district courts as to when and if mandamus relief can be granted in these cases, and only one court of appeals has ruled on this issue, finding that it had no jurisdiction under either the mandamus statute or the Administrative Procedures Act. *Bian v. Clinton*, 605 F.3d 249 (5th Cir. 2010). For a survey of decisions both granting and denying mandamus relief for delayed immigration applications and petitions, see the [LAC's Mandamus Issue page](#).

processing adjustment of status applications appears to have been the impetus behind the significant steps that USCIS took to remedy these adjustment delays.⁴

Despite this record of success with USCIS, there is little record of mandamus filings against the DOL in the context of either prevailing wage determinations (DOL Form ETA 9141) or labor certifications for permanent resident applications (DOL Form ETA 9089). Mandamus can be as effective a tool to remedy delays by DOL as it has been for delays by USCIS. This practice advisory outlines basic information about mandamus actions and suggests strategies and practice tips for bringing a mandamus action against DOL.

What is a mandamus action?

The federal mandamus statute, 28 U.S.C. § 1361, allows a court to compel a federal agency or officer to perform a nondiscretionary duty that it owes to a plaintiff. A mandamus plaintiff must demonstrate that: (1) he or she has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available.⁵ Under the mandamus statute, the court may compel the government to take action, but the court cannot compel the agency to exercise its discretion in a particular manner, nor can it grant the relief the plaintiff seeks from the agency. For a full discussion of these requirements and how courts have interpreted them, see the Legal Action Center's Practice Advisories:

- [Mandamus Actions: Avoiding Dismissal and Proving the Case](#) (August 6, 2009); and
- [Mandamus Jurisdiction Over Delayed Applications: Responding to the Government's Motion to Dismiss](#) (August 30, 2009).

In the DOL context, a mandamus action would assert that: 1) the employer or employee, or both, have a right to a decision on their prevailing wage request or their labor certification application within a reasonable period of time; 2) the DOL has a duty to issue a PWD or to adjudicate the labor certification application and this duty to the parties (employers and employees) is ministerial and clearly prescribed; and 3) as with DHS/USCIS applications, there is no other adequate remedy available when the DOL delays in issuing a PWD or adjudicating a labor certification application.

What is the need for mandamus actions against DOL?

- Prevailing Wage Determinations

Recent past experience has been that PWDs generally were issued within three to four weeks. Currently, however, DOL has advised that it has *suspended* the processing of PWDs, PWD redeterminations, and Center Director Reviews in order for it to comply

⁴ See the LAC's [Litigation Issue Page on mandamus](#).

⁵ *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002).

with a district court order regarding implementation of a new regulation on prevailing wage determinations for H-2B workers.⁶ As a result, prevailing wage requests filed in June, 2011 and through this writing⁷ remain pending. While DOL has indicated that it will complete its reissuance of PWDs for H-2B workers by October 1, 2011, there will be a considerable backlog of prevailing wage requests from other categories by that time. Thus, the full impact of this temporary delay is not yet known.

A delay in the issuance of a prevailing wage slows the entire process down, as in most cases the PWD must be entered into the ETA 9089 before it is filed. Thus, the current suspension of the issuance of PWDs will result in a hold on most ETA 9089s where the employer has not yet received a determination. Also, where an employer has already begun recruitment, a delay by DOL in issuing the PWD can invalidate the recruitment and the employer will have to begin recruitment all over, a process that often is quite expensive.

These delays could also result in serious and irreversible consequences for the foreign national, namely when a foreign national stands to lose eligibility for a 7th year H extension,⁸ or when a foreign national has derivative children that are approaching the age of 21.⁹ These two situations present particularly compelling cases for a mandamus action against the DOL. Practitioners who have cases with these fact patterns should contact the AILA Liaison Department for liaison purposes at reports@aila.org.

- PERM labor certification applications

The DOL has been inconsistent in its ability to timely adjudicate labor certification applications. The inception of the PERM program in 2005 marked the end of the original labor certification system, in which processing delays of several years were not uncommon. Those delays rendered employment based immigration impossible for many foreign nationals. The PERM program sped up adjudication times radically, resulting in labor certification application adjudication within 2 to 3 months of filing and oftentimes within a few days, or sometimes as little as a week.

⁶ For more on this suspension, see [“What’s Going on with DOL Prevailing Wage Determinations?”](#) AILA InfoNet Doc. No. 11072571 (posted Aug. 11, 2011).

⁷ This updated Practice Advisory was released on August 18, 2011.

⁸ For a more complete explanation of the importance of the timing of the PWD, including its potential impact on 7 year H-1B extensions, see Cora-Ann V. Pestaina, [“Prevailing Wage Determinations Suspended Until Further Notice: How Do I File A PERM Labor Certification?”](#) (August, 12, 2011).

⁹ Note that where time is of the essence and the mandamus action will not be decided by the district court in time to prevent an irreparable injury (such as a child aging out), at least one court was willing to grant an emergency motion for a temporary restraining order, filed as part of a pending mandamus action. See [AILA InfoNet Doc. No. 09071661 \(posted July 16, 2009\)](#).

Following the centralization of the PERM program, however, PERM processing slowed significantly. In 2009, adjudication times sometimes averaged up to 10 months for unaudited cases and over two years for audited cases. Accordingly, a few AILA practitioners turned to the federal courts for assistance, on the basis that the DOL has a plainly prescribed duty to adjudicate labor certification applications on behalf of US employers and foreign nationals.

Although delays are not significant at the time of this writing, DOL processing times are notoriously fickle and there may be a return to delayed processing in the future. Recent events with suspension of PWDs illustrate that DOL delays can occur at any time, with little to no warning, and the DOL has historically been unresponsive to the dire situation that employers and foreign nationals face in these circumstances. Given the DOL's track record of delay and the recent freeze on prevailing wages, practitioners must remain vigilant and prepared to use mandamus as a remedy when processing times become unreasonable.

What are the steps to a successful mandamus action against the DOL?

Generally, a mandamus suit over the delayed issuance of a PWD or adjudication of a labor certification application will be similar to any other mandamus suit. For comprehensive guidance, see the LAC's practice advisory "[Mandamus Actions: Avoiding Dismissal and Proving the Case](#) (August 6, 2009)." Here are some additional tips:

1. Build your facts and administrative record prior to filing a mandamus action.

As far in advance of filing in federal court as possible, request in writing that DOL adjudicate or expedite your client's case. E-mail is a particularly helpful means to correspond, as it shows the date and time at which you relayed your client's request(s) for action. If DOL denies the request, it is likely to do so in writing by return e-mail. Responses such as these can be used to show that your client has attempted to use non-judicial means to have the labor certification application adjudicated in a reasonable period of time and, where applicable, in an expeditious manner.

2. Assess whether your case is appropriate for judicial review.

Under the mandamus statute, the court may order the agency to make a decision on your ETA 9141 or ETA 9089, but it cannot rule on whether that decision will be favorable to your client. Remember that filing a mandamus action can easily result in a swift denial of your client's ETA 9089 or an unfavorable PWD. Since the only relief you are seeking in a mandamus action is that the agency issue the PWD or decide the application, either of these actions would moot the mandamus action. Moreover, in the case of ETA 9089s, employers have an administrative remedy for labor certification denials in the way of the appeal process with the Board of Alien Labor Certification Appeals (BALCA), and the employer would be required to exhaust that administrative remedy before pursuing

further litigation.¹⁰ A negative decision in a mandamus case also has the potential to create bad law in your district. Thus, this is a remedy that should be reserved for seriously delayed cases, particularly those that are sympathetic and clearly approvable.

In the case of the recent suspension of PWD issuance, practitioners are advised to select only their most compelling cases. The DOL is currently laboring under a court order and may provide a reasonable defense that it simply does not have the resources to comply with that order and issue PWDs at its usual pace. The goal of mandamus in the current crisis should be the issuance of PWDs in the most urgent cases.

3. Prepare your argument, emphasizing your client's legal right to have the prevailing wage determination made or the labor certification application adjudicated and DOL's legal duty to make these decisions.
 - Employer and/or employee's legal right to PWD or decision on a labor certification application: The statutory and regulatory scheme makes clear that employers may petition for immigrant visas for foreign workers.¹¹ A labor certification is an essential first step in this process for most employment-based immigrant visa categories and the prevailing wage determination is a mandatory part of the labor certification process.¹² Moreover, the adjustment of status provision requires that an adjustment applicant must be admissible and that a visa must be immediately available.¹³ Without a labor certification, the foreign worker will be inadmissible in most employment-based immigrant visa categories, and no visa will be issued. Without a PWD, the labor certification cannot be filed in the first place.
 - DOL's duty to adjudicate the labor certification and make prevailing wage determinations: Congress gave the Secretary of DOL the responsibility to determine and certify the factual questions underlying a labor certification.¹⁴ DOL's own regulations make clear that its statutory

¹⁰ See, e.g., *Powell Electrical Manufacturing Company v. DOL*, No. 3:07-2173, 2009 U.S. Dist. LEXIS 32541 (N.D. Tex. April 13, 2009) (finding that plaintiff employer failed to exhaust its administrative remedies when it failed to appeal a denied labor certification application to BALCA).

¹¹ See, e.g., 8 U.S.C. §§ 1153(b) and 1154(a)(1)(F).

¹² See, e.g., 8 U.S.C. § 1153(b)(2) (members of the professions holding advanced degrees) and 8 U.S.C. § 1153(b)(3) (skilled workers, professionals and unskilled workers).

¹³ 8 U.S.C. § 1255(a).

¹⁴ 8 U.S.C. § 1182(a)(5); see also *Yasin v. Bartlett*, No. 04-994, 2004 U.S. Dist. LEXIS 28638, *3-4 (S.D. Tex. Oct. 25, 2004) (concluding that the only way that DOL can carry out its statutory responsibility is to process cases and that this duty is mandatory).

responsibility imposes a mandatory duty to decide applications and issue PWDs.¹⁵

- Time frame for adjudicating cases: Some courts have held that for a mandamus to be granted a plaintiff must show either that 1) the right that is owed to the plaintiff is the right to have an application decided within a certain time frame; or 2) that the agency's duty must require it to act within a certain time frame.¹⁶ The INA does not impose a specific time period on DOL to process cases, just as it does not impose on USCIS a time frame for deciding adjustment and naturalization applications. However, some courts have held that because section 555(b) of the Administrative Procedures Act (APA) mandates that an agency act within a reasonable time, the underlying statute and regulations do not need to contain time frames; a reasonable period of time is presumed.¹⁷ For a full discussion of this argument, with case citations, see "[Mandamus Jurisdiction Over Delayed Applications: Responding to the Government's Motion to Dismiss](#)."
4. Research DOL policy regarding PERM cases and PWDs for factual support for your claim that DOL has unreasonably delayed deciding your client's ETA 9089 and ETA 9141.¹⁸ In the current situation regarding PWDs, DOL has officially suspended processing indefinitely, which clearly indicates that it is not performing its duty. In the case of ETA 9089 delays, you will have to make an argument as to whether the delays are reasonable:
- Look to the statements made by the DOL to the Office of Management and Budget ("OMB") regarding the time required to process a PERM

¹⁵ See, e.g., 20 C.F.R. §§ 656.17(b) and 656.24.

¹⁶ See, e.g., *Lake Michigan College and Milorad Suvacarov v. U.S. DOL*, No. 09-327, 2009 U.S. Dist. LEXIS 37184 *12-13 (W.D. Mich. May 1, 2009) (finding that, because the INA does not contain a mandatory time frame for a decision, the plaintiffs did not establish "clear and certain claim to an 'immediate adjudication of their labor certification.'").

¹⁷ See, e.g., *Yasin*, 2004 U.S. Dist. LEXIS 28638 at *5 (Relying on the APA to find that DOL must decide labor certifications within a reasonable time); *but see Lake Michigan College*, 2009 U.S. Dist. LEXIS 37184 at *15-16 (dismissing mandamus and APA claims after finding that neither the INA nor the APA provide any guidelines for determining when a delay in processing a labor certification becomes unreasonable).

¹⁸ For further discussion on when a mandamus action is appropriate, see "Thinking Outside the Bureaucratic Box: Using the Federal Court to Challenge Unlawful Agency Action," *Immigration and Nationality Handbook, 2009-10*, Joseph, Jeff, et al., p. 409-417.

labor certification application.¹⁹ DOL specifically stated that “[c]lean’ applications require 0.25 hours of DOL staff time,” and that audited applications will “require, on average, four (4) hours of DOL staff time.” “Supporting Statement for Request for OMB Approval under the Paperwork Reduction Act of 1995,” at 24 (see http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200707-1205-012).

- Look to aspirational language regarding the amount of time required to adjudicate cases under the PERM system. In the Supplementary Information to the PERM regulations published in December 2004, DOL stated that “an electronically filed application not selected for audit will have a computer-generated decision within 45 to 60 days of the date the application was initially filed.” 69 FR 77326, at 77328 (Dec. 27, 2004). While a labor certification may only have been pending several months rather than the years that are more typical of a successful mandamus case involving an adjustment of status, several months may be “unreasonable” given this statement. For example, a PERM case pending 10 months will have been pending 5 times longer than the outer limit set forth by the DOL.
- Look to statements made by DOL in recent AILA/DOL Liaison Committee Meetings and Stakeholder Teleconferences regarding current processing times, to determine whether your client’s case is beyond such times. Append the minutes of the meetings as an exhibit to your case, and highlight the relevant language. Also look to the processing times that are posted on the DOL iCERT website.²⁰

5. Marshall your client’s most compelling facts.

The harm to successful mandamus plaintiffs in the labor certification context, or even at the PWD stage, is marked and apparent. In one successful case, a surgeon in his sixth year of H-1B status would be required to leave the country and the medically underserved community in which he practiced if the labor certification application were not certified within one month. In another case, the child of the labor certification beneficiary was due to “age out” within a matter of weeks. Look to the impact of the delay on the employer and the local community, as well as on the employee and his or her family members. While the plaintiffs are only the employee/beneficiary and his or her employer, including evidence of all of the adverse impact factors will increase the likelihood of success in your case.

¹⁹ Such statements are discussed in detail in an article by Jay Solomon, “What DOL told OMB about PERM...Shhh?,” *Bender's Immigration Bulletin* (April, 24 2008).

²⁰ <http://icert.doleta.gov/>.

6. Draft your complaint, telling your client's story clearly and persuasively.

The complaint will be the first document read by the local Assistant U.S. Attorney, or "AUSA," who is assigned your case. As with other federal court litigation, your Plan A is to persuade the AUSA, ideally even before the first status hearing, that the government should resolve the case internally. This saves your client – as well as the administrative and judiciary branches of the government – time and money. Therefore, draft the complaint as though it will be the first and last substantive pleading in your case, since you hope it will be.

The complaint will also serve as the point of reference when you pick up the telephone and call the AUSA assigned to your case. The complaint containing a real story is more likely to be remembered.

7. Be sure to name all of the appropriate parties in your complaint.

- a. Plaintiffs

Either or both the employer and the employee would have standing to sue over the delayed adjudication of the labor certification application, as both would be harmed by the delay. With respect to visa petitions and pre-PERM labor certifications, the government has argued that the beneficiary does not have standing to sue because he or she was not a party to the action. There are several responses should the government raise this argument. First, unlike the visa petition or pre-PERM labor certifications, where only the employer files the petition, the foreign worker is a party to the labor certification application and must sign the application.²¹ 20 C.F.R. 656.17(a)(1). Second, at least five courts of appeals have rejected the government's position in visa petition and pre-PERM labor certification cases.²² Finally, it is only necessary for one plaintiff to have standing.²³ Thus, where both the employer and the employee appear as plaintiffs, it is immaterial whether the employee has standing since the employer unquestionably does.

²¹ In the case of the ETA 9141, neither party signs the document and it is submitted electronically, but petitioners should argue that the ETA 9141 is part of the larger process of labor certification application, in which both the employer and the employee have standing.

²² *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986) (visa petition); *Ghaly v. INS*, 48 F.3d 1426, 1434 n. 6 (7th Cir. 1995) (same); *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (same); *Reddy, Inc. v. U.S. DOL*, 492 F.2d 538, 543 (5th Cir. 1974) (pre-PERM labor certification); *Stenographic Machines, Inc. v. Regional Administrator*, 577 F.2d 521, 527-28 (7th Cir. 1978) (same); *Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (same).

²³ See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case or controversy requirement.") (citation omitted).

b. Defendants

To determine who should be named as defendants in the case, see the LAC practice advisory “[Whom to Sue and Whom to Serve](#).” As of the writing of this practice advisory, the following are the relevant offices at DOL and DOJ:

- Administrator and National Certifying Officer, Office of Foreign Labor Certification, U.S. Department of Labor, Employment & Training Administration;
 - Center Director, Foreign Labor Certification, Atlanta National Processing Center;
 - Director, Division of Prevailing Wage and Helpdesk Assistance (for PWD mandamus)
 - Hilda L. Solis, Secretary, U.S. Department of Labor; and
 - Eric Holder, Jr., U.S. Attorney General.
8. Determine the correct district court in which to file the action and carefully follow the court's procedure in the filing of your complaint

A mandamus action can be brought in one of three judicial districts: the district in which a defendant “resides;” the district in which a substantial part of the events or omissions giving rise to the claim occurred; or a district in which a plaintiff resides. 28 U.S.C. § 1391(e). For more on venue, see the LAC practice advisory “[Mandamus Actions: Avoiding Dismissal and Proving the Case](#).”

If you have never filed an action in district court before, start by reviewing the website for the district court. All of the district courts have comprehensive websites, often with step by step guides on local procedures. District court actions are generally filed electronically (e-filed) now, so you should set up an account and review the e-filing procedures. See also [Electronic Filing and Access to Electronic Federal Court Documents](#). The clerks are also very helpful in providing orientation for first-time users. Electronic filing is still relatively new and many practitioners are still familiarizing themselves with the system.

9. Work with the AUSA assigned to your case.

Keep in mind that the AUSAs may be willing to settle the case. Be cooperative if they request extensions of time; they may be using the extension to look into whether they can find a non-judicial solution for your client. If the DOL approves the ETA-9089 PERM application or issues the prevailing wage while your case is pending, be prompt about

filing a Motion for Voluntary Withdrawal. On the other hand, do not withdraw your complaint until you actually have solid evidence that the ETA-9089 has been certified or the prevailing wage determination has been issued.

10. Long-term practice pointer: Establish a sterling reputation and build long-term professional relationships with your local AUSAs.

From your first filing in federal court onwards, be prepared to support any case you file with thoroughness and hard work. In addition, extend mutual professional courtesy when extensions or the like are requested, provided that such an extension would not adversely impact your client's case. Many U.S. Attorney offices will routinely assign immigration cases to the same AUSA or a small group of AUSAs. The development of a healthy and mutually respectful professional relationship with them can prove to be invaluable.

PRACTICE ADVISORY¹

Updated June 24, 2011

PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT

By Mary Kenney

Highlights of the June 17, 2011 Morton Memoranda on Prosecutorial Discretion

On June 17, 2011, John Morton, Director of Immigration and Customs Enforcement (ICE), issued two new memoranda encouraging the expanded use of prosecutorial discretion by ICE officers, agents, and attorneys in all phases of civil immigration enforcement. The first outlines in detail how ICE employees should approach a wide range of opportunities to apply prosecutorial discretion in line with ICE enforcement priorities; the second describes specific protections for certain crime victims, witnesses, and plaintiffs.

These recent memoranda are significant: if followed in the field, more intelligent exercises of prosecutorial discretion should be forthcoming. Building on decades of agency guidance, the first memorandum sets forth a broad range of alternatives for ICE personnel and encourages targeted enforcement on a case-by-case basis. This new guidance provides the broadest and most explicit instruction, setting the agency's enforcement priorities as the standard for the exercise of prosecutorial discretion. The memorandum outlines who within ICE is authorized to make discretionary enforcement decisions and what factors they should consider. Furthermore, ICE personnel are encouraged to consider proactively the appropriate exercise of discretion as early in a case or proceeding as possible. John Morton, Director, ICE, "[Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#)" (June 17, 2011) (hereinafter "Exercising Prosecutorial Discretion").

¹ Copyright (c) 2011 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The Legal Action Center thanks Maurice Goldman, Matthew Guadagno and Shoba Sivaprasad Wadhia for their assistance with the original version of this practice advisory. The LAC thanks Laura Lichter for her assistance with the current version.

The second memorandum highlights ICE’s recognition that cases involving crime victims, witnesses and plaintiffs require a heightened standard of prosecutorial discretion. This guidance makes clear that it is generally *against ICE policy* to initiate removal proceedings against victims or witnesses to a crime, or to “remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties.” John Morton, [“Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs”](#) (June 17, 2011) at 1-2 (emphasis added) (hereinafter “Victims, Witnesses, and Plaintiffs”). This is the first time that the Department of Homeland Security (DHS) has formally recognized that private civil rights and labor litigants are deserving of protection. Moreover, the language of the memo is expansive and will protect those involved in labor, housing or similar disputes being waged outside of a courtroom. These protections could go far towards removing the fear of retaliation and removal that noncitizens face when contemplating whether to defend their rights.

The following are the *highlights* of each of the two memoranda (more detail about these and the earlier memoranda is provided throughout the practice advisory):

1. **“Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens.”** This memorandum:

- Emphasizes that prosecutorial discretion decisions should be consistent with ICE enforcement priorities and reframes the standard for prosecutorial discretion decisions to whether the case meets the agency’s civil immigration enforcement priorities,² which are national security, border security, public safety, and the integrity of the immigration system;
- Clarifies the broad scope of options to exercise prosecutorial discretion by supplying a list of examples of the types of decisions that can be made; notable among these are the decisions on whether to:
 - Issue or cancel a notice of detainer;
 - “Reissue” or “serve” Notices to Appear (NTA); arguably, this gives an ICE officer the flexibility to allow a respondent to accrue the necessary continuous residence or continuous physical presence time for LPR and non-LPR cancellation, respectively;
 - Settle or dismiss a proceeding; this appears to apply at all stages of a removal proceeding, including federal court appeals;
- Expands the list of favorable factors to be considered, to include:
 - Whether the case falls within agency priorities;
 - Graduation from a U.S. high school and/or pursuit of higher education in the U.S.; inclusion of this factor will benefit “DREAM” students;

² Previously, the Meissner memo had articulated the standard as whether a “substantial federal interest” was present.

- A much greater emphasis on family relationships; thus, for example, consideration is now to be given to the military service of a noncitizen or an *immediate relative*; whether a noncitizen or spouse is pregnant, nursing, or has a severe mental or physical condition; and whether the noncitizen is the primary caretaker of an ill *relative* (emphasis added); family relationships also now are recognized explicitly as part of a noncitizen's ties to the community.
- Identifies the ICE personnel who can exercise prosecutorial discretion; significantly, ICE attorneys can exercise such discretion at any stage of a case, including at the federal courts; moreover, ICE attorneys can do so even in cases initiated by United States Citizenship and Immigration Services (USCIS) or Customs and Border Patrol (CBP);
- Identifies classes of individuals warranting "particular care": veterans and members of the U.S. armed forces; long-time permanent residents; elderly; minors; seriously ill or disabled; victims of abuse, trafficking or other crimes; pregnant or nursing women; those in the U.S. since childhood;
- Identifies only a few negative factors warranting "particular" consideration: national security risks; serious felons, repeat offenders, or those with lengthy criminal records; known gang members; and "egregious" immigration violators;
- Encourages personnel to proactively consider prosecutorial discretion even absent a request from the noncitizen or representative; and
- Requires that ethics rules be followed regarding contact with represented individuals.

2. **"Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs."** This memorandum:

- States that, absent special circumstances, it is against ICE policy to initiate removal proceedings against crime victims and witnesses, or to remove those in the midst of legitimate efforts to protect their civil rights;
- Seeks to minimize the deterrent effect that immigration enforcement may have on victims, witnesses, and plaintiffs calling police and pursuing justice;
- Identifies classes of individuals warranting "particular care": victims of domestic violence, trafficking, or other serious crimes; witnesses in pending criminal investigations or prosecutions; plaintiffs in non-frivolous civil rights lawsuits; and individuals involved in protected activity related to civil or other rights (such as union organizing or complaining about discrimination in employment or housing); and
- States that, in the absence of serious adverse factors (such as national security concerns; serious criminal history; significant immigration fraud; human rights violations), exercising prosecutorial discretion "*will be appropriate*." (Emphasis added).

Introduction

Like all other enforcement agencies, ICE has prosecutorial discretion. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case. Morton, “Exercising Prosecutorial Discretion” at 2. In immigration cases, this discretion can be exercised with respect to investigations, arrests, detention, parole, the initiation of removal proceedings, and even the execution of final removal orders. In some cases, a favorable grant of prosecutorial discretion may be the only relief available to a client.

This practice advisory explains what prosecutorial discretion is, who has authority to exercise it, and how it is exercised most often in immigration cases. It also suggests ways that attorneys can advocate for the favorable exercise of prosecutorial discretion by DHS officers, whether from ICE, USCIS or CBP.³

This practice advisory also discusses all currently applicable agency guidance on prosecutorial discretion in immigration cases – including memoranda from the legacy Immigration and Naturalization Services (INS), ICE and USCIS – and summarizes this guidance in an attachment at the end of the advisory. In general, this guidance encourages officers to consider the exercise of prosecutorial discretion in a variety of settings and sets forth guidelines for doing so. In particular, Director Morton clearly explains that, because of limited resources, ICE officers should focus enforcement efforts on cases that fall within the agency’s four enforcement priorities: national security, border security, public safety, and the integrity of the immigration system. See Morton, “Exercising Prosecutorial Discretion.”

Unfortunately, in the past, officers in the field too often failed to follow the guidance on prosecutorial discretion and, as a result, infrequently exercised such discretion favorably. For that reason, it is essential that attorneys advocate for expanded use of prosecutorial discretion, consistent with the 2011 Morton memoranda, by specifically requesting favorable prosecutorial discretion in meritorious cases, and building a case for this relief on behalf of clients, just as you would any other type of relief.

What is prosecutorial discretion?

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether – and to what degree – to enforce the law in a particular case. See Morton, “Exercising Prosecutorial Discretion.” A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include a grant of deferred action; a stay of removal; or a decision not to issue a Notice to Appear (NTA).

³ For a more in-depth discussion of prosecutorial discretion, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010.

Prosecutorial discretion applies in the law enforcement context only; that is, only in situations in which a person is suspected of having violated the law (whether civil or criminal). Both ICE and USCIS officers have the authority to exercise prosecutorial discretion. In immigration cases, prosecutorial discretion primarily is exercised with respect to removal proceedings (including the decision whether to place a person in proceedings); detention; parole; and the execution of removal orders. Prosecutorial discretion is not the same as the discretion that a USCIS officer exercises when deciding an affirmative application for an immigration benefit, such as adjustment of status, since such a decision is not about whether to *enforce* a law against a person. However, if after the officer denies an adjustment application, he agrees not to issue an NTA against an applicant who might be subject to removal, he has favorably exercised prosecutorial discretion.

Prosecutorial discretion can be exercised on either an agency-wide basis or by an individual officer or employee. When ICE adopts priorities streamlining its enforcement efforts, for example, it is exercising prosecutorial discretion as an agency with respect to how to spend its resources. Administrative advocacy and liaison efforts often seek to influence the agency-wide exercise of prosecutorial discretion by advocating for adoption of more favorable enforcement practices and policies. For example, in response to coordinated advocacy efforts, USCIS adopted a new policy establishing a procedure for surviving spouses and children of deceased U.S. citizens to apply for deferred action. See Donald Neufeld, “[Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children](#)” (June 15, 2009). In contrast, a DHS officer who decides to cancel an NTA as improvidently issued, see 8 C.F.R. § 239.2(a)(6), is exercising favorable prosecutorial discretion on an individual basis.

Prosecutorial discretion is not addressed in either the immigration statute or regulations (although there may be statutory or regulatory authority for some of the decisions made). Rather, prosecutorial discretion is the inherent discretionary authority that the agency has with respect to how it enforces the law. See Bo Cooper, General Counsel, INS, “[INS Exercise of Prosecutorial Discretion](#)” (undated) (discussing the origins of prosecutorial discretion and its application in immigration proceedings). Both courts and the Board of Immigration Appeals (BIA) have long recognized the agency’s authority to exercise prosecutorial discretion. See, e.g., *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-92 (1999) (finding that the INS retains inherent prosecutorial discretion as to whether to bring removal proceedings); *Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009) (noting that DHS has prosecutorial discretion over deferred action and citing cases); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (finding that the former INS had prosecutorial discretion to decide whether to commence removal proceedings against a person subsequent to IIRIRA).

However, prosecutorial discretion only can be exercised within the bounds of the agency’s – or an officer’s – legal authority to act. Where the Immigration and Nationality Act (INA) makes a determination/action mandatory, the agency or officer generally does not have discretion to act in ways contrary to that mandate. For example, DHS has stated that the mandatory detention statute, INA § 236(c), eliminates an

officer's prosecutorial discretion to release a person subject to such detention. See Doris Meissner, Commissioner, ["Exercising Prosecutorial Discretion"](#) (Nov. 17, 2000) ("Meissner memo"). Note, however, that this would not prevent an officer from exercising prosecutorial discretion and *not* issuing an NTA against a person who – if and when the NTA were issued – would be subject to mandatory detention. *Id.* at 6. Arguably, and for the same reasons, an officer also might be able to cancel an NTA in a compelling case before it is filed with the court and thus eliminate the basis for mandatory detention. Thus, while it is always important to keep in mind the limits of an officer's statutory authority when seeking prosecutorial discretion, it is also important to think creatively about potential solutions not prohibited by law – especially in particularly compelling cases.

Finally, prosecutorial discretion is not only a humanitarian tool of the agency. It also serves other agency purposes. As a practical matter, understanding these purposes will assist you in arguing that your client is a good candidate for favorable prosecutorial discretion. Important among these purposes is that the agency's ability to exercise prosecutorial discretion – by declining to prosecute certain cases or types of cases – assists it in focusing its limited resources on higher priorities. DHS estimates that ICE only has resources to remove, annually, less than 4% of noncitizens who are in the U.S. without authorization. John Morton, Director, ICE, ["Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens"](#) (March 2, 2011).⁴ Consequently, ICE has set as its highest enforcement and removal priorities national security, public safety and border security. *Id.*; see also Morton, "Exercising Prosecutorial Discretion."⁵ In accord, the agency has explained that the first question behind all prosecutorial discretion decisions should be whether the enforcement action advances the agency's goals. Meissner memo, at 4-6. Consistent with this, the standard for prosecutorial discretion in a given case now is whether pursuing it meets the agency's priorities for federal immigration enforcement. Morton "Exercising Prosecutorial Discretion," at 2 n.1.

Over what types of immigration decisions can an immigration officer exercise prosecutorial discretion?

In the immigration context, DHS officers have the authority to favorably exercise prosecutorial discretion at all stages of any enforcement process. This discretion can be

⁴ This memorandum is a reissuance of a memorandum first issued on June 30, 2011. The only difference between the two is that the current version, cited above, contains a final paragraph stating that it does not create any right or benefit enforceable by law.

⁵ Unfortunately, ICE's conduct in the field often is not consistent with the agency's national priorities. See, e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010; Michele Waslin, ["ICE's Enforcement Priorities and the Forces that Undermine Them"](#) (November 2010); Shoba Sivaprasad Wadhia, ["Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion"](#) (November 2010).

exercised with respect to detainers, investigations, arrests, detention, parole, the initiation of removal proceedings, appeals, motions to reopen, and even the execution of final removal orders. See Morton, “Exercising Prosecutorial Discretion,” at 2-3 (listing examples of when an officer can exercise prosecutorial discretion).

The following provides examples of the types of prosecutorial discretion decisions that an immigration officer can make at three discrete stages of a case: (1) prior to filing an NTA with the immigration court; (2) while the noncitizen is in removal proceedings; and (3) after a removal order has been issued. Note that this list is not exhaustive but intended to illustrate the range of decisions subject to discretionary action by agency personnel.

1. Prior to filing an NTA. An officer can exercise prosecutorial discretion over:

- Whether to focus enforcement resources on particular administrative violations or conduct;
- Whether to stop, question, or arrest an individual for an administrative violation;
- Whether to issue or cancel a notice of detainer;
- Whether to place a person in expedited or other summary removal proceedings;
- Whether to issue, serve, file, or cancel an NTA or refrain from doing so;⁶
- What charges to include in an NTA;
- Whether to agree to cancel an NTA before it is filed with the court;⁷
- Whether to agree to pre-hearing voluntary departure;
- Whether to parole under § 212(d)(5) a person in the U.S. who was never admitted or paroled (i.e., a grant of “parole-in-place”) but who otherwise is eligible to adjust so that she can pursue that relief;
- Whether to parole an arriving alien into the United States, rather than detain the alien under § 235(b);
- Whether to detain a person or release him or her on bond, supervision, personal recognizance, or other condition;
- Whether to grant a noncitizen deferred action;

⁶ See 8 C.F.R. §§ 239.1(a) and 1239.1(a) for a listing of officers who can issue an NTA.

⁷ Before an NTA is filed with the court, any officer with authority to issue an NTA also has the authority to cancel the NTA as “improvidently issued,” due to changed circumstances, or for other reasons. 8 C.F.R. § 239.2(a). Note that ICE attorneys (known as Assistant Chief Counsels or trial attorneys) do not have authority to issue an NTA and thus do not have authority to cancel one. However, an ICE attorney can advise her client to cancel the NTA. See William Howard, Principal Legal Advisor, ICE, [“Prosecutorial Discretion”](#) (Oct. 24, 2005), at 4-5. Additionally, once the NTA is filed with the immigration court, the trial attorney can move to dismiss proceedings. *Id.* at 5; see also 8 C.F.R. § 1239.2(c); Morton, “Exercising Prosecutorial Discretion,” at 3.

2. **While the noncitizen is in removal proceedings.** An officer can exercise prosecutorial discretion over:
 - Whether to agree to join a motion to administratively close or terminate a removal case;
 - Whether to agree to a continuance for the person to become eligible for relief at a later date (i.e., while waiting for a family member to naturalize);
 - Whether to amend the NTA to change or remove certain charges;
 - Whether to agree not to oppose a grant of relief or voluntary departure;
 - Whether to agree to limit the issues to be heard or the evidence presented;
 - Whether to appeal an immigration judge decision that ruled in favor of a noncitizen;
 - Whether to grant deferred action or otherwise settle the case;
3. **After issuance of a removal order.** An officer can exercise prosecutorial discretion over:
 - Whether to not oppose a motion to reopen;
 - Whether to join in a proposed joint motion to reopen;
 - Whether to stay the execution of a removal order;
 - Whether to place the individual on supervised release, rather than detain the individual;
 - Whether to grant a noncitizen deferred action; and
 - Whether to agree to a remand if a case is before a court of appeals on a petition for review.

What is deferred action status and is it a favorable grant of prosecutorial discretion?

Deferred action is a DHS decision not to pursue enforcement against a person for a specific period of time, in the exercise of the agency's prosecutorial discretion. The grant of deferred action by USCIS does not confer lawful immigration status or alter the person's existing immigration status. See ICE, "[Detention and Deportation Officer's Field Manual](#)" (updated Mar. 27, 2006). While deferred action does not affect any already existing period of unlawful presence, periods of time in deferred action *do* qualify as periods of stay authorized by the Secretary of DHS for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I). See Donald Neufeld, Acting Assoc. Dir., USCIS, "[Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212\(a\)\(9\)\(B\)\(i\) and 212\(a\)\(9\)\(C\)\(i\)\(I\) of the Act](#)" (May 6, 2009). Note, however, that deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status.

An individual with deferred action may apply for an Employment Authorization Document (EAD) if she can establish an economic necessity for employment. 8 C.F.R. § 274(a).12(c)(14). Thus, it can be a significant benefit to a person without other options for relief.

For a full discussion of deferred action, including factors that are to be considered, suggestions for preparing and advancing a deferred action request, and sample requests, see [“Private Bills and Deferred Action Toolkit,”](#) prepared and issued by Maggio Kattar, Duane Morris and Penn State Law School.

Who can make the decision to favorably exercise prosecutorial discretion in a given case?

The immigration officer or employee with the authority to exercise prosecutorial discretion will vary depending on the issue and stage of the proceeding involved. Generally, an immigration officer/employee has this authority over any prosecutorial discretion decision that falls within the scope of her duties, subject to his chain of command. Meissner memo, at 1, 5.

With respect to ICE officers, the Morton memorandum “Exercising Prosecutorial Discretion” more specifically lists who has the authority to exercise prosecutorial discretion. These are:

- Enforcement and Removal Operations (ERO) officers, agents, and their supervisors with authority to institute removal proceedings or otherwise engage in immigration enforcement;
- Homeland Security Investigations (HSI) officers, special agents, and their supervisors with the same authority;
- Attorneys and their supervisors within the Office of the Principal Legal Advisory (OPLA) who have authority to represent ICE in removal proceedings; and
- The Director, the Deputy Director, and their senior staff.

As a practical matter, practitioners should become familiar with officers within their local DHS offices and learn who has authority over what types of decisions. It is also important to know who the supervisors are, as they may have the final say over a decision. While some DHS personnel may not have the authority to make the decision, they still could be influential. For example, Assistant Chief Counsels (also known as trial attorneys) are not authorized to cancel an NTA, or to grant deferred action or a stay of removal. See William Howard, Principal Legal Advisor, ICE, [“Prosecutorial Discretion”](#) (Oct. 24, 2005). Nonetheless, someone from the local Office of the Chief Counsel may be able to help favorably resolve a case, and certainly ICE attorneys can advise their clients, the agency, about steps to take in a case. *Id.* Moreover, ICE attorneys do have authority over other determinations, such as whether to consent to administratively close a removal case or whether to join a motion to reopen. *Id.*; see also, Morton, “Exercising Prosecutorial Discretion” at (discussing ICE attorney’s exercise of prosecutorial discretion to “dismiss, suspend, or close” a case).

Additionally, other immigration attorneys in the locale can assist greatly in guiding you on local policies and procedures.

What policy memos or other guidance on the exercise of prosecutorial discretion exist and what authority do they provide for local officers to act?

Over the years, both legacy INS and components within DHS have issued numerous memoranda that discuss various aspects of prosecutorial discretion. At the end of this practice advisory is a list of agency guidance that discusses prosecutorial discretion in different contexts, with a short description of each memorandum. This list may not be exhaustive, so be sure to look for additional policy or procedural guidance supporting the exercise of prosecutorial discretion, including guidance that does not explicitly mention “discretion.”

What factors will be considered in a prosecutorial discretion decision?

The factors that will influence a decision on prosecutorial discretion will vary according to the nature of the case. However, there are some general guidelines about important factors that the agency will consider in most, if not all cases. This list of factors, taken from the June 17, 2011 memorandum, Morton, “Exercising Prosecutorial Discretion,” at 4, includes:

- The agency’s civil immigration enforcement priorities;
- The person’s length of presence in the U.S., with particular consideration to presence in lawful status;
- The circumstances of the individual’s arrival, particularly if arrival was as a young child;
- Graduation from a U.S. high school and the pursuit of higher education in the U.S.;
- U.S. military service of the individual or immediate relative, particularly combat service;
- Criminal history;
- Immigration history;
- Whether the person is a national security or public safety concern;
- Ties and contributions to the community, including family ties;
- Ties to and conditions in the home country;
- Whether the person is elderly or a minor;
- Whether a spouse, parent or child is a U.S. citizen or permanent resident;
- Whether the person is the primary caretaker of any person with a disability or illness or a minor relative;
- Whether the person or a spouse is pregnant or nursing, or suffers from a severe mental or physical illness;
- Likelihood of removal;
- Likelihood of permanent or temporary immigration relief; and
- Cooperation with federal, state or local law enforcement (including the Department of Labor and the National Labor Relations Board).

The decision should be based upon the totality of the circumstances, with the goal of conforming to ICE’s enforcement priorities. *Id.*⁸

Significantly, the 2011 Morton memos also identify certain classes or individuals warranting “particular care.” These include veterans and members of the U.S. armed forces; long-time permanent residents; minors and the elderly; those present in the U.S. since childhood; pregnant and nursing women; victims of domestic violence, trafficking, or other serious crimes; and those with serious health conditions or disabilities. Predictably, certain negative factors will warrant “particular care and consideration,” including: risks to national security; serious felons, repeat offenders, or those with a lengthy criminal record; known gang members; and individuals with an egregious record of immigration violations, including illegal reentry and immigration fraud. Morton, “Exercising Prosecutorial Discretion,” at 5.

What role can an attorney play in influencing an immigration officer to exercise favorable prosecutorial discretion?

- 1. Ask that favorable prosecutorial discretion be exercised in your client’s case.** Despite language in earlier memoranda encouraging immigration officers to consider the favorable exercise of prosecutorial discretion on their own, this has not previously happened. See, e.g., Meissner memo.⁹ Thus, an attorney can play an important role in requesting a specific type of favorable action in a case, and advocating for this result. It is not sufficient to simply ask for a favorable exercise of prosecutorial discretion. Instead, ask specifically for what it is that you want the officer to do (e.g., grant deferred action; terminate proceedings; grant a stay of removal; etc.), and outline why prosecutorial discretion is appropriate, with particular care to highlight the positive factors and how the exercise of prosecutorial discretion in your case would meet agency enforcement priorities.

⁸ The Meissner memo, at 7-8, makes clear that there also are factors that cannot be considered, including the individual’s race, religion, sex, ethnicity, national origin, or political association, activities or beliefs (unless the above is relevant to the person’s immigration status or case in another way); the officer’s own personal feelings regarding the individual; or the possible effect of the decision on the officer’s own professional or personal circumstances.

⁹ Moreover, be aware that despite its overall encouraging tone, the Meissner memo also cautions against “attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that been thoroughly considered and decided, or for other improper tactical reasons.” Meissner Memo, at 10. For this reason, attorneys may want to be judicious in selecting the cases in which they advocate for this relief. Asking for it in cases in which it clearly is not warranted could undermine your future efforts to get this relief in meritorious cases.

2. **Put together a package of materials to support your request for prosecutorial discretion.** To better make a record, make your request in writing. Consider providing a detailed cover letter or brief, supported by material that will demonstrate that your client is deserving of prosecutorial discretion. Include all the facts that an immigration officer will need to make an informed decision, but be as concise as possible.
3. **Use the agency memoranda to support your request.** The exercise of favorable prosecutorial discretion is not mandatory in any circumstance. However, the memoranda do provide authority for an officer and/or local office to act favorably. For example, where a client in removal proceedings has an adjustment application pending before USCIS (because, e.g., she is an “arriving alien” and only USCIS has jurisdiction over the application), argue that the removal case should be terminated pursuant to the August 20, 2010 Morton memo. See John Morton, Assistant Secretary, ICE, [“Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens”](#) (June 2010). Another example is found in the Howard memo, which contains the following advice to local ICE counsel: “[w]here a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is eligible to be granted the relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1002.23, *strongly consider* exercising prosecutorial discretion.” William Howard, Principal Legal Advisor, ICE, [“Prosecutorial Discretion”](#) (Oct. 24, 2005) (emphasis added). The 2011 Morton memoranda contain similarly strong directives.
4. **Highlight the positive factors in your client’s case.** Review the criteria supporting favorable action that are listed in the relevant memos and highlight the applicable criteria for the officer. Where a client falls within a classification deserving “particular care,” be sure to emphasize and build upon this fact. Morton, “Exercising Prosecutorial Discretion,” at 5. Develop other favorable equities, just as you would in a case seeking a discretionary benefit or relief from removal from DHS.
5. **Address any problems or inadequacies in the case or the evidence.** It is better to address such problems directly because otherwise it could appear that you were trying to hide information from the officer, which could undercut the credibility of your other arguments. Moreover, when there is negative information, you should not only disclose it, but also provide mitigating information. For example, when there is a conviction, provide evidence of completion of probation or parole.

6. **Provide the evidence that the officer needs to support the decision.** A decision to exercise prosecutorial discretion in a given case requires an individualized determination based upon the facts and the law. Meissner memo, at 6. The more developed the facts are with respect to the factors favoring your client, the stronger the request will be. Thus, where time permits, an attorney can play an important role in providing the immigration officer with evidence demonstrating why a favorable exercise of discretion is warranted in a case. Where there is a relevant memo, review the criteria to be considered in support of favorable prosecutorial discretion and offer evidence demonstrating that these criteria are satisfied.
7. **If removal proceedings have been initiated, consider seeking a continuance of the proceedings so that you can discuss prosecutorial discretion options with ICE counsel.** An immigration judge may be inclined to grant a continuance to allow—or even encourage – the parties to discuss prosecutorial discretion options. For example, an attorney was granted a continuance after he argued that his client did not fall within the enforcement priorities outlined in the June 30, 2010 Morton memo and that he wanted an opportunity to advocate for ICE to favorably exercise prosecutorial discretion and join him in a motion to dismiss.¹⁰
8. **Ensure that all details of any plan for favorable action for your client are completely worked out and are committed to writing.** For example, if deferred action will not benefit your client unless she also is granted an EAD, be sure to include this in your advocacy for your client, and if agreed to, in the written summary of the final grant of deferred action.¹¹
9. **Consider having your client contact his or her Senator or Congressional representative for additional support.** Your client can provide the elected official with a copy of the request for favorable

¹⁰ An ICE attorney has the authority under the regulations to move to dismiss a case for all of the reasons that an NTA can be cancelled. See 8 C.F.R. § 1239.2(c) (citing 8 C.F.R. § 239.2). These reasons include, among others, that the noncitizen is not deportable or inadmissible; that the NTA was improvidently issued; and that circumstances have changed such that it is no longer in the best interest of the government to continue the case. The motion, however, must be granted by the IJ in order to terminate proceedings, and such termination is without prejudice to new proceedings at a later date. Counsel should consider whether termination is the appropriate resolution, as some matters might benefit from continuing with immigration proceedings.

¹¹ An EAD is not automatic with a grant of deferred action, but can be granted upon a showing of economic necessity.

prosecutorial discretion that you submitted to DHS. Some officials will be receptive to this and their staff members will follow up with the local DHS office.

How will I know if the officer decided to exercise prosecutorial discretion in my client's favor or not?

The Meissner memo requires that when a decision is made to favorably exercise prosecutorial discretion, it must be documented in the file, including the specific decision taken and its factual and legal basis. Meissner memo, at 11. Additionally, when the decision is favorable, the officer must notify the individual in writing of the action to be taken in her case and the consequences. Normally, notice should be by letter to the individual and the attorney of record. *Id.* Officers are cautioned to make clear in the letter that the favorable exercise of prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole),¹² immunity from future removal proceedings, or enforceable right or benefit. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), this should be identified in the letter. *Id.* at 11-12. It is a good idea to remind the officer of this notice requirement, since otherwise it may be overlooked.

The Meissner memo, however, does not require notice to the individual if the officer decides not to favorably exercise prosecutorial discretion. *Id.* Thus, an individual who has requested the favorable action could be left hanging (or worse, arrested or deported) – not knowing if the request is still pending or if it has been denied. Practically, the only way to know definitively if a decision has been made is to periodically call the officer.

If my client receives a favorable grant of prosecutorial discretion not to be placed into removal proceedings or to stay execution of a final order, what impact does this have on his or her encounters with DHS in the future?

It is important to remember, and to fully explain to your client, that a favorable grant of prosecutorial discretion does not confer lawful immigration status on the client. See Meissner memo, at 12. In many cases, all that such a grant will do is provide a reprieve – of indefinite duration – from adverse action. For example, if ICE agrees not to place a client in removal proceedings, this does not give the individual any different status than that which she previously had. Additionally, there is always the chance that if the circumstances that led ICE to refrain from initiating proceedings change, there is nothing to prevent ICE from initiating removal proceedings at a future date. Similarly, where favorable action is taken by the agency – for example a stay of execution of removal, a grant of deferred action, or parole – that action is not permanent and can be reversed if the circumstances change. However, the Meissner memo advises that where an

¹² Although your client may be eligible for advance parole, be sure to check his or her vulnerability to the three or ten year inadmissibility bars before suggesting this option.

individual granted favorable prosecutorial discretion comes to the attention of an agency officer at a future date, the officer should abide by the earlier decision as a matter of agency policy, absent new facts or changed circumstances. *Id.*

If DHS refuses to exercise prosecutorial discretion in my client's favor, can I appeal this decision or otherwise challenge it?

As noted earlier, none of the DHS guidance on prosecutorial discretion requires that an immigration officer favorably exercise his or her prosecutorial discretion in any particular case, even the most compelling ones. Instead, the immigration officer has discretion to make the decision, and this discretion is bounded only by his or her authority under the law, the DHS guidelines on the exercise of prosecutorial discretion, and any supervisory review to which the officer is subject.

Unfortunately, there is no formal appeal process to challenge the denial of a request for the exercise of favorable prosecutorial discretion. However, there are internal supervisory channels through which to informally appeal a decision or seek reconsideration, so this is an avenue worth exploring in many cases. If your request is denied, you need to learn the proper chain of command at ICE or USCIS and work your way up the ladder. This also is information that your local AILA chapter may develop through ongoing liaison efforts. (See below).

Additionally, as a general matter, there is no federal court review over the exercise of (or the failure to exercise) prosecutorial discretion. See *e.g. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding that there is a rebuttable presumption under the Administrative Procedures Act that a decision not to prosecute is not reviewable by the courts); see also INA § 242(g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (finding that 8 U.S.C. § 1252(g) was directed against attempts to impose judicial constraints on prosecutorial discretion). Thus, once an agency decides not to exercise prosecutorial discretion, it generally will not be possible to challenge this decision in federal court.

Are there other steps I can take in particularly compelling cases if DHS refuses to favorably exercise prosecutorial discretion?

In select cases you may want to consider less conventional tactics in an attempt to influence ICE in granting deferred action or other prosecutorial discretion. Use of the media (both conventional and social), local and national advocacy organizations and your client's congressional representative can be beneficial to the overall cause. In recent months, this sort of strategy has worked in select cases involving DREAM Act eligible persons. There is no specific procedure in employing this sort of strategy. However, it is recommended that you consider this as a last resort and only in cases where your client has compelling facts to his or her case and understands the risks involved.

Some suggested strategies include:

- Set up a Facebook group titled “Stop the Deportation of _____” and invite as many contacts as possible to help support the cause;
- Contact local and national immigration advocacy groups to get them to post Action Alerts on their websites on where the public can call or fax ICE officials in support of the client;
- Speak to local or national media contacts about the case and try to get stories written;
- Engage local human rights organizations or religious groups to assist in forwarding the cause; and
- Hold local press conferences and have your client speak about his or her plight.

How can I advocate for more consistent use of prosecutorial discretion?

There are several ways that you, your local AILA chapter (or similar groups that engage in advocacy with local ICE and/or USCIS offices) can push for more consistent, regular and humane use of prosecutorial discretion locally. First, get information about procedures that local offices follow with respect to these decisions, such as who within the office has the authority to make such decisions initially; who must sign off on them; and what procedures exist for an attorney to request the exercise of prosecutorial discretion. If it is not possible to get information through liaison channels, request this information through Freedom of Information Act requests.

In addition, efforts can be made to get the local DHS offices to adopt more favorable policies with respect to the exercise of discretion and to include consideration of favorable prosecutorial discretion as a matter of routine. Additionally, OPLA has previously indicated that it wants to know “if there is a pattern and practice” of an OCC not agreeing to exercise prosecutorial discretion such as by joining motions to reopen. “[AILA-ICE Liaison Minutes](#)” (Oct. 30, 2009) at § III. Thus, local AILA chapters and other advocates are encouraged to track the willingness of their local DHS offices to engage in favorable prosecutorial discretion. Where an office is out of compliance with national policies, consider contacting AILA National to report and remedy anomalies.

Finally, AILA and the LAC are in the process of setting up reporting and monitoring of local compliance with the June 17, 2011 Morton memoranda in order to evaluate whether the policies and procedures are effectively being put into practice, as well as to identify any issues which arise through their application. Assistance from local AILA chapters, AILA attorneys and other immigration legal services and advocacy organizations will be essential to the success of this effort.

ATTACHMENT

SUMMARY OF DHS GUIDANCE ON PROSECUTORIAL DISCRETION

DHS (or legacy INS) guidance:

Doris Meissner, Commissioner, INS, [“Exercising Prosecutorial Discretion”](#) (Nov. 17, 2000). Still followed by DHS, this is the most comprehensive of its memoranda on prosecutorial discretion. Importantly, this memo stresses that immigration officers not only have the authority to favorably exercise prosecutorial discretion but that they should consider doing so in cases that warrant it at the earliest point possible. Thus, this memo provides general authority to support an argument that an immigration officer should act favorably in your client’s case. The Meissner memo also sets forth the principles that should motivate prosecutorial discretion decisions; the process to be followed by agents in exercising this discretion; and factors that can be considered in decision-making.

Bo Cooper, General Counsel, INS, [“INS Exercise of Prosecutorial Discretion”](#) (undated). This memorandum sets forth the legal basis for legacy INS’s exercise of prosecutorial discretion in its enforcement activities. The memo is not policy guidance itself, but instead intended to lay the foundation for development of such guidance. It summarizes what prosecutorial discretion is; why law enforcement officers have prosecutorial discretion; how it applies in the immigration context; the limits on prosecutorial discretion; practical difficulties relating to the exercise of prosecutorial discretion in immigration cases; and finally, how it relates to detention, including mandatory detention.

ICE guidance:

John Morton, Assistant Secretary, ICE, [“Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions”](#) (Aug. 20, 2010). This memo explains a new policy for handling removal cases in which there is a pending or approved application or petition with USCIS. Adopted “as a matter of prosecutorial discretion” and to promote efficient use of resources, the policy allows for the dismissal of removal cases in which there is a pending or approved application or petition with USCIS and ICE determines, as a matter of law and in the exercise of discretion, that the individual is eligible for relief. Certain criteria must be met in all cases. Additionally, in detained cases, the trial attorney must consult with local ICE officers regarding adverse factors that may weigh against dismissal. Note that all local Offices of Chief Counsel are instructed to adopt local standard operating procedures to implement this policy. If you do not already have a copy of your local office’s procedure, you could ask for one, seek a copy through your local AILA liaison, or file a FOIA request.

John Morton, Assistant Secretary, ICE, [“Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens”](#) (March 2, 2011) (prior version issued on June 30, 2010). This memorandum identifies priorities for the apprehension, detention and removal of noncitizens, which are to be applied in all ICE programs. It

identifies and discusses the top three ICE priorities as 1) noncitizens who pose a danger to national security or a risk to public safety; 2) recent illegal entrants; and 3) noncitizens who are fugitives or otherwise obstruct immigration controls.¹³ The memo indicates that ICE resources should primarily be committed to advancing these priorities and that, given the limited resources of the agency, ICE employees should exercise sound judgment and discretion consistent with these priorities in carrying out enforcement.

Peter S. Vincent, Principal Legal Advisor, ICE, [“Guidance Regarding U Nonimmigrant Status \(U visa\) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal”](#) (Sept. 25, 2009). This memo provides field guidance with respect to persons with pending U visa petitions who either are 1) subject to a final administrative order of removal and request a stay of removal or 2) are in removal proceedings. Explaining that ICE officers have discretion to stay removal where an individual with a pending U visa petition demonstrates prima facie eligibility for the visa, the memo explains how ICE is to coordinate with USCIS to obtain a prima facie determination of eligibility. The memo also discusses factors that ICE officers should consider in exercising their discretion where prima facie eligibility is shown.

Julie L. Myers, Assistant Secretary, ICE, [“Prosecutorial and Custody Discretion”](#) (Nov. 7, 2007). This memo concerns the exercise of prosecutorial discretion with respect to arrest and custody decisions related to nursing mothers.

John P. Torres, Director, ICE, [“Discretion in Cases of Extreme or Severe Medical Concern”](#) (Dec. 11, 2006). This memo reiterates the importance of ICE officers exercising prosecutorial discretion when making custody determinations with respect to adults and juveniles transferring from hospitals, social services or other law enforcement agencies who have severe medical conditions (including psychiatric). The memo explains that officers have a responsibility to identify and respond to cases presenting meritorious health claims in which detention may not be in ICE’s best interest. The memo explains the procedures to be followed and provides guidance on how to make a determination about the seriousness of the medical problem.

ICE, [“Detention and Deportation Officer’s Field Manual”](#) (updated Mar. 27, 2006).
-**Chapter 20.8, “Deferred Action.”** This chapter describes generally the standard and procedures for determining whether to grant deferred action.
-**Chapter 20.9, “Exercising Discretion.”** This chapter describes generally the standards and procedures for exercising prosecutorial discretion.

William Howard, Principal Legal Advisor, ICE, [“Prosecutorial Discretion”](#) (Oct. 24, 2005). This memo, which is still followed, focuses on when and how prosecutorial discretion can be used by trial attorneys. It explains how the exercise of prosecutorial discretion is critical to managing work overload and adhering to priorities. It also details various ways in which trial attorneys can and should consider exercising prosecutorial

¹³ According to the memo, numbers 2 and 3 are equal priorities to one another, but fall below number 1.

discretion and provides numerous examples. The memo indicates that proceedings should not be instituted, or if instituted, should be dismissed where an adjustment of status is clearly approvable based on an approvable I-130 or I-140 and the case is appropriate for adjudication by USCIS. Similarly, the memo also suggests that remands should be considered to allow a person to apply for naturalization; and that alternatives to removal should be considered in cases in which there are compelling humanitarian factors. Finally, among other types of discretionary action available to trial attorneys, the memo discusses motions to reopen and provides examples of when it would be appropriate for ICE to join these.

William Howard, Principal Legal Advisor, ICE, [“Exercising Prosecutorial Discretion to Dismiss Adjustment Cases”](#) (Oct. 6, 2005). This memo discusses when trial attorneys can exercise prosecutorial discretion to file or join a motion to dismiss a case without prejudice to allow USCIS an opportunity to adjudicate an adjustment of status application. It is not clear whether this memo has been superseded by the August 20, 2010 memo by John Morton that covers a similar topic. This memo is intended to preserve ICE resources in cases in which it appears that an adjustment application would be clearly approvable. The memo lays out the criteria that must be met before a trial attorney can exercise prosecutorial discretion and move to dismiss a case.

Marcy M. Forman, Acting Director, Office of Investigations, ICE, [“Issuance of Notice to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service”](#) (June 21, 2004). This memo explains that ICE officers can exercise prosecutorial discretion with respect to the issuance of an NTA, an administrative order of removal or a reinstatement of a final removal order when the noncitizen has military service with the U.S. The memo stipulates that the Special Agent in Charge of each field office is required to sign off on any of these actions in these cases, after review of the A file. It also sets out general guidelines for consideration of prosecutorial discretion in these cases, and emphasizes that all such cases should be reviewed for eligibility for naturalization under INA § 328 and 329 (special naturalization provisions for members of the military).

USCIS Guidance

Michael Aytes, Assoc. Dir. for Domestic Operations, USCIS, [“Disposition of Cases Involving Removable Aliens”](#) (July 11, 2006). This memo revises guidance to USCIS officers on how to process and prioritize cases in which the person appears to be removable. The memo explains that deciding whether a person is removable and whether to issue an NTA is an integral part of the adjudications process. Prosecutorial discretion comes into play with respect to whether to issue an NTA in a case that does not involve egregious public safety, national security, a regulatory requirement to issue an NTA, or fraud (each of which is discussed in the memo). In all other cases, USCIS has discretion not to issue an NTA in compelling cases, to recommend deferred action or to reinstate a person’s nonimmigrant status.

William R. Yates, Deputy Exec. Assoc. Comm'r, INS, [“Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote”](#) (May 7, 2002). This memorandum provides guidance on handling naturalization applications of persons who have unlawfully voted or falsely represented themselves as U.S. citizens in association with registering to vote or by voting. The memo lays out a six step process for adjudicating these cases. As part of this process, and after determining that a person is removable for having unlawfully voted or for making a false claim to U.S. citizenship when registering to vote, the officer is to determine whether the case merits the exercise of prosecutorial discretion using the Meissner memo as guidance. Where a case does warrant this exercise, the officer is to proceed with the adjudication of the naturalization application.

PRACTICE ADVISORY¹
Updated April 29, 2011

**HOW TO FILE A PETITION FOR REHEARING, REHEARING EN BANC
AND HEARING EN BANC IN AN IMMIGRATION CASE**

By Beth Werlin

After a court of appeals renders a decision, the parties may ask the court to reconsider its decision by filing a petition for rehearing.² Parties can seek panel rehearing, rehearing en banc, or both panel and en banc rehearing. Panel rehearing means that only the panel of three judges that issued the original decision reconsiders the case. Rehearing en banc means that the full court (or an en banc panel) reconsiders the case. In addition, the parties may petition for initial hearing en banc (that is, before the panel has made a decision) as long as the petition is filed before the appellee's brief is due.³ It is important to note that the courts only rarely rehear cases and/or undertake en banc review.

STANDARDS AND INITIAL CONSIDERATIONS

Standards for En Banc Review and Panel Rehearing

The courts will consider a case en banc only when:

- (1) it is necessary to secure or maintain uniformity of the court's decisions. This means that the court's decision conflicts with a decision of the Supreme Court or there is an intra-circuit conflict; or
- (2) the case involves a question of exceptional importance. As an example, a case may present a question of exceptional importance where there is an inter-circuit conflict.⁴

¹ Copyright (c) 2011 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

² See Federal Rules of Appellate Procedure (FRAP) 35 and 40.

³ FRAP 35(c).

⁴ FRAP 35(a).

The standard for when a panel may rehear a case is less stringent. The rules indicate that panel rehearing may be appropriate where the panel has overlooked or misapprehended points of law and/or fact.⁵

Should My Client Seek Rehearing En Banc?

When advising your client about whether to seek rehearing en banc, one important factor to take into account is that the chances of success are very slim. The courts of appeals only grant rehearing en banc petitions in a very small number of cases. In FY 2010, several thousand petitions were filed, but the courts issued only 44 en banc decisions. Of these 44, most were not immigration-related cases.

Despite the small number of cases, a review of the immigration cases the courts have considered en banc offers insight into the types of cases the courts are more likely to hear en banc and provides guidance in drafting a petition.

- *There is an intra-circuit conflict.* Many of the cases heard en banc involve intra-circuit conflicts, i.e., where panels within the circuit have reached contrary results or adopted irreconcilable positions.⁶ (Although unpublished decisions are not binding, they may demonstrate that en banc review is needed to ensure uniformity within the circuit.⁷)
- *There was a dissent or a concurrence in the underlying opinion.* In recent years, most of the immigration-related en banc decisions involve situations where there was a divided panel below.⁸ Not only does a dissent or concurrence indicate that one or more of the judges may be predisposed to rehearing the case, but a strong, well-reasoned dissent or concurrence may help persuade other judges in the circuit that the panel reached the wrong result and that rehearing en banc is needed.
- *There is an inter-circuit conflict.* Some of the cases heard en banc involve inter-circuit conflicts, i.e., where another circuit has reached contrary results or adopted irreconcilable positions.⁹ Just as a strong, well-reasoned dissent or concurrence may be persuasive, strong decisions from other circuits may influence the court's decision whether to hear a case en banc.

⁵ FRAP 40(a)(2).

⁶ See, e.g., *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010); *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009).

⁷ See FRAP 32.1 and local rules regarding citation of unpublished decisions.

⁸ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); *Aronov v. Napolitano*, 562 F.3d 84 (1st Cir. 2009); *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009); *Lin Zheng v. Atty. Gen.*, 557 F.3d 147 (3d Cir. 2009); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008); *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008).

⁹ See, e.g., *Lin Zheng v. Atty. Gen.*, 557 F.3d 147 (3d Cir. 2009); *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009).

- *The case involves a legal issue.* The courts generally only hear cases en banc to resolve legal issues.¹⁰ In addition, typically, the legal issue is one that is recurring and thus impacts a large number of people. To the extent you can show that the issue has a significant effect, this may support your petition.

In addition to assessing the strength of the petition, there are practical considerations to take into account:

- What are the financial costs of litigating the petition? Can your client afford these costs?
- Do you have the time and resources necessary to litigate the petition for rehearing?
- Are there reasons why your client would not want to prolong litigation? Is your client detained, and will he or she likely remain detained while a petition is pending?
- Are there additional benefits to staying the mandate? (The filing of a petition for rehearing stays the mandate.¹¹)

Should My Client Seek Initial Hearing En Banc?

As with rehearing petitions, the courts rarely grant petitions for initial hearing en banc. In fact, none of the immigration cases the courts heard en banc over the last few years involved initial hearing en banc. Nonetheless, there are certain situations where it may be advisable to seek initial hearing en banc. In addition to the questions presented above, you may want to consider:

- Are you presenting an argument that arguably conflicts with a precedent decision in the circuit? The general rule is that panels are bound by prior precedent decisions directly on point and only an en banc decision can overrule a precedent (“prior panel precedent rule”).¹² Therefore, you may be in a situation where you will be able to obtain a favorable decision only by seeking en banc review.

¹⁰ See, e.g., *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (eligibility for 212(c) waiver); *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008) (court’s jurisdiction).

¹¹ FRAP 41(d)(1).

¹² See, e.g., *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 160 (1st Cir. 2004); *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171-72 (2d Cir. 2001); *Reich v. D.M. Sabia Company*, 90 F.3d 854, 855 & n.2, 858 (3d Cir. 1996); *Loudon Leasing Dev. Co. v. Ford Motor Credit Co.*, 128 F.3d 203, 206 n.1 (4th Cir. 1997); *FDIC v. Abraham*, 137 F.3d 264, 268-69 (5th Cir. 1998); *Sam & Ali, Inc. v. Ohio Dep’t of Liquor Control*, 158 F.3d 397, 405 (6th Cir. 1998); *United States v. Mosby*, 101 F.3d 1278, 1279 n.3 (8th Cir. 1996); *United States IRS v. Osborne*, 76 F.3d 306, 309 (9th Cir. 1996); *United States v. Meyers*, 200 F.3d 715, 720-21 (10th Cir. 2000); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998).

Importantly, there are exceptions to the prior panel precedent rule:

1. A panel decision may be undermined by controlling authority, subsequently announced, such as the opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling.
2. A panel decision may be undermined by an authority postdating the original decision that, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.¹³

In cases where there are arguments that either a prior precedent is not on point or an exception to the prior panel precedent rule applies, petitioners may prefer to have the case decided by a panel. If the panel reaches an adverse decision, and/or finds that prior precedent applies, the petitioner still has the option of seeking rehearing en banc.

- Have various panels in your circuit reached contradictory results in cases similar to your case? Although unpublished decisions are not binding, they may demonstrate that en banc review is needed to ensure uniformity within the circuit.

Panel Rehearing vs. Rehearing En Banc

In most cases, a party seeking rehearing will petition for both panel rehearing and rehearing en banc. Many of the circuits permit or require the petitioner to file the en banc petition in the same document entitled petition for rehearing or rehearing en banc. Some courts automatically treat a petition for rehearing en banc as a petition for panel rehearing, even if the petitioner does not expressly seek panel rehearing.

However, there may be situations where a party would prefer to petition for panel rehearing only. In determining whether panel rehearing is the best option in your case, it is important to know the court's history and the judges on your panel. Consider whether your case would fare better before the panel than the other judges in the court. For example, in cases where the panel overlooked an important fact, it may be advisable to seek only panel rehearing if the panel is good and the case is in a circuit that rarely rules in favor of noncitizens.

¹³ *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995). See also *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) ("where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority," panel is bound by the later and controlling authority); *FDIC*, 137 F.3d at 269 & n.19 (panel required to follow prior panel's interpretation of state law unless a subsequent state court decision makes the prior panel's decision clearly wrong); *Reich v. D.M. Sabia Co.*, 90 F.3d at 858 (panel can reevaluate prior panel precedent in light of intervening authority and amendments to statutes or regulations); *Landreth v. Comm'r of Internal Revenue Serv.*, 859 F.2d 643, 648 (9th Cir. 1988) (same). But see *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (rejecting any exception to the prior panel precedent rule "based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time").

PETITION REQUIREMENTS

The petition requirements described below are governed by FRAP. The courts, however, have adopted local rules regarding petitions for rehearing, rehearing en banc, and hearing en banc, so be sure to consult with the local rules as well as FRAP. The courts all post their local rules on their web pages.

Panel Rehearing – FRAP 40 and Local Rules

Standards and Contents

Petitions for panel rehearing “must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.”¹⁴

Filing Deadline

Although the general rule is that petitions for rehearing must be filed within 14 days after the entry of judgment, in cases where the United States or its officer or agency is a party, petitions may be filed within 45 days after entry of a judgment.¹⁵ Thus, in immigration cases, where the government is always a party, petitions for rehearing must be filed within 45 days after entry of the judgment. A petition is deemed to be filed on the date on which the circuit court *receives* the petition, not on the date which it is mailed.¹⁶ Petitioners may move for extensions of time in which to file a petition.¹⁷ The parties may file petitions for rehearing even if the person has been deported or departed voluntarily.

Length

A petition for rehearing must not exceed 15 pages unless the petitioner receives the court’s permission or a local rule provides otherwise.¹⁸ Many courts have adopted alternative length limitations based on the word count. If a party files a petition for panel rehearing and a petition for rehearing en banc, even if they are filed separately, the court considers them one document for the purpose of the petition length, unless the local rules require separate filing.¹⁹

Number of Copies

Copies of a petition for rehearing must be served and filed pursuant to FRAP 31.²⁰ Rule 31 prescribes that twenty-five copies of each petition must be filed with the clerk and two copies served on each unrepresented party and on counsel for each separately represented party. However, most courts have local rules that specify different numbers of copies. In addition, the courts generally require electronic filing under FRAP 25(a)(D), so be sure to consult local rules regarding this requirement.

¹⁴ FRAP 40(a)(2).

¹⁵ FRAP 40(a)(1).

¹⁶ FRAP 25(a)(2)(A).

¹⁷ FRAP 26(b); 40(a)(1).

¹⁸ FRAP 40(b).

¹⁹ FRAP 35(b)(3).

²⁰ FRAP 40(b).

Cover and Binding

A petition for rehearing does not need a cover as long as the caption and signature page contains the information specified in FRAP 32(a)(2).²¹ The petition may be bound using any method as long as the brief is secure, the binding does not obscure the text, and the brief lies “reasonably flat when open.”²² Petitions for rehearing typically are not bound like briefs, but are stapled in the upper left corner.

Answer

Under FRAP 40(a)(3), no party may respond to a petition for rehearing unless the court requests a response. “But ordinarily rehearing will not be granted in the absence of such a request.”²³ This means that the party who won the panel decision does not have an automatic opportunity to respond, but the court will “ordinarily” not grant the petition for rehearing without asking for a response.

Action by the Court

Under FRAP 40(a)(4), if the court grants a petition, it may:

1. make a final determination on the case without re-argument;
2. order that the case be re-argued or resubmitted; or
3. “issue any other appropriate order.”

Rehearing En Banc – FRAP 35 and Local Rules

Standards and Contents

Petitions for rehearing en banc will only be granted when it is necessary to secure or maintain uniformity of the court’s decisions or when the case involves a question of exceptional importance.²⁴ The petition *must* begin with a statement that either:

1. the panel decision conflicts with a decision of the U.S. Supreme Court or of the court to which the petition is filed (with citation/s to the conflicting case/s) and consideration by the full court is necessary to ensure the uniformity of the court’s decisions; or
2. the proceeding involves at least one “question of exceptional importance,” which must be succinctly stated. (An example of a question of exceptional importance may be an issue on which the panel decision is inconsistent with the binding decisions of other circuit courts that have ruled on the issue.)²⁵

Some circuit courts will automatically treat a petition for rehearing en banc as a petition for panel rehearing as well, even if not specified. Many circuit courts permit or require the petitioner to

²¹ FRAP 32(c)(2); 40(b).

²² FRAP 32(a)(3).

²³ FRAP 40(a)(3).

²⁴ FRAP 35(a).

²⁵ FRAP 35(b).

file a petition for rehearing and rehearing en banc in one document. At least one court, the Fifth Circuit, requires separate petitions for rehearing and petitions for rehearing en banc. Be sure to consult local rules.

Filing Deadline

Although the general rule is that petitions for rehearing en banc must be filed within 14 days after the entry of judgment, in cases where the United States or its officer or agency is a party, petitions may be filed within *45 days* after entry of a judgment.²⁶ Thus, in immigration cases, where the government is always a party, petitions for rehearing en banc must be filed within 45 days after entry of the judgment. A petition is deemed to be filed on the date on which the circuit court *receives* the petition, not on the date which it is mailed.²⁷ Petitioners may move for extensions of time in which to file a petition.²⁸ The parties may file petitions for rehearing en banc even if the person has been deported or departed voluntarily.

Length of Petition

A petition for rehearing en banc must not exceed 15 pages unless the petitioner receives the court's permission or a local rule provides otherwise.²⁹ Many courts have adopted alternative length limitations based on the word count. If a party files a petition for panel rehearing and a petition for rehearing en banc, even if they are filed separately, the court considers them one document for the purpose of the petition length, unless the local rules require separate filing.³⁰

Number of Copies

Each court of appeals shall prescribe the number of copies of a petition for rehearing en banc.³¹ In addition, the courts generally require electronic filing under FRAP 25(a)(D), so be sure to consult local rules regarding this requirement.

Cover and Binding

A petition for rehearing en banc does not need a cover as long as the caption and signature page contains the information specified in FRAP 32(a)(2).³² The petition may be bound using any method as long as the brief is secure, the binding does not obscure the text, and the brief lies "reasonably flat when open."³³ Petitions for rehearing en banc typically are not bound like briefs, but are stapled in the upper left corner.

²⁶ FRAP 35(c); 40(a)(1).

²⁷ FRAP 25(a)(2)(A).

²⁸ FRAP 26(b).

²⁹ FRAP 35(b)(2).

³⁰ FRAP 35(b)(3).

³¹ FRAP 35(d).

³² FRAP 32(c)(2).

³³ FRAP 32(a)(3).

Response

No response may be filed unless the court requests a response.³⁴ This means that the party who won the panel decision does not have an automatic opportunity to respond, but the court often will ask for a response if it is giving serious consideration the petition for rehearing.

Call for a Vote

The court will hear a case en banc where the majority of the circuit judges who are in regular active service and who are not disqualified vote to hear the case.³⁵ However, “[a] vote need not be taken to determine whether the case will be ... reheard en banc unless a judge calls for a vote.”³⁶

Hearing En Banc – FRAP 35 and Local Rules

Standards and Contents

Petitions for hearing en banc will only be granted when it is necessary to secure or maintain uniformity of the court’s decisions or when the case involves a question of exceptional importance.³⁷ The petition *must* begin with a statement that either:

1. the panel decision conflicts with a decision of the U.S. Supreme Court or of the court to which the petition is filed (with citation/s to the conflicting case/s) and consideration by the full court is necessary to ensure the uniformity of the court’s decisions; or
2. the proceeding involves at least one “question of exceptional importance,” which must be succinctly stated. (An example of a question of exceptional importance may be an issue on which the panel decision is inconsistent with the binding decisions of other circuit courts that have ruled on the issue.)³⁸

Filing Deadline

A petition for hearing en banc must be filed by the date when the *appellee’s* brief is due.³⁹ A petition is deemed to be filed on the date on which the circuit court *receives* the petition, not on the date which it is mailed.⁴⁰ Nothing in this rule affects the briefing schedule set by the court.

Length of Petition

A petition for hearing en banc must not exceed 15 pages unless the petitioner receives the court’s permission or a local rule provides otherwise.⁴¹ Many courts have adopted alternative length limitations based on the word count.

³⁴ FRAP 35(e).

³⁵ FRAP 35(a).

³⁶ FRAP 35(f).

³⁷ FRAP 35(a).

³⁸ FRAP 35(b).

³⁹ FRAP 35(c).

⁴⁰ FRAP 25(a)(2)(A).

⁴¹ FRAP 35(b)(2).

Number of Copies

Each court of appeals shall prescribe the number of copies of a petition for hearing en banc.⁴² In addition, the courts generally require electronic filing under FRAP 25(a)(D), so be sure to consult local rules regarding this requirement.

Cover and Binding

A petition for hearing en banc does not need a cover as long as the caption and signature page contains the information specified in FRAP 32(a)(2).⁴³ The petition may be bound using any method as long as the brief is secure, the binding does not obscure the text, and the brief lies “reasonably flat when open.”⁴⁴

Response

No response may be filed unless the court requests a response.⁴⁵

Call for a Vote

The court will hear a case en banc where the majority of the circuit judges who are in regular active service and who are not disqualified vote to hear the case.⁴⁶ However, “[a] vote need not be taken to determine whether the case will be ... reheard en banc unless a judge calls for a vote.”⁴⁷

STAY OF THE MANDATE

The timely filing of a petition for rehearing or rehearing en banc stays the mandate until the court decides the motion, unless the court orders otherwise.⁴⁸ Although the stay of the mandate does not automatically stay a person’s removal from the United States, if the court already granted a stay of removal, the stay of removal remains intact until the court issues the mandate.⁴⁹

⁴² FRAP 35(d).

⁴³ FRAP 32(c)(2).

⁴⁴ FRAP 32(a)(3).

⁴⁵ FRAP 35(e).

⁴⁶ FRAP 35(a).

⁴⁷ FRAP 35(f).

⁴⁸ FRAP 41(d)(1).

⁴⁹ See, e.g., *Rife v. Ashcroft*, 374 F.3d 606, 617 (8th Cir. 2004), *Nwakanma v. Ashcroft*, 352 F.3d 325, 328 (6th Cir. 2003).

PRACTICE ADVISORY

HOW TO FILE A PETITION FOR REVIEW

Legal Action Center

Updated by Debbie Smith February 28, 2011¹

I. HIGHLIGHTS OF THIS ADVISORY

This Practice Advisory addresses petition for review procedures and requirements:

- Petitions for review must be filed **and received** by the court no later than 30 days after the date of the decision of the Board of Immigration Appeals (BIA) or the U.S. Immigration and Customs Enforcement (ICE). This deadline is jurisdictional.
- The 30-day deadline for filing a petition for review is not extended either by filing a motion to reopen or reconsider or by the grant or extension of voluntary departure.
- Separate petitions for review must be filed for each BIA decision, including issues arising from the denial of a motion to reopen or reconsider.
- Filing a petition for review does *not* stay the individual's removal from the country.
- A separate request for a stay must be filed with the court.
- Filing a petition for review terminates the voluntary departure order, with one exception.
- ICE can deport an individual *before* the 30-day deadline to file a petition for review.
- If in doubt about whether the court of appeals has jurisdiction, it may be prudent to timely file the petition for review to preserve the individual's right to seek review.
- Electronic filing is the norm in most circuit courts of appeal. It is recommended that attorneys register as soon as possible to create an account in the circuit court of appeals.
- Attorneys must be admitted to the bar of the circuit court.
- Unrepresented individuals may move the circuit court to appoint pro bono counsel.
- Indigent individuals may move the circuit court to grant *in forma pauperis* status and file the petition without the filing fee.
- It may be appropriate to request a conference with the Mediation Unit of the court.
- When in doubt about circuit court procedures, call the court clerk with your question.
- A petition for review may be litigated even if the individual has been removed.

¹ Copyright (c) 2009, 2010, 2011 American Immigration Council. Debbie Smith is an attorney at Catholic Legal Immigration Network, Inc. (CLINIC). Thanks to Trina Realmuto and Christopher Rickerd for their helpful comments. [Click here](#) for information on reprinting this Practice Advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

Sample petitions for review are attached as Appendices A and B. A list of websites for the courts of appeals is attached as Appendix C. A list of national addresses for service of the petition is attached as Appendix D.

II. INTRODUCTION

A petition for review is the document filed by, or on behalf of, an individual seeking review of an agency decision in a circuit court of appeals. In the immigration context, a petition for review is filed to obtain review of a decision of removal (and the former deportation and exclusion) issued by the BIA. In addition, a petition for review may be filed to obtain review of a removal order issued by ICE under a few very limited specific provisions of the Immigration and Nationality Act (INA).

Section 242 of the INA, 8 U.S.C. § 1252, as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)² and amended by the REAL ID Act,³ contains the jurisdictional basis for petitions for review and sets out rules and procedures governing petitions for review.⁴ In addition, the Federal Rules of Appellate Procedure (FRAP) and local circuit court rules provide petitioners with additional court procedures and requirements. The circuit courts post the FRAP and local rules on their websites. See a list of the court websites in Appendix C. In addition, many of the circuit court websites contain valuable resources to assist practitioners. For example, the website of the 9th Circuit Court of Appeals posts a detailed outline of procedural and substantive immigration law in the 9th Circuit, a list of Frequently Asked Questions, and an explanation of practice issues entitled “After Opening a Case – Counselor Immigration Cases.” Similarly, the 3rd Circuit Court of Appeals website includes a detailed explanation of the court’s mediation program. See Appendix C.

² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

³ REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

⁴ Prior to the enactment of the REAL ID Act, judicial review of final deportation or exclusion orders (i.e., where proceedings commenced before April 1, 1997), was governed by transitional rules set forth in IIRAIRA §309. Subsequently, the REAL ID Act said that petitions for review of orders of deportation or exclusion filed under the transitional rules “shall” be treated as if filed as a petition for review under new INA §242 (as amended by REAL ID Act §106(d)). Thus, regardless whether the person has a removal order, deportation order, or exclusion order, the same rules should apply.

III. COURT OF APPEALS JURISDICTION OVER PETITIONS FOR REVIEW

The courts of appeals have **exclusive** jurisdiction to review “a final order of removal,” except an expedited removal order entered under INA § 235(b)(1).⁵ INA § 242(a)(1), 8 U.S.C. § 1252(a)(1). The following are examples of the types of decisions that may be reviewed through a petition for review:

A BIA decision to:

- issue a final removal order (including the finding of removability and the denial of any applications for relief);
- deny a motion to reconsider or a motion to reopen; or
- deny asylum in asylum only proceedings.

An order of removal issued by ICE under:

- INA §241(a)(5); or
- INA §238(b).

A challenge to a BIA or ICE decision may involve legal, constitutional, factual, and/or discretionary claims. In general, (1) legal claims assert that BIA/ICE erroneously applied or interpreted the law (*e.g.*, the INA or the regulations); (2) constitutional challenges assert that BIA/ICE violated a constitutional right (*e.g.*, due process or equal protection); (3) factual claims assert that certain findings of fact made by BIA/ICE were erroneous; and (4) discretionary claims assert BIA/ICE abused its discretion by the manner in which it reached its conclusion.

Jurisdictional Bars

The restrictions on judicial review imposed by INA §242, 8 U.S.C. § 1252 require practitioners to analyze each case to determine whether a particular claim is reviewable in the court of appeals. In order to decide if review is permitted, practitioners must first consider whether the INA contains a bar to review that is related to the decision, nature of the claim, or the person bringing the challenge. To do this, practitioners must be familiar with evolving case law within their circuit interpreting the relevant bar to review. Second, if there is a bar to review, practitioners must evaluate whether the petition raises a constitutional claim or a question of law that supersedes the bar.

Discretionary Decisions

INA §242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) contains two sub-provisions which generally prohibit review of discretionary decisions including waivers of removal under §§ 212(h) and

⁵ Whether a decision is “final” for purposes of judicial review sometimes is not clear. Yet, if an order is not final at the time the petitioner filed the petition for review, most courts of appeals will dismiss the petition as prematurely filed. However, if the individual foregoes the opportunity to file a petition for review when one should have been filed, later review in the court of appeals may be precluded. Read an in-depth discussion of the finality requirement in the LAC’s Practice Advisory, “Finality of Removal Orders for Judicial Review Purposes” (Aug. 5, 2008) at http://www.legalactioncenter.org/sites/default/files/lac_pa_finrem.pdf.

212(i), 8 U.S.C. §§ 1182(h) and (i), cancellation of removal, voluntary departure, and adjustment of status, and other decisions or action the authority for which is specified in Title II of the INA to be discretionary. With respect to this last category, discretionary decisions in Title II, the Supreme Court held in *Kucana v. Holder* that the proscription against review of discretionary determinations applies only to Attorney General determinations made discretionary by statute, not to determinations declared discretionary by the Attorney General through regulation.⁶ Prior to the enactment of REAL ID's provisions authorizing review of constitutional claims or questions of law,⁷ several circuits found jurisdiction to review non-discretionary determinations that were within the context of a discretionary benefit.⁸ Following the REAL ID amendments to the statute, review is not precluded in cases that raise a constitutional claim or a question of law. For example, a court has jurisdiction to consider questions of statutory interpretation in cancellation of removal cases, and thus courts have decided whether the hardship standard is consistent with international law⁹, whether the individual has met the continuous presence requirement¹⁰ or whether a qualifying relative meets the definition of "child."¹¹ Similarly, the utter failure to consider evidence in the context of a cancellation case may be a reviewable question of law.¹²

Criminal Offenses

INA §242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) prohibits review of cases involving criminal offenses under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) or specific subsections of INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). Nonetheless, the court retains jurisdiction to review whether the individual to be removed 1) is a non-citizen, 2) who is removable, 3) based on a disqualifying offense.¹³ Thus, the individual must actually be removable on a basis specified in the relevant section of the statute. For example, if the individual is not charged and found removable on grounds that might implicate the bar, **such as the aggravated felony bar**, the bar does not apply. In addition, the right to review is also restored pursuant to INA §242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), for cases involving criminal offenses that raise a constitutional claim or a question of law. For example, the court retains jurisdiction to determine whether an individual

⁶ *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010).

⁷ See INA § 242(a)(2)(D), 8 U.S.C. §1252(a)(2)(D).

⁸ See *Santana-Albarran v. Ashcroft*, 393 F.3d 699,703 (6th Cir. 2005); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (holding that there is jurisdiction to consider the continuous presence requirement for cancellation of removal); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2001) (holding there is jurisdiction to review the definition of child).

⁹ See *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005).

¹⁰ See *Augustin v. AG of the United States*, 520 F.3d 264, 267 (3d Cir. 2008).

¹¹ See *Partap v. Holder*, 603 F.3d 1173, 1174 (9th Cir. 2010); *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1176-78 (9th Cir. 2007) (court reviewed whether unborn child or grandchild met the definition of "child" under the statute).

¹² See *Champion v. Holder*, 626 F.3d 952, 956 (7th Cir. 2010).

¹³ See *Moore v. Ashcroft*, 251 F.3d 919, 923 (11th Cir. 2001).

subject to the aggravated felony grounds of removal is eligible for 212(c) relief if there is no statutory counterpart in the grounds of inadmissibility.¹⁴

Asylum

Although asylum is a discretionary form of relief, the court retains jurisdiction to review most aspects of the asylum determination pursuant to INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). However, INA § 208(a)(3), 8 USC § 1158(a)(3), limits review of several determinations related to asylum such as whether an individual established changed circumstances or extraordinary circumstances regarding a delay in filing for asylum.¹⁵ Again, the prohibition does not apply to cases that raise a constitutional claim or a question of law. Not all courts agree on what constitutes a “question of law.” The Ninth and Second Circuit have held that questions of law include the application of statutes or regulations to undisputed facts, or mixed questions of facts and law.¹⁶ Therefore, in the Ninth and Second Circuits, a decision on “changed circumstances” or “extraordinary circumstances” is a mixed question of law and fact over which the court has jurisdiction.¹⁷

In conclusion, the limitations on jurisdiction affecting discretionary decisions, cases involving criminal offenses, and specific asylum determinations are mitigated by the court’s authority to review constitutional claims and questions of law. In addition, courts retain jurisdiction to determine whether they have jurisdiction over the petition for review. As discussed below, following the REAL ID Act amendments, few, if any, issues outside of challenges to detention remain reviewable via habeas corpus. Thus, it is advisable to *timely* file a petition for review to preserve the individual’s right to seek review.¹⁸

IV. PETITION REQUIREMENTS

Filing Deadline

A petition for review “*must be filed not later than thirty days after the date of the final order*” of removal or the final order of exclusion or deportation. See INA § 242(b)(1), 8 USC § 1252(b)(1) (removal orders).

The 30-day deadline for filing a petition for review of the underlying decision is *not* extended by the filing of a motion to reopen or reconsider, nor is it extended by the grant or extension of

¹⁴ See *De La Rosa v. U.S. Atty. Gen.*, 579 F.3d 1327, 1328 (11th Cir. 2009) cert. denied *De La Rosa v. Holder*, 130 S. Ct. 3272 (2010).

¹⁵ INA § 208(b)(2)(A), 8 USC § 1158(b)(2)(A).

¹⁶ Other circuit courts have not found jurisdiction where there is a mixed question of law and fact.

¹⁷ See *Taslimi v. Holder*, 590 F.3d 981, 985 (9th Cir. 2010); *Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007); *Chen v. United States DOJ*, 471 F.3d 315, 322 (2d Cir. 2006).

¹⁸ Courts have held that review of detention issues including the length and conditions of detention, still is available in habeas corpus proceedings. See the LAC’s practice advisory titled “Introduction to Habeas Corpus” (April 2006), at http://www.legalactioncenter.org/sites/default/files/lac_pa_0406.pdf.

voluntary departure. To obtain review of issues arising from a BIA decision and issues arising from the denial of a motion to reopen or reconsider, separate petitions for review of each BIA decision must be filed. If separate petitions are not filed, the court's review may be limited to the issues arising from the BIA decision for which review is sought. For example, if a petition for review of the BIA's decision denying a motion to reopen or reconsider has been filed, but a petition for review of the BIA decision underlying the motion has *not* been filed, the court may not review issues arising from the underlying BIA decision.

The deadline for filing a petition for review is "mandatory and jurisdictional" and is "not subject to equitable tolling." *Stone v. INS*, 514 U.S. 386, 405 (1995). Because the 30-day deadline is jurisdictional, circuit courts lack authority to consider late-filed petitions for review.¹⁹

The 30-day time period begins running from the date of the BIA's decision. If the BIA denied a motion to reopen or reconsider, the 30-day time period begins running from the date of the BIA decision denying the motion. In reinstatement cases under INA §241(a)(5), or administrative deportation cases under INA §238(b), the 30-day deadline begins running from the date of the final ICE order.²⁰ In computing the 30 day period to file the petition for review, if the last day to file the petition for review is a Saturday, Sunday, or legal holiday,²¹ the filing period continues to run until the day after the Saturday, Sunday, or legal holiday.²² The petition for review must be **received** by the clerk's office on or before the thirtieth day and not merely mailed by that date. The date the petition is postmarked is **not** relevant.

Where the 30-day deadline has expired due to ineffective assistance of counsel, new counsel may consider filing a motion to reopen to the BIA (provided the motion is filed within the 90-day statutory time period for filing motions to reopen). See *Matter of Compean*, 25 I. &N. Dec. 1, 3 (AG 2009) (finding that BIA may consider claims of ineffective assistance based on conduct that occurred after the entry of a removal order). Counsel also may consider filing a motion requesting that the BIA rescind and re-issue its decision to allow petitioner to seek judicial

¹⁹ There are very few situations in which a court might excuse a late-filed petition for review: (1) where the court or the BIA provided misleading information as to the deadline for filing a petition for review; and (2) where the BIA failed to comply with the applicable regulations regarding mailing the decision to petitioner or petitioner's counsel. For further information on these situations and potential remedies, see the LAC's Practice Advisory, "Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court" (April 20, 2005) at http://www.legalactioncenter.org/sites/default/files/lac_pa_042005.pdf.

²⁰ At least one circuit has held, however, that the thirty day deadline does not commence until *service* of the final ICE order where government misconduct delayed service beyond the thirty day period. See *Villegas de la Paz v. Holder*, ___ F.3d ___, 2010 U.S. App. LEXIS 23182 (6th Cir. Nov. 8, 2010), *reh'g en banc denied*, *Villegas de la Paz v. Holder*, 2010 U.S. App. LEXIS 26935 (6th Cir. Dec. 28, 2010)

²¹ Absent further instruction from a circuit court, legal holidays are limited to New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

²² FRAP 26(a).

review.²³

Attachments and Contents

Under INA §242(c), 8 USC §1252(c), a petition for review must and need only: (1) include a copy of the final administrative order; and (2) state whether any court has upheld the validity of the order, and if so, state which court, the date of the court’s ruling, and the type of proceeding.

However, the circuit court rules may mandate additional requirements for the filing of the petition for review beyond those specified in the statute. These additional requirements affect only those cases filed in that circuit. For example the Ninth Circuit rule governing the contents of a petition for review requires the petition to state whether the petitioner is detained in the custody of the Department of Homeland Security or at liberty and whether the petitioner has filed a motion to reopen before the Board of Immigration Appeals or applied to the district director for an adjustment of status.²⁴ Therefore, it is crucial that practitioners familiarize themselves with the circuit rules for the circuit in which the petition will be filed prior to filing the petition for review.

The petition should state the name of each individual petitioning for review and should not use “et al.” to reference more than one petitioner. FRAP 15(a)(2)(A). For example, where a family is in immigration proceedings, but the BIA decision only references the lead respondent, the petition for review should name each family member whose case was decided by that order and include their A number, even if all family members were not specifically listed in the BIA decision. Individual petitions for review need not be filed for each family member.

A sample petition for review is attached as Appendix A. Although it is not necessary at this stage to discuss the jurisdictional basis or merits of the petition, a more detailed sample petition for review, containing the basis for jurisdiction and venue, also is provided as a reference and is attached as Appendix B. An affirmative explanation of jurisdiction may be desirable in cases where an opposition to jurisdiction is anticipated.

V. STAY OF REMOVAL AND TERMINATION OF VOLUNTARY DEPARTURE

Stay of Removal

The filing of a petition for review does *not* provide an automatic stay of removal. Immigration and Customs Enforcement (ICE) may deport an individual as soon as the BIA issues its order;

²³For further information regarding motions to rescind and re-issue, see the LAC’s Practice Advisory, “Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court” (April 20, 2005) at http://www.legalactioncenter.org/sites/default/files/lac_pa_042005.pdf. In addition, the Ninth Circuit has said that there is habeas jurisdiction to consider a claim of ineffective assistance relating to counsel’s failure to file the petition for review. *See Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007)

²⁴ Ninth Circuit Rule 15-4. Counsel should update the court regarding any pertinent changes subsequent to the filing of the petition for review.

ICE need not wait until the 30-day period for filing a petition for review has run. Likewise, in reinstatement cases under INA §241(a)(5), and administrative removal cases under INA §238(b), deportation may occur as soon as ICE issues its removal order. In the post-AEDPA²⁵ and IIRAIRA era, serving the petition for review does *not* stay deportation, “unless the court orders otherwise.” Thus, petitioner also may want to file for a stay of the removal order pending the petition for review. Obtaining a judicial stay is necessary to prevent petitioner’s removal from the country. If the court orders the stay of removal, the stay remains in place until the court’s mandate issues.

In *Nken v. Holder*,²⁶ the Supreme Court held that a court of appeals should apply the traditional criteria governing stays when adjudicating a stay of removal. In doing so, the Court rejected the government’s argument that the stringent standard in INA § 242(f)(2), 8 U.S.C. § 1252(f)(2) (“clear and convincing evidence” that the removal order “is prohibited as a matter of law”) applies. The Court’s decision reversed the Fourth and Eleventh Circuits, which had held that INA § 242(f)(2) applies to stays of removal pending petitions for review.

Under the traditional standard for stays, the court shall consider (1) whether the stay applicant has made a strong showing that he/she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The *Nken* Court noted that the first two factors are most critical. The last two factors merge because the government is the respondent. In addition, the Court advised “that the burden of removal alone cannot constitute the requisite irreparable injury” and that courts should not assume that “ordinarily, the balance of hardships will weigh heavily in the applicant’s favor.”

Unlike the filing of the petition for review, the filing of a motion for a stay requires a detailed analysis of the facts of petitioner’s case, the legal issues raised in the case, the BIA’s errors of law, and the hardships that would ensue if the petitioner were forced to return to his or her native country pending review of the petition. In most cases practitioners will be preparing and filing the stay request without the benefit of the administrative record, which, pursuant to the FRAP must be filed within 40 days of service of the petition for review. The absence of the administrative record increases the burden on practitioners who did not represent the petitioner before the BIA. Practitioners in this situation must examine the BIA decision, all information available from previous counsel, and the facts of the case as recounted by the petitioner. Stay motions should not be cursory; they require significant care and analysis. The government may or may not oppose a stay motion. If an opposition is filed the petitioner has an opportunity to reply. See FRAP 27(a)(4).

Voluntary Departure

Under regulations that took effect on January 20, 2009, an order of voluntary departure will terminate automatically upon the filing of a petition for review or other judicial challenge and the

²⁵ Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

²⁶ *Nken v. Holder*, 129 S. Ct. 1749, 1754 (2009).

alternate order of removal will take effect.²⁷ 8 C.F.R. § 1240.26(i). However, if a person then departs within 30 days of filing the petition for review and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. *Id.* See 73 Fed. Reg. 76927, 76933 (Dec. 18, 2008) for a discussion of what proof and evidence may be sufficient.

VI. WHERE TO FILE THE PETITION FOR REVIEW

Venue is restricted to the court of appeals for the judicial circuit in which the IJ completed the proceedings. INA §242(b)(2), 8 USC §1252(b)(2). If a case is conducted by video hearing, the immigration judge must state on the record the location of the hearing, which may be different from where the IJ and the parties are located. See OPPM 04-06, Creppy, Chief IJ, EOIR (August 18, 2004) available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-06.pdf>.

VII. FILING FEE AND MOTION FOR PRO BONO COUNSEL

The filing fee for a petition for review is currently \$450. Petitioner may request leave to proceed *in forma pauperis* by filing a motion and supporting affidavit with the court.²⁸ The request to proceed *in forma pauperis* is governed by 28 U.S.C. § 1915. In the affidavit and motion, petitioner must demonstrate that he/she is incapable of paying the filing fee because of indigence. Local circuit court rules may require the submission of a form demonstrating petitioner's income. If petitioner is represented by counsel, the affidavit and motion may explain whether such representation is pro bono.

Indigent petitioners without counsel may also move the court to appoint counsel to pursue the petition for review. The motion for pro bono counsel should contain information about the legal merits of the case and the petitioner's indigency. The court appoints counsel in a limited number of civil cases and the motion must present compelling legal and humanitarian reasons for the appointment.

VIII. SERVICE ON RESPONDENT

Whom to Sue

The INA states that "[t]he respondent is the Attorney General." INA §242(b)(3)(A), 8 USC §1252(b)(3)(A).

²⁷ This rule applies prospectively only, and therefore does not apply to cases where the voluntary departure was ordered prior to January 20, 2009. See 73 Fed. Reg. at 76936.

²⁸ See FRAP 24(b) and corresponding local circuit court rules.

Whom to Serve

The petition must be served “on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 240 was entered.” INA §242(b)(3)(A), 8 USC §1252(b)(3)(A).²⁹

Serve the Attorney General by sending a complete copy of the petition for review to the address set forth in Appendix D. Attorneys from the Office of Immigration Litigation (OIL), a division within the Civil Division of the Department of Justice, litigate on behalf of the Attorney General. Thus, it is advisable to also serve a copy of the petition on OIL at the address listed in Appendix D. After receiving a copy of the petition, the OIL attorneys assigned to the case will enter their appearance before the court and should inform petitioner’s counsel.

To serve the officer in charge of the district, counsel should serve the ICE Field Office Director for Enforcement and Removal Operations (formerly Detention and Removal) with jurisdiction over the district where the final administrative order was issued. Counsel may need to make inquiries to learn the name of the officer in charge of detention and removal in their area. Counsel also will need to ascertain the proper mailing address for the ICE Field Office Director in order to serve this official.

At the same time, petitioner must file a certificate of service listing the names and addresses of those served and the manner of service. FRAP 15(c). Addresses for the Attorney General and the Office of Immigration Litigation are attached as Appendix D. Counsel may contact the local ICE office to get the correct address of that office. FRAP 15(c) further requires that petitioner must give “the clerk enough copies of the petition . . . to serve each respondent.” Presumably, an original plus one copy of the petition must be filed where the Attorney General is the only named respondent. However, counsel should verify the number of copies required by checking local procedures or contacting the clerk’s office. *See also* FRAP 25 (Filing and Service) and corresponding local court rules.

Service of Future Pleadings

After opposing counsel has entered his or her appearance, future pleadings’ service “must be made on the party’s counsel” by a prescribed method. FRAP 25(b) and (c). Such pleadings must be filed with either: (1) an acknowledgement of service by the person served; or (2) a statement by the person effectuating service attesting to the date and manner of service, the names of those served, and the appropriate mail, e-mail or delivery address or facsimile number, depending on the manner of service. The proof of service may appear on or be affixed to the pleading. *See* FRAP 25(d)(3). The local rules set out acceptable methods of service.

Electronic Filing

Many courts of appeals now require electronic filing as permitted under FRAP 25(a)(2)(D). The local rules specify which documents are exempt from electronic filing and practitioners must consult local rules. Currently the filing of a petition for review is exempt from electronic filing

²⁹ If the order of removal was entered under another section of law, for example, INA §§238(b) or 241(a)(5), counsel presumably is bound by the service requirements of INA §242(b)(3)(A), 8 USC §1252(b)(3)(A).

requirements and paper filing is required. While the filing of the petition for review is exempt from the electronic filing requirements, subsequent filings, including motions and briefs, must be filed electronically in some circuit courts if the petitioner is represented by counsel. In order to be prepared for future filings in the circuit court, it is important that attorneys register as electronic filers in advance. This registration will create an account in the circuit court of appeals. See the Legal Action Center's (LAC) Practice Advisory, "Electronic Filing and Access to Electronic Federal Court Documents" (April 13, 2009) at http://www.legalactioncenter.org/sites/default/files/pa-ElectronicFiling_20090413.pdf.

IX. LITIGATING THE PETITION IN THE COURT OF APPEALS

Admission and Entry of Appearance

Attorneys must be admitted to practice before the court of appeals in which the petition for review is filed or, in some courts, must file an application for admission either simultaneously or within a prescribed time period. Some courts of appeals allow an attorney who is not admitted to appear pro hac vice.

The courts of appeals require counsel to enter an appearance in each case. Entry of Appearance forms are available on the court's website and from the clerk's office.

For further information regarding admission and appearance requirements, counsel may consult FRAP 46 and corresponding local circuit rules. Information also is available on court websites. See Appendix C, listing websites for the courts of appeals.

Federal Rules of Appellate Procedure

The rules and procedure for litigation in the courts of appeals are governed by the Federal Rules of Appellate Procedure in conjunction with each circuit's local rules. This advisory provides a brief overview of appellate procedure related to petition for review litigation; however, it does not address all of the Federal Rules of Appellate Procedure nor does it address local circuit rules.

Mediation Program

FRAP 33 establishes the availability of appeal conferences to aid the court in the disposition of cases and the possibility of settlement. All civil cases, including immigration petitions for review, may be considered for acceptance in circuit court mediation programs. However, not all circuits permit mediation in immigration cases. For example, the 4th Circuit Court of Appeals does not offer mediation in immigration cases. Counsel must determine if mediation is available and request a mediation conference.

Mediation is generally requested pre-briefing before each side has invested significant resources in the case. An example of an instance where mediation may resolve the case is a petition for review raising an asylum issue where an adjustment of status possibility becomes available.

Certified Record of Proceedings and Briefing Schedule

Once a petition for review is filed, the court generally issues an order/schedule for the parties to file: (1) the Certified Record of Proceedings (also known as the "Administrative Record"); (2) Petitioner's Opening Brief (and possibly Excerpts of Record); (3) Respondent's Answering Brief; and (4) Petitioner's Reply Brief (optional).

The agency is obligated to file the Certified Record of Proceeding within 40 days of service of the petition for review. FRAP 17(a). The record must include: (1) the order involved; (2) any findings or report on which it is based; and (3) pleadings, evidence, and other parts of the proceeding before the agency, including the transcripts of hearings. FRAP 16(a). Where the petition seeks review of a BIA order, the record is prepared by the Executive Office for Immigration Review and filed by OIL.

INA §242(b)(3)(C), 8 USC §1252(b)(3)(C), states that petitioner must serve and file the opening brief no later than 40 days after the date on which the administrative record is available, and further states that petitioner may serve and file a reply brief within 14 days *after service* of the government’s brief. *See also* FRAP 31(a)(1) (“The appellant must serve and file a brief within 40 days after the record is filed.”). The statute and rule say these deadlines may only be extended by motion upon a showing of good cause. INA §242(b)(3)(C); FRAP 31(a)(1). Also, if the brief is not filed, INA §242(b)(3)(C) instructs courts to dismiss the appeal unless a manifest injustice would result. In circuits that require electronic filing of briefs, the circuit rules state the manner of electronically filing and whether paper copies are also required. *See* FRAP 31 and local rules. In circuits that do not require electronic filing of briefs, local rules may also modify the number of paper briefs required for filing FRAP 31.

Importantly, most courts do not rely on the time frame in the statute or rule; instead, they issue a schedule setting out due dates for the filing of both the administrative record and the briefs. Further, it is common for counsel on either side or both sides to move to extend the briefing schedule or move to hold briefing in abeyance.

When filing briefs in the circuit courts, counsel should consult FRAP 28 (Briefs), 30 (Appendix to the Briefs), 31 (Serving and Filing), and 32 (Form of Briefs, Appendices, and Other Papers), as well as all corresponding local rules. A list of websites for the courts of appeals is attached as Appendix C.

Motions

Written motions are governed by FRAP 27 and corresponding local rules. Some courts also allow telephonic motions for an extension of time to file a brief. In addition, the briefing schedule may be delayed or vacated if the government files a motion to dismiss for lack of subject matter jurisdiction claiming that petitioner is barred from review in the court of appeals.

Generally, motions are supported by an affidavit or declaration.³⁰ When the motion requests relief by a date certain, the request must be included in the caption.³¹ Frequently local rules require that the motion include the position of the opposing party to the request, and the 9th Circuit Court of Appeals requests a statement of the petitioner’s detention status.³² Deadlines for responses and replies to motions are set forth in FRAP 27. Local rules may provide special procedures for the filing of an emergency motion. If the petitioner is detained and wishes to get a decision on his or her case as quickly as possible, counsel should discuss whether to file a motion to expedite consideration of the petition for review with the court.

Practitioners must be prepared to respond to motions to dismiss and motions for summary disposition. Motions to dismiss for lack of jurisdiction may allege that the petition raises a discretionary decision, criminal offense, or asylum case that is barred under INA §242, 8 U.S.C. § 1252. Practitioners must be ready to address the court’s jurisdiction affirmatively and address

³⁰ 28 U.S.C. § 1746.

³¹ FRAP 27(a)(3)(B).

³² Ninth Circuit Rule 27-8.2

whether the petition raises constitutional claims or questions of law or whether the petitioner is removable. Similarly a motion for summary disposition may allege that the questions raised on review are insubstantial. In that case, practitioners must provide information about the petition's significant legal issues.

Supplemental Authorities—28(j) Letters

If pertinent and significant authorities come to petitioner's attention after briefing is completed or after oral argument, but before the court issues a decision, counsel should advise the court of the supplemental citations pursuant to FRAP 28(j). The advisal is made by letter and copied to opposing counsel. "The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited." FRAP 28(j).

Oral Argument

Pursuant to FRAP 34, any party may file, or a court may require by local rule, a statement explaining why an oral argument should, or need not, be permitted. Oral arguments must be permitted unless a panel of three judges decides that:

- the appeal is frivolous;
- the dispositive issue(s) have already been decided; or
- the facts and arguments are adequately presented in the briefs and records.

The court clerk will notify the parties of the date, time, place, and amount of time allotted for argument if the court determines oral argument is necessary.

Judgment and Post-Judgment Review

The judgment (or decision) is entered on the docket by the clerk after he or she receives the court's opinion or upon the court's instruction (where judgment is rendered without opinion). FRAP 36 (Entry of Judgment). A petition for rehearing and/or petition for rehearing en banc may be filed within 45 days after entry of judgment, unless otherwise specified by the court or local rule. FRAP 35 (En Banc Determination) and FRAP 40 (Petition for Panel Rehearing). Unless the court directs otherwise, the mandate will automatically issue seven calendar days after the time to file a petition for rehearing expires, or seven calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. FRAP 41. For additional information regarding petitions for panel and en banc rehearing, see the LAC's Practice Advisory, "How To File A Petition For Rehearing, Rehearing En Banc And Hearing En Banc In An Immigration Case" at http://www.legalactioncenter.org/sites/default/files/lac_pa_082704.pdf.

APPENDIX A: SAMPLE PETITION FOR REVIEW

Notes:

1. Complete ALL underlined spaces (except “Case File No.”) as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk’s Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n.4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, rules regarding admission and entry of appearance as counsel, and electronic filing requirements.
5. **If the local circuit court rules require it**, add information about whether the petitioner is detained and whether the petitioner has filed a motion to reopen to the BIA or applied for adjustment of status.

UNITED STATES COURT OF APPEALS FOR THE _____CIRCUIT

[Name of Petitioner],	)	
	)	
Petitioner,	)	Case File No.
	)	
v.	)	
	)	Immigration File No.: A_____
Eric H. HOLDER,	)	
Attorney General,	)	
	)	PETITION FOR REVIEW
Respondent .	)	
_____	)	

The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court’s ruling, and the kind of proceeding).

Dated: _____

Respectfully submitted,

Attorney/s Name
Firm / Organization
Address
Telephone:
Facsimile:
Attorney/s for Petitioner

APPENDIX B: SAMPLE PETITION FOR REVIEW (MORE DETAILED)

Notes:

1. Complete ALL underlined spaces (except “Case File No.”) as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk’s Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n. 4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, rules regarding admission and entry of appearance as counsel, and electronic filing requirements.
5. **If the local circuit court rules require it**, add information about whether the petitioner is detained and whether the petitioner has filed a motion to reopen to the BIA or applied for adjustment of status.

UNITED STATES COURT OF APPEALS FOR THE _____CIRCUIT

[Name of Petitioner],	)	
	)	
Petitioner,	)	Case File No. _____
	)	
v.	)	
	)	Immigration File No.: A _____
Eric H. HOLDER,	)	
Attorney General,	)	
	)	PETITION FOR REVIEW
Respondent .	)	
_____	)	

The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court’s ruling, and the kind of proceeding).

Jurisdiction is asserted pursuant to 8 U.S.C. § 1252(a)(1) (removal cases) / § 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as amended by § 106 of the REAL ID Act of 2005 (deportation and exclusion cases.)

Venue is asserted pursuant to 8 U.S.C. § 1252(b)(2) (removal cases) / IIRIRA § 309(c)(4)(D) (deportation/exclusion cases) because the immigration judge / ICE (in cases under INA §§ 241(a)(5) or 238(b)) completed proceedings in City, State, within the jurisdiction of this judicial circuit.

This petition is timely filed pursuant to 8 U.S.C. § 1252(b)(1) (removal) / IIRIRA § 309(c)(4)(C) (deportation / exclusion) as it is filed within 30 days of the final order of removal / deportation / exclusion.

Dated: _____

Respectfully submitted,

Attorney/s Name
Firm / Organization
Address
Telephone:
Facsimile:

Attorney/s for Petitioner

APPENDIX C: WEBSITES FOR U.S. COURTS OF APPEALS

First Circuit: www.ca1.uscourts.gov

First Circuit Checklist for Briefs:

http://www.ca1.uscourts.gov/files/faq/checklist_for_briefs.pdf

Second Circuit: www.ca2.uscourts.gov

How to Appeal an Agency Case to the Second Circuit :

[http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/How to Appeal Your Agency Case 12-09.pdf](http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/How_to_Appeal_Your_Agency_Case_12-09.pdf)

Third Circuit: www.ca3.uscourts.gov

Third Circuit Mediation Program :

<http://www.ca3.uscourts.gov/medhome.htm>

Fourth Circuit: www.ca4.uscourts.gov

Fourth Circuit Motions Procedures:

<http://www.ca4.uscourts.gov/pdf/motproc.pdf>

Fifth Circuit: www.ca5.uscourts.gov

Fifth Circuit Form and Instruction for Appearance of Counsel

<http://www.ca5.uscourts.gov/documents/dkt-5a.pdf>

Sixth Circuit: www.ca6.uscourts.gov

Sixth Circuit Checklist for Briefs

[http://www.ca6.uscourts.gov/internet/forms/documents/Amended Brief Checklist.pdf](http://www.ca6.uscourts.gov/internet/forms/documents/Amended_Brief_Checklist.pdf)

Seventh Circuit: www.ca7.uscourts.gov

Seventh Circuit Practitioner's Handbook

http://www.ca7.uscourts.gov/wiki/index.php?title=Practitioner%27s_Handbook

Eighth Circuit: www.ca8.uscourts.gov

Eighth Circuit Contact List

<http://www.ca8.uscourts.gov/newcoa/contact.htm>

Ninth Circuit: www.ca9.uscourts.gov

Instructions for counseled immigration cases:

http://www.ca9.uscourts.gov/datastore/uploads/file_an_appeal/case_opening_csl_imm.htm

Ninth Circuit Immigration Outline:

http://www.ca9.uscourts.gov/guides/immigration_outline.php

Tenth Circuit: www.ca10.uscourts.gov

Tenth Circuit Practitioner's Guide

http://www.ca10.uscourts.gov/downloads/pracguide_web.pdf

Eleventh Circuit: www.ca11.uscourts.gov

Eleventh Circuit Mediation Information

<http://www.ca11.uscourts.gov/documents/pdfs/KMC-MEDIATION-PROGRAMS.pdf>

DC Circuit: www.cadc.uscourts.gov

APPENDIX D: LIST OF ADDRESSES FOR SERVICE OF A PETITION FOR REVIEW

Attorney General

Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of Immigration Litigation

Thomas W. Hussey, Director
Office of Immigration Litigation
U.S. Department of Justice / Civil Division
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

ICE District Offices

Service must also be made on the Field Office Director or, where none exists, the most senior officer in the Detention & Removal Unit. Counsel will need to contact the local ICE office to obtain the name and position title of the appropriate local officer and to obtain the mailing address for service on this individual.

PRACTICE ADVISORY¹
Updated August 30, 2010

**MANDAMUS JURISDICTION OVER DELAYED APPLICATIONS:
RESPONDING TO THE GOVERNMENT’S MOTION TO DISMISS**

By the American Immigration Council’s Legal Action Center

In recent years, many non-citizens have filed mandamus and Administrative Procedure Act (APA) suits against USCIS in federal district court, seeking to force the agency to make decisions on long-delayed applications for immigration benefits. These suits do not ask the court to grant the immigration benefit, but instead to simply order the agency to act on an application.² The government frequently has challenged these suits with motions to dismiss claiming that the courts lack jurisdiction.

This practice advisory will outline arguments that can be made in response to the government’s primary arguments that the district court should dismiss the cases for lack of jurisdiction. It may not address all arguments advanced by the government in a particular case. For example, it does not address suits to remedy delays in naturalization cases brought under 8 U.S.C. § 1447(b). See the LAC’s practice advisory on naturalization delay suits for more on this topic, <http://www.legalactioncenter.org/practice-advisory-topics>. Additionally, the cases cited in this practice advisory are meant to be representative only, and thus are not meant to be an exhaustive list of all relevant decisions on any particular issue.

¹ Copyright © 2007, 2010 American Immigration Council. [Click here for information on reprinting this practice advisory](#). We are a 501(c)(3) non-profit

[pages/mandamus](#) and mandamus practice advisory at <http://www.legalactioncenter.org/practice-advisory-topics>. For more on APA suits, see the LAC’s practice advisory on this topic at <http://www.legalactioncenter.org/practice-advisory-topics>.

The LAC is interested hearing from practitioners who are pursuing circuit court appeals of mandamus cases that were dismissed for lack of jurisdiction. Please contact us at clearinghouse@immcouncil.org if you are appealing a district court dismissal or if the government appeals a denial of its motion to dismiss.

1. What has been happening with mandamus cases in the last few years?

In many mandamus cases addressing adjudicatory delay, the agency has argued in its motion to dismiss that the delay was due to pending security checks, often pinpointing the FBI name check process. These delays affected any application subject to the FBI name check; however a large number of mandamus cases brought in the last few years were suits to compel action on adjustment applications. In addition, naturalization applicants who have not had an interview yet, and therefore could not bring a lawsuit under 8 U.S.C. § 1447(b),³ also have brought mandamus and APA suits to compel adjudication of their applications.⁴

However, in recent years, USCIS and the FBI have taken steps to resolve the long delays associated with the FBI name check process.⁵ In a February 4, 2008 memorandum, USCIS announced that certain applications would be adjudicated even when FBI name checks were not complete – the memorandum advised the adjudicator to approve the application and proceed with the card issuance if the FBI fingerprint and IBIS check were complete and the FBI name check request had been pending for more than 180 days.⁶

³ Congress has provided a special statutory remedy under § 1447(b) for naturalization applicants whose applications have been pending for more than 120 days following the naturalization examination. See also the LAC's practice advisory on naturalization delay suits at <http://www.legalactioncenter.org/practice-advisory-topics> and the LAC's issue page on this topic at <http://www.legalactioncenter.org/litigation-issue-pages>. Because this more specific statutory remedy exists, mandamus and APA claims are not necessary when the delay in a naturalization case occurs after the interview.

⁴ Mandamus lawsuits to compel naturalization interviews became more important after USCIS adopted a policy of scheduling naturalization interviews only after the FBI name check process was complete. See 2006 USCIS Memo at <http://www.legalactioncenter.org/sites/default/files/docs/lac/uscismemo060425.pdf> (announcing the new USCIS policy). 8 U.S.C. § 1447(b) is a remedy for delays that occur *after* the interview has taken place, and thus is not available to address pre-interview delays. For more on naturalization delay litigation after the interview, see the LAC's naturalization delay litigation issue page at <http://www.legalactioncenter.org/litigation-issue-pages>.

⁵ For more information about the agency guidance described in this section, see the LAC's mandamus issue page at <http://www.legalactioncenter.org/litigation-issue-pages>.

⁶ This policy applied to Applications for Adjustment of Status (I-485); Applications for Waiver of Ground of Inadmissibility (I-601); Applications for Status as a Temporary Resident Under Section 245A of the Immigrant and Nationality Act (I-687); and Applications to Adjust Status from Temporary Permanent Resident (Under Section 245A of Public Law 99-603) (I-698).

After the issuance of the memorandum, many pending court cases were mooted out because the agency moved quickly to adjudicate plaintiffs' applications.

A February 9, 2009 USCIS memorandum superseded the February 4, 2008 memorandum, changing USCIS' policy of automatic approval. The February 2009 memorandum stated that adjudicators would have to seek authorization from USCIS Headquarters before automatically approving applications in which the FBI name check had not been completed in 180 days. According to the memorandum, the change in policy was due to improved FBI processing and response times – at the time, the FBI allegedly was returning name check results in 90 days and few, if any, name checks remained pending at the FBI for 180 days.

Most recently, in a June 22, 2009 press release, USCIS stated that, in partnership with the FBI, it had eliminated the FBI name check delays – officially described as the FBI National Name Check Program (NNCP) backlog. USCIS stated that it had met the goals set forth in a joint business plan between USCIS and the FBI announced on April 2, 2008: to achieve a sustainable performance level by the NNCP of completing 98 percent of name check requests submitted by USCIS within 30 days, and the remaining two percent within 90 days. USCIS stated in its press release that this performance level will become the new agency standard.

Despite USCIS' resolution of most of the FBI name check delays, USCIS has invoked other reasons for delaying adjudication of applications. For example, in some cases USCIS has stated that "additional investigation" or "detailed review" is needed before it can complete the application. USCIS also has delayed adjudication of adjustment applications pursuant to a 2008 USCIS policy to withhold adjudication in certain cases where terrorism-related grounds of inadmissibility apply, but where the person may benefit from a waiver. In other cases, the cause of the delay is simply unknown. Thus, applicants continue to seek judicial remedies for USCIS' failure to adjudicate an application. *See, e.g., Karim v. Holder*, No. 08-671, 2010 U.S. Dist. LEXIS 30030 (D. Colo. Mar. 29, 2010) (finding plaintiff's adjustment application was unreasonably delayed pursuant to USCIS' policy of withholding from adjudication certain applications subject to terrorism-related bars).

No matter the cause of the delay, the government typically moves to dismiss mandamus/APA cases for lack of jurisdiction. Some courts have granted government motions to dismiss for lack of jurisdiction, although the majority of courts have not.⁷ Only one court of appeals has ruled on the jurisdictional issues, issuing an adverse decision.⁸ Generally, when plaintiffs have appealed a district court decision dismissing a

⁷ For a listing of some recent cases, both favorable and unfavorable, see the LAC's issue page on mandamus suits at <http://www.legalactioncenter.org/litigation-issue-pages>.

⁸ The Fifth Circuit found that the court has no jurisdiction over a mandamus action challenging the delay in adjudication of an adjustment application. *Bian v. Clinton*, 605 F.3d 249 (5th Cir. 2010). However, the plaintiff-appellant filed a petition for rehearing

mandamus case for lack of jurisdiction, USCIS adjudicates the application and the case is mooted out.

2. What are the general arguments that the government makes to dismiss a mandamus/APA case for lack of jurisdiction?

The government's motions to dismiss for lack of jurisdiction are filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (FRCP). The government generally makes some combination of the following four arguments, all of which center on alleged agency discretion with respect to adjudication of applications:

- That USCIS does not have a duty to adjudicate an application and therefore an essential element of the mandamus claim is missing;
- That the pace of adjudication of an application is discretionary and therefore not subject to mandamus relief;
- That adjudication of applications is committed to agency discretion by law and not subject to APA relief; and
- That 8 U.S.C. § 1252(a)(2)(B)(ii), which limits judicial review over certain discretionary issues in immigration cases, bars review of these mandamus and APA cases.

3. In responding to a motion to dismiss, can I argue that at least some of the issues raised by the government are not jurisdictional?

Yes. An initial response to a government motion to dismiss for lack of jurisdiction is to question whether, in fact, the government has raised a *jurisdictional* challenge. The Supreme Court has distinguished between jurisdiction – which is the court's power to hear the case – and the sufficiency of a valid cause of action. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1988); *see also Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003) (distinguishing between the court's power to adjudicate the case, which is jurisdictional, and the court's power to grant relief, which is not jurisdictional); *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 825 (S.D. Tex. 2008) (reasoning that the plaintiff's claim that pre-interview naturalization application was unreasonably delayed may ultimately fail on the merits, but it is not so insubstantial and frivolous as to defeat subject-matter jurisdiction).

The failure to state a valid cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946). The Supreme Court has made clear that:

‘jurisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.’ Rather, the district court has jurisdiction if ‘the right of the petitioners to recover under their complaint will be sustained if the [] laws

and the court ordered the government to respond to the petition. As of August 23, 2010, the court had not issued a decision on the rehearing petition.

of the United States are given one construction and will be defeated if they are given another ...’

Steel Co. v. Citizens for a Better Environment, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 682, 685).

To win a mandamus claim on the merits, a plaintiff must show that: (1) he or she has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available. *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002). The Seventh Circuit has explained that in resolving whether mandamus jurisdiction is present in an immigration case, the allegations of the complaint are taken as true (unless patently frivolous) to avoid “tackling the merits under the ruse of assessing jurisdiction.” *Ahmed*, 328 F.3d at 386-87. The court also held in *Ahmed* that the question of whether a statute imposed a “duty” on the government for purposes of mandamus relief was not a jurisdictional question. As the court explained:

[T]he district court has jurisdiction under § 1361 [the mandamus statute] to determine whether the prerequisites for mandamus relief have been satisfied: does the plaintiff have a clear right to the relief sought; does the defendant have a duty to perform the act in question; and is there no other adequate remedy available. ... A conclusion that any one of those prerequisites is missing should lead the district court to deny the petition, not [for lack of jurisdiction], but because the plaintiff has not demonstrated an entitlement to this form of extraordinary relief.

Ahmed, 328 F.3d at 386-87.

Thus, where the government claims that jurisdiction is lacking because a prerequisite to mandamus is missing, the plaintiff can respond by arguing that this is not a jurisdictional question and cannot lead to dismissal under Rule 12(b)(1). However, you also will want to address the substance of the challenge as an alternative way to dispute the government’s motion. *See, e.g.*, § 4, below.

4. What response is there to the government argument that USCIS does not have a duty to adjudicate an application?

For a mandamus application to succeed, the plaintiff must show that the defendant has failed to carry out a statutory or regulatory duty owed to the plaintiff. *See, e.g.*, *Work v. U.S.*, 267 U.S. 175, 177 (1925); *see also* the LAC’s mandamus practice advisory, located at <http://www.legalactioncenter.org/practice-advisory-topics>. In some motions to dismiss, the government has argued that USCIS does not owe a legal duty to an adjustment applicant to adjudicate his or her application. *See, e.g.*, *Villa v. DHS*, 607 F. Supp. 2d 359 (N.D.N.Y. 2009).

The first response to this will be to argue that this is not a jurisdictional question, and therefore does not subject the case to dismissal under Rule 12(b)(1) (see § 3, above). Additionally, however, you will want to argue that USCIS does owe a legal duty to an

applicant to adjudicate the application.⁹ The Immigration and Nationality Act (INA) and its implementing regulations impose this duty on USCIS. The APA also imposes on USCIS an independent duty to adjudicate the application. The following discussion uses adjustment applications as an example, but similar arguments may be available for other types of applications.

a. How do the INA and regulations impose a duty on USCIS to adjudicate an adjustment application?

When viewed as a whole, the INA and implementing regulations demonstrate that Congress intended to impose a duty on USCIS to adjudicate all properly filed applications and that the agency, through its regulations, carried out this intent. While the adjustment statute gives USCIS discretion about the actual decision, Congress did not intend that USCIS have the discretion to not decide an application.

- i. The imposition of a mandatory adjudication fee creates a duty to actually decide the application.

Congress intended that USCIS would charge a fee to cover the cost of adjudicating benefit applications such as those for adjustment. *See* 8 U.S.C. § 1356(m). The regulations mandate that a non-refundable adjudication fee be paid in advance. *See* 8 C.F.R. §§ 103.2(a)(1) and (a)(7). In recent years, the fee for an adjustment application was increased to \$930 from \$305 for each applicant. *See* 72 Fed. Reg. 29851 (May 30, 2007). USCIS made clear that the reason for the increase was to insure that the adjudication fee covered the full cost of adjudicating an application. *Id.* It is untenable for the government to charge almost \$1000 for adjudication costs of each adjustment application and then to argue it has no duty to adjudicate a properly filed application.

- ii. Because the INA and regulations impose a duty to issue a decision, these provisions also impose a duty to adjudicate the application.

The INA mandates that USCIS record a non-citizen's lawful admission to permanent residence "upon approval" of an adjustment application. 8 U.S.C. § 1255(b). This duty implicitly requires the adjudication of all applications to determine those that are to be approved. Moreover, the duty to make a decision on all applications is explicit in the regulations. *See, e.g.,* 8 C.F.R. §

⁹ Where the government's motion is only for dismissal for lack of jurisdiction under Rule 12(b)(1), you may succeed in convincing the court to deny the motion outright because the issues raised by the government are not jurisdictional. However, the government often argues in the alternative that a case should be dismissed under Rule 12(b)(6) for failure to state a claim. When the government makes an alternative 12(b)(6) claim, you will need to address that the complaint does, in fact, allege all of the substantive requirements necessary for mandamus and APA actions.

103.2(b)(19); 8 C.F.R. § 245.2(a)(5). Additionally, the instructions to the adjustment application inform an applicant that he or she will be notified in writing of a decision on the application. The instructions are incorporated into the regulations, with the same effect. *See, e.g.*, 8 C.F.R. § 103.2(a)(1).

The non-discretionary, ministerial duty of notifying an applicant of a decision cannot be carried out unless the application is decided. Thus, the duty to make a decision and notify the applicant carries with it a duty to adjudicate the application.

- iii. The remaining regulatory structure demonstrates that USCIS has a duty to adjudicate the application.

Other regulations presume that a decision must be made on all applications, thus underscoring the intent discussed above. For example, several regulations dictate how certain applications must be decided. *See* 8 C.F.R. §§ 103.2(b)(12); 103.2(b)(14); 103.2(b)(8)(i). Other regulations dictate the sequence of the adjudicatory process. *See, e.g.*, 8 C.F.R. § 103.2(b)(6); 103.2(b)(8)(ii)-(iv); 103.3(a)(1); 103.2(b)(16); 245.2(a)(5). Finally, one regulation specifically imposes a duty on USCIS to make a decision upon the request of the applicant, even in the absence of all requested evidence. 8 C.F.R. § 103.2(b)(14). It would make no sense for the government to have imposed on itself a duty to make a decision where not all evidence is submitted if no such duty existed in cases in which all requested evidence is submitted.

- iv. The limited flexibility in the regulations for processing an application does not absolve USCIS of the duty to adjudicate it.

The government frequently argues that the adjudication process is entirely discretionary and cites to several regulations that provide limited flexibility. In fact, these regulations do not say anything about the agency's ultimate duty to adjudicate an adjustment application. To the contrary, one of the regulations – which allows USCIS to waive an adjustment interview – actually works to speed up the adjudication process. 8 C.F.R. § 245.6.

In some cases, the government has relied on the regulation that allows USCIS to temporarily withhold adjudication in certain limited circumstances. *See* 8 C.F.R. § 103.2(b)(18). Contrary to the government's argument, this regulation only provides an *exception* to the normal adjudicatory process. The normal adjudicatory process – as evidenced by the statutory and regulatory scheme in full – does not allow for even a temporary withholding of adjudication. As an exception to the normal adjudicatory process, § 103.2(b)(18) can only be implemented in accordance with its strict requirements.

Even under this regulation, the agency does not have discretion to never decide an application. Moreover, in many cases, USCIS will not have applied the regulation to your client, but only will have mentioned it in its briefing to the district court. If this is the case, be sure to argue that the regulation is irrelevant to the case because it was not applied in the case. *See, e.g., Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1166 (N.D. Cal. 2007) (§ 103.2(b)(18) inapplicable where defendants provide no evidence it was used in the case); *Toor v. Still*, No. 07-0645, 2007 U.S. Dist. LEXIS 53173, *11 (N.D. Cal. July 10, 2007) (same); *Elmalky v. Upchurch*, No. 06-2359, 2007 U.S. Dist. LEXIS 22353, *13 (N.D. Tex. Mar. 28, 2007) (same).

b. Do the USCIS FBI name check memoranda reflect the existence of a duty on USCIS to adjudicate an application?

The February 4, 2008 USCIS memorandum, “Revised National Security Adjudication and Reporting Requirements,” stated that, for certain applicants, after a FBI fingerprint and IBIS check have been completed and the FBI name check request has been pending for more than 180 days, *the adjudicator shall approve the application and proceed with the card issuance*. The language used in the memorandum – that the USCIS adjudicator “shall approve” the pending application and “shall . . . proceed” to issue the appropriate card 180 days after the request is received – acknowledged USCIS’ understanding of its duty to adjudicate certain applications, even in instances where the name check was not complete.

In February 2009, the agency changed its position regarding automatic approval of applications prior to complete FBI name checks; however, it did so because the FBI had drastically improved name check processing times. Therefore, this subsequent memo confirms and lends additional support to the argument that USCIS intends to adjudicate applications within 180 days or less after the date that a name check request is received by the FBI.

While the agency has an independent duty to adjudicate applications under the INA, its implementing regulations and the APA, the February 4, 2008 and February 9, 2009 memoranda provide additional evidence of USCIS’ recognition of this duty.

c. How does the APA impose an independent duty on USCIS to adjudicate an application?

Section 555(b) of the APA, 5 U.S.C. § 555(b), requires that “[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” A number of courts of appeals have held that § 555(b) creates a non-discretionary duty to conclude agency matters. *See, e.g., Friends of the Bow v. Thompson*, 124 F.3d 1210, 1220-21 (10th Cir. 1997); *Litton Microwave Cooking Prods. v. NLRB*,

949 F.2d 249, 253 (8th Cir. 1991); *Estate of French v. FERC*, 603 F.2d 1158 (5th Cir. 1979); and *Silverman v. NLRB*, 543 F.2d 428, 430 (2d Cir. 1976).

Moreover, § 555(b) requires that agency matters be resolved within a reasonable time. A violation of this duty is a sufficient basis for mandamus relief. See, e.g., *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987).

Courts have reached this same result in APA cases brought in the immigration context. See, e.g., *Villa v. United States Dep't of Homeland Sec.*, 607 F. Supp. 2d 359, 366 (N.D.N.Y. 2009); *Toor v. Still*, No. 07-0645, 2007 U.S. Dist. LEXIS 53173, *4-5 (N.D. Cal. July 10, 2007); *Yue Yu v. Brown*, 36 F. Supp. 2d 922, 928 (D.N.M. 1999); *Xu v. Chertoff*, No. 07-366, 2007 U.S. Dist. LEXIS 50027, *7 (D.N.J. July 11, 2007); and *Haidari v. Frazier*, No. 06-3215, 2006 U.S. Dist. LEXIS 89177, *9-10 (D. Minn. 2006).

5. Under the mandamus statute, does the agency's duty to act depend upon a statutory or regulatory timeframe?

No. Because § 555(b) of the APA mandates that an agency act within a reasonable time, courts have held that the underlying statute and regulations do not have to include specific timeframes.

The seminal case on assessing claims of agency delay, *TRAC v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), specifically acknowledges that courts will be called on to assess delay even in the absence of a statutory timeframe. The *TRAC* court lists six factors useful in assessing delay. See *TRAC*, 750 F.2d at 80. The second factor addresses cases in which Congress provided a timetable for agency action in the enabling statute. *Id.* By setting forth a single factor applicable only in cases where the enabling statute does provide a timeframe, the *TRAC* court necessarily contemplates that courts will assess delay even in the absence of timeframes. There are numerous other examples of courts assessing the reasonableness of delay under the APA in the absence of a deadline in the underlying statute. See, e.g., *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1998); *Sierra Club*, 828 F.2d at 796-98; *Toor v. Still*, No. 07-0645, 2007 U.S. Dist. LEXIS 53173, at *12-13 (N.D. Cal. July 10, 2007); *Singh v. Still*, 470 F. Supp. 2d 1064, 1072 (N.D. Cal. 2007); *Kim v. Ashcroft*, 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004).

In addition, the presence of a timeframe within one section of the INA and its absence in another, does not indicate Congress' intent to bar courts from reviewing the latter. The government frequently argues that 8 U.S.C. § 1447(b) provides a 120-day timeframe in which a naturalization application should be adjudicated after the completion of a naturalization "examination," and that the absence of such a time frame in the adjustment context indicates Congress' intent not to impose a time limit. Despite the absence of statutory timeframe for the adjudication of applications other than post-examination naturalization applications, Congress is presumed to know that the APA requires agency action within a reasonable period. Thus, Congress does not need to include a specific timeframe in every statute. In addition, courts have held that Congress must be explicit

when an agency should not be subject to the APA's reasonableness standard. *See, e.g., Sierra Club*, 828 F.2d at 796-98.

Moreover, the February 4, 2008 USCIS memorandum on FBI name check procedures and subsequent USCIS memoranda have provided timeframes in which the FBI will complete name checks and USCIS will adjudicate certain applications. This stated agency policy recognizes a duty to complete certain applications within a certain time period.

Finally, Congress outlined what should be considered a reasonable processing time in The Immigration Services and Infrastructure Improvements Act of 2000. There, Congress stated, "[i]t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application." 8 U.S.C. § 1571. Some courts have found that 8 U.S.C. § 1571 provides a meaningful standard to assess the reasonableness of agency delay. *See, e.g., Houle v. Riding*, No. 07-1266, 2008 U.S. Dist. LEXIS 8482, at *19-20 (E.D. Cal. Jan. 28, 2008); *Chen v. Chertoff*, No. 06-176, 2007 U.S. Dist. LEXIS 64664, at *11-12 (W.D. Wash. April 30, 2007); *Konchitsky v. Chertoff*, No. 07-00294, 2007 U.S. Dist. LEXIS 53998, at *11 (N.D. Cal. July 13, 2007).

6. What is the response to the government's argument that the case is not subject to the APA?

The federal question statute, 28 U.S.C. § 1331, provides the court with jurisdiction over an APA suit. The APA provides the court with a cause of action for unreasonable agency delay. *See* the LAC's practice advisory on the APA, <http://www.legalactioncenter.org/practice-advisory-topics>. An exception to this APA cause of action is when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The government frequently argues that this exception applies because adjustment of status, including the adjudication of an application, is discretionary.

As discussed above, the government does not have discretion to refuse to adjudicate an adjustment application. Therefore, this exception does not apply for that reason alone. Additionally, this exception to the APA applies only in "rare" circumstances where discretion is entirely "unfettered" – that is, where a court would have no meaningful standards by which to judge the agency's action. *See, e.g., Lincoln v. Vigil*, 508 U.S. 182, 190 (1993). Here, as explained above, both the INA and the regulations provide guidance by which to judge the agency's delay. *See, e.g., M.B. v. Quarantillo*, 301 F.3d 109, 112-13 (3d Cir. 2002) (finding that an agency's regulations could supply the "law to apply" in an APA case).

7. Does 8 U.S.C. § 1252(a)(2)(B)(ii) bar jurisdiction over these mandamus and APA cases?

No, there are strong arguments that 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar review of these cases. By its specific terms, § 1252(a)(2)(B)(ii) only bars review of a "decision or action" of the Attorney General or the Secretary of DHS, and *only* when such decision or

action “is specified under this subchapter to be in the discretion” of the Attorney General or the Secretary of DHS.¹⁰

The courts read this section narrowly and require that the grant of discretion must be explicit in a relevant statutory provision. *See, e.g., Kucana v. Holder*, 130 S.Ct. 827 (2010) (§ 1252(a)(2)(B)(ii) does not bar review over decisions that are not made discretionary by statute); *Soltane v. U.S. Dept. of Justice*, 381 F.3d 143, 146 (3d Cir. 2004); *Spencer Enterprises v. United States*, 345 F.3d 683-92 (9th Cir. 2003); *Zafar v. U.S. Atty Gen.*, 461 F.3d 1360 (11th Cir. 2006); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005). Here, the agency’s failure to adjudicate an adjustment application is not “specified” in the adjustment statute as being within the agency’s discretion. The adjustment statute, 8 U.S.C. § 1255, authorizes discretion to grant or deny an adjustment application, but does not specify any agency authority to fail to act on an adjustment application. *See, e.g., Sharadanant v. USCIS*, 543 F. Supp. 2d 1071, 1075 (D.N.D. 2008); *Duan v. Zamberry*, No. 06-1351, 2007 U.S. Dist. LEXIS 12697, *6 (W.D. Pa. Feb. 23, 2007) *quoted in Linville v. Barrows*, 498 F. Supp. 2d 1278, 1282 (W.D. Okla. 2007); *Yang Tang v. Chertoff*, No. 07-10231, 2007 U.S. Dist. LEXIS 46030, *10 (D. Mass. June 10, 2007); *but see Bugulu v. Gonzalez*, 490 F. Supp. 2d 965, 967 (W.D. Wis. 2007) (holding that § 1252(a)(2)(B)(ii) barred review of a delayed adjustment application).

Additionally, § 1252(a)(2)(B)(ii) does not apply because the failure to adjudicate an adjustment application is not a “decision or action” within the meaning of this section. *See, e.g., Iddir v. INS*, 301 F. 3d 492, 497-98 (7th Cir. 2002). The first step in interpreting Congressional intent is to examine the plain meaning of the statute. Courts must narrowly interpret bars to judicial review and may only limit review where the plain language of the statute indicates that review is precluded. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

Here, the plain meaning of the word “action” does not include the pace of adjudication or agency delay. *See Black’s Law Dictionary* 28 (7th ed. 1999) (defining “action” as the “process of doing something” or a “thing done”). Further, the plain meaning of “action” also does not incorporate the agency’s failure to act. Any other interpretation would distort the meaning of “action,” a word that implies an affirmative step in the adjudication process or an actual decision on the application, and expand this meaning to include the opposite of “action,” namely, inaction. This is not a permissible construction of the plain language of § 1252(a)(2)(B)(ii).

8. Can these arguments be used in naturalization cases?

Yes, as mentioned, in some cases, an extensive delay occurs prior to the interview and § 1447(b) is not available as a remedy. In cases addressing pre-interview delay, a mandamus and APA action might be appropriate. If so, the government may move to

¹⁰ The subchapter consists of 8 U.S.C. §§ 1151 through 1363a. For more on this bar to discretionary decisions, see the LAC’s practice advisory on § 1252(a)(2)(B) at <http://www.legalactioncenter.org/practice-advisory-topics>.

dismiss for the reasons discussed here, and these counter-arguments would be appropriate. See the LAC's mandamus issue page (<http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/mandamus>) for examples of pre-interview naturalization mandamus and APA cases.

PRACTICE ADVISORY¹

Updated May 13, 2010

**WHOM TO SUE AND WHOM TO SERVE IN IMMIGRATION-
RELATED DISTRICT COURT LITIGATION**

By Trina A. Realmuto²

INTRODUCTION

This Practice Advisory addresses who is, or who may be, the proper respondent-defendant and recipient for service of process in immigration-related litigation in district court.³

Part I of this advisory contains a general overview of potential officials and entities that might be proper respondents-defendants in district court. Part I also addresses whom to sue in specific types of immigration-related actions, including mandamus actions, Federal Tort Claims Act actions (and administrative claims), *Bivens*, and habeas actions. Part II discusses the Federal Rules of Civil Procedure that govern service of process in most immigration-related district court actions. Part III covers adding and substituting respondents-defendants after the initial complaint is filed.

¹ Copyright (c) 2010, American Immigration Law Foundation and National Immigration Project of the National Lawyers Guild. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice provided by a lawyer familiar with a client's case. The advisory discusses some local practice and procedures, which may vary. Always check local court rules and procedures.

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³ The terms petitioner-plaintiff and respondents-defendants are used throughout this advisory to refer to the person filing the action and the person/entity being sued, respectively. For example, in federal question or mandamus actions, the person who files the action is the plaintiff and each person/entity sued is a defendant. In habeas actions, the person who files the action is the petitioner and each person/entity being sued is a respondent.

A list of addresses for service is attached as Appendix A and sample certificate of service is attached as Appendix B.

PART I: WHOM TO SUE

A. General Overview of Potential Respondents-Defendants

District court actions are generally brought against the officer/s or entity/entities responsible for the alleged wrongdoing and capable of providing the relief sought unless otherwise specified by statute or case law as discussed below. It is important to identify all the officials, entities or even executive departments (often there is more than one) that may be able to grant the requested relief when filing an action in district court.

In general, most immigration-related actions in district court are brought against the United States and/or one or more officers or entities within the Department of Homeland Security or the Department of Justice.

The Department of Homeland Security (DHS) is headed by the Secretary of Homeland Security (currently Janet Napolitano). Within DHS, Immigration and Customs Enforcement (ICE) is responsible for the detention and removal of non-citizens (currently led by an Assistant Secretary). U.S. Citizenship and Immigration Services (USCIS) is responsible for adjudications of applications for immigration and citizenship benefits (currently led by a Director). Customs and Border Protection (CBP) is responsible for immigration and customs inspections and border patrol (currently led by a Commissioner).

Within DHS, the Division of Immigrant Health Services (DIHS) facilitates health care services for immigration detainees. Medical professionals employed by the U.S. Public Health Service (within the Department of Health and Human Services) provide medical care at ICE-owned Service Processing Centers and Contract Detention Facilities. County or state health department employees or other contract medical providers may treat detainees at state or county facilities.

The Department of Justice is headed by the Attorney General (currently Eric H. Holder, Jr.). Within DOJ, the Executive Office for Immigration Review (EOIR) is responsible for adjudicating immigration cases and it includes the Board of Immigration Appeals (BIA) and the immigration courts. The Federal Bureau of Investigations (FBI) and Federal Bureau of Prisons also are within DOJ. The FBI or FBP and/or officers within these agencies also might be named, for example, in cases involving delayed background checks or detention conditions, respectively.

The Department of State (DOS) is headed by the Secretary of State (currently Hillary Clinton) and is responsible for foreign affairs, including visa issuance. The consular non-reviewability doctrine limits most law suits challenging visa denials. In unusual cases,

for example, a person may seek a writ of mandamus to compel adjudication of a visa application and/or seek to challenge a visa denial based on constitutional grounds, DOS and/or its officers might need to be named.

Where the identity of the government officer is not known at the time a suit is filed, the names “John Doe” and “Jane Doe” can be used to denote fictitious defendants until the person’s real identity becomes known through the discovery process.

Suing more than one official or entity is often necessary and also is advisable when the petitioner-plaintiff is unsure whom to sue. If a court determines that it lacks either personal or subject-matter jurisdiction over a respondent-defendant, the court will dismiss the action against that respondent-defendant. However, as long as the court has subject-matter jurisdiction and personal jurisdiction over *at least one* respondent-defendant, the court may proceed to the merits of the case. *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937) (without personal jurisdiction a district court is “powerless to proceed to an adjudication”).

B. Whom to Sue in Specific Types of District Court Actions

1. Mandamus Actions

The Mandamus Act, 28 U.S.C. § 1361, authorizes actions in district court “to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” In the immigration context, mandamus actions generally seek to force DHS to adjudicate an application for an immigration benefit, for example, a visa petition, adjustment of status application, or naturalization application.

In a mandamus action, the defendant is the person or entity who has the duty to the plaintiff. Thus, the named defendant will depend on the type of action the mandamus suit seeks to compel. For example, a mandamus action to compel adjudication of an application for a benefit pending at a USCIS district office, should name the DHS Secretary, the USCIS Director, and the USCIS District Director as defendants. A mandamus action to compel adjudication of an application for a benefit pending at a USCIS service center, should name the DHS Secretary, USCIS Director, and the Service Center Director as defendants.

The procedure for how to file a mandamus action and summary of relevant case law are discussed in greater detail in AIC’s Practice Advisory entitled, *Mandamus Actions: Avoiding Dismissal and Proving the Case* (<http://www.legalactioncenter.org/practice-advisory-topics>).

2. Actions under the Federal Tort Claims Act

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 authorizes monetary recovery for damages, loss of property, personal injury or death in suits where damages occurred as a result of the “negligent or wrongful act or omission of any

employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1326(b).

Section 2680(h) of the FTCA permits suits for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights committed by “investigative or law enforcement officers of the United States Government.” An investigative or law enforcement officer is defined as an individual “empowered by law to execute searches, seize evidence, or make arrests for violation of Federal law.” *Id.* This definition includes most DHS officers. INA § 287(a)(2) (authorizing warrantless arrests by DHS officers); 8 C.F.R. § 103.1(b) (defining immigration officers); 8 C.F.R. § 287.5(c)&(d) (addressing power and authority of immigration officers to arrest and conduct searches).

The FTCA liability also extends to medical negligence committed by employees of the U.S. Public Health Service during immigration detention. *Hui v. Castaneda*, No. 08-1529, 599 U.S. ___, 2010 U.S. LEXIS 3676 (May 3, 2010).

Before an FTCA action may be filed in district court based on the actions or omissions of DHS employees, the claimant must present a written claim to DHS within two years after the claim accrues. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.1 et seq. Although there are currently no specific regulations or written guidance for public distribution regarding where immigration-related FTCA *administrative* claims should be sent, such claims arguably fall under the regulations governing service of summonses and complaints in litigation against DHS and its subdivision agencies. *See* 6 C.F.R. §§ 5.41 and 5.42. Litigation is defined to include administrative actions, 6 C.F.R. § 5.41(d), which presumably includes an administrative FTCA claim. These regulations provide for service on the Office of General Counsel.

Because compliance with the statute of limitations is jurisdictional, however, it is advisable to serve the administrative complaint on all appropriate offices. Therefore, we suggest also sending a copy of the administrative claim to the DHS agency employing the officer at the time of the act or omission that forms the basis of the claim and to the agency’s regional/local counsel. And, if the claim is related to medical care, we suggest also sending a copy of the claim to the Department of Health and Human Services (if the medical care was or is believed to have been provided by the U.S. Public Health Service) and to the local medical provider (if the care was *not* provided by the U.S. Public Health Service or the medical care provider’s identity is unknown).

Mailing the claim via certified or registered mail provides independent evidence of proof of compliance with the two-year statute of limitations for administrative claims.

If DHS denies the written claim, the claimant must file suit in district court within six months after DHS mails the notice of denial. 28 U.S.C. § 2675(a). DHS’ failure to

respond to the claim within six months may be deemed a constructive denial of the claim under 28 U.S.C. § 2675(a).

A district court complaint under the FTCA must name the United States as the defendant, not the federal agency or individual officers. 28 U.S.C. § 1326(b).

For further information on FTCA claims, see *Suing Officials for Damages*, by Philip Hwang, Immigration and Nationality Law Handbook, AILA (2009-10 Ed.).

3. Bivens Actions

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court held that petitioners are entitled to recover damages for injuries resulting from Fourth Amendment violations by federal officials. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court extended such right to recover damages to violations of the Due Process Clause of the Fifth Amendment. Actions based on the tort theory set forth in *Bivens* and its progeny are filed in district court under 28 U.S.C. § 1331 (federal question jurisdiction).

Although a *Bivens* remedy is not available for medical negligence committed by employees of the U.S. Public Health Service during immigration detention, *Hui v. Castaneda*, No. 08-1529, 599 U.S. ___, 2010 U.S. LEXIS 3676 (May 3, 2010), it may be available if the negligence was committed by another medical care provider.

A *Bivens* action can only be brought against a government officer in his/her individual capacity, and not against the United States, a government agency, or an officer acting in their official capacity. Superior or supervisory officers may also be named in the complaint where liability for the alleged injury can be linked to the actions or inactions of the senior officer.

For further information on FTCA claims, see *Suing Officials for Damages*, by Philip Hwang, Immigration and Nationality Law Handbook, AILA (2009-10 Ed.).

4. Habeas Corpus Actions Challenging Detention

In general, a petition for a writ of habeas corpus under 28 U.S.C. § 2241 is filed in district court when a petitioner is challenging the length and/or conditions of detention.⁴ In addition, habeas review may be available in the rare circumstance where there is a compelling reason that court of appeals review is inadequate. See, e.g., *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007).

In detention-related habeas cases, the government has argued that the only proper respondent to the petition is the warden of the facility in which the person is detained. The Supreme Court adopted this position in an enemy combatant case. [*Rumsfeld v.*](#)

Padilla, 542 U.S. 426, 447 (2004). At least one circuit court has adopted this position in an immigration case. *Kholyavskiy v. Achim*, 443 F.3d 946, 952-53 (7th Cir. 2006). Although there are arguments that naming the warden is not required, if the court concludes otherwise, the habeas petition could be dismissed. Thus, attorneys may wish to name the warden to avoid litigating this issue.

Additional potential respondents to a habeas petition challenging detention might include the following: DHS; DHS Secretary; Director, Office of Detention and Removal Operations, ICE; Field Office Director, ICE; ICE Officer-in-Charge, ICE; the detention facility; and the Attorney General.

PART II: WHOM TO SERVE

A. Service of the Summons and Complaint

Once the summons and complaint have been filed with the district court, the clerk should issue a case number. The clerk usually stamps the case number on the summons and returns the summons to counsel. The file-stamped summons is then copied for service.

Federal Rule of Civil Procedure 4(i) sets forth the requirements and manner of service of the summons and complaint in suits against the US and its agencies and officers sued in their official capacity. The rule also allows for reasonable time to cure deficiencies in service provided that the United States Attorney *or* the Attorney General has been served. Fed. Rule. Civ. Proc. 4(i)(3).

1. Service on the United States

In suits against the United States, Federal Rule of Civil Procedure 4(i)(1)(A)-(C) provides that counsel must serve the summons and complaint on the:

- * local US Attorneys Office either by in person delivery to the US Attorney, an Assistant US Attorney or clerical employee designated to accept service *or* by registered or certified mail to the civil process clerk; and
- * US Attorney General by registered or certified mail (to the address in Appendix A); and
- * if the action is attacking the validity of an order of an officer or agency *not named as a party to the action*, the US agency or officer by registered or certified mail. See Part II, section A.2 below for information on how to serve US agencies and officers.

2. Service on an Agency or Officer of the United States

To serve a US agency or officer, Federal Rule Civil Procedure 4(i)(2) provides that counsel must serve the summons and complaint on the:

- * the United States as explained above in Part II, section A.1 above; and
- * US Agency or Officer by registered or certified mail. To serve DHS, USCIS, ICE, or any DHS employee in their official capacity, including the DHS Secretary, the regulations state that the summons and complaint should be sent to the Office of the General Counsel at the address in Appendix A.⁵

3. Service on Individuals Within a Judicial District of the United States

To serve an individual within a judicial district of the United States, Federal Rule of Civil Procedure 4(e) provides:

“Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, . . . , may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.”

Unlike other litigation against the government, because *Bivens* actions are filed against individuals and not against a government agency, counsel is required to serve each individual defendant to a *Bivens* action. If the individual defendant is within the judicial district of the court where the action is filed, Federal Rule of Civil Procedure 4(e) applies.

The regulations say that “summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may . . . be served upon the Office of the General Counsel.” 6 C.F.R. § 5.42(c).⁶ As *Bivens*

⁵ 6 C.F.R. § 5.42(a) provides that “[o]nly the Office of the General Counsel is authorized to receive and accept on behalf of the Department summonses or complaints sought to be served upon the Department, the Secretary, or Department employees.”

⁶ 6 C.F.R. § 5.42(c) reads as follows:

actions are “legal proceedings arising out of the performance of official duties,” service on the Office of General Counsel is also advisable.

B. Return of Service and Serving Future Pleadings

After the summons and complaint has been served, generally, counsel will complete the section on the back of the summons entitled “return of service” by filling in the names, positions and addresses of the parties served and the method of service. Generally, the original summons (with the return of service section on the back completed) is then filed with the district court and constitutes proof of service.

Attorneys from the local US Attorneys Office or the Office of Immigration Litigation (a division within the Civil Division of the Department of Justice) generally represent the government. Where counsel represents a party, including the government, future pleadings must be served on counsel “unless service upon the party is ordered by the court.” Fed. R. Civ. Proc. 5(b).⁷ All future pleadings after the filing of the complaint must be filed with a certificate of service. Fed. R. Civ. Proc. 5(d). A sample certificate of service is attached as Appendix B.

PART III: PROCEDURAL ISSUES

A. Adding or Removing Respondents-Defendants After The Initial Filing

Federal Rule of Civil Procedure 21 governs adding or removing a respondent-defendant after a complaint is filed. Federal Rule of Civil Procedure 21 states that “[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” Thus, to add or remove a respondent-defendant, counsel should make a motion for leave to amend the petition-complaint to add the appropriate party.

B. Substituting Respondents-Defendants After The Initial Filing

Under Federal Rule of Civil Procedure 25(d), when a public officer is sued in their official capacity and subsequently dies, resigns, or otherwise ceases to hold office, the

Except as otherwise provided §§ 5.42(d) and 5.43(c), the Department is not an authorized agent for service of process with respect to civil litigation against Department employees purely in their personal, non-official capacity. Copies of summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may, however, be served upon the Office of the General Counsel.

⁷ Fed. R. Civ. Proc. 5(b) further provides that service of future pleadings on opposing counsel may be completed by delivery, as defined under the rule, or mail. Service by mail is complete upon mailing.

officer's successor is automatically substituted as a party. Future pleadings should name the officer's successor, however, any misnomer will be disregarded unless it affects substantial rights.

Although Federal Rule of Civil Procedure 25(d) provides for substitution as a matter of law, counsel may wish to notify the court of the change by inserting a footnote after the change in the case caption and briefly explaining the change.

APPENDIX A: LIST OF SERVICE ADDRESSES

Please note that government addresses may change. Attorneys are advised to verify the addresses in this appendix.

Attorney General: Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001	Board of Immigration Appeals: United States Department of Justice Executive Office for Immigration Review Office of the Chief Clerk Board of Immigration Appeals 5201 Leesburg Pike, Suite 2000 Falls Church, VA 22041
Office of the General Counsel: Office of the General Counsel U.S. Department of Homeland Security Washington, DC 20528 ⁸	Department of State: U.S. Department of State 2201 C Street NW Washington, DC 20520

Administrative Claims under the Federal Tort Claims Act: In addition to sending the administrative claim to the Office of General Counsel at the above address, send a copy of the administrative claim to the appropriate agency employing the officer at the time of the act or omission at the following addresses:⁹

If ICE employed the officer , send the claim to: Office of the Principal Legal Advisor Immigration and Customs Enforcement U.S. Department of Homeland Security 500 12th Street SW Washington, DC 20024	If CBP employed the officer , send the claim to: U.S. Customs and Border Protection Office of the Chief Counsel 1300 Pennsylvania Avenue, N.W. Washington, DC 20229

⁸ The zip code for the Office of the General Counsel is erroneously listed in the regulations as 20258. See 6 C.F.R. §5.42(a). The correct zip code is 20528. See <http://www.dhs.gov/xutil/contactus.shtm> (DHS website); and http://zip4.usps.com/zip4/zcl_2_results.jsp (U.S. Postal Service website). This footnote was added on February 14, 2006.

⁹ Because of the ambiguity surrounding the issue of where to file an administrative claim under the Federal Tort Claims Act, it may be worthwhile to also send copies of the administrative claim to the agency's regional/local counsel.

If the claim is related to medical care facilitated by the Division of Immigrant Health Services while in detention, send the claim to: Office of the Principal Legal Advisor Immigration and Customs Enforcement U.S. Department of Homeland Security 500 12th Street SW Washington, DC 20024 and US Department of Health and Human Services Office of the General Counsel 200 Independence Ave. S.W. Washington, D.C. 20201 and, if the person was <u>not</u> detained in a Service Processing Center or Contract Detention Facility, we suggest also sending a copy of the claim to the local medical provider.	If USCIS employed the officer, send the claim to: U.S. Citizenship and Immigration Services U.S. Department of Homeland Security Office of the Chief Counsel 20 Massachusetts Ave. N.W., Room 4210 Washington, DC 20529-2120

APPENDIX B: SAMPLE CERTIFICATE OF SERVICE*

CERTIFICATE OF SERVICE

On **[Date]**, I, **[Name]**, the undersigned, served the within:

[Title of Document/s]

on each person/entity listed below addressed as follows:

[Manner of Service]

For example: (by regular mail/ by overnight mail/ by hand delivery)

[Name]

[Name of Entity]

[Address]

I declare under penalty of perjury that the foregoing is true and correct. Executed on **[Date]** at **[City]**, **[State]**.

[Name]

[Title]

***Note:**

In district court, a certificate of service may be attached to a pleading or it may be filed as a separate document. In addition, many district courts require pleading format. Counsel should check local district court rules regarding the format and contents of a certificate of service.

PRACTICE ADVISORY¹
Updated March 2010

RESCINDING AN *IN ABSENTIA* ORDER OF REMOVAL

By Beth Werlin

The Immigration and Nationality Act (INA) permits an immigration judge to order a person removed *in absentia* if the government establishes by clear, unequivocal and convincing evidence that proper written notice was provided and that the person is removable. There are two main situations where individuals who were ordered removed or deported *in absentia* can reopen their cases: (1) they did not receive notice of the hearing, and (2) they did not appear at their hearing because of exceptional circumstances.² This Practice Advisory addresses both situations.

Throughout this Practice Advisory, citations for both the pre-IIRAIRA and post-IIRAIRA statute are provided. Unless otherwise noted, the INA citations refer to the current statute. Individuals whose proceedings commenced prior to April 1, 1997 fall under the pre-IIRAIRA law and are in deportation or exclusion proceedings. Individuals whose proceedings commenced on or after April 1, 1997 are governed by the post-IIRAIRA statute and are in removal proceedings.

NO NOTICE CASES

An *in absentia* order may be rescinded by the immigration judge upon the filing of a motion to reopen if the respondent did not receive proper notice of the hearing. INA §240(b)(5)(C)(ii); INA §242B(c)(3)(B) (pre-IIRAIRA); 8 CFR §1003.23(b)(4)(ii), (iii)(A)(2); see *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

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² In addition, an order may be rescinded if the respondent demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the respondent. INA § 240(b)(5)(C)(ii). See also *Matter of Evra*, 25 I&N Dec. 79 (BIA 2009) (discussing what constitutes "fault").

Where to File the Motion to Reopen – The motion should be filed with the immigration court having administrative control over the record of proceedings. 8 CFR §1003.23(b)(1)(ii). Typically, this will be the court where the *in absentia* order of removal or deportation was entered.

Time for Filing the Motion to Reopen – A motion to reopen based on lack of proper notice can be filed at *anytime*. INA §240(b)(5)(C)(ii); INA §242B(c)(3)(B) (pre-IIRAIRA). This also means that a motion may be filed even after a person has departed the United States. See *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009).

Filing Fees – There is no fee for a motion to reopen if the basis for the motion is lack of notice in removal or deportation proceedings. 8 CFR §1003.24(b)(2)(v).

Automatic Stay of Removal/Deportation – An automatic stay goes into effect when the motion is filed and remains in effect pending disposition of the motion by the immigration judge. INA §240(b)(5)(C); see also INA §242B(c)(3) (pre-IIRAIRA). In deportation cases, the stay remains in effect during the appeal to the Board of Immigration Appeals (BIA or Board). *Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996). The BIA takes the position that for removal cases, the automatic stay does not remain in effect during the appeal process. See BIA Practice Manual, chapter 6, available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap6.pdf>.

To alert the court and the U.S. Immigration and Customs Enforcement (ICE) to the applicability of the automatic stay provision, motions may indicate (in bold letters on the cover page and on the front page of the motion) that an automatic stay applies.

Consideration of the following questions will help a person to determine whether he or she received proper notice and then demonstrate to the immigration court that rescission of the *in absentia* order is warranted.

What Does Proper Notice Mean?

Proper notice means that ICE must properly serve the respondent with a charging document at the outset of proceedings. The charging document is an Order to Show Cause (OSC) in deportation and exclusion proceedings and a Notice to Appear (NTA) in removal proceedings. Also, the court must properly serve the respondent with written notice of all hearings.

What Information Must the Government Put in the Notice?

The charging document must include: the nature of the proceedings, the legal authority for the proceedings, the acts/conduct alleged to be in violation of the law, the charges against the respondent, notification of the right to be represented by counsel, and the requirement that the respondent must provide a change of address or telephone number. INA §239(a)(1); INA §242B(a)(1) (pre-IIRAIRA). The notice also must inform the respondent of the consequences of not providing a change of address (i.e., that the he or

she may be ordered removed or deported *in absentia*). *Id.* The notice of hearing, whether contained in the charging document or as a separate notice, must state the time and place of the proceedings and must inform the respondent of the consequences of failing to attend the hearing. INA §§239(a)(1)(G), (2)(A)(ii); INA §242B(a)(2) (pre-IIRAIRA).

What are Proper Methods of Service?

As discussed in a subsection below, there is a presumption of effective delivery where the evidence indicates that the notice was properly served. However, if the respondent can show that the notice was not served properly, the presumption of effective delivery should not apply and thus there is no need to rebut the presumption. The following are the service requirements:

a. *Exclusion Cases and Deportation Cases Filed Prior to June 13, 1992*

Before June 13, 1992, the regulation provided that service of the OSC could be accomplished either by personal service or by routine service. 8 CFR §242.1(c). However, the regulation stated that when routine service was used and the respondent did not appear for the hearing (or acknowledge in writing that the OSC was received), personal service was required. *Id.* Personal service included mailing the notice by certified or registered mail, return receipt requested. 8 CFR §103.5a(a)(2). The mail receipt must be signed by the respondent or a responsible person at the respondent's address and returned to effect personal service. *Matter of Huete*, 20 I&N Dec. 250, 253 (BIA 1991).

b. *Deportation Cases Filed Between June 13, 1992 and April 1, 1997 (INA § 242B(a)(1) (pre-IIRAIRA))*

If the OSC was filed between June 13, 1992 and April 1, 1997, the OSC and all notices of hearing must be served in person or by *certified mail* to the respondent or the attorney of record, if any. INA §§242B(a)(1), (2) (pre-IIRAIRA). The OSC also must be mailed return receipt requested. *Matter of Grijalva*, 21 I&N Dec. 27, 32 (BIA 1995). Thus, in order to accomplish service of the OSC, the certified mail receipt must be signed by the respondent or a responsible person at the respondent's address. *Id.* However, a signature is not required to effect service of a subsequent notice of hearing. *Id.* at 34.

c. *Removal Proceedings Filed On or After April 1, 1997 (INA § 239(c))*

Like the OSC, the NTA and notice of hearing may be served in person or by mail, but *there is no requirement that the NTA be mailed by certified mail*. INA § 239(c). Regular mail is sufficient. Consequently, signatures of receipt are not required.

How Does the “Change of Address” Requirement Affect Proper Service and Can the Notice Requirements Be Satisfied Without Actual Receipt?

ICE may mail the NTA to the last address on file for the respondent. *Matter of G-Y-R*, 23 I&N Dec. 181, 189-90 (BIA 2001). This may be the address that was included in an affirmative application that was filed with U.S. United States Citizenship and Immigration Services (USCIS). However, in *Matter of G-Y-R*, the BIA said that respondents cannot be ordered removed or deported *in absentia* until they are warned (by receipt of the NTA or OSC) that they may be ordered removed or deported *in absentia* as a consequence of failing to inform the government of a change of address. *See id.* at 190. Thus, individuals who failed to report a change of address and do not receive the NTA or OSC as a result, cannot be ordered removed *in absentia*.³ *Id.* But see *Dominguez v. U.S. Att’y Gen.*, 284 F.3d 1258, 1259-60 (11th Cir. 2002) (holding that notice is statutorily sufficient if the NTA is sent to the most recent address provided by the petitioner, even if the petitioner has moved).

In a subsequent case, *Matter of M-D*-, the BIA clarified that *Matter of G-Y-R* applies only in cases where there is a dispute about the correct address. *See Matter of M-D*-, 23 I&N Dec. 540, 545 (BIA 2002). In that case, the NTA was sent by certified mail to the last address on file, which was still the respondent’s correct address, but was returned “unclaimed.” The BIA found that the notice requirements were satisfied in the absence of actual receipt, and noted that “the respondent [was not allowed] to defeat service by neglecting or refusing to collect his mail.” *Id.* at 547.

After receiving the OSC or NTA, service of additional hearing notices is sufficient if there is proof of attempted delivery to the last address provided by the respondent, even if the respondent does not receive the notice. *See* INA § 239(c); INA § 242B(c)(1) (pre-IIRAIRA, April 1997); *Matter of G-Y-R*-, 23 I&N Dec. 181, 187-88 (BIA 2001). Moreover, if the respondent fails to notify the court of a change of address, the court is not required to serve respondent a notice of hearing. INA §§239(a)(2)(B); INA §§242B(a)(2), (b)(2) (pre-IIRAIRA).

How Can the Respondent Prove that He or She Did Not Receive Notice Even If the Record Shows that It Was Mailed to the Correct Address?

Pre-IIRAIRA cases

Where the notice was sent by *certified mail*, the Board has held that there is a presumption of effective service by mail. *See Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995) citing *Powell v. C.I.R.*, 958 F.2d 53 (4th Cir.), *cert. denied*, 506 U.S. 965 (1992); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926) (“There is a presumption that public officers, including Postal Service employees, properly discharge

³Section 265(a) of the INA requires all noncitizens who must be registered to inform the Attorney General of any change of address. INA §265(a). However, *Matter of G-Y-R* held that failure to comply with this section does not automatically subject an individual to an *in absentia* order of removal.

their duties.”). An unsupported denial of receipt is insufficient to support a motion to reopen in deportation proceedings. *Id.* Therefore, if the record shows that the mail was delivered to the correct address by the appropriate method, the court usually will presume that the notice was served.

The presumption of effective service can be overcome if the respondent demonstrates nondelivery or improper delivery by the Postal Service. *Id.* Nondelivery or improper delivery can be established by submitting substantial and probative evidence, such as documentary evidence from the Postal Service and affidavits. *Id.* For example, if there were ongoing problems with the mail delivery, you may want to provide details about the problems and affidavits from people with direct knowledge of the problem.

Post IIRAIRA Cases

There is a weaker presumption of delivery where the notice was sent by *regular* mail. *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008); *Matter of C-R-C-*, 24 I&N Dec. 677 (BIA 2008). In determining whether the respondent has overcome this presumption, the immigration judge must consider both circumstantial and corroborating evidence, and may consider a variety of factors, including (but not limited) to:

- respondent’s affidavit
- affidavits from family members and other individuals who are knowledgeable about the relevant facts
- respondent’s actions upon learning about the *in absentia* order and whether he or she exercised due diligence in seeking redress
- any prior affirmative application for relief or application filed with USCIS or prima facie eligibility for relief (to help establish an incentive to appear)
- previous attendance at immigration court hearings
- other circumstances or evidence indicating possible non-receipt

What Happens if the Respondent Does Not Receive the Notice Because It Is Served on the Attorney of Record?

Service on the attorney of record constitutes service on the respondent. INA §§239(a)(1), (2); INA §§242B(a)(1), (2) (pre-IIRAIRA); *Matter of Peugnet*, 20 I&N Dec. 233, 237 (BIA 1991). Therefore, if the attorney of record is properly served, in most cases, a motion to reopen for lack of notice will fail even if the attorney did not inform the respondent of the hearing. The respondent may have an argument that counsel’s failure to properly notify him or her of the hearing was ineffective assistance of counsel and amounts to an exceptional circumstance. *See Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996). However, the respondent generally must comply with the requirements for ineffective assistance of counsel claim as set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *See Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996); *see also Matter of Compean*, 25 I&N Dec. 1 (BIA 2009) (reaffirming the application of the *Lozada* requirements).

What if the Respondent Did Not Receive *Oral Notice* of the Consequences of Failing to Appear?

The statute only provides for rescission of an *in absentia* order when the government fails to properly serve the respondent with *written* notice. However, respondents who did not receive oral warnings of the consequences of failing to appear may be able to reopen their cases even if the court properly entered an *in absentia* order of deportation. The leading case on this issue is *Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998). This case applies if:

- (1) No oral warnings were provided in the respondent's native language or a language the respondent understands. The oral warnings must give notice of the time and place of the proceedings and the consequences of failing to appear at the hearing.⁴
- (2) Respondent is eligible for a form of relief that was unavailable at the time of the hearing.

In *Matter of M-S-*, the Board held that the limitations on reopening to rescind an *in absentia* order do not serve as limitations on reopening for other purposes. The Board focused on INA §242B(e)(1) (pre-IIRAIRA) (now, INA §240(b)(7)) which states that any respondent who is provided with oral notice, in a language he or she understands, of the time and place of the proceedings and of the consequences of failing to attend will be ineligible for various forms of relief, including adjustment of status and voluntary departure, for five years (now, ten years). INA §240(b)(7); INA §§242B(c)(1), (e)(1) (pre-IIRAIRA). This section explicitly allows respondents to apply for relief when they were not warned verbally of the consequences of failing to appear for a hearing.

Therefore, respondents who did not receive oral warnings and are eligible for a form of relief that was unavailable to them at their last hearing can reopen their cases under the general motion to reopen rules. See 8 CFR §1003.23(b)(1) and (3). These provisions require that the motion be filed within 90 days of the final order of removal or deportation and that the respondent submit the application for relief with the motion to reopen. *Id.*

What Should You Look for in the Record of Proceedings?

A review of the record of proceedings may provide evidence of lack of proper notice. Consider the following when reviewing the record:

- Are there any typos in the mailing address?
- Was the hearing date correct?

⁴ The oral notice sometimes is provided upon service of the NTA or OSC (if service in person) or at the first immigration court hearing.

- Was the mailing address the last one provided by the respondent? Is there a change of address form that was not processed by the clerk's office?
- Is there evidence that the respondent received the charging document? Did the respondent sign the document? Is there a fingerprint? Did the respondent receive the required oral notice regarding the consequences of failing to attend a hearing?
- If the notice was returned to the court undelivered, was a reason for nondelivery provided?
- Was the notice mailed by the proper method (e.g., certified mail if applicable)?
- Did an attorney withdraw from the case? Was notice mailed to him or her in error?

II. EXCEPTIONAL CIRCUMSTANCES CASES

There are cases where the respondent received proper notice, but failed to appear for the hearing and was ordered removed or deported *in absentia* as a result. The immigration judge may rescind an *in absentia* order of removal or deportation if the respondent's failure to appear for the hearing was because of exceptional circumstances. INA §240(b)(5)(C)(i); INA §242B(c)(3)(A) (pre-IIRAIRA). In exclusion and deportation cases prior to June 13, 1992, a less stringent standard, "reasonable cause," applies. *See, e.g., Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

Preliminary Issues:

Where to File the Motion to Reopen – The motion should be filed with the immigration court having administrative control over the record of proceedings. 8 CFR §1003.23(b)(1)(ii). Typically, this will be the court where the *in absentia* order of removal or deportation was entered.

Time for Filing the Motion to Reopen – A motion to reopen in removal proceedings or deportation proceedings initiated on or after June 13, 1992 must be filed within 180 days of the entry of the *in absentia* order. INA §240(b)(5)(C)(i); INA §242B(c)(3)(A) (pre-IIRAIRA); 8 CFR §§1003.23 (b)(4)(ii), (iii)(A)(1). A motion to reopen in exclusion proceedings or deportation proceedings before June 13, 1992 may be filed at anytime. *See* 8 CFR §1003.23(b)(4)(iii)(B); *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999); *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1159 (BIA 1999).

Although the BIA has taken the position that the 180 day filing deadline is not subject to equitable tolling,⁵ all but one of the courts of appeals to consider this issue have

⁵ In *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998), the Board held that the ineffectiveness of counsel does not create an "exception" to the 180-day time limit for

reached the opposite conclusion.⁶ This means that the respondent may be able to file a motion to reopen after 180 days, particularly in situations where he or she did not know about the *in absentia* order because prior counsel was ineffective. However, equitable tolling generally is available only where the person exercised due diligence in pursuing his or her immigration case. *See, e.g., Scorteanu v. INS*, 339 F.3d 407, 413-14 (6th Cir. 2003); *Jobe v. INS*, 238 F.3d 96, 101 (1st Cir. 2001); *Iavorski*, 232 F.3d at 134.

Filing Fees – The filing fee for a motion to reopen is \$110. 8 CFR §1103.7(b)(2). Respondents who cannot afford the fee may request a fee waiver. 8 CFR §1003.24.

Automatic Stay of Removal/Deportation – An automatic stay goes into effect when the motion is filed and remains in effect pending disposition of the motion by the immigration judge. INA §240(b)(5)(C); *see also* INA §242B(c)(3) (pre-IIRAIRA). In deportation cases, the stay remains in effect during the pendency of any BIA appeal of the decision on the motion to reopen. *Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996). The BIA takes the position that for removal cases, the automatic stay does not remain in effect during the appeal process. *See* BIA Practice Manual, chapter 6, *available at* <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap6.pdf>.

To alert the court and the ICE to the applicability of the automatic stay provision, motions may indicate (in bold letters on the cover page and on the front page of the motion) that an automatic stay applies.

What Does “Exceptional Circumstances” Mean?

The INA states, “the term ‘exceptional circumstances’ refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.” INA §240(e)(1); *see also* INA §242B(f)(2) (pre-IIRAIRA).

The term “exceptional circumstances” was added to the Act by the Immigration Act of 1990 (effective June 13, 1992). Prior to that, the standard for determining whether an *in absentia* order should be rescinded was “reasonable cause” for failure to appear. *See*,

filing a motion to reopen under INA §242B(c)(3)(A) (pre-IIRAIRA), and has taken the position that the deadline is not subject to equitable tolling.

⁶ *See Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *see also Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004) (finding 90 day deadline for general motion to reopen subject to equitable tolling); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002) (same); *but see Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

e.g., *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1158 (BIA 1999); *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988). *See also De Jimenez v. Ashcroft*, 370 F.3d 783, 790 (8th Cir. 2004). This standard applies to deportation cases initiated before June 13, 1992 and exclusion cases. The Board has held that “exceptional circumstances” is a more stringent standard than “reasonable cause.” *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999).

What Must the Respondent Do to Establish Exceptional Circumstances?

The immigration courts employ a “totality of the circumstances” test to determine whether the respondent’s reason for not attending the hearing is an exceptional circumstance. *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) *citing* H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990); *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996).

In general, the respondent should try to include the following in the motion to reopen:

- A detailed and plausible explanation for why he or she failed to appear.
- Adequate documentation in support of the motion. If documentation is not available, the respondent should submit signed affidavits. *See Matter of J-P-*, 22 I&N Dec. 33, 34-35 (BIA 1998).
- A statement that the respondent attempted to contact the Immigration Court on the date of the hearing or an explanation for why he or she did not do so. *See Matter of J-P-*, 22 I&N Dec. 33, 35 (BIA 1998); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002); *Morales v. INS*, 116 F.3d 145, 149 (5th Cir. 1995).

It is helpful to provide as much detail as possible and to try to submit evidence with the initial motion. Also, consider including information about the issues the respondent plans to raise upon reopening and attach any applications for relief that have not been submitted. Immigration judges may be more inclined to reopen cases where the respondent has a meritorious claim for relief or there is a strong argument challenging removability and where the respondent has demonstrated a commitment to resolve his immigration case. *See, e.g., Herbert v. Ashcroft*, 325 F.3d 68, 72 & n.1 (1st Cir. 2003) (noting that there was no meaningful delay by respondent); *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) (remanding the case for review on the merits where the petitioner “had no possible reason to try to delay the hearing,” had a basis for relief, had previously attended all hearings, and where the deportation would break up a family or force U.S. citizen children overseas). Furthermore, courts are more likely to reopen the case if the respondent had attempted to contact the court prior to the hearing; therefore, in preparing clients for upcoming hearings, you may want to advise them to contact the court if they are delayed.

What is an Exceptional Circumstance?

There is a significant body of case law on what constitutes an exceptional circumstance, so be sure to consult with the law in the circuit in which you are filing the motion. However, the following are general guidelines:

Illness can be an exceptional circumstance/reasonable cause, but the respondent must provide adequate documentation. *See Matter of J-P-*, 22 I&N Dec. 33, 34 (BIA 1998) (need documentation); *Matter of Singh*, 21 I&N Dec. 998, 1000 (BIA 1997) (stepson's illness is an exceptional circumstance); *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999) (serious illness requiring surgery is reasonable cause for failure to appear). *But see Lonyem v. U.S. Att'y Gen.*, 352 F.3d 1338, 1341 (11th Cir. 2003) (upholding the IJ's determination that a nurse's affidavit stating that petitioner had been treated for malaria the day before the hearing was not credible in the absence of further documentation and because he had failed to contact the immigration court on the day of the hearing); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002) (finding inadequate a hospital form that failed to indicate that petitioner's asthma attack was a "serious health condition").

Generally, filing a motion for change of venue or for a continuance does not excuse the respondent's appearance at the hearing. *See Jian Jun Tang v. Ashcroft*, 354 F.3d 1192, 1195 (10th Cir. 2003); *Hernandez-Vivas v. INS*, 23 F.3d 1557, 1560 (9th Cir. 1994); *Patel v. INS*, 803 F.2d 804, 806 (5th Cir. 1986); *Maldonado-Perez v. INS*, 865 F.2d 328, 335 (D.C. Cir. 1989). However, one court said that an immigration judge should not have entered *in absentia* order where the attorney filed a motion for continuance because he was ordered to appear in U.S. District Court at the same time of the immigration court hearing. *See Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003); *see also Romero-Morales v. INS*, 25 F.3d 125, 130 (2d Cir. 1994). Further, the BIA found that where the respondent requested multiple continuances because his employment prevented him from attending the hearing, the respondent had not established exceptional circumstances. *See Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

The courts and the BIA have found that traffic and car trouble usually are not exceptional circumstances. *See Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996); *De Morales v. INS*, 116 F.3d 145, 148 (5th Cir. 1995); *Matter of S-A-*, 21 I&N Dec. 1050, 1051 (BIA 1997). However, the Board has indicated that a detailed (and well documented) explanation of why there was an extraordinary amount of traffic can establish an exceptional circumstance. *Matter of S-A-*, 21 I&N Dec. 1050, 1051 (BIA 1997). In one case where the court found that car trouble was not an exceptional circumstance, the respondents were faulted for failing to contact the immigration court and/or attempting to find an alternate means for getting to the court. *See De Morales v. INS*, 116 F.3d 145, 149 (5th Cir. 1997). Moreover, traffic, when combined with other factors, including that the attorney timely notified the IJ that he had a conflict, may result in exceptional circumstances. *Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003); *see De Jimenez v. Ashcroft*, 370 F.3d 783, 789-90 (8th Cir. 2004) (traffic and multitude of other factors constitute reasonable cause for failure to appear for exclusion hearing).

The BIA has held that ineffective assistance of counsel can be an exceptional circumstance. *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996). See also *Galvez- Vergara v. Gonzales*, 484 F.3d 798 (5th Cir. 2007). A respondent claiming ineffective assistance of counsel generally must comply with the requirements set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). See *Matter of Rivera*, 21 I&N Dec. 599, 607 (BIA 1996); see also *Matter of Compean*, 25 I&N Dec. 1 (BIA 2009) (reaffirming the application of the *Lozada* requirements).

What Happens if the Respondent Appears Late for a Hearing?

Although it may difficult to show that a late arrival constitutes an exceptional circumstance, the respondent may be able to establish that a late arrival does not constitute a failure to appear for the hearing. Several courts of appeals have reached this conclusion, especially if the delay was short and the IJ was still on the bench or had recently retired when the respondent arrived. See *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008); *Abu Hasirah v. Dep't of Homeland Sec.*, 478 F.3d 474 (2d Cir. 2007); *Cabrera-Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999); *Nazarova v. INS*, 171 F.3d 478, 480 (7th Cir. 1998); but see *Thomas v. INS*, 976 F.2d 786, 790 (1st Cir. 1992) (not reasonable cause where respondent and counsel arrived ten minutes after IJ entered order of deportation). In such a case, the respondent may argue that the immigration judge entered the in absentia order in error and therefore, it is not necessary to establish exceptional circumstance.



AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY ¹

August 6, 2009

**MANDAMUS ACTIONS:
AVOIDING DISMISSAL AND PROVING THE CASE**

This advisory provides basic information about filing an immigration-related mandamus action in federal district court. It discusses the required elements of a successful mandamus action as well as the jurisdictional concerns that sometimes arise. The information in this document is accurate and authoritative as of the date of this advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

Mandamus can be a relatively simple and quick remedy in situations where the government has failed to act when it has a duty to do so. However, there are a number of adverse published decisions, some of which are discussed in this advisory. Although it is helpful to understand these cases – and to identify the weaknesses in the courts' analyses – potential plaintiffs should not be discouraged. Most successful mandamus actions are unreported and/or do not result in written decisions. In fact, often, the filing of a mandamus action prompts the government to take whatever action is requested and the case ultimately is dismissed.

I. INTRODUCTION

Mandamus can be used to compel administrative agencies to act. The Mandamus Act, codified at 28 U.S.C. § 1361 says, in its entirety:

1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The Mandamus Act authorizes the court to order a remedy. It does not provide independent, substantive grounds for a suit. A mandamus plaintiff must demonstrate that: (1) he or she has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available. *Iddir v. INS*, 301 F.3d 492, 499 (7th

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Cir. 2002). Under the Mandamus Act, the court may compel the government to take action, but the court cannot compel the agency to exercise its discretion in a particular manner, nor can it grant the relief the plaintiff seeks from the agency.

II. JURISDICTION AND CAUSE OF ACTION

Plaintiffs in a mandamus action may allege subject matter jurisdiction under both the mandamus statute, 28 U.S.C. § 1361, and the federal question statute, 28 U.S.C. § 1331.² Generally, it is better to allege both grounds, in part because some courts have confused the issue of subject matter jurisdiction under § 1361, *see, e.g.*, footnote 2, and in part because the same complaint may seek mandamus relief and other forms of relief as well.

The Administrative Procedures Act (“APA”), 5 U.S.C. § 551 *et seq.* does not provide an independent basis for subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977). However, the APA provides a basis for the suit when the government unreasonably delays action or fails to act. *See* 5 U.S.C. §§ 555(b) and 706(1). Thus, the plaintiff may allege the APA as a cause of action. *Id.* In many cases involving agency delay, the court will accept jurisdiction under 28 U.S.C. § 1331 and grant relief under the APA instead of the Mandamus Act. Therefore, it is additionally important to allege jurisdiction under 28 U.S.C. § 1331 and a cause of action under the APA.

III. ELEMENTS OF A SUCCESSFUL MANDAMUS ACTION

A mandamus plaintiff must establish that

- (1) he or she has a clear right to the relief requested;
- (2) the defendant has a clear duty to perform the act in question; and
- (3) no other adequate remedy is available.

Not all courts analyze these issues the same way, or even consistently. Often, the courts mesh these issues or frame them differently. However, for clarity and completeness, this advisory addresses these issues individually.

² The court’s subject matter jurisdiction is a separate issue from the court’s authority to grant mandamus relief. *Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003). Subject matter jurisdiction is a threshold question that determines whether the court has the power to think about the case in the first place. *Id.* at 387. After the court has determined that the petitioner’s “claim is plausible enough to engage the court’s jurisdiction,” the court turns to the question of whether it has authority to grant the particular relief. *Id.*

The Seventh Circuit decision *Ahmed v. DHS* provides a good discussion of these two issues. Furthermore, *Ahmed* cites several cases where the courts have tended to collapse the question of subject matter jurisdiction into the analysis of the merits of the case. *See Ahmed*, 328 F.3d at 386; *see also Davis Associates v. Sec. of Dept. of Housing and Urban Dev.*, 498 F.2d 385, 388-89 (1st Cir. 1974).

A. Does the Plaintiff Have a Clear Right?

A mandamus plaintiff must show that he or she has a clear right to the relief requested. Sometimes, the courts say that a person has a clear right when they fall within the “zone of interests” of a particular statute. This means that the interests the plaintiff seeks “to be protected are within those ‘zone of interests’ to be protected or regulated by the statute ... in question.”³

In immigration related mandamus actions, plaintiffs may identify a specific provision of the INA that creates a clear right to relief. The courts will look to the purpose of the statute – both the specific statutory provision in question, as well as the general purpose of the INA – to determine whether the mandamus plaintiff is an intended beneficiary of the statute. Said another way, the statute should indicate that the government owes a duty *to the plaintiff*.

In the adjustment context, courts have found that the INA establishes a clear right to relief. *See, e.g. Razik v. Perryman*, No. 02-5189, 2003 U.S. Dist. LEXIS 13818, *6-7 (N.D. Ill. Aug. 6, 2003) (courts have consistently held that 8 U.S.C. § 1255 provides a right to have an application for an adjustment of status adjudicated). For example, diversity lottery applicants have established that the INA confers a right to have their applications adjudicated. *See Iddir*, 301 F.3d at 500 (affirmed in *Ahmed v. DHS*, 328 F.3d 383 (7th Cir. 2003));⁴ *Basova v. Ashcroft*, 373 F. Supp. 2d 192, 199 (E.D.N.Y. 2005); *Paunescu v. INS*, 76 F. Supp. 2d 896, 901 (N.D. Ill. 1999). Likewise, in *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999), the court said that applicants under the special immigrant juvenile program “fell within the zone of interest of the INA provisions for SIJ and LPR status.”

Courts have also found that the INA establishes a clear right to relief in the context of delayed naturalization applications where the interview has not yet been conducted. *See Hadad v. Scharfen*, 08-22608, 2009 U.S. Dist. LEXIS 26147, *6-7 (S.D. Fla. Mar. 12, 2009) (finding 8 U.S.C. § 1446(d) creates a right to have the application for naturalization processed and a decision rendered); *Olayan v. Holder*, No. 08-715, 2009 U.S. Dist. LEXIS 12825, *11-12 (S.D. Ind. Feb. 17, 2009) (8 U.S.C. § 1445(c), § 1446(b) and § 1446(d) create right to have naturalization application adjudicated).⁵

In contrast, several courts have said that the INA does not create a clear right to relief in the context of application adjudication delays. *See Bayolo v. Swacina*, No. 09-21202, 2009 U.S. Dist. LEXIS 42604, *5-6 (S.D. Fla. May 11, 2009) (plaintiff did not demonstrate a clear right to relief because there is no provision in INA § 245(a) which sets a time limit for the Attorney General or USCIS to decide whether to adjust an applicant's status); *Castillo v. Rice*, 581 F. Supp. 2d 468 (S.D.N.Y. 2008) (no clear right under 8 U.S.C. §§ 1101(a)(15)(K)(i)-(ii), 1184(d),

³ *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 150 (1970). The zone of interests test was first articulated by the Supreme Court in *Data Processing*. Although this case addressed the issue of standing, the zone of interests test was later used by some courts as a way to determine if the plaintiff has a clear right to relief for purposes of mandamus.

⁴ In both *Iddir* and *Ahmed*, the court denied the mandamus relief on other grounds, i.e., that the government did not have a duty to the plaintiffs.

⁵ To remedy delays following a naturalization interview, an applicant can seek relief under INA § 336(b), 8 U.S.C. § 1446(b). *See* the American Immigration Council's practice advisory “How to Get Judicial Relief Under 8 USC § 1447(b) for a Stalled Naturalization Application.”

and 1184(r) to expedite scheduling of K-1 or K-3 visa interviews by United States consulates).

Courts have similarly held that the INA does not create a right to have deportation proceedings initiated. See *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847-48 (10th Cir. 1995); *Giddings v. Chandler*, 979 F.2d 1104, 1109-10 (5th Cir. 1992); *Gonzalez v. INS*, 867 F.2d 1108, 1109-10 (8th Cir. 1989). In these cases, the plaintiffs – immigrants who were serving criminal sentences – argued that former INA § 242(i) created a clear right to an immediate deportation hearing. Former section 242(i) said that the Attorney General shall initiate deportation proceedings “as expeditiously as possible after the date of conviction.” The courts concluded that this provision was enacted not to benefit the noncitizens, but instead, to address prison overcrowding and avoid the costs of detaining noncitizens; thus the detainees themselves are outside of the “zone of interest” of the statute.⁶

Apart from the INA, in the context of agency delay, courts have also found the right to relief in the APA. See *Villa v. DHS*, 607 F. Supp. 2d 359, 365 (N.D.N.Y. 2009) (§555(b) of the APA requires USCIS to adjudicate applications within a reasonable time).

B. Is there a Mandatory Duty?

In addition to having a clear right to relief, the plaintiff must show that *the defendant* owes him or her a duty.⁷ The courts have said that this duty must be mandatory or ministerial, but mandamus actions can be used to compel the government to exercise its discretion in a case where the government has failed to take any action. For example, the court may order the defendant to adjudicate an application or petition. See, e.g., *Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (duty to adjudicate applications under the diversity lottery program); *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (duty to adjudicate visa application); *Villa v. DHS*, 607 F. Supp. 2d 359, 363 (N.D.N.Y. 2009) (duty to adjudicate adjustment application in a reasonable amount of time); *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999) (duty to process SIJ application in a reasonable amount of time). But see *Orlov v. Howard*, 523 F. Supp. 2d 30, 38 (D.D.C. 2007) (defendants have no duty to increase the pace at which they are adjudicating an adjustment application).

Many – though not all – courts correctly distinguish between the government’s duty to take *some* discretionary action and the actual discretionary decision that the government makes. A court generally will not order the defendant to exercise its discretion in any particular manner. See

⁶ The Ninth Circuit initially found that detained immigrants were within the zone of interests protected by former INA § 242(i). *Garcia v. Taylor*, 40 F.3d 299 (9th Cir. 1994); *Silveyra v. Mozhorak*, 989 F.2d 1012 (9th Cir. 1993). In *Campos*, however, the court held that a subsequent amendment to the INA, which provided that section 242(i) “shall not be construed to create any substantive or procedural right or benefit,” overrules its prior rulings in *Garcia* and *Silveyra*. *Campos*, 62 F.3d at 314 (citing § 225 of the Immigration and Nationality Technical Corrections Act of 1994). See also *Hernandez-Avalos*, 50 F.3d at 848 (citing § 225 as barring detainees’ standing).

⁷ See, e.g., *Naporano Metal & Iron Co. v. Sec’y of Labor*, 529 F.2d 537 (3d Cir. 1976) (duty to issue labor certification); *Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D.P.A. 2003) (ministerial duty to issue derivative citizenship); *Rios v. Aguirre*, 276 F. Supp. 2d 1195, 199-1200 (D. Kan. 2003) (no duty to entertain motion to reconsider).

Silveyra v. Moschorak, 989 F.2d 1012, 1015 (9th Cir. 1993). (“[m]andamus may not be used to instruct an official how to exercise discretion unless that official has ignored or violated ‘statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised.’”); *Nigmadzhanov v. Mueller*, 550 F. Supp. 2d 540, 546 (S.D.N.Y. 2008) (the Attorney General’s has discretion to grant or deny an application, but does not have discretion to simply never adjudicate an adjustment application).

Rather, the court will order the government to take *some* action. As a result, be aware that filing a mandamus action may result in a prompt denial of the application by the agency.

The question of the defendant’s mandatory duty is closely related to the question of the plaintiff’s clear right to relief, and in many cases, the answer to these questions will be same. However, just because there is a clear right to relief does not mean that the government has an affirmative duty and vice versa. For example, in *Iddir v. INS*, the plaintiffs had a clear right to have their adjustment applications adjudicated, but because defendants had no statutory authority to issue the visa after the fiscal year statutory deadline had passed, the defendants no longer had a duty to adjudicate the applications. 301 F.3d 492, 500-01 (7th Cir. 2002).⁸ Alternatively, in *Giddings v. INS*, the court held that although the INA imposes “a duty on the Attorney General to deport criminal aliens, we stop short of concluding that this created a duty *owed to the alien*.” 979 F.2d 1104, 1110 (5th Cir. 1992). In doing so, the court noted the distinction between “imposing a duty on a government official and vesting a right in a particular individual.” *Id.* (citing *Gonzalez v. INS*, 867 F.2d 1108, 1109 (8th Cir. 1989)).

Even if the government has a nondiscretionary duty to adjudicate an application, mandamus is appropriate only if the government fails to act within a reasonable amount of time. *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1147 (D. Ariz. 2008) (finding, after applying 5 U.S.C. § 555(b), that the nearly six-year delay in adjudicating Plaintiff’s application was unreasonable). Where there is no statutory deadline for adjudicating an application, what is “reasonable” will depend on the circumstances of the case. Courts have found delays in adjudicating immigration applications to be unreasonable when the delays are lengthy. *Compare Aslam v. Mukasey*, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (finding a nearly three-year delay in the adjudication of an adjustment application unreasonable) *with Alkenani v. Barrows*, 356 F. Supp. 2d 652, 657, n.6 (N.D. Tex. 2005) (finding 15-month delay was not unreasonable, but noting that decisions from other jurisdictions suggest that delays approximating two years may be unreasonable).

The courts also have found government delays unreasonable when the passage of time causes a plaintiff to become ineligible for the relief sought. *See, e.g., Harriott v. Ashcroft*, 277 F. Supp. 2d 538 (E.D. Pa. 2003) (granting mandamus where INS unreasonably delayed issuing derivative citizenship); *Yu v. Brown*, 36 F. Supp. 2d 922 (D.N.M. 1999) (granting mandamus where INS delayed adjustment under special immigration juvenile status); *but c.f. Ahmed*, 328 F.3d at 287 (finding no right to relief because delay resulted in plaintiff becoming ineligible for relief, but

⁸ Note, however, that the Eleventh Circuit did not reach the issue of whether the government had a duty to adjudicate the petitioner’s adjustment of status application under the diversity visa program. *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003). Rather, in *Nyaga*, the court dismissed the case as moot because the fiscal year had ended.

In two district court cases where the plaintiffs filed mandamus complaints prior to the end of the fiscal year, relief was granted even though the visa was not issued prior to the end of the fiscal year. *See Przhebel'skaya v. USCIS*, 338 F Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999).

noting that the result may have been different if case filed while government still had authority to act).

A mandamus plaintiff may look to regulations or internal operating procedures to find out if the agency itself has set guidelines.⁹ Plaintiffs also may look to what the agency's average adjudication period is; however, just because a delay is "not unusual" does not make it reasonable. See *Jefrey v. INS*, 710 F. Supp. 486 (S.D.N.Y. 1989).

The following issues provide guidance on what is reasonable:

- (1) the time agencies take to make decisions must be governed by a "rule of reason";
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
- (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) the court should also take into account the nature and extent of the interests prejudiced by delay;
- (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (quoted in *Kashkool v. Chertoff*, 553 F. Supp. 2d 1131, 1143 (D. Ariz. 2008)).

C. Is There Another Remedy Available?

The courts will not grant mandamus relief if the plaintiff has an alternative, fully adequate remedy available. This means that plaintiffs must exhaust their administrative remedies. See, e.g., *Cheknan v. McElroy*, 313 F. Supp. 2d 270, 274 (S.D.N.Y. 2004); *Henriquez v. Ashcroft*, 269 F. Supp. 2d 106, 108 (E.D.N.Y. 2003). Failure to exhaust may be excused, however, when one of the exceptions are established.¹⁰

⁹ However, the agency's delay may be unreasonable even if it adjudicates an application within the agency-specified timeframe. See *Singh v. Ilchert*, 784 F. Supp. 759, 764 (N.D. Cal. 1992) (finding that "the mere fact that the INS promulgates a regulation establishing a time period in which applications must be adjudicated does not, in and of itself, mean that an adjudication within the time period cannot constitute unreasonable delay").

¹⁰ Failure to exhaust may be excused if: (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an "indefinite time frame for administrative action"; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative

Furthermore, courts generally will not grant relief if the plaintiff has a judicial alternative available. For example, in *Bhatt v. Board of Immigration Appeals*, the plaintiff asked the court to compel the BIA to adjudicate his motion to reconsider. 328 F. 3d 912 (7th Cir. 2003). The court held that to the extent that the plaintiff can challenge the BIA's inaction, it must do so as part of a petition for review in the court of appeals. *Id.* at 915 n.3 (citing INA § 242(b)(9)). Similarly, in *Kulle v. Springer*, the court dismissed a mandamus action that sought to compel discovery in an immigration court proceeding. 566 F. Supp. 279 (N.D. Ill. 1983). The court said that the determinations involving discovery fall within the scope of the judicial review provisions of the INA (former section 106(a)). *Id.* at 280.

In several cases, the government has argued that applicants for adjustment of status are precluded from mandamus when the government has not initiated removal proceedings against them. The government has reasoned that (1) adjustment applicants have not exhausted remedies because they have not re-adjudicated their applications before the immigration court and the Board of Immigration Appeals in removal proceedings, and/or (2) there is (or will be) an alternative judicial forum available after removal proceedings conclude (i.e., petition for review under INA § 242). Although some courts have agreed with the government, *see, e.g., Sadowski v. INS*, 107 F. Supp. 2d 451 (S.D.N.Y. 2000), most courts have implicitly rejected this reasoning, and a few courts have rejected it explicitly. In *Iddir*, the court said that even though INS may initiate removal proceedings in the future, administrative exhaustion is excused because this situation constitutes an “indefinite timeframe for administrative action.”¹¹ 301 F.3d at 498-99 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992)).

Finally, courts sometimes find that the availability of APA relief precludes granting mandamus relief. *See Valona v. U.S. Parole Comm'n*, 165 F.3d 508, 510 (7th Cir. 1998) (finding “APA . . . authorizes district courts to ‘compel agency action unlawfully withheld or unreasonably delayed’ without the need of a separate action seeking mandamus”); *Ali v. Frazier*, 575 F. Supp. 2d 1084, 1091 (D. Minn. 2008) (dismissing plaintiff’s mandamus claims because the APA provides a remedy for unlawfully delayed agency action); *Sawan v. Chertoff*, 589 F. Supp. 2d 817 (S.D. Tex. 2008) (same).

III. OTHER THRESHOLD ISSUES

The following are some jurisdictional and other threshold issues that often arise in immigration mandamus actions.

process would be futile because the agency is biased or has predetermined the issue; or (4) substantial constitutional questions are raised. *See Iddir v. INS*, 301 F.3d at 498 (citations omitted).

¹¹ The court also found that two other exhaustion exceptions applied: (1) the agency lacks the ability to grant the relief requested and (2) exhausting the administrative process would be futile.

A. Mootness

The courts will dismiss a civil action where the plaintiff's claim is moot. Some courts have found that when an agency fails to adjudicate an application, and, as result of the passage of time, the applicant becomes ineligible for the benefit requested, the issue is moot.

For example, in *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003), the plaintiff asked the court to compel the government to adjudicate his adjustment application under the diversity visa program. The court found that the plaintiff was no longer eligible to receive a diversity visa because the fiscal year during which the visa was available had ended. *Nyaga*, 323 F.3d at 915-16.¹² As a result, his claim was moot.¹³ *Id.* at 916. Likewise, in *Sadowski v. INS*, the court found that the plaintiff's claim was moot because he no longer was eligible for derivative beneficiary status, having turned twenty-one. 107 F. Supp. 2d 451, 454 (S.D.N.Y. 2000). *But see Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D. Pa. 2003) (court ordered government to issue derivative citizenship nunc pro tunc where plaintiff alleged very compelling factors and government acted unreasonably).

B. Statutory Bars to Review under INA § 242, including Amendments by the REAL ID Act.

Section 242 of the INA bars jurisdiction over a variety of different issues in immigration cases. The government often argues that INA § 242(a)(2)(b)(ii) applies to bar jurisdiction over mandamus actions challenging agency delay. This provision bars review of a "decision or action" of the Attorney General or the Secretary of DHS when such decision or action "is specified under this subchapter to be in the discretion" of the Attorney General or the Secretary of DHS. In many cases, plaintiffs have successfully overcome government motions to dismiss that raise this jurisdictional bar. *See, e.g., Sharadanant v. USCIS*, 543 F. Supp. 2d 1071, 1075 (D.N.D. 2008); *see also* the American Immigration Council's practice advisory, "Mandamus Jurisdiction over Delayed Applications: Responding to the Government's Motion to Dismiss," for arguments challenging the applicability of this bar to jurisdiction at <http://www.legalactioncenter.org/practice-advisory-topics>. However, some district courts agree that INA § 242(a)(2)(B)(ii) bars jurisdiction. *See e.g., Safadi v. Howard*, 466 F. Supp. 2d 696, 700 (E.D. Va. 2006) (§ 1252(a)(2)(B) precludes review of a mandamus action to compel adjudication of an adjustment application).

¹² The plaintiff filed the complaint after the expiration of the fiscal year for which he had won the diversity visa lottery. Thus the court may have reached a different result if the complaint had been filed before the end of the year. *See Nyaga*, 323 F.3d at 915 n.7 (plaintiff's case arguably distinguishable from a case where complaint filed before end of year); *Paunescu v. INS*, 76 F. Supp. 2d 896, 898 (N.D. Ill. 1999) (mandamus issued where complaint filed before end of fiscal year); *see also Przhebelkaya v. USCIS*, 338 F. Supp. 2d 399, 405 (E.D.N.Y. 2004) (motion to compel granted where mandamus issued prior to end of fiscal year). *But see Keli v. Rice*, 571 F. Supp. 2d 127, 135-36 (D.D.C. 2008) (when petitioner filed complaint only ten days before the end of the fiscal year, the court held there was not adequate time to intervene before the fiscal year expired).

¹³ Note that in *Iddir*, the Seventh Circuit reached the same result, but did not rely on mootness. Rather, the court found that the government did not have a duty to adjudicate the application because the plaintiff was no longer eligible for a diversity visa. *Iddir*, 301 F.3d at 501.

The REAL ID Act of 2005¹⁴ amended INA § 242 to include specific bars to judicial review by mandamus action. The majority of the amendments to provisions of INA § 242 pertain to judicial review of orders of removal or removal proceedings.¹⁵ Courts generally do not review removal orders or removal proceedings by means of mandamus actions. In fact, in one case in which this was tried in the past, the court found that INA § 242(g) barred jurisdiction in mandamus cases. The Second Circuit said that the court lacked jurisdiction to compel the government to execute a final order of deportation. *Duamutef v. INS*, 386 F.3d 172, 180-81 (2d Cir. 2004). Likewise, courts have held that § 242(g) bars a plaintiff from seeking to have removal proceedings commenced. *Chapinski v. Ziglar*, 278 F.3d 718, 721 (7th Cir. 2002); *Alvidres-Reyes v. Reno*, 180 F.3d 199, 205 (5th Cir. 1999).

The government also sometimes argues that INA § 242(a)(2)(B)(i) (bar over certain discretionary decisions) bars review in mandamus actions. The REAL ID Act amended this section to specifically bar mandamus review of discretionary decisions that are covered by INA § 242(a)(2)(B)(i). See REAL ID Act § 106(a)(1)(A)(ii). Additionally, the REAL ID Act amended this section so that it now applies to both removal and non-removal immigration cases. See REAL ID § 101(f)(2).

However, most courts have found that INA § 242(a)(2)(B)(i) does not apply in mandamus actions. Through mandamus, the plaintiff seeks an order compelling the government to take action; the court will not compel the government to grant or deny an application. Thus, because the plaintiff is not challenging a decision to deny relief, the relief sought is not discretionary and in fact, is by definition a mandatory duty. See *Iddir*, 301 F.3d at 497-98; but see *Elzerw v. Mueller*, 2007 U.S. Dist. LEXIS 30429 (E.D. Pa. Apr. 23, 2007) (in combination with other provisions of the INA, § 242(a)(2)(B)(i) demonstrates that the process of adjustment of status is wholly discretionary)

C. Consular Nonreviewability

If a person is seeking to compel a consular officer to process an application or petition abroad, the government likely will argue that such a claim is barred under the doctrine of consular nonreviewability. The courts generally have held that they lack authority to review consular decisions. See, e.g., *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999).

However, the law is not firmly settled regarding the applicability of the consular nonreviewability doctrine to mandamus cases. See *Ahmed v. DHS*, 328 F.3d 383, 388 (7th Cir. 2003). And, in fact, the Ninth Circuit has found that it has authority to grant mandamus relief to compel a consular officer to act on a visa petition. In *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), the court ordered the U.S. Consulate in Bombay, India to act on the plaintiff's visa petition. Although the court acknowledged that "[n]ormally, a consular official's discretionary decision to grant or deny a visa petition is not subject to review," the court found mandamus jurisdiction when the consul "fail[s] to take an action." *Id.* at 931-32; see also *Am. Acad. of*

¹⁴ P.L. 109-13, 119 Stat. 231 (May 11, 2005).

¹⁵ See amended INA §§ 242(a)(2)(A), (B) and (C); new § 242(a)(4); new § 242(a)(5); amended § 242(b)(9); and amended § 242(g).

Religion v. Chertoff, 463 F. Supp. 2d 400, 417 (S.D.N.Y. 2006) (finding the doctrine does not apply in cases brought by U.S. citizens raising constitutional, rather than statutory, claims).

IV. PROCEDURES

Mandamus is a civil action and therefore, the Federal Rules of Civil Procedure and the district court's local rules apply. The local rules are available on the courts' websites.

Whom to Sue and Serve: Because mandamus actions seek to force an officer or employee of the government of the United States to take an action, the named defendant depends on the type of action the suit seeks to compel. For example, a mandamus action to compel the U.S. Citizenship and Immigration Services (USCIS) to adjudicate an application may name the USCIS District Director, USCIS Director, and the Secretary of the Department of Homeland Security (DHS) as defendants. If security checks conducted by the FBI are cause for the delay, an action may also name the Director of the Federal Bureau of Investigations and the Attorney General. It is better to be over inclusive in naming defendants, and if it is unclear which officer had the duty to act, name the agency/department or even the United States.¹⁶

If the defendant is DHS (or a department or officer within DHS), by regulation¹⁷ the complaint must be served to:

Office of the General Counsel
United States Department of Homeland Security
Washington, DC 20528

For more information about identifying the defendants and about service, please see the American Immigration Council's Practice Advisory, "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation" (Amended Apr. 7, 2006) (<http://www.legalactioncenter.org/practice-advisory-topics>).

Venue: Venue for the mandamus action, unless otherwise specified in some other statute, can be in any judicial district in which the defendant "resides;" in which a substantial part of the events or omissions giving rise to the claim occurred; or in which the plaintiff resides. 28 U.S.C. § 1391(e).¹⁸

¹⁶ If the complaint turns out to be over-inclusive, the court may dismiss the complaint against the improperly named defendants and continue with the proper defendants. See *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (granting defendant's summary judgment in part, and denying in part).

¹⁷ Service of Summonses and Complaints, 6 C.F.R. § 5.42 (2004). The regulations list the zip code for DHS as 20258. The postal service indicates that no such zip code exists, however, and thus this appears to be a typographical error. The USCIS website lists the zip code noted above: 20528.

¹⁸ The government has sometimes challenged venue when the action is brought where the defendant resides. The government argues that the defendant, even if a lawful permanent resident, does not "reside" in the United States for purposes of venue. See *Ou v. Chertoff*, 07-3676, 2008 U.S. Dist. LEXIS 108848, *3-4 (N.D. Cal. Mar. 12, 2008) (finding, for venue purposes, a lawful permanent resident could not bring a mandamus action where he resided because an "alien is 'assumed not to reside in the United States'" (citing *Galveston v. Gonzales*, 151 U.S. 496, 506-07 (1894)); *Ibrahim v. Chertoff*, No. 06-2071, 2007 U.S. Dist. LEXIS 38352, *13 (S.D. Cal. May 24, 2007) (for venue purposes nonresident aliens do not "reside" in any district of the United States). When the government challenges venue, courts have found jurisdiction if there is some "act or omission" that can form a basis

Fee: Parties instituting a civil action in district court are required to pay a filing fee pursuant to 28 U.S.C. § 1914. The current fee is \$350. Complaints may be accompanied by an application to proceed in *forma pauperis*, if the plaintiff is unable to pay the filing fee.

Injunctive/Declaratory Relief: A mandamus suit is an action for affirmative relief, as compared to injunctive relief, which typically seeks to prohibit improper action. Although 28 U.S.C. § 1361 does not authorize injunctive relief, mandamus jurisdiction permits a flexible remedy. Furthermore, the same complaint may request declaratory, injunctive, and mandamus relief. For example, the court could declare a policy or regulation illegal, enjoin its enforcement, and order affirmative relief all at the same time.

for venue pursuant to 28 U.S.C § 1391(e)(2). *See e.g., Taing v. Chertoff*, 526 F. Supp. 2d 177, 180 (D. Mass. 2007) (finding venue where the plaintiff resided in Lowell, Massachusetts; a substantial part of the events giving rise to the claim occurred in Eastern Massachusetts, and the office that denied the Application was the Boston Region/District Office of the United States Citizenship and Immigration Services); *Ibrahim v. Chertoff*, No. 06-2071, 2007 U.S. Dist. LEXIS 38352, *14-15 (S.D. Cal. May 24, 2007) (finding § 1391(e)(2) provides a proper basis for venue because significant events took place in the court's district, even if substantial events or omissions also took place in other districts).

THE CRIMINAL JUSTICE ACT
Appointment of Counsel in Habeas Corpus Proceedings¹

By the Legal Action Center

Updated August 2009

The Criminal Justice Act (CJA) authorizes the U.S. district courts to appoint counsel to represent financially eligible individuals in habeas corpus actions brought pursuant to 28 U.S.C. § 2241. *See* 18 U.S.C. § 3006A. The courts have discretion to appoint counsel when the interests of justice so require. *Id.* The relevant section of the CJA states:

(2) Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who –

...

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

18 U.S.C. § 3006A(a)(2)(B).

WHO IS “FINANCIALLY ELIGIBLE”?

The CJA states that financially eligible individuals are “financially unable to obtain adequate representation.” This does not mean that a person must be found indigent in order to qualify under the CJA. *See Green v. United States*, 262 F.3d 715, 716 (8th Cir. 2001) (“indigence connotes a greater financial need than is necessary to qualify for appointed counsel”).

HAVE COURTS APPOINTED COUNSEL IN IMMIGRATION CASES?

Yes. Numerous U.S. district courts have appointed counsel to represent individuals in immigration-related habeas actions brought under 28 U.S.C. § 2241. *See Duran v. Reno*, 193 F.3d 82 (2d Cir.) *vacated as moot*, 197 F.3d 63 (2d Cir. 1999); *Ponnapula v.*

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Ashcroft, 02-3546, 2002 U.S. Dist. LEXIS 9975, *2 n.1 (S.D.N.Y. June 3, 2002); *Lawrence v. INS*, No. 00-2154, 2000 U.S. Dist. LEXIS 18429 (S.D.N.Y. Dec. 21, 2000); *Chamblin v. INS*, 176 F. Supp. 2d 99 (D.N.H. 2000); *Saldina v. Thornburgh*, 775 F. Supp. 507 (D. Conn. 1991).

Only the Eleventh Circuit has held that the CJA does not apply to immigration-related habeas actions. *Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir. 1986). Several courts, however, have rejected the Eleventh Circuit's reasoning. See, e.g., *Lawrence v. INS*, No. 00-2154, 2000 U.S. Dist. LEXIS 18429 (S.D.N.Y. Dec. 21, 2000); *Chamblin v. INS*, 176 F. Supp. 2d 99 (D.N.H. 2000); *Saldina v. Thornburgh*, 775 F. Supp. 507 (D. Conn. 1991). In addition, subsequent to the Eleventh Circuit's decision, Congress amended the CJA, and arguably *Perez-Perez* is no longer good law.

WHAT FACTORS DO COURTS CONSIDER IN DETERMINING WHETHER TO APPOINT COUNSEL “IN THE INTERESTS OF JUSTICE”?

Once the court determines that the petitioner is eligible for appointment of counsel under the CJA, the court must determine whether the interests of justice require such an appointment. In general, the court will consider the extent to which appointed counsel will benefit both the petitioner and the court. The courts have taken into account the following factors:

- y Likelihood of success on the merits of the petition
- y Complexity of the factual or legal issues raised
- y Need for an evidentiary hearing vs. resolution of case based on the record
- y Petitioner's ability to present forcefully and coherently his or her contentions
- y Petitioner's ability to investigate facts

See, e.g., *Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994); *Reese v. Fulcomer*, 946 F.2d 247, 264 (3d Cir. 1991); *Battle v. Armontrout*, 902 F.2d 701, 702 (8th Cir. 1990); *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987).

HOW DO COURTS SELECT COUNSEL FOR APPOINTMENT?

Each district court must establish a “plan” for implementing the CJA. 8 U.S.C. § 3006A(a). The plan must ensure that private attorneys are appointed in a “substantial portion” of cases. 18 U.S.C. § 3006A(a)(3). In addition, courts may appoint attorneys from a bar association, legal aid, and public defender organizations. *Id.*

Each court's plan includes specific rules about how private attorneys are selected for appointment. Generally, each court has a CJA panel of private attorneys. Private attorneys must apply to be on the panel, and each court has its own application procedures and requirements for applicants.

Typically, neither the court nor the soon-to-be client may request the appointment of a specific attorney. However, some courts allow for the appointment of a specific attorney,

and even a non-panel attorney, when required by the interests of justice and there is an exceptional circumstance. Some immigration lawyers have successfully requested that they be appointed in specific cases. Once an attorney is appointed, the attorney usually is obligated to represent the client through the appeal, including any ancillary matters appropriate to the appeal.

WHAT OTHER SERVICES ARE COVERED BY THE CJA?

The CJA provides for “investigative, expert, or other services necessary for adequate representation.” 18 U.S.C. § 3006A(e). Often, counsel must gain the court’s approval before obtaining the services. *Id.*



AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY¹

July 6, 2009

**Voluntary Departure: Automatic Termination and
the Harsh Consequences of Failing to Depart**

By the Legal Action Center

There is a common perception that a “grant” of voluntary departure—an order allowing a respondent in removal proceedings to leave the United States by a date certain, without being subject to a removal order—is a benefit. It is true that departing voluntarily by the specified date can protect a respondent from the consequences of a removal order. However, even a timely voluntary departure does not protect him or her from other inadmissibility bars. For example, if a respondent accrued unlawful presence before the voluntary departure order, he or she may be inadmissible under INA § 212(a)(9)(B). Moreover, overstaying a voluntary departure period brings severe, unwaivable consequences. As described in this advisory, the results of failing to comply with a voluntary departure order may be harsher than the results of accepting a removal order. Respondents are well advised to accept a voluntary departure order only if they intend to and are able to timely depart and satisfy any other conditions imposed.

This Practice Advisory addresses when the voluntary departure period runs and the events that cause automatic termination of a voluntary departure order. The advisory also discusses the serious consequences that result from failing to depart, when these consequences apply, and importantly, when they do not apply. The Appendix provides background about the eligibility requirements for voluntary departure.

This Practice Advisory incorporates two significant recent developments in voluntary departure law: (1) the Supreme Court’s decision *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), and (2) EOIR’s subsequent voluntary departure regulations, which went into effect on January 20, 2009, see Department of Justice, Executive Office for Immigration Review, “Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review,” 73 Fed. Reg. 76927 (Dec.

¹ Copyright (c) 2009, 2010 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

18, 2008). AILF also has issued two other Practice Advisories that focus exclusively on these developments:

- “Voluntary Departure Q&A” (Dec. 22, 2008). This advisory provides an overview of EOIR’s voluntary departure regulations that went into effect on January 20, 2009.
- “*Dada v. Mukasey* Q&A: Preliminary Analysis and Approaches to Consider” (June 17, 2008). This advisory discusses the Supreme Court’s decision *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), which held that in order to protect the right to file a motion to reopen, a person must have the opportunity to unilaterally withdraw his voluntary departure before the voluntary departure period expires. (Note: aspects of the Supreme Court’s decision were superseded by the subsequent EOIR regulations. Thus, practitioners are advised to read the *Dada* Practice Advisory in conjunction with the Practice Advisory addressing the regulations.)

I. When Does Voluntary Departure Begin to Run; Can the Departure Period Be Extended; and When Does the Order Terminate?

Typically, the voluntary departure period begins running on the date of the order. However, when a respondent appeals an immigration judge’s (IJ) decision to the BIA, the filing of the appeal automatically stays execution of the IJ’s order. See *Matter of A-M-*, 23 I&N Dec. 737, 744 (BIA 2005) (citing 8 C.F.R. § 1003.6(a)). Thus, while an appeal is pending, the voluntary departure period is not running and a respondent cannot be charged with failing to depart.² If the Board of Immigration Appeals (BIA) dismisses the appeal, the BIA’s general policy is to reinstate the voluntary departure order for the same amount of time initially ordered by the immigration judge.³ See *Matter of A-M-*, 23 I&N Dec. at 744.

Only DHS has jurisdiction to extend a final order of voluntary departure, and for individuals in removal proceedings, DHS only may extend the period up to “120 days or 60 days as set forth in section 240B of the Act.” 8 C.F.R. § 1240.26(f). For many people, this makes seeking an extension impractical, given that the request often is not adjudicated within this short period of time. However, the pre-IIRIRA voluntary departure statute did not include a limit on the amount of time in which a respondent could be permitted to depart. See INA § 244(e) (1996). As a

² In fact, if a person departs while an appeal is pending, his or her departure will be deemed a withdrawal of the appeal. 8 C.F.R. § 1003.4.

³ Pursuant to voluntary departure rules that went into effect on January 20, 2009, a voluntary departure applicant is required to provide the BIA with proof of having posted the voluntary departure bond within 30 days of filing the notice of appeal. 8 C.F.R. § 1240.26(c)(3)(ii). If the person does not provide proof, the BIA will not reinstate the voluntary departure order. Individuals who decide that they do not want voluntary departure should not provide proof of payment, thus indicating their intent to withdraw their request for voluntary departure. In the preamble to the regulation, EOIR rejected the suggestion that DHS provide proof that a person has posted bond on the basis that “such a process would assume that every alien granted voluntary departure by the immigration judge would request reinstatement by the Board.” See 73 Fed. Reg. at 76934.

result, individuals in deportation proceedings (commenced before April 1, 1997) may seek an extension beyond 120 or 60 days and/or reinstatement of their voluntary departure order. *See* 8 C.F.R. § 1240.57.

A voluntary departure order will terminate automatically in certain situations:

Upon Filing a Petition for Review

Under regulations that took effect on January 20, 2009, an order of voluntary departure will terminate automatically upon the filing of a petition for review or other judicial challenge and the alternate order of removal will take effect.⁴ 8 C.F.R. § 1240.26(i). However, if a person then departs within 30 days of filing the petition for review and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. *Id.* *See* 73 Fed. Reg. at 76933 for a discussion of what proof and evidence may be sufficient.

Prior to the issuance of this termination rule, most of the courts of appeals had held that they have authority to stay voluntary departure during the pendency of the petition for review. *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006); *Obale v. Attorney General*, 453 F.3d 151 (3d Cir. 2006); *Vidal v. Gonzales*, 491 F.3d 250 (5th Cir. 2007); *Nwakanma v. Ashcroft*, 352 F.3d 325 (6th Cir. 2003); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *El Himri v. Ashcroft*, 344 F.3d 1261 (9th Cir. 2003); *but see Ngaururi v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004) (finding that the court lacks authority to stay voluntary departure). EOIR's regulation attempts to bypass the courts' stay procedures by terminating the voluntary departure order upon filing the petition for review. However, individuals whose voluntary departure orders were reinstated by the BIA before the termination rule went into effect on January 20, 2009, may seek stays of the voluntary departure period according to the case law in their circuit.

Upon Filing a Motion to Reopen or Reconsider

Under regulations that went into effect on January 20, 2009, if a respondent files a motion to reopen or reconsider during his or her voluntary departure period, the filing automatically terminates the voluntary departure order and the alternate removal order takes effect.⁵ 8 C.F.R. § 1240.26(e)(1). Immigration judges and the BIA may not toll, stay, or reinstate voluntary departure, except as allowed under current 8 C.F.R. § 1240.26(h). This rule does not apply to respondents who filed motions to reopen or reconsider after the voluntary departure period has expired. Such individuals are subject to the consequences of overstaying the voluntary departure period, and therefore may be ineligible for the very relief they are seeking in their motion (see discussion in Section II).

⁴ This rule applies prospectively only, and therefore does not apply to cases where the voluntary departure was ordered prior to January 20, 2009. *See* 73 Fed. Reg. at 76936.

⁵ This rule applies prospectively only, and therefore does not apply to cases where the voluntary departure was ordered prior to January 20, 2009. *See* 73 Fed. Reg. at 76936.

Prior to this rule, EOIR had taken the position that the voluntary departure period continues to run during the pendency of the motion and that upon its expiration, individuals would become ineligible for the relief sought. See *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996). Several circuits rejected *Shaar*'s application to post-IIRIRA cases and held that the voluntary departure period should be tolled during the pendency of the motion to reopen period. See *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006); but see *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006); *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007).

In *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), the Supreme Court said that the voluntary departure period is not tolled when the motion to reopen is filed, but that voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. When EOIR issued regulations a few months after the Supreme Court decided *Dada*, EOIR declined to adopt the Supreme Court's approach (i.e., allowing individuals to withdraw their requests for voluntary departure), and instead chose the automatic termination approach. 73 Fed. Reg. at 76930. According to EOIR, its approach is consistent with and relies on the Supreme Court's reasoning in *Dada*. See 73 Fed. Reg. at 76930.

Upon Failure to Post Bond

If an individual fails to post the required voluntary departure bond within five days of the IJ's order, an alternate order of removal goes into effect. 8 C.F.R. §§ 1340.26(c)(4) and 1241.1(f). Nonetheless, the regulation says that the failure to post bond does not terminate the obligation to depart or exempt a respondent from the consequences of failing to depart under INA § 240B(d). 8 C.F.R. § 1240.26(c)(4).⁶ However, if a respondent does not post bond, but departs within 25 days of the failure to post bond and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. 8 C.F.R. § 1240.26(c)(4). See 73 Fed. Reg. at 76935 for a discussion of what proof and evidence may be sufficient.

II. Consequences of Failing to Depart

Because the penalties for failing to depart are so severe, individuals who are eligible for voluntary departure should carefully consider the potential repercussions of a voluntary departure order before deciding to apply for this relief. In many cases, a respondent who accepts

⁶ This rule purports to reverse EOIR's position in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). 73 Fed. Reg. at 76933-34, 76935. In this case, the BIA found that a person who does not post bond does not have a voluntary departure order and is not subject to the consequences of failing to depart. Arguably, the new position set forth in this rule is inconsistent with the voluntary departure statute, which suggests that Congress did not intend the privileges and consequences of voluntary departure to apply until the conditions of bond are met. See *Matter of Diaz-Ruacho*, 24 I&N Dec. at 50. See further discussion of this argument in Section III of this Practice Advisory.

a voluntary departure order may end up in a worse position than someone who is ordered removed.

Any respondent who is granted voluntary departure is subject to civil penalties if he or she “fails voluntarily to depart the United States within the time period specified....” INA § 240B(d). The respondent may be subject to a monetary fine of up to \$5,000,⁷ and he or she is barred, for ten years, from being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. *Id.* Individuals whose voluntary departure orders were issued under former INA § 244(e) (1995) are barred from these forms of relief for five years. INA § 242B(e)(2) (1995).

Thus, if a respondent is ordered to voluntarily depart and fails to do so, but later becomes eligible to adjust his or her status, the respondent almost certainly will be found ineligible for adjustment for ten years based on INA § 240B(d). However, if this same respondent had been ordered removed rather than granted voluntary departure, he or she would not be statutorily barred from adjustment and could file a motion to reopen his or her removal proceedings.⁸

Further, once a respondent fails to voluntarily depart, the voluntary departure order becomes a removal order, and any subsequent departure is considered a self-removal. 8 C.F.R. § 1240.26(d); 8 C.F.R. § 241.7; 8 C.F.R. § 1241.7. Additionally, a respondent who remains in the United States after the voluntary departure period expires begins to accrue unlawful presence, and may be subject to the three or ten year bar under INA § 212(a)(9)(B).⁹ *See* USCIS Field

⁷ There is a rebuttable presumption that the penalty for failure to depart shall be set at \$3000, unless the immigration judge specifies a different amount. 8 C.F.R. § 1240.26(j). The immigration judge must inform the individual of the amount of the penalty at the time of granting voluntary departure. *Id.*

⁸ Motions to reopen generally must be filed within 90 days of the final order of removal unless the government agrees to join in the motion. INA § 240(c)(7)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b). DHS has set forth guidelines for when it may join a motion to reopen removal proceedings. *See* Memorandum on Prosecutorial Discretion from William J. Howard, U.S. Immigration and Customs Enforcement Principal Legal Advisor, to all Office of Principal Legal Advisor Chief Counsel (Oct. 24, 2005), *available at* <http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122>; Memorandum on Motions to Reopen for Consideration of Adjustment of Status from Bo Cooper, General Counsel for Immigration and Naturalization Service, to Regional Counsel (May 17, 2001), *available at* <http://www.aila.org/Content/default.aspx?docid=16962>. In addition, IJs and the BIA have *sua sponte* authority to reopen a case at any time, 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1), and most courts have held that the filing deadlines are subject to equitable tolling. *See, e.g., Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

⁹ According to DHS, “Accrual of unlawful presence stops on the date an alien is granted voluntary departure and resumes on the day after voluntary departure expires, if the alien has not departed....” *See* USCIS Field Adjudicator’s Manual, § 40.9.2(b)(3)(H), set forth in Memorandum on Consolidation of Guidance on Unlawful Presence from Donald Neufeld et al., U.S. Citizenship and Immigration Services, to Field Leadership (May 6, 2009), *available at*

Adjudicator's Manual, § 40.9.2(b)(3)(H), set forth in Memorandum on Consolidation of Guidance on Unlawful Presence from Donald Neufeld et al., U.S. Citizenship and Immigration Services, to Field Leadership (May 6, 2009), *available at* <http://www.aila.org/Content/default.aspx?docid=28871>.

III. When Do the Consequences of Failing to Timely Depart Not Apply?

Even individuals who have remained in the United States beyond the departure period may be able to establish that the civil penalties for failing to depart do not apply to them. The following is a checklist of situations where the consequences of overstaying may not apply. Note that there has been relatively little case law discussing the failure to depart and that the courts have not addressed some of the arguments discussed below.

The Voluntary Departure Period Was Stayed, Extended, or Terminated.

As discussed in the prior section (see section I), there are several situations where a voluntary departure order did not go into effect because it was stayed, extended, or terminated. In these situations, a respondent cannot be charged with overstaying the order. For example, if an individual filed a petition for review or a motion to reopen or reconsider before the voluntary departure period expired, the voluntary departure order terminated and therefore, the respondent did not overstay and is not subject to the consequences of overstaying. 8 C.F.R. §§ 1240.26(e)(1), (i).

Government Did Not Provide Proper Notice of the Voluntary Departure Order.

The applicable regulations provide that the IJ and the Board must serve its decision on the respondent. 8 C.F.R. §§ 1003.37 and 1003.1(f). If the individual is represented by counsel, the decision must be served on the attorney of record. 8 C.F.R. § 1292.5(a). If the respondent or counsel never received notice of the voluntary departure order, the respondent may argue that he or she is not subject to the consequences of overstaying. First, the consequences attach only when the respondent *voluntarily* fails to depart, which would not be the case when a respondent did not receive the notice ordering or reinstating voluntary departure. *Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007) (see further discussion of this case below).¹⁰ Second, due process requires proper notice. See generally *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<http://www.aila.org/Content/default.aspx?docid=28871>. Thus, a voluntary departure order does not cure previously accrued unlawful presence.

¹⁰ Although the regulations require only that the BIA or IJ properly serve the decision, under *Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007), whether the respondent actually received the notice arguably is relevant in determining whether the failure to depart is voluntary. In addition, the fact that the respondent did not receive the decision is evidence that it was not served properly. See *Jahjaga v. AG of the United States*, 512 F.3d 80 (3d Cir. 2008); *Singh v. Gonzales*, 494 F.3d 1170 (9th Cir. 2007); *Ping Chen v. United States AG*, 502 F.3d 73 (2d Cir. 2007); see also *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008).

Client Was Not Eligible for Voluntary Departure or Was Not Provided an Opportunity to Decline.

Applicants for voluntary departure must demonstrate they meet a number of statutory and regulatory requirements before an order of voluntary departure can issue (see Appendix). In addition, the 2009 regulations require IJs to advise the respondent of the conditions that will be imposed. 8 C.F.R. § 1003.26(c)(3). The respondent then must have an opportunity to decline voluntary departure if he or she is unwilling to accept the amount of bond or other conditions. *Id.* If the respondent did not request voluntary departure, did not have an opportunity to decline, or if there is not strict compliance with eligibility and notice requirements, then the voluntary departure order was invalid and the respondent may argue that the consequences of overstaying do not apply. *C.f. Tovar-Alvarez v. Attorney General*, 427 F.3d 1350, 1352 (11th Cir. 2005) (person who failed to take the oath of allegiance during a public ceremony as required under 8 U.S.C. § 1448(a) and 8 C.F.R. § 337.2 failed to meet the statutory prerequisite for citizenship and therefore was not a citizen).

Government Failed to Provide Proper Notice of the Consequences of Failing to Depart.

Section 240B(d) of the INA requires that the notice ordering voluntary departure inform the respondent of the consequences of failing to depart. The statute states, “The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.” INA § 240B(d); 8 C.F.R. § 240.25(b); *Matter of Arguelles*, 22 I&N Dec. 811, 818 (BIA 1999). If the respondent did not receive proper written notice in the order of removal, the statutory requirements were not met and the consequences should not apply.

Before the passage of IIRIRA, the notice requirement was somewhat different than it is under current law. *See* former INA § 242B(e)(2)(B) (1996). First, the language of the statute stated specifically that the consequences of failing to depart did not apply unless proper notice was provided. Second, the statute also required that both written and oral notice (in a language the person understands) be provided. *See Ordonez v. INS*, 345 F.3d 777, 783 (9th Cir. 2003) (inadequate notice when oral warning of ineligibility did not include specific forms of relief). If voluntary departure was ordered during deportation proceedings, and there is any doubt about whether the oral notice was provided, the respondent or counsel may review the transcript or request to listen to the recording of the hearing if no transcript is available.

Failure to Depart Was Not Voluntary.

The consequences of failing to depart only apply where a respondent *voluntarily* fails to depart. *See Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007). Thus, where a respondent “through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart” the consequences do not apply. *See id.* at 94.¹¹ In *Matter of Zmijewska*, the

¹¹ According to the BIA, being “physically unable to depart” does not include situations where departure within the period would involve exceptional hardships to the individual or his family or where the individual lacks funds to depart. *Matter of Zmijewska*, 24 I&N Dec. at 94.

BIA said that where a respondent's accredited representative failed to notify her of the voluntary departure order until she already had overstayed, she did not voluntarily fail to depart.¹²

“Exceptional Circumstances” in Deportation Proceedings.

Under the pre-IIRIRA statute, the consequences of failing to depart did not apply to any respondent whose failure to depart was because of “exceptional circumstances.” See former INA § 242B(e)(2)(B) (1995). The INA defined exceptional circumstances as “exceptional circumstances (such as the serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.” See former INA § 242B(f)(2). Thus, any respondent who is or was granted voluntary departure in deportation proceedings (i.e., initiated prior to April 1, 1997) will not be subject to the consequences of overstaying if he or she establishes exceptional circumstances for the failure to depart.

There are several pre-IIRIRA cases that discuss what constitutes “exceptional circumstances” in the context of failure to depart. Courts have declined to find exceptional circumstances where an individual requests an extension of the voluntary departure period, but does not receive a response from the government. See *Rojas-Reynoso v. INS*, 235 F.3d 26 (1st Cir. 2000); *Mardones v. McElroy*, 197 F.3d 619 (2d Cir. 1999). The Second Circuit has held that the enactment of INA § 245(i) was not an “exceptional circumstance” because the “change in the statute” did not constitute an “absence of physical or moral impossibility.” See *Mardones*, 235 F.2d at 624.

Ineffective assistance of counsel has been found to constitute “exceptional circumstances.” See *Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000); see also *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (exceptional circumstances in context of failure to appear for deportation hearing); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996) (same). In *Stewart v. INS*, 181 F.3d 587 (4th Cir. 1999), however, the court refused to consider petitioner's claim that ineffective assistance was an exceptional circumstance because petitioner had not raised this claim as prescribed by the BIA in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). But see *Varela*, 204 F.3d at 1240 (petitioner's failure to comply with *Lozada* requirements was not fatal).

VAWA Self Petitioner Exception.

Violence Against Women Act self-petitioners remain eligible for cancellation and adjustment of status if the extreme cruelty or battery was at least one central reason for overstaying the voluntary departure. INA § 240B(d)(2).

The IJ or BIA Reopened the Case.

Occasionally, the BIA or IJ will reopen a case and subsequently DHS will oppose the IJ's adjudication of the application for relief, asserting that the reopening was improper because the

¹² Zmijweska had complied with the requirements of bringing an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 639 (BIA 1988).

respondent was ineligible for relief because he or she failed to depart under an order of voluntary departure. The Seventh Circuit addressed this scenario in *Orichitch v. Gonzales*, 421 F.3d 595 (7th Cir. 2005). In that case, the petitioner timely filed a motion to reopen after the voluntary departure period expired. After reopening the case, the BIA reversed itself and held that the petitioner was barred from adjusting status because she overstayed her voluntary departure period. The Seventh Circuit held that the intermediate reopening by the BIA disposed of the § 240B(d) bar to relief. *Orichitch*, 421 F.3d at 598. The BIA order reopening the case “effectively vacated” the “voluntary departure order (a previously entrenched fixture of the underlying proceedings), disposing along with it all arguments contingent upon the continued validity of that order—namely, those predicated on Section 240B(d).” *Id.*¹³

However, at least two courts have disagreed with the Seventh Circuit’s analysis. See *Chedad v. Gonzales*, 497 F.3d 57, 64-65 & n.9 (1st Cir. 2007); *Singh v. Gonzales*, 468 F.3d 135, 139-40 (2d Cir. 2006). Also, the Fifth Circuit, in *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), found that the petitioner was ineligible for relief for overstaying his voluntary departure even though the BIA had initially reopened the case. The court’s decision, however, does not address the argument that the BIA’s initial reopening effectively vacated the voluntary departure order. The Seventh Circuit has not considered whether the Supreme Court’s decision in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), compels revisiting *Orichitch*.

Failure to Post Bond Within Five Business Days.

If an individual fails to post the required voluntary departure bond within five business days, an alternate order of removal goes into effect. 8 C.F.R. §§ 1240.26(c)(4) and 1241.1(f). In 2006, the BIA held that a respondent who does not post bond does not have voluntary departure and is not subject to the consequences of failing to depart. *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006).¹⁴ The BIA found that Congress’ inclusion of a bond requirement for an individual

¹³ Other courts have held that the grant of a motion to reopen vacates the previous order, but have not addressed whether it relieves the person of the consequences of overstaying the voluntary departure order. See *Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (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); *Excellent v. Ashcroft*, 359 F. Supp. 2d 333, 335 (S.D.N.Y. 2005) (same); but see *Wright v. Ouellette*, 171 F.3d 8, 12 (1st Cir. 1999) (filing a motion to reopen is more akin to starting a new proceeding).

¹⁴ See also *Hegy v. Gonzales*, 136 Fed. Appx. 777 (6th Cir. 2005) (unpublished) (remanded to BIA based on a “strong argument” that Heygi did not overstay her voluntary departure period at all because one did not exist); *Hernandez-Rodriguez v. Gonzales*, 118 Fed. Appx. 115 (9th Cir. 2005) (unpublished) (remanded to BIA based on a “strong argument” that Hernandez did not overstay the voluntary departure period at all since one did not exist); but see *Romero-Gamez v. Gonzales*, 104 Fed. Appx. 118 (9th Cir. 2005) (unpublished) (failure to post bond automatically vacated their voluntary departure order, but the ten-year bar to relief still applies); *Beshay v. Gonzales*, 76 Fed. Appx. 420 (3d Cir. 2005) (unpublished) (240B(d) still applies when no bond is posted).

granted voluntary departure at the conclusion of proceedings “strongly indicates that Congress intended that the privileges and penalties related to section 240B(b) voluntary departure do not apply until the statutory bond requirement is satisfied.” *Id.* at 50. The BIA also found that prior BIA precedent and the statutory and regulatory scheme indicate that the posting of bond is a condition precedent to ensure timely departure. *Id.* Finally, the BIA noted that the then-current regulation stated that the failure to post bond results in the automatic termination of voluntary departure and therefore, a respondent who did not post a bond is not subject to the penalties.¹⁵ *Id.* at 51.

EOIR’s 2009 voluntary departure regulations purport to reverse *Matter of Diaz-Ruacho*. See 73 Fed. Reg. at 76933-34, 76935. The regulations provide that the failure to post bond does not terminate the obligation to depart or exempt a respondent from the consequences of failing to depart under INA § 240B(d). 8 C.F.R. § 1240.26(c)(4). In addition, EOIR removed the regulatory language saying that the voluntary departure order “shall vacate automatically” if a respondent fails to pay the bond, and replaced it with “the alien’s failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to 8 C.F.R. § 1241.1(f).”

EOIR’s regulation providing that the penalties for overstaying voluntary departure apply where a respondent fails to post bond may be susceptible to challenge. First, to the extent that the BIA in *Matter of Diaz-Ruacho* relied on prior BIA precedent and Congressional intent, the BIA’s reasoning remains persuasive.¹⁶ Second, the removal of the regulatory language “shall vacate automatically” did not change the substance of the rule: the regulations still make it clear that when a respondent fails to post bond, the voluntary departure order no longer exist and is replaced by a removal order. See 8 C.F.R. § 1240.26(c)(4) (providing that the “alternate order of removal takes effect immediately”).

Third, the statutory provision on overstaying voluntary departure indicates that the consequences apply only where a respondent stays beyond the period of time set by the immigration judge. It says, a respondent is subject to the consequences of overstaying “if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United *within the time period specified...*” INA § 240B(d)(1) (emphasis added). When a respondent does not post the bond within five days, the alternate order goes into effect and therefore, in many cases, there is no voluntary departure order on the date that the IJ initially set for departure. As a result, a respondent cannot be charged with failing to depart “within the time period specified” given that the order no longer exists.

Ten Years (or Five) Have Passed After Failing to Depart.

¹⁵ Former 8 C.F.R. § 1240.26(c)(3) (2006) stated, “If the bond is not posted within 5 business days, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect the following day.”

¹⁶ For example, in *Diaz-Ruacho*, the BIA said, “Under the statutory and regulatory framework, voluntary departure granted at the conclusion of a hearing remains inchoate until the posting of a bond within 5 days of the order.” 24 I&N Dec. at 50.

Individuals granted voluntary departure where ten years have passed from the expiration of the departure period should not be barred from applying relief by INA § 240B(d). This provision says that a respondent who fails to depart is ineligible for several forms of relief “for a period of ten years.” The only other date referenced in INA § 240B(d) is “the time period specified” for voluntary departure, thus suggesting that the period of ten years begins to run on the day that the voluntary departure expired. Likewise, individuals granted voluntary departure under former INA § 244(e) (1995) where five years have passed should not be barred from relief. Under former INA § 242B(e)(2)(A) (1995), the five year penalty period began to run “after the scheduled date of departure or the date of unlawful reentry.” There is no indication that the five or ten year period of ineligibility for relief only runs once a respondent departs the United States.

Regardless whether the voluntary departure order was issued under the current or former statute, most individuals still will face the problem that the only way to apply for adjustment of status or other relief now is to move to reopen deportation or removal proceedings. Typically, however, motions to reopen must be filed within 90 days of the final order of removal or deportation unless the government agrees to join in the motion. INA § 240(c)(7)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), (c)(3)(iii) and 8 C.F.R. §§ 1003.23(b)(1), (b)(4)(iv). DHS has set forth guidelines for when it may join a motion to reopen removal proceedings. See Memorandum on Prosecutorial Discretion from William J. Howard, U.S. Immigration and Customs Enforcement Principal Legal Advisor, to all Office of Principal Legal Advisor Chief Counsel (Oct. 24, 2005), *available at* <http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122>; Memorandum on Motions to Reopen for Consideration of Adjustment of Status from Bo Cooper, General Counsel for Immigration and Naturalization Service, to Regional Counsel (May 17, 2001), *available at* <http://www.aila.org/Content/default.aspx?docid=16962>. Another option is to request that the BIA or the immigration court exercise its *sua sponte* authority to reopen the case. See 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1).

APPENDIX

Requirements for an Order of Voluntary Departure

There are three different stages at which the Department of Homeland Security (DHS) or an Immigration Judge (IJ) may order voluntary departure: before removal proceedings are initiated, before completion of proceedings, and at the conclusion of proceedings. See INA §§ 240B(a), (b); 8 C.F.R. § 240.25(a); 8 C.F.R. §§ 1240.26(b), (c); *Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999). The statutory and regulatory requirements for voluntary departure differ depending on when the order is imposed. In addition, if a respondent is in deportation proceedings (i.e., proceedings initiated before April 1, 1997), the pre-IIRIRA voluntary departure statute governs.

Removal Proceedings

Before Removal Proceedings are Initiated

In lieu of initiating removal proceedings, DHS may authorize voluntary departure for up to 120 days. INA § 240B(a)(1), (2)(A); 8 C.F.R. § 240.25(c). The person must request voluntary departure and agree to its terms and conditions. 8 C.F.R. § 240.25(c). The person must present DHS with a passport or travel document, which DHS may hold to investigate its authenticity. 8 C.F.R. § 240.25(b). In addition, DHS may set “any conditions it deems necessary to ensure the alien’s timely departure from the United States including the posting of bond, continued detention pending departure, and removal under safeguards.” 8 C.F.R. § 240.25(b). A voluntary departure applicant at this stage need not show good moral character nor establish any length of physical presence in the United States.

A person who is removable for an aggravated felony (INA § 237(a)(2)(A)(iii)) or certain security related grounds (INA § 237(a)(4)(B)) is not eligible for voluntary departure. INA § 240B(a)(1). Persons stopped at the border are not eligible for voluntary departure; however, they may request to withdraw their application for admission. INA § 240B(a)(4).

Prior to Completion of Removal Proceedings

Before completion of removal proceedings, an immigration judge may order voluntary departure for a period of up to 120 days. INA § 240B(a). The IJ may only order this form of voluntary departure if the respondent has requested it prior to or at the master calendar hearing at which the case is initially scheduled for a merits hearing or at any time before conclusion of the proceedings if DHS stipulates to the voluntary departure order. 8 C.F.R. § 1240.26(b)(1)(i). To receive voluntary departure, the respondent must: (1) withdraw any pending requests for relief, (2) make no additional requests for relief, (3) concede removability, (4) not have an aggravated felony conviction or be deportable under INA § 237(a)(4) (related to security grounds), and (5) waive appeal of all issues.¹⁷ *Id.* The IJ may impose conditions that he or she deems necessary to

¹⁷ Appealing a denial of voluntary departure based on ineligibility does not bar a person from seeking voluntary departure. See *Matter of Cordova*, 22 I&N Dec. 966, 969-70 (BIA 1999).

ensure the respondent's timely departure, and the respondent may be required to submit travel documents to DHS. 8 C.F.R. §1240.26(b)(3)(i). In addition, the applicant must merit a favorable exercise of discretion. *Matter of Arguelles*, 22 I&N Dec. 811, 816 (BIA 1999).

At the Conclusion of Removal Proceedings

At the conclusion of proceedings, the immigration judge may order up to 60 days of voluntary departure. INA § 240B(b)(2). The IJ must find that the respondent: (1) has been physically present in the United States for one year immediately preceding the issuance of the notice to appear, (2) is and has been a person of good moral character for the immediately preceding 5 years from the application for voluntary departure, (3) is not removable for an aggravated felony or certain security related grounds, and (4) has shown by clear and convincing evidence that he or she has the means and intent to depart the United States. INA § 240B(b)(1); 8 C.F.R. §§ 1240.26(c)(1) and (c)(2). In addition, the applicant must merit a favorable exercise of discretion, *Matter of Arguelles*, 22 I&N Dec. at 817, and post a voluntary departure bond of at least \$500, INA § 240B(b)(3); 8 C.F.R. § 1240.26(c)(3)(i). The immigration judge has authority to order continued detention as a condition of voluntary departure, *Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009), and may set other conditions as he or she deems necessary, 8 C.F.R. § 1240.26(c)(3).

Deportation Proceedings

Individuals who are in deportation proceedings (i.e., commenced before April 1, 1997) may apply for voluntary departure under former INA § 244(e) (1995). Under this section, in order to qualify for voluntary departure, a respondent must (1) be willing to depart voluntarily within the time period allowed, (2) currently have the financial means to depart, and (3) possess good moral character for the past five years. *See* former INA § 244(e) (1995). Additionally, a respondent who has an aggravated felony conviction after November 18, 1988 is ineligible for voluntary departure in deportation proceedings. *See* 8 C.F.R. § 1240.56.

PRACTICE ADVISORY ¹

THE § 237(a)(1)(H) FRAUD WAIVER

By the Legal Action Center²

June 1, 2009

Amended June 24, 2009

Introduction

INA § 237(a)(1)(H) provides a discretionary waiver in removal proceedings for certain misrepresentations and fraud at admission that would otherwise render deportable a lawful permanent resident (LPR) or a self-petitioner under the Violence Against Women Act (VAWA). This waiver provides significant relief from removal for those who are eligible. For all applicants, a grant of the waiver will result in termination of proceedings. For the largest class of applicants, the waiver also will validate the applicant's LPR status back to the date of admission, even if that status was originally obtained through fraud or misrepresentation. Highlights of this waiver are that it:

- Benefits LPRs and VAWA self-petitioners who engaged in fraud or misrepresentation at the time of admission and who now are in removal proceedings because of this fraud or misrepresentation;
- Is available to LPRs who meet certain admissibility requirements and who have a qualifying U.S. citizen or LPR relative, without the necessity of demonstrating hardship to the applicant or the relative;

¹ Copyright (c) 2009, 2010 American Immigration Council. [Click here for information on reprinting this practice advisory.](#) The information in this advisory is accurate as of the date of the advisory. Readers are cautioned to check for additional or new cases and legal developments. This Practice Advisory is written and intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

² The Legal Action Center wishes to thank D. Jackson Chaney and Gail Pendleton for providing their expertise on this issue.

- Also is available to all VAWA self-petitioners without restriction;
- Applies to misrepresentations that are either willful or innocent;
- Is available in removal proceedings where the deportation charge is INA § 237(a)(1)(A) and (G);
- Can result in termination of removal proceedings, validation of LPR status back to the date of admission, and waiver of the underlying fraud.

The practice advisory will discuss the contexts in which the waiver is applicable, eligibility requirements for the waiver, and the relief that can be obtained through a favorable grant of the waiver. The practice advisory does not address what constitutes fraud or misrepresentation and also does not address ways in which the underlying removal charges can be challenged.³

What is the current version of INA § 237(a)(1)(H)?

This statutory waiver provision reads in full:

(H) Waiver authorized for certain misrepresentations. The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i) (I) is the spouse, parent, son or daughter of a citizen of the United States or an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

³ On these topics, see “Fraud/Misrepresentation Bar and § 212(i) Waiver: Don’t Waive Goodbye,” Steve Morley, AILA’s Immigration and Nationality Law Handbook (2007-08) and “Fraud and Misrepresentation Waivers – Planning for Success,” Richard M. Ginsburg, AILA’s Immigration and Nationality Law Handbook (2006-07).

Were there prior versions of this waiver?

This waiver has been amended by Congress numerous times. For example, prior to 1981, the statute mandated that the waiver be granted to any applicant who met the eligibility requirements. In 1981, the waiver was amended such that it is now discretionary. It also has been renumbered three times. Prior to 1990, the waiver existed at INA § 241(f). In 1990, the § 241(f) waiver was amended and renumbered as INA § 241(a)(1)(H). In 1996, this waiver again was renumbered, this time as the still-current § 237(a)(1)(H). The earlier versions of the waiver will be referenced in this practice advisory to the extent that case law interpreting these earlier versions remains applicable and binding.

Why did Congress enact this fraud waiver?

The § 237(a)(1)(H) waiver is a humanitarian waiver which Congress intended would prevent the break-up of families with U.S. citizen or LPR members. *INS v. Errico*, 385 U.S. 214 (1966). This Congressional intent has influenced a number of BIA interpretations of the waiver. In some instances, the BIA interpreted the waiver liberally to give effect to Congress' purpose. See, e.g., *Matter of DaLomba*, 16 I&N Dec. 616 (BIA 1978) (expansively interpreting the requirement that a noncitizen be "otherwise admissible"); *Matter of Anaba*, 18 I&N Dec. 87 (BIA 1981) (same). However, the BIA also has relied on the purpose behind the waiver to limit its availability. See, e.g., *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008) (Congress' purpose to unite family members is not served where the qualifying relative is deceased); *Matter of Matti*, 19 I&N Dec. 43 (BIA 1984) (denying waiver after finding that family relationships entered into solely to obtain immigration benefits are not the type of families Congress intended to preserve).

What are the eligibility requirements for this waiver and who is eligible to receive one?

The one eligibility requirement that is common to all is that the applicant cannot be a person who participated in Nazi persecution, genocide, or the commission of an act of torture or extrajudicial killing, as described in INA § 237(a)(4)(D).

Beyond this, the eligibility requirements for a § 237(a)(1)(H) waiver are specific to two classes of applicants: 1) non-citizens with a qualifying family member who meet certain other requirements and 2) VAWA self petitioners.

1. The first class, specified in § 237(a)(1)(H)(i)(I) and (II), consists of non-citizens who:
 - Have a qualifying family member (a spouse, parent, son or daughter who is a U.S. citizen or LPR);
 - Were in possession of an immigrant visa or equivalent document at the time of admission; and
 - Were otherwise admissible at the time of admission except for inadmissibility under INA §§ 212(a)(5)(A) and (7)(A) that was a direct result of the fraud or misrepresentation.

Qualifying relative: To fall within this first class, the waiver applicant must be the spouse, parent, son or daughter of a U.S. citizen or an LPR. The existence of a qualifying relationship at the relevant time is sufficient to satisfy this requirement. Unlike other types of immigration relief, there is *no* requirement that the applicant also demonstrate “hardship” to the qualifying relative or to the applicant.

The BIA has held that § 237(a)(1)(H) requires a relationship with a living relative. *Matter of Federiso*, 24 I&N Dec. 661 (BIA 2008). Additionally, according to one court, the relationship must currently exist, at least as of the date of the immigration judge decision. *Kalezic v. INS*, 647 F.2d 290 (9th Cir. 1981) (finding waiver applicant ineligible where divorce from U.S. citizen wife was final at the time of the immigration judge’s decision). The relationship need not have existed at the time of admission, however. *Matter of Gonzalez*, 16 I&N Dec. 564 (BIA 1978). The qualifying relative also must be living in the U.S. *Chung Wook Myung v. District Director*, 468 F.2d 627, 628 (9th Cir. 1972) (noncitizen ineligible where his U.S. citizen child lived in Korea as unity with the citizen child would not be promoted by a grant of the waiver).

Whether a noncitizen is a parent is determined according to the definition of “parent” in INA § 101(b)(2). *Matter of Sandin Nova*, 14 I&N Dec. 88 (BIA 1972). For “illegitimate” children, the definition of a “parent” requires that the parent demonstrate that the child has been legitimated under the law of the child’s residence or domicile. *See, e.g., Matter of Johnson*, 13 I&N Dec. 644 (BIA 1970) (respondent unable to prove that he was the “parent” of a U.S. citizen child where he did not establish adoption of his child born out of wedlock under California law); *Matter of Sandin Nova*, 14 I&N Dec. 88 (BIA 1972) (parent of U.S. citizen child of bigamous marriage fell within waiver where the child was legitimated under California law); *Matter of Alzona*, 14 I&N Dec. 496 (BIA 1973) (parent ineligible for a waiver where the child “illegitimate” under DC law).

Possession of an immigrant visa or equivalent document: The second requirement for eligibility within this class is that the waiver applicant possessed an immigrant visa or equivalent document with which they gained admission. An immigrant visa or equivalent document that was procured by fraud or misrepresentation will satisfy this requirement, as the waiver – if granted in the exercise of discretion – is specifically intended to forgive this fraud or misrepresentation.

Because an applicant in this first class must have possessed an immigrant visa or equivalent document at the time of admission, the waiver is available only to noncitizens who gained LPR status at admission.⁴ Thus, the BIA has held that the

⁴ The term “equivalent document” is not defined in the statute or in any cases. Arguably, it could include any document that allowed for the admission of a non-citizen as an LPR.

waiver is not available to *nonimmigrants* who gained entry by fraud or misrepresentation. *See, e.g., Matter of Mangabat*, 14 I&N Dec. 75 (BIA 1972) (interpreting the former § 241(f) waiver). This holding remains applicable to this first class of applicants; however, it may not be applicable to the second class of applicants, VAWA self-petitioners. *See* discussion below.

Otherwise admissible: The third requirement for this first class of applicants is that the applicant was “otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs 5(A) and 7(A) of section 212(a) which were a direct result of that fraud or misrepresentation.” INA § 237(a)(1)(H)(i)(II). The Supreme Court has interpreted this provision as requiring that the non-citizen have been admissible at the time of admission on all grounds other than those stemming from the fraud or misrepresentation. *INS v. Errico*, 385 U.S. 214, 217 (1966).⁵ As specified in this provision, inadmissibility due to the lack of a labor certification (INA § 212(a)(5)(A)) or a valid admission document (§ 212(a)(7)(A)), will not interfere with the applicant’s eligibility for the waiver, provided the lack of these documents was a result of the fraud or misrepresentation.

2. The second class of applicants consists of VAWA self-petitioners. INA § 237(a)(1)(H)(ii). A VAWA self petitioner is defined in INA § 101(a)(51).⁶ There are no additional specific limitations on the eligibility of a VAWA self-

⁵ In *INS v. Errico*, 385 U.S. 214, 217 (1966), the government argued that the term “otherwise admissible” in former § 241(f) required a showing that the waiver applicant would have been admitted at the time of the initial admission if no fraud or misrepresentation had occurred. The government argued that the non-citizens in *Errico* were not “otherwise admissible” because – had the non-citizens not lied about their preference status – quota restrictions would have prevented them from gaining admission at that time. *Id.* The Supreme Court rejected this interpretation as it would have rendered the waiver virtually meaningless.

⁶ INA § 101(a)(51) reads:

The term “VAWA self-petitioner” means an alien, or the child of the alien, who qualifies for relief under—

- (A) clause (iii), (iv), or (vii) of section 204(a)(1)(A);
- (B) clause (ii) or (iii) of section 204(a)(1)(B);
- (C) section 216(c)(4)(C);
- (D) the first section of Public Law 89-732 (8 U.S.C. § 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;
- (E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. § 1255 note);
- (F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or
- (G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

petitioner for a § 237(a)(1)(H) waiver, as there are for the first class of applicants. VAWA self-petitioners must show only that they were admitted to the U.S. and that the admission involved fraud or misrepresentation (innocent or willful).

Unlike the first class of applicants, not all VAWA self-petitioners will be LPRs when they apply for the waiver. Those seeking removal of conditions from their LPR status will be LPRs. *See* INA § 216(c)(4)(C). Others also may be LPRs. Still others, however, may be in the process of applying for LPR status as VAWA self-petitioners. For the non-LPR VAWA self-petitioners, their status upon admission is not relevant to eligibility for the § 237(a)(1)(H) waiver, and arguably could even include admission as non-immigrants.⁷

To date, there are no published cases interpreting the VAWA provision in § 237(a)(1)(H).

What does INA § 237(a)(1)(H) waive?

Section 237(a)(1)(H) is a waiver of deportability based upon removal charges under INA § 237(a)(1)(A). The waiver applies to any underlying inadmissibility ground that directly resulted from the fraud or misrepresentation committed at admission. Additionally, the waiver also waives the underlying fraud or misrepresentation. The following explains each of these three points more fully.

- 1. Section 237(a)(1)(H) waives removability based primarily upon the deportability ground § 237(a)(1)(A):** Section 237(a)(1)(H) is available to non-citizens who have been admitted and thus is a waiver of deportation grounds of removal. It is not available where the removal charge is a ground of inadmissibility found in INA section § 212. *See, e.g., Matter of Pendon*, 13 I&N Dec. 769 (BIA 1971) (holding that the former 241(f) waiver was not available in former exclusion proceedings).

Section 237(a)(1)(H) primarily operates to waive the deportation ground INA § 237(a)(1)(A). This ground renders a person deportable if, at the time of entry or adjustment of status,⁸ he or she was within a class of non-citizens who were

⁷ The first class of applicants is limited to those who were in possession of an “immigrant” visa at the time of entry, *see* § 237(a)(1)(H)(i)(II), which is why the BIA found that the waiver was not available to members of this first class who entered as non-immigrants. *Matter of Mangabat*, 14 I&N Dec. 75 (BIA 1972). That statutory limitation is not present for the second class of waiver applicants, VAWA self-petitioners.

⁸ Whether the current § 237(a)(1)(H) waiver is available to waive deportation that is based on fraud committed during an adjustment of status – as opposed to an entry – is an open question. The BIA held that the former § 241(f) waiver was not available to waive fraud committed during adjustment of status. *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984). However, former § 241(f) was limited to fraud or misrepresentation committed at “entry.” The current waiver is applicable to fraud or misrepresentation

inadmissible.⁹ The waiver is available where the inadmissibility at admission was due to fraud or misrepresentation, whether willful or innocent.

The § 237(a)(1)(H) waiver also waives the deportation ground for marriage fraud at § 237(a)(1)(G). This ground renders a non-citizen deportable for having procured a visa or other documentation by fraud, within the meaning of INA § 212(a)(6)(C)(i).

While § 237(a)(1)(H) is a deportation waiver that requires a prior admission, it also requires that, at the time of that admission, the applicant was inadmissible due to fraud or misrepresentation. The BIA has held that the waiver is not available if the fraud or misrepresentation occurred subsequent to the admission. *See, e.g., Salas-Velasquez v. INS*, 34 F.3d 705, 708 (8th Cir. 1994) (former § 241(f) waiver unavailable where applicant entered U.S. on a valid visitor visa and subsequently entered into a fraudulent marriage with a U.S. citizen); *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984) (addressing the former § 241(f) waiver).

The waiver also is not available where the ground of removal is not dependent on a finding that the individual was inadmissible at admission due to fraud or misrepresentation, even if such fraud or misrepresentation actually existed. For example, in *Reid v. INS*, 420 U.S. 619 (1975), the Court held that the former § 241(f) waiver did not waive the deportation ground of entry without inspection because this ground was not based on a finding that the non-citizen was excludable at entry. Similarly, in *Matter of Gawaran*, 20 I&N Dec. 938 (BIA 1995) *aff'd* *Gawaran v. INS*, 95 F.3d 1332 (9th Cir. 1996), the BIA held that the former § 241(f) waiver did not waive deportability based upon the ground that the non-citizen's conditional permanent resident status was terminated (even where marriage fraudulent), since this is an entirely separate ground of deportation that is not dependant on fraud or misrepresentation.

committed at “admission.” The BIA has held that, at least in some contexts, an adjustment of status is an admission. *See, e.g., Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999). A number of courts of appeals have rejected this conclusion, however. *See, e.g., Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006) (citing other cases).

⁹ INA § 237(a)(1)(A) reads in full:

(b) Classes of deportable aliens.— Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at the time of entry or adjustment of status or violates status.—

(A) Inadmissible aliens.— Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

2. **A § 237(a)(1)(H) waiver applies to any underlying inadmissibility ground that directly resulted from the fraud or misrepresentation committed at admission:** The deportation ground § 237(a)(1)(A) renders a non-citizen deportable if at the time of entry or adjustment of status, he or she was within a class of non-citizens inadmissible by law. Thus, removal on this deportation ground is dependant on the person having been inadmissible at admission under INA § 212. A § 237(a)(1)(H) waiver will apply to any underlying inadmissibility ground that directly results from the fraud or misrepresentation at admission, including specifically § 212(a)(6)(C)(1)¹⁰ – which is referenced in § 237(a)(1)(H) – but also other inadmissibility grounds.

For example, in *Matter of Fu*, 23 I&N Dec. 985 (BIA 2006), the BIA held that § 237(a)(1)(H) waives deportability under § 237(a)(1)(A) that is based on inadmissibility under § 212(a)(7)(A)(i)(I). This inadmissibility ground applies to a noncitizen not in possession of a valid entry document at the time of application for admission. In *Matter of Fu*, the respondent was the beneficiary of a petition that his LPR father filed on his behalf. The petition was granted but there was a delay in visa issuance. Before the son's entry into the U.S., the father died. When the visa was issued, the son used it to enter as the son of an LPR, despite the fact that his father was deceased. DHS subsequently discovered this misrepresentation and initiated removal. DHS initially charged him as removable under § 237(a)(1) as being inadmissible for fraud at entry under § 212(a)(6)(C)(i), but later withdrew the § 212(a)(6)(C)(i) ground and substituted a charge of removability based upon inadmissibility at entry under INA § 212(a)(7)(A)(i)(I). This charge was sustained.¹¹

The BIA found that respondent could use a § 237(a)(1)(H) waiver to waive inadmissibility under § 212(a)(7)(i)(I), regardless of whether the misrepresentation was innocent or willful. The BIA also noted that there are other grounds of inadmissibility directly resulting from misrepresentation at the time of entry that could be waived by § 237(a)(1)(H), including INA § 212(a)(5)(A) (relating to labor certification requirements). *Matter of Fu, supra*. Under *Matter of Fu*, the government should not be allowed to preclude a § 237(a)(1)(H) waiver when the basis of removal is misrepresentation or fraud at entry, simply by

¹⁰ INA § 212(a)(6)(C)(i) reads:

(6) *Illegal entrants and immigration violators.*—

(C) *Misrepresentation.*—

(i) In general.— Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

¹¹ The BIA explained that the respondent was removable for lack of a valid entry document because, when his father died prior to his entry, the visa was automatically revoked. Therefore, he had no valid visa upon admission. *See Matter of Fu, supra*.

charging the non-citizen with an underlying ground of inadmissibility other than for fraud under § 212(a)(6)(C)(i).

3. **A § 237(a)(1)(H) waiver also waives the underlying fraud:** In *Matter of Sosa Hernandez*, 20 I&N Dec. 758 (BIA 1993), the BIA held that a waiver under former § 241(f) waives not only the non-citizen's deportability but also the underlying fraud or misrepresentation. Consequently, because the fraud at admission is excused, the admission has been excused of illegality. Where the individual was admitted as an LPR, this retroactive waiver of the fraud ensures that the person is an LPR from the time of admission. *Matter of Sosa Hernandez, supra*.

How does an applicant benefit from the grant of a § 237(a)(1)(H) waiver?

Where the waiver is granted, the applicant cannot be removed due to the fraud or misrepresentation. As a result, where the only charge of removability is § 237(a)(1)(A) premised on inadmissibility relating to the fraud or misrepresentation at admission, a grant of the waiver will result in termination of removal proceedings.

In cases in which there are multiple grounds of removal, all of which do not directly result from the fraud or misrepresentation, the § 237(a)(1)(H) waiver will be available only where there is independent relief available to overcome all other grounds of removal. See, e.g., *Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993) (terminating proceeding where BIA found that non-citizen charged on two grounds of removal was independently eligible for two forms of relief – waivers under both former §§ 241(f) and 212(c)); *Matter of Roman*, 19 I&N Dec. 855 (BIA 1988) (a non-citizen cannot establish combined eligibility for *nunc pro tunc* permission to reapply for admission and a former § 241(f) waiver where she was not separately eligible for either form of relief).¹²

In addition to termination of the removal proceedings, for those applicants who were admitted as an LPR,¹³ a grant of a § 237(a)(1)(H) waiver will leave the non-citizen in LPR status, retroactive to the date of admission. In *Matter of Tadena*, 15 I&N Dec. 458 (BIA 1975), the BIA interpreted the former § 241(f) waiver and held that where a noncitizen is admitted upon the presentation of an immigrant visa and in subsequent deportation proceedings is granted a waiver, he is lawfully admitted for permanent

¹² In *Matter of Roman*, the BIA reasoned that the non-citizen could not “bootstrap” eligibility from one waiver to the other where she is not separately eligible for either.” In contrast, in *Matter of Sosa Hernandez*, the BIA held that the case was not an attempt to “bootstrap” eligibility from one waiver to another. Instead, it held that the respondent was independently eligible for the § 241(f) waiver. The BIA also noted that the respondent’s need for § 212(c) relief was based upon a conviction that occurred ten years after admission, and that this was an entirely separate issue from the retroactive validating of the respondent’s LPR status through the fraud waiver.

¹³ This would include all applicants within the first class and VAWA self-petitioners seeking to remove the conditions on the LPR status.

residence. The BIA reasoned that if the waiver recipient were not found to be an LPR, the waiver would have the anomalous result of rendering the recipient non-deportable but without any lawful immigration status. *Matter of Tadena, supra.*

As *Matter of Sosa Hernandez*, 20 I&N Dec. 758 (BIA 1993), illustrates, the retroactive impact of the waiver can be critical in some circumstances. In that case, the respondent was charged with two deportation grounds: as excludable at entry due to the fraud or misrepresentation and also as having been convicted of a deportable offense (this conviction occurred approximately 13 years after his entry). He sought to waive the first deportation ground with a former § 241(f) waiver, and the second ground with a former § 212(c) waiver. To be eligible for the § 212(c) waiver, he had to demonstrate seven years in LPR status. Because the BIA found that the § 241(f) waiver operated retroactively, and that he thus had been an LPR since entry, it also found that he had accrued the necessary seven years in LPR status to be eligible for the § 212(c) waiver.

Similarly, in certain marriage fraud cases, the retroactive validation of the applicant's LPR status is critical. Specifically, where a non-citizen has been found to have committed prior marriage fraud, but now is in a valid marriage to a U.S. citizen or LPR, INA § 204(c) would bar approval of a visa petition filed by the second spouse. Thus the non-citizen would be barred from ever immigrating through this second, valid marriage. However, in *Virk v. INS*, 295 F.3d 1055, 1059 (9th Cir. 2002), the Ninth Circuit held that, where the non-citizen was admitted as an LPR based upon the fraudulent marriage, the grant of a § 237(a)(1)(H) waiver would waive the underlying fraud and the non-citizen would retain LPR status. As such, the court found that there was no need for a new visa petition by the second spouse and INA § 204(c) was inapplicable.

What factors can the immigration judge consider when deciding whether to exercise discretion and grant a § 237(a)(1)(H) waiver?

Even when an applicant is statutorily eligible for a § 237(a)(1)(H) waiver, an immigration judge may deny it in the exercise of discretion. In *INS v. Yang*, 519 U.S. 26 (1996), the Supreme Court held that, in deciding whether to grant a former § 241(a)(1)(H) waiver, an immigration judge may take into consideration as an adverse factor the fraud committed by the applicant in connection with his admission into the U.S. The Court reached this conclusion after finding that, while the statute contained prerequisites for eligibility, it imposed no limits on the factors that the government could consider in determining whether to grant a waiver.

Following *Yang*, the BIA held that in considering whether to grant a waiver, an immigration judge “must look at each of the adverse factors, including the alien’s initial fraud, to determine whether, in light of all of the factors presented, a waiver of deportability should be granted to maintain the alien’s family unity and strong ties to the United States.” *Matter of Tijam*, 22 I&N Dec. 408, 417 (1998). The BIA concluded that only in this way could an immigration judge determine whether the applicant’s “after-acquired family ties” outweighed the fraud. *Id.*

Matter of Tijam also sets forth the various factors – both negative and positive – that are to be considered by an immigration judge when determining whether to grant a § 237(a)(1)(H) waiver. The Ninth Circuit has held that the BIA must take into account all relevant factors, both negative and positive, when exercising discretion and may not give weight to any plainly irrelevant factors. *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (citations omitted) (considering former § 241(f) waiver).

How does the INA § 237(a)(1)(H) waiver differ from the INA § 212(i) waiver?

Waivers under §§ 237(a)(1)(H) and 212(i) are similar in that they both are discretionary fraud waivers. There also are significant differences, however. As noted, § 237(a)(1)(H) applies to non-citizens who are deportable due to the fraud, while a § 212(i) waiver applies to non-citizens who are inadmissible due to the fraud. Additionally, § 237(a)(1)(H)'s eligibility requirements are less stringent. Section 237(a)(1)(H) includes among the qualifying relatives a U.S. citizen or LPR son or daughter, which a § 212(i) waiver does not. Finally, § 237(a)(1)(H) does not require any showing of hardship to the qualifying relative; § 212(i) requires a showing of extreme hardship.

How does a respondent in removal proceedings apply for a § 237(a)(1)(H) waiver?

8 C.F.R. § 1240.11(d)¹⁴ specifies that a respondent may apply for relief from removal under § 237(a)(1)(H) with an immigration judge. There is no form to use when filing this waiver. See AILA InfoNet Doc. No. 05112371 (Oct. 17, 2005) (Question 11); AILA InfoNet Doc. No. 06051668 (Mar. 22, 2006) (Question 10). Some immigration judges reportedly, and mistakenly, ask for submission of Form I-601. This form is not designed for a § 237(a)(1)(H) waiver, but instead is limited to inadmissibility waivers.

There also is no fee for a § 237(a)(1)(H) waiver. The only fee that will be required is for biometric processing. See 8 C.F.R. § 1003.47. Note, however, that where an immigration judge demands submission of Form I-601, there is a fee associated with the filing of this form. In these circumstances, practitioners will have to make a strategy decision about whether to oppose the immigration judge with respect to filing the form I-601.

¹⁴ This regulation applies to § 237(a)(1)(H) waivers filed in removal proceedings. The corresponding regulation with respect to deportation proceedings that began prior to April 1, 1997 is 8 C.F.R. § 1240.49(d).



LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY ¹

ELECTRONIC FILING AND ACCESS TO ELECTRONIC FEDERAL COURT DOCUMENTS

By the Legal Action Center
April 13, 2009

I. INTRODUCTION

This Practice Advisory explains the federal rules authorizing electronic filing in federal court; describes how to file documents in federal court using the Electronic Case Files (CM/ECF) System; and outlines how to access electronic documents through Public Access to Court Electronic Records (PACER). The advisory also clarifies some limitations to electronic access of documents in federal immigration cases.

a. Quick Overview of the CM/ECF System and PACER

PACER is a system designed to allow electronic access to U.S. District Court and U.S. Courts of Appeals case information. Through PACER, practitioners may access information about current and recently closed federal cases by entering case specific information such as a party name, case number or filing dates. A person does not have to represent a party in a case to gain access to information through PACER, but must maintain a PACER account and pay fees for downloading documents from the PACER site. Information about PACER is available at <http://www.pacer.gov/>. More detailed information about registering for and using PACER is also provided in Part III of this advisory.

CM/ECF is the federal courts' case management and electronic case files system. It allows courts to maintain case documents in electronic form, and it gives each court the option of permitting case documents to be filed electronically. To electronically file in each federal district court, a person must obtain a CM/ECF password for that individual district court. Each

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court maintains its own case information, as well as a court website, which may contain local rules.² Only one password is needed for filing in all courts of appeals.

A person does not need a PACER password in order to file a document in a district court or court of appeals case. However, if a party or attorney wishes 1) to view electronic documents filed in a case that is not their own case, or 2) to view documents after their free “look” through CM/ECF has expired, they must obtain a PACER password. General information about CM/ECF is available at <http://www.uscourts.gov/CourtRecords.aspx>. More detailed information about registering for and using CM/ECF is also provided in Part IV of this advisory.

II. RULES GOVERNING ELECTRONIC CASE MANAGEMENT AND FILING; PRIVACY AND REMOTE ACCESS

Individual district courts and courts of appeals have court rules and a general set of procedures, available on individual court websites, that set forth the electronic filing practices of that court.³ These individual court rules comply with rules found in the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Appellate Procedure (FRAP) governing electronic filing, privacy requirements, and limitations to remote access of electronic documents. The local court rules can be found on individual court websites. The applicable federal rules are set forth below.

a. Electronic Filing, Signatures, and Service

i. Filing and Signatures

FRCP Rule 5(d)(3) governs electronic filing in district courts. It states that a court, by local rule, may allow papers to be filed, signed, or verified electronically, but that a local rule only may *require* electronic filing if reasonable exceptions are allowed. Rule 5(d)(3) also provides that, for purposes of FRCP, a paper filed electronically in compliance with a local rule is the equivalent of a written paper.

Many courts of appeals also require electronic filing pursuant to FRAP Rule 25(a)(D). Like FRCP Rule 5(d)(3), FRAP Rule 25(a)(D) states that a local rule only may require electronic filing if reasonable exceptions are allowed. For purposes of FRAP, a paper filed by electronic means in compliance with a local rule is the equivalent of a written paper.

² The U.S. Courts website has a complete list of district courts and courts of appeals and their websites, http://www.uscourts.gov/court_locator.aspx.

³ For a complete list of courts that 1) have implemented or are implementing the Case Management/Electronic Case Filing (CM/ECF) system and 2) information about whether a particular court requires electronic filing, visit the CM/ECF website, <http://www.pacer.gov/cmecf/ecfinfo.html>. It is important to note that many courts have made

electronic filing mandatory. Electronic filing procedures are also discussed in greater detail in Part IV of this advisory.

ii. Service

The Civil and Appellate Rules also permit electronic service. FRCP Rule 5(b)(2)(E) provides that a document may be served electronically if the person to be served consented to electronic service in writing. However, under 5(b), service is not effective if the serving party learns that it did not reach the person to be served. FRAP Rule 25(c) allows service by electronic means in the courts of appeals with the similar requirement that the person to be served consented to electronic service in writing. FRAP Rule 25(c) also states that service is not effective if the serving party learns that the electronic document did not reach the person to be served.

b. Additional Time to Act After Electronic Service

FRCP Rule 6(d) of the Federal Rules of Civil Procedure allows three days to be added to the time period in which a party may or must act after service is made under FRCP Rule 5(b)(2)(E) (Electronic Service).⁴ Thus, a party has three additional days to act if they are responding to an electronically filed document. These three days are added after the period would otherwise expire under Rule 6(a). In the courts of appeals, FRAP Rule 26(c) also provides that a responding party has an additional three days to respond to a document filed electronically.

c. Rules Governing Privacy and Limiting Remote Access to Immigration Cases

Amendments to FRCP 5.2 and FRAP 25 implement the privacy provision of section 205 of the E-Government Act of 2002 governing public access to electronic filings in federal court. These amendments became effective on December 1, 2007. In immigration cases, these rules specifically limit remote access to immigration case filings. See Memorandum from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to Chief Justice Roberts (Nov. 1, 2006), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1106/summary_proposed_amend.pdf (stating that Rule 5.2 implements the privacy provisions of the E-Government Act, limiting remote access to immigration electronic case filings due to “the prevalence of sensitive information in such cases and the volume of filings”).

FRCP Rule 5.2(c) limits remote access to electronic files, “[u]nless the court orders otherwise in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention.” Only parties and their attorneys may have remote electronic access to all parts of the case file, including the administrative record. Any other person may only have remote access to the docket maintained by the court, and an opinion, order, judgment, or other disposition of the court. However, any person may have electronic access to the full record at the courthouse. FRAP Rule 25 extends the FRCP 5.2(c) restrictions to immigration appellate cases.

⁴ *Custer v. Schumacher Racing Corp.*, 2008 U.S. Dist. LEXIS 9716, *11-13 (S.D. Ind. Feb. 8, 2008). But see *McCray v. Peachey*, 2009 U.S. Dist. LEXIS 10401, *10-11 (E.D. La. Feb. 2, 2009) (finding Rule 6(d) did not apply to extend time for filing a Rule 59 motion, because although judgment was electronic mailed, the period for filing a Rule 59 motion does not run from “service,” but runs from “entry of judgment”).

FRCP Rule 5.2(a) also implements privacy provisions of the E-Government Act, requiring certain information be redacted from court documents filed with the court. However, because immigration cases are not accessible by the public, they are not subject to Rule 5.2(a).⁵

Some courts that are restricting remote access have issued general orders explaining how they are implementing the privacy provisions of the E-Government Act. *See e.g.*, Administrative Order Regarding Electronic Filing in All Eighth Circuit Cases (May 29, 2007), <http://www.ca8.uscourts.gov/files/cmecfstandingorder.pdf> (explaining that in petitions for review in immigration cases, 1) the court clerk will restrict remote electronic public access to documents so that only the court's judges and staff and the parties and attorneys in the case may access them electronically, however 2) no restrictions will be placed on remote electronic public access to the court's *orders* and *opinions* in immigration cases); General Order 08-02, Authorizing Electronic Filing in the District Court for the Central District of California (Feb. 7, 2008), [http://www.cacd.uscourts.gov/CACD/GenOrders.nsf/0/33293c5e9531578e882573e900613b62/\\$FILE/GO%2008-02.pdf](http://www.cacd.uscourts.gov/CACD/GenOrders.nsf/0/33293c5e9531578e882573e900613b62/$FILE/GO%2008-02.pdf) (same).

Despite the implementation of these privacy provisions, many district courts do not appear to be uniformly restricting access to documents filed in immigration cases and many documents, other than court-generated documents, are accessible through PACER.

III. ACCESS TO CASE FILINGS

a. **Access to Court Documents: The Public Access to Court Electronic Records (PACER) Program**

After completing a registration process, any person may view and retrieve case filings through PACER - an electronic public access system designed by the United States Courts for online access to district court and courts of appeals cases. As mentioned, certain restrictions may limit a person's ability to access documents in immigration cases, but when a document is accessible, PACER allows a person to view, print and download the document.

Each court has its own computer system and case information database, so the appearance of the information online may vary depending on the jurisdiction. A PACER account does not entitle a person to file documents in a case. As described in Part IV of the advisory, a CM/ECF account is required for electronic filing. For a thorough explanation of PACER features, see the PACER manual, <http://www.pacer.gov/documents/pacermanual.pdf>.

⁵ Rule 5.2(a) requires that, unless the court states otherwise, personal identification information be redacted from documents filed with the court — social-security and taxpayer-identification numbers, birthdates, names of minor children, and financial-account numbers. Rule 5.2(b) provides certain exemptions from the redaction requirement. One of these exemptions is any case that is covered by FRCP 5.2(c), the rule limiting the ability of a person to view an electronic document in an immigration case. Therefore, the redaction requirements of Rule 5.2(a) do not apply to immigration cases.

b. PACER Registration and Use: Fees

i. Registration and Use

In order to obtain a PACER login and password, a user must complete the on-line PACER Registration Form, <http://www.pacer.gov/register.html>. Once the registration has been processed, a login and password can be retrieved online. If a firm registers for a PACER account, different members of the firm may access documents. However, if the firm prefers to keep individual billing separate, each PACER user must have a separate account.

After registering for PACER, a person may use different search criteria to locate a case and access documents filed in that case. To locate a case, a person must have at least a party name, a case number, or a Nature of Suit (NOS) code.⁶ Other fields, such as date range or region, are optional and are provided to limit a search. Explanations of the different criteria used to locate a case may be found in the PACER User Manual, <http://www.pacer.gov/documents/pacermanual.pdf>.

After entering login information and the case-specific information necessary to locate a case, a user may search the desired case docket. To access a particular document, it is necessary to click on the document. The next screen will display information regarding the number of billable pages and the related cost. A user can also click on the bullet next to the document for an abbreviated description of the document before accessing the document and incurring a charge.

ii. Fees

The U.S. Federal Courts charge user fees for electronic access to case information.⁷ Each page of a document accessed through PACER costs \$.08. PACER charges are based on the results of a search, including a search that yields no matches – a search with no matches results in a bill for one page.

Before incurring a charge to view a document, a user must click on the ‘View Document’ button. There is currently a cap of \$2.40 (30 pages) for a single document or case specific report including docket sheets. PACER users may enter different client codes during each PACER login, and are billed on a quarterly basis for transactions. For more information about fees and how they are assessed, see the PACER manual, <http://www.pacer.gov/documents/pacermanual.pdf>.

⁶ To view a list of all NOS codes, visit “PACER Documents” at <http://pacer.psc.uscourts.gov>.

⁷ A party or attorney in a case who registers to file electronically in a district court or court of appeals through the CM/ECF Program, can access a court document one time for free after receiving an EM/ECF filing notice. See Part IV of this advisory.

IV. ELECTRONIC CASE MANAGEMENT AND FILING

a. **Electronic Case Management: Overview of the Case Management and Electronic Case Files (CM/ECF) System**

Many federal courts now require electronic filing through CM/ECF, the federal judiciary's electronic case management system. CM/ECF allows courts to maintain court documents in electronic form, provides access to these documents over the Internet, and gives the option for electronic filing. District courts began implementing CM/ECF in 2002. Courts of appeals began implementing the system in 2004.⁸ A PACER account is not required to use the CM/ECF system. However, a CM/ECF user will only receive one free "look" at a court document filed in a case (which can be downloaded and saved), and thereafter, must use PACER to access the document.

b. **CM/ECF Registration and Use; Electronic Notices; and Fees**

i. Registration and Use

Each district court has its own requirements and procedures for registering with CM/ECF which are available on individual court websites.⁹ The list provides links to each district court's website with court-specific information about what steps a person must take to register for CM/ECF, filing requirements and procedures, electronic filing trainings, and manuals.

Generally, in order for an attorney to be authorized to file documents electronically and to receive e-mail notices of documents that are filed, he or she must be admitted to practice in that particular court and be registered to file electronically with the specific court providing the CM/ECF system.

Appellate courts have a streamlined process for registering for CM/ECF. It is possible to register for a CM/ECF filing ID in one or more appellate courts by completing the registration form on the CM/ECF website: <https://www.pacer.gov/psco/cgi-bin/cmecf/ea-regform.pl>. A person who already has registered to file case documents at one court of appeals can register at additional courts of appeals by updating his or her account information on the CM/ECF website: <https://www.pacer.gov/psco/cgi-bin/cmecf/ea-login.pl>. Electronic training modules are available on this website for appellate CM/ECF: <http://www.pacer.gov/ecfcbt/ap/>.

⁸ Brochure describing CM/ECF and PACER, *available at* http://www.pacer.gov/documents/pacer_brochure.pdf

⁹ The CM/ECF website provides a list of courts that have implemented or are implementing the CM/ECF system, <http://www.pacer.gov/cmecf/ecfinfo.html>; the U.S. Courts Website provides a complete list of district courts and courts of appeals and their websites, http://www.uscourts.gov/court_locator.aspx.

After registering with the court, a person receives an identification name and password that will allow him or her to file electronically. This identification name and password will also serve as the lawyer's signature on electronic documents for purposes of FRCP Rule 11.

ii. Electronic Notice and Fees

After filing a document, an attorney of record will receive a Notice of Electronic Filing with a hyperlink to the filed document. Each attorney of record receives one free "look" at this document and any secondary address listed under the e-mail information screen also receives a free copy. An attorney may also list multiple e-mail addresses for their filer login so that other parties can be notified of filings. Once a person has accessed a document using the hyperlink in the notice of filing, the hyperlink to access the document will not work a second time. Thereafter, a user will then be asked for a PACER login and will be charged to view the document. The first user to access the hyperlink can print or save the document during the initial viewing period in order to avoid future charges. The initial viewing period is 15 days – after 15 days, the hyperlink will expire. For more information about accessing filed documents, see CM/ECF website, Frequently Asked Questions, <http://www.pacer.gov/psc/efaq.html#CMECF>.

For help using CM/ECF, visit the PACER Service Center web site at <http://www.pacer.gov/>, send email to the PACER Service Center at pacer@psc.uscourts.gov or call (800) 676-6856 between 8 a.m. and 6 p.m. Central Time.

V. QUICK GUIDE TO HELPFUL SITES

- PACER Service Center homepage: <http://www.pacer.gov/>
- CM/ECF homepage: <http://www.pacer.gov/cmecf/>
- CM/ECF Frequently Asked Questions: <http://www.pacer.gov/psc/efaq.html#CMECF>
- CM/ECF Registration for Appellate Courts: <https://www.pacer.gov/psco/cgi-bin/cmecf/ea-regform.pl>
- Links to individual district courts where lawyers may access information about registering for CM/ECF: <http://www.pacer.gov/cmecf/ecfinfo.html>
- U.S. Courts Website for complete list of district courts and courts of appeals and their websites: http://www.uscourts.gov/court_locator.aspx



LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY December 22, 2008

VOLUNTARY DEPARTURE RULE Q&A¹

Overview

On December 18, 2008, the Executive Office for Immigration Review (EOIR) issued a final rule on voluntary departure, “Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review.” The rule, which goes into effect on January 20, 2009, addresses various aspects of voluntary departure, including the relationships between voluntary departure and motions to reopen and reconsider and petitions for review in the circuit court. These issues have been the subject of extensive litigation in the federal courts. Among other things, this rule:

- specifies that voluntary departure terminates upon the filing of a motion to reopen or reconsider
- specifies that voluntary departure terminates upon the filing of a petition for review
- requires immigration judges and the Board of Immigration Appeals (BIA) to provide notice about the obligations and conditions of voluntary departure and of filing a motions or petition for review
- requires individuals granted voluntary departure to provide proof to the BIA of payment of the voluntary departure bond if a case is appealed
- purports to reverse *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006) (regarding consequences of failing to depart if voluntary departure bond is not posted within five days)

The rule also serves as reminder of the weighty conditions placed on individuals granted voluntary departure and the severe penalties for failing to depart. Individuals who are eligible for voluntary departure should consider the potential repercussions of a grant of voluntary departure before deciding to apply for this relief.

The Legal Action Center (LAC) is issuing this Q&A to inform lawyers about some of the most important aspects of the December 18, 2008 voluntary departure rules. It does not address every

¹ Copyright (c) 2008, 2010 American Immigration Council. [Click here](#) for information on reprinting this Q&A. This Q&A is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

aspect of the rules, and lawyers are urged to read the rules and the preamble published in the Federal Register, see 73 Fed. Reg. 76927 (Dec. 18, 2008), available at <http://www.aila.org/content/fileviewer.aspx?docid=27460&linkid=187734>. In addition to issuing this Q&A, the LAC has been involved in the litigation surrounding voluntary departure and commented on EOIR's proposed regulations. The LAC has posted its comments at <http://www.legalactioncenter.org/litigation/voluntary-departure>.

What happens to voluntary departure when a person files a motion to reopen or reconsider?

Under the new rule, if a person files a motion to reopen or reconsider during his or her voluntary departure period, the filing automatically terminates the grant of voluntary departure and the alternate order of removal takes effect. 8 C.F.R. § 1240.26(b)(3)(iii).² As a result, the person is not subject to the consequences of overstaying the voluntary departure period pursuant to INA § 240B(d) (monetary penalties and ten year bar to various forms of relief, including adjustment of status). Prior to this rule, EOIR had taken the position that the voluntary departure period continues to run during the pendency of the motion and that upon its expiration, individuals would become ineligible for the very relief sought. See *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996).

This rule applies to motions filed at the immigration court or the BIA. Filing a motion automatically terminates the voluntary departure; a person is not required to explicitly seek withdrawal of voluntary departure in the motion or in a separate motion. The rule does not allow immigration judges or the BIA to toll, stay or reinstate voluntary departure, except as allowed under current 8 C.F.R. § 1240.26(h). This existing regulation says that an immigration judge or the BIA may reinstate voluntary departure where a case was reopened for a purpose other than solely applying for voluntary departure.

The new rule does not apply to persons who file motions to reopen or reconsider after the voluntary departure period has expired. Such individuals are subject to the consequences of overstaying voluntary departure.

What is the relationship between this rule and the Supreme Court's decision in *Dada v. Mukasey*?

In *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), the Supreme Court also addressed the intersection of motions to reopen and voluntary departure. The Court held that voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. In its rule, EOIR declined to adopt the approach taken in *Dada* (i.e., allowing individuals to withdraw their requests for voluntary departure), and instead chose the automatic termination approach. 73 Fed. Reg. at 76930. According to EOIR, its approach is consistent with and relies on the Supreme Court's reasoning in *Dada*. See 73 Fed. Reg. at 76930.

² Unless otherwise noted, the citations in this Q&A are referencing the regulations as they will appear on January 20, 2009, the effective date of this rule.

To read more about the Supreme Court's decision in *Dada*, see AILF's case summary <http://www.ailf.org/lac/chdocs/Dada-summary.pdf> and Q&A http://www.legalactioncenter.org/sites/default/files/Dada-FAQ_0.pdf. Note, however, that AILF's Q&A predates EOIR's new voluntary departure rule.

What happens to voluntary departure when a person files a petition for review?

A grant of voluntary departure will terminate automatically upon the filing of a petition for review or other judicial challenge and the alternate order of removal will take effect. 8 C.F.R. § 1240.26(i). However, if a person then departs within 30 days of filing the petition for review and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. *Id.* See 73 Fed. Reg. at 76933 for a discussion of what proof and evidence may be sufficient.

The rule attempts to deprive the circuit courts of the opportunity to issue stays of voluntary departure. 73 Fed. Reg. at 76932. To date, most of the courts of appeals have held that they have authority to stay voluntary departure during the pendency of the petition for review. *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006); *Obale v. Attorney General*, 453 F.3d 151 (3d Cir. 2006); *Vidal v. Gonzales*, 491 F.3d 250 (5th Cir. 2007); *Nwakanma v. Ashcroft*, 352 F.3d 325 (6th Cir. 2003); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *El Himri v. Ashcroft*, 344 F.3d 1261 (9th Cir. 2003). Only the Fourth Circuit found that it lacks such authority. *Ngaruruih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004).

What notice must immigration judges and the BIA provide regarding voluntary departure?

The final rule's notice requirements respond to some of AILF's criticisms and are an improvement over those EOIR initially proposed.

Notice prior to accepting voluntary departure. Under new 8 C.F.R. § 1240.26(c)(3), prior to accepting voluntary departure, an immigration judge must advise the individual of:

- the amount of the voluntary departure bond and the duty to post bond within five business days; and
- any voluntary departure conditions beyond those enumerated in the regulations.

After this notice is provided, the individual will have the opportunity to accept or decline voluntary departure.

Notice upon grant of voluntary departure. Under 8 C.F.R. § 1240.26(c)(3), the immigration judge also must advise the individual that:

- voluntary departure will terminate automatically upon the filing of a motion to reopen or reconsider during the voluntary departure period and the alternate order of removal will take effect immediately;

- if an appeal is filed, he or she must submit proof of having posted the voluntary departure bond to the BIA within 30 days of filing the appeal. If he or she does not submit proof, the BIA will not reinstate voluntary departure in the final order.³

BIA notice obligations. If the BIA reinstates voluntary departure following an appeal, the BIA must advise the individual in writing that voluntary departure will terminate automatically upon the filing of a motion to reopen or reconsider or a petition for review during the voluntary departure period. 8 C.F.R. § 1240.26(i).

Statutory notice provision. Although not addressed by this new rule, by statute, the order permitting an individual to depart voluntarily must inform him or her of the consequences of overstaying the voluntary departure period (including a civil penalty and ineligibility for relief) under INA § 240B(d).

What does the rule say about voluntary departure bond?

Requirement to post bond within five business days. The rule states that an individual granted voluntary departure at the conclusion of proceedings must post bond with ICE within five business days. 8 C.F.R. § 1240.26(c)(4). ICE may detain a person until bond is posted. *Id.* If the individual does not post bond, the alternate order of removal goes into effect. 8 C.F.R. § 1241.1(f). The rule also specifies that failure to post bond may be considered in determining whether the individual is a flight risk and as a discretionary factor with respect to applications for relief. 8 C.F.R. § 1240.26(c)(4).

In addition, the rule states that failure to post bond does not terminate the obligation to depart or exempt a person from the consequences of failing to depart under INA § 240B(d). 8 C.F.R. § 1240.26(c)(4). This rule purports to reverse EOIR's position in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). 73 Fed. Reg. at 76933-34, 76935. In this case, the BIA found that a person who does not post bond does not have voluntary departure and is not subject to the consequences of failing to depart. Arguably, the new position set forth in this rule is inconsistent with the voluntary departure statute, which suggests that Congress did not intend the privileges and consequences of voluntary departure to apply until the conditions of bond are met. *See Matter of Diaz-Ruacho*, 24 I&N Dec. at 50.

The rule provides an exception for some individuals who fail to post bond and would be subject to removal. If a person does not post bond, but departs within 25 days of the failure to post bond and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. 8 C.F.R. § 1240.26(c)(4). See 73 Fed. Reg. at 76935 for a discussion of what proof and evidence may be sufficient.

Providing proof of posting bond to BIA. Under the rule, if an appeal is filed, an individual must submit proof of having posted the voluntary departure bond to the BIA within 30 days of filing

³ The regulation is not explicit about when the immigration judge must provide notice of the obligation to submit proof to the BIA. However, it does not seem to require the immigration judge to provide notice prior to the individual accepting voluntary departure.

the appeal. 8 C.F.R. § 1240.26(c)(3)(ii). If he or she does not submit the proof, the BIA will not reinstate voluntary departure in the final order. In the preamble to the rule, EOIR says that Form I-352 (immigration bond worksheet) and Form I-305 (fee receipt) are evidence that bond was posted. 73 Fed. Reg. at 76933.

Return and forfeiture of bond. The rule provides that (1) an individual who departs the U.S. pursuant to a grant of voluntary departure may apply to ICE for the bond to be cancelled, 8 C.F.R. § 1240.26(c)(3)(v), and (2) ICE may cancel a voluntary departure bond if an individual is successful in overturning or remanding an immigration judge's decision regarding removability, 8 C.F.R. § 1240.26(c)(3)(vi). EOIR's decided not to adopt the proposed rule's provision that an individual whose voluntary departure was terminated by filing a motion or a petition for review forfeited his or her bond. See 73 Fed. Reg. at 76934. AILF opposed the proposed forfeiture rule in its comments.

What is the effective date of this rule?

This rule is effective on January 20, 2009. It applies prospectively only. 73 Fed. Reg. at 76936. The preamble to the rule also provides examples of how EOIR intends to apply this rule prospectively. See 73 Fed. Reg. at 76936. Importantly, according to EOIR, the automatic termination provisions will not apply to motions pending on the effective date, as such individuals did not receive prior notice of the termination rule. *Id.* Individuals with motions currently pending and others not covered by the rule may be able to withdraw their voluntary departure request pursuant to the rule set forth in the Supreme Court's decision in *Dada*. See *id.*; AILF's *Dada* Q&A http://www.legalactioncenter.org/sites/default/files/Dada-FAQ_0.pdf.

What does the rule say about the civil penalty for failing to depart under a grant of voluntary departure?

Although EOIR acknowledges that it lacks authority to enforce or collect a civil penalty for failing to depart voluntarily under INA § 240B(d), 73 Fed. Reg. at 76936, it nonetheless adopted a provision regarding the amount of the penalty. New 8 C.F.R. § 1240.26(j) establishes a rebuttable presumption that penalty for failure to depart shall be set at \$3000, unless the immigration judge specifies a different amount. The immigration judge must inform the individual of the amount of the penalty at the time of granting voluntary departure.

PRACTICE ADVISORY¹

**REQUESTING ATTORNEY'S FEES UNDER THE
EQUAL ACCESS TO JUSTICE ACT**

Trina Realmuto and Stacy Tolchin²

December 15, 2008

I. INTRODUCTION

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 et seq., authorizes payment by the government of attorney's fees and costs for successful litigation against the government in the federal courts. A successful litigant who establishes eligibility under EAJA is entitled to a fee award for both litigating the case and litigating the fee request. Fees and costs under EAJA can be awarded without regard to what the client paid or did not pay, including in cases taken on a pro bono basis.

This advisory addresses the deadline for filing an EAJA fee application and discusses the statutory requirements for eligibility. In addition, the advisory addresses procedural aspects of filing an EAJA fee application, including documenting and calculating fees. Highlights of this advisory include:

¹ Copyright (c) 2008, 2010 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This advisory was first issued on June 1, 2004 and subsequently updated on April 7, 2006. It is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. As the case law relating to EAJA is extensive and is not limited to immigration cases, attorneys are advised to research the case law in their circuits and consult local court rules.

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Preparing for Filing an EAJA Fee Application Even Before Commencing Litigation

- Have a clear, written agreement with your client (and co-counsel, if any) at the outset of the representation regarding who is entitled to the fees in the event of a court award or settlement. Fees belong to the client absent a representation agreement to the contrary.
- Keep contemporaneous time records with descriptive billing entries on all time spent by attorneys, paralegals and law clerks preparing for and litigating the case and an itemization and description of all costs incurred.
- Pursuant to the Supreme Court’s decision in *Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, a judicially enforceable court order or settlement agreement memorializing a federal court victory is necessary to establish prevailing party status.
- Although EAJA does not require it, it may be advisable to state in the original pleadings or brief that attorneys’ fees will be requested under EAJA.

Assessing EAJA Fee Eligibility and Filing an EAJA Fee Application after Winning in Federal Court

- The fee application must be filed within 30 days of entry of final judgment in the action; i.e. within 30 days after the expiration of time for filing an appeal, or, if an appeal is filed, within 30 days of entry of final judgment by the court of appeals or Supreme Court.
- The fee application must establish that the petitioning party is a prevailing party who has met the appropriate “net worth” requirements. The application also must allege that the pre-litigation and litigation position of government was not substantially justified and that there are no special circumstances that would make an award unjust.
- The fee application must include a statement of the total amount of fees and costs requested along with an itemized account of time expended and rates charged.
- If the fee application is for work performed in more than one court (i.e., district court and court of appeals), check the relevant case law and local court rules to see where the application should be filed.

II. PROCEDURAL REQUIREMENTS

A. Overview of the Components of an EAJA Fee Application

An application for fees and costs under EAJA should include the following:

- A written motion explaining why your client is statutorily eligible (See Part V)
- A signed affidavit executed by each named party attesting that he/she met the appropriate net worth requirements at the time the action was filed (See Part VD)

- Contemporaneous time records and description of costs (See Part IIB)
- Evidence of award calculation/formula used to calculate the requested fee award (See Part VI)

In addition, an application may include:

- An application form, if required by local rule
- Evidence of prevailing market rates for paralegal or law clerks in your area (surveys, declarations from other attorneys)
- Evidence of prevailing market rates for attorneys claiming enhanced rates based on specialized knowledge (See Part VIC)

Before filing an EAJA fee request (if not done earlier) attorneys need a clear, written agreement with their client (and co-counsel) regarding who is entitled to the fees in the event of a court award or settlement. Fees belong to the client absent a representation agreement to the contrary.

B. Documenting Fees and Costs

1. Compensable work

In general, fee-shifting statutes like EAJA compensate for time that is "reasonably expended *on the litigation*." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). In preparing the fee request, the petitioning party is expected to exercise "billing judgment," *i.e.* "make a good-faith effort to exclude from a fee request those that are excessive, redundant, or otherwise unnecessary...." *Hensley*, 461 U.S. at 434.

The initial work performed before the immigration service or the immigration courts is not compensable.³ However, requesting compensation for time preparing litigation is permissible. The Supreme Court has expressly approved compensation for time spent drafting the initial pleadings and developing the theory of the case. *Webb v. Board of Education*, 471 U.S. 234, 243 (1985) (citation omitted).⁴

A petitioning party who has established eligibility for fee award is entitled to recover "fees on fees." In other words, the party is entitled to compensation for time reasonably expended on litigating the fee request. *Commissioner, INS v. Jean*, 496 U.S. 154, 163-165 (1990).

³ See, *Ardestani v. INS*, 502 U.S. 129, 135 (1991). See also, n. 9, *infra*.

⁴ But see, *LaPointe v. Windsor Locks Bd. of Educ.*, 162 F. Supp. 2d 10, 18 (D.Conn. 2001) (reducing fee award for pre-litigation time spent in telephone conferences with client and co-counsel, drafting memos to file, drafting correspondence to her client because, that court concluded, "none of these activities were actually spent 'on the litigation'").

2. Keeping Contemporaneous and Detailed Time Records

The EAJA fee applicant bears burden of documenting fees and costs. *Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983). A fee award may be reduced for insufficient or inadequate documentation. For this reason, it is best to keep contemporaneous time records indicating: (1) the date; (2) the identity of the timekeeper; (3) a description of the specific task performed; and (4) the amount of the time spent on the task.

Include some detail when describing the specific task performed. For example, instead of “research and drafting legal brief or motion” one might write “research for opening brief” or “drafting habeas petition.”⁵

Maintain a list containing the date and description of all costs stemming from the litigation, including, for example, filing fees, long-distance telephone and facsimile charges, messenger/courier fees, computer research and expert witness fees.

Itemize the fees and costs incurred. This will assist the court in determining whether the hours and costs claimed are reasonable for the work performed. Thus, an EAJA fee application should include a tally of the total number of hours expended on the litigation by each timekeeper, the total amount of costs, and the total amount of combined fees and costs requested.

3. Defending Against Allegations of Improper Time Records

Once an EAJA fee application is filed, the government’s response often raises objections to billing entries that it deems to be vague, imprecise or duplicative. The government will usually request that the court remedy the alleged impropriety by reducing any fee award in the exercise of discretion.

Case law addresses the degree of specificity required for billing records and whether the records, taken in context, are sufficient to identify the substance of the work done. In addition, presenting documentary or testimonial evidence from qualified attorneys who have reviewed the billing records and can attest that the records comport with general standards of timekeeping may rebut the government’s allegations of vague or non-descriptive billing records.

The government may also contest a claimed EAJA fee based on duplication and similarly request the court to reduce the award in the exercise of discretion. At least one circuit court has held that reductions for alleged duplication, however, are appropriate “only if the attorneys are *unreasonably* doing the *same* work.”⁶ The burden is on government to show specific instances of unreasonable duplication.⁷

⁵ *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) (“plaintiff’s counsel ... is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures”).

⁶ *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original).

⁷ *McGrath v. County of Nevada*, 67 F.3d 248, 255-256 (9th Cir. 1995).

The need for multiple attorneys to prepare briefs to ensure timely filing, share information, assign responsibilities, and plan strategy is well recognized.⁸

III. FILING DEADLINE

The EAJA statute requires fee applications to be filed within 30 days of "final judgment" in the action. 28 U.S.C. § 2412(d)(1)(B). A "final judgment" means a judgment that is final and not appealable, and includes an order of settlement. 28 U.S.C. § 2412(d)(2)(G). Thus, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal. In immigration cases (where longer appeal deadlines apply because the government is always a party), the time for filing an appeal varies depending on whether the case was litigated in district or circuit court.

In district court cases, a party has 60 days after the judgment or order is entered by the district court to file an appeal. Fed. R. App. P. 4(a)(1)(B). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 60-day time period for filing an appeal. If an appeal is taken, the district court's judgment is not final and therefore the 30-day period for filing an EAJA fee application does not begin to run until all the appellate proceedings are concluded. *Al-Harbi v. INS*, 284 F.3d 1080, 1084 (9th Cir. 2002) ("final judgment" is "the date on which a party's case has met its final demise, such that there is no longer any possibility that the district court's judgment is open to attack").

If the circuit court remands the case, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal following the district court's entry of judgment on remand.

In circuit court cases, a party has 90 days after the judgment or order is entered by the circuit court to file a petition for certiorari to the Supreme Court. Sup. Ct. R. 13(1). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 90-day time period for filing a petition for certiorari. *Al-Harbi v. INS*, 284 F.3d 1080 (9th Cir. 2002) and cases cited therein. The date the mandate is issued is not relevant to calculation of the filing deadline. *Zheng v. Ashcroft*, 383 F.3d 919, 921-22 (9th Cir. 2004).

If a petition for rehearing is filed in the court of appeals, the 90-day period to file a petition for certiorari runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. Sup. Ct. R. 13(3). Moreover, if the losing party files a petition for certiorari, the circuit court's judgment is not final and therefore the 30-day period for filing an EAJA fee application would not begin to run until the Supreme Court denies the petition for certiorari. In the event that the Supreme Court grants the petition for certiorari, the 30-day period would not begin to run until the Supreme Court enters judgment or, if the case is remanded, until the circuit (or possibly the district court if the circuit court orders remand) enters judgment.

⁸ See, e.g., *Berberena v. Coler*, 753 F.2d 629, 633-634 (7th Cir. 1985); *McKenzie v. Kennickell*, 645 F. Supp. 437, 450 (D.D.C. 1986); *Tchemkou v. Mukasey*, 517 F.3d 506, 511-12 (7th Cir. 2008).

In general, the government responds to EAJA fee applications by filing an opposition within the time prescribed by Federal Rule of Appellate Procedure 27(a)(3) or by requesting additional time to file a response. At least one court has held the lack of a timely opposition may warrant granting the fee application. In *Gwaduri v. INS*, 362 F.3d 1144 (9th Cir. 2004), the government filed an opposition along with a motion to accept the untimely opposition nearly six weeks after the due date. The court denied the motion to accept the untimely opposition and granted fees, stating “[t]here is simply nothing in the significantly delinquent motion for filing out of time that justifies the government’s lengthy silence in this matter.” 362 F.3d at 1146. The court reasoned that it was “well-within” its discretion to determine that the government’s lack of a timely opposition amounted to a concession that its litigation position was not substantially justified or, alternatively, a failure to offer a basis for a finding of substantial justification. *Id.*

IV. WHERE TO FILE

The EAJA statute does not specify where to file an EAJA fee request. However, logic and common practice dictate that where only one court has considered the merits of the case, that same court should consider the merits of the EAJA fee request. In a petition for review, an EAJA fee application is properly filed in the court of appeals that adjudicated the petition. In district court actions where neither side appealed to the court of appeals, the application is properly filed in the district court where the action was adjudicated.

In district court actions where one side appeals on the merits, the issue of where to file is more complicated as the appellate court may issue the final judgment in the case when adjudicating the appeal or may remand the case for further proceedings. When an EAJA fee request includes fees for appellate work, it is advisable to review the appropriate circuit court case law and consult the court’s local rules.

Some courts have indicated a preference for district courts to adjudicate fee requests that include appellate fees.⁹ Other courts have awarded fees for appellate work without remanding for the

⁹ See, e.g., *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 144-45 (1st Cir. 1991) (noting that determination of fee award by appellate court in first instance would usurp trial court function); *McDonald v. Secretary of Health and Human Services*, 884 F.2d 1468, 1481 (1st Cir. 1989) (“Plaintiffs may also apply to the district court for attorneys’ fees reasonably incurred in connection with the present appeal.”) (footnote omitted); *Garcia v. Schweiker*, 829 F.2d 396, 398 (3d Cir. 1987) (reiterating the district court should set the fees for work in both courts when representation in each was required) (citation omitted); *Smith v. Detroit Bd. of Educ.*, 728 F.2d 359, 360 (6th Cir. 1984) (per curiam) (district court more appropriate forum to award fees incurred in appeal); *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 588-91 (9th Cir. 1984) (remanding to district court to reconsider award of attorney fees for appellate work); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1527 (10th Cir. 1984) (antitrust action remanded to district court to award appropriate attorney fees for appellate work), *aff’d*, 472 U.S. 585 (1985). See also, *Spell v. McDaniel*, 852 F.2d 762, 766 (4th Cir. 1988) (reviewing district court award of fees for appellate work under § 1988). And see, *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970) (stating that the amount of attorneys’ fee award for appellate services

district court to award fees in the first instance.¹⁰ Still other courts have suggested that either the district court or the court of appeals may adjudicate fee requests that include fees for work on appeal.¹¹ In the Second Circuit, applications for appellate fees are filed directly with the court of appeals.¹²

Some courts have separate local rules for attorneys' fees requests in general and local rules for fee requests under EAJA. Many local rules expressly provide that the court of appeals may remand fee requests filed in the courts of appeals to the district court for adjudication upon a motion or in the exercise of the court's discretion.¹³

For a discussion regarding where to file an EAJA fee application for work done before the Supreme Court, see *Dague v. Burlington*, 976 F.2d 801, 803-805 (2d Cir. 1991).

V. STATUTORY REQUIREMENTS

The EAJA statute, 28 U.S.C. §§ 2412(d)(1)(A)&(B), directs that a fee application must include:

- A showing that the petitioning party is a prevailing party.
- An allegation that the pre-litigation and litigation position of government was not substantially justified. See also, 28 U.S.C. § 2412(d)(2)(D).

under § 4 of the Clayton Act “should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered”).

¹⁰ See, e.g., *Jenkins by Jenkins v. Missouri*, 127 F.3d 709, 719 (8th Cir. 1997) and cases cited therein.

¹¹ *Martin v. Heckler*, 754 F.2d 1262, 1265 n. 6 (5th Cir. 1985) (“In some cases, applications for fees and expenses should be considered in the district court in the first instance. In others, we may consider them first.”) (citations omitted); *Ekanem v. Health & Hosp. Corp.*, 778 F.2d 1254, 1257 (7th Cir. 1985) (“our research reveals that a petition on entitlement to appellate attorneys fees may be filed in either the district court or the court of appeals”). See also, 11th Circuit R. 39-2 (e) (permitting attorneys fees request to be filed in district court in lieu of court of appeals where appeal resulted in remand for further proceedings).

¹² *Smith v. Bowen*, 867 F.2d 731, 736 (2d Cir. 1989) (“applications [under the EAJA] for appellate fees in this Circuit should be filed directly with the Court of Appeals”); *McCarthy v. Bowen*, 824 F.2d 182, 183 (2d Cir. 1987) (per curiam) (directing the filing of EAJA appellate fee applications in court of appeals so that it may determine whether to enlist the aid of the district court in resolving disputed issues).

¹³ See, e.g., 1st Circuit R. 39(a) (“The court in its discretion may remit any such [EAJA fee] application to the district court for a determination.”); 8th Circuit R. 47A (“On the Court’s own motion or at the request of the prevailing party, a motion for attorneys fees may be remanded to the district court or administrative agency for appropriate hearing and determination.”); 9th Circuit R. 39-1.8 (“Any party who is or may be eligible for attorneys fees on appeal to this Court may, . . . , file a motion to transfer consideration of attorneys fees on appeal to the district court . . . from which the appeal was taken.”); 11th Circuit R. 39-2 (d) (permitting motion to transfer fee application to district court from which the appeal was taken).

- An allegation that there are no special circumstances that would make an award unjust.
- A showing that the petitioning party has met the appropriate “net worth” requirements. *See also*, 28 U.S.C. § 2412(d)(2)(B).
- A statement of the total amount of fees and costs sought along with an itemized account of time expended and rates charged.

Each of these statutory requirements is discussed in detail below. However, one additional statutory requirement is worth mentioning here.

The EAJA statute applies to “any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action.” 28 U.S.C. § 2412(d)(1)(A). Thus, in the immigration context, EAJA fees generally are available in petitions for review, mandamus actions, and habeas corpus actions. EAJA fees generally are not recoverable in actions under the Federal Tort Claims Act but some courts have allowed recovery where the government acted in “bad faith.” *Rodriguez v. United States*, 542 F.3d 704 (9th Cir. 2008); *Campbell v. U.S.*, 835 F.2d 193 (9th Cir. 1987); *Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989).¹⁴

The government has argued that the term “civil action” does not unambiguously encompass habeas corpus actions under 28 U.S.C. § 2241 and, thus, EAJA fees are not available in habeas cases. While some courts have accepted this argument for prisoners in *criminal* custody, importantly, no court has accepted it for noncitizens in *immigration* custody. *Vacchio v. Gonzales*, 404 F.3d 663, 668-72 (2d Cir. 2005) (rejecting government’s argument that habeas petition challenging an immigration detention does not qualify as a “civil action”); *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 901 (E.D.Wisc. 2007) (same); *O’Brien v. Moore*, 395 F.3d 499, 507-08 (4th Cir. 2005) (accepting government’s “civil action” argument but expressly distinguishing habeas petitions challenging immigration detentions from habeas petitions in the criminal context); *In re Petition of Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) (rejecting government’s “civil action” argument in habeas case challenging petitioner’s exclusion).

A. Prevailing Party Status

To qualify for an EAJA award, the petitioning party has the burden of proving that he is a prevailing party. A “prevailing party” is one who “has been awarded some relief by a court.” *Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 603 (2001).

¹⁴ In general, EAJA fees also are *not* recoverable against the government in successful damages actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Kreines v. U.S.*, 33 F.3d 1105 (9th Cir. 1994); *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir.1984).

1. Prevailing Party Status Cannot Be Based On the “Catalyst Theory”

Under the so-called “catalyst theory,” a litigant was entitled to prevailing party status if the lawsuit was a catalyst that prompted the government to voluntarily alter its conduct. For example, a party could be considered a “prevailing party” under the catalyst theory if the lawsuit prompted the government to voluntarily grant the requested relief or pass legislation that mooted the federal case.

In *Buckhannon*, the Supreme Court held that the “catalyst theory” is no longer a permissible basis for an attorneys’ fees award under the fee-shifting statutes at issue in that case. The “catalyst theory” “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” 532 U.S. at 605. The Court held that a party can only be deemed a prevailing party, for purposes of fee-shifting statutes such as EAJA, if there has been an enforceable “alteration of the legal relationship of the parties.” *Id.* at 621. Thus, under *Buckhannon*, a party whose suit prompts the precise relief sought may be a prevailing party if there is a judicially enforceable court entry memorializing the victory.

2. Types of Court Entries That May Prove Prevailing Party Status

Examples of court entries that may serve as the basis for an award of EAJA fees include enforceable judgments on the merits and settlement agreements that are favorable to one-side and enforceable through a consent decree. *Buckhannon*, 532 U.S. at 604-606. A consent decree is technically a judgment entered by consent of the parties whereby the government agrees to stop the alleged illegal activity without necessarily admitting guilt or wrongdoing.

Post-*Buckhannon* case law has created additional examples of judicially enforceable court entries specific to immigration cases. In *Vacchio v. Gonzales*, 404 F.3d 663, 673-74 (2d Cir. 2005), the court held that an interim order directing release pending adjudication of petitioner’s habeas corpus appeal was sufficient to confer prevailing party status. In *Carbonell v. INS*, 429 F.3d 894, 901 (9th Cir. 2005), the court held that a district court order attesting to a voluntary stipulation between petitioner and INS to stay deportation pending the BIA’s adjudication of a motion to reopen conveyed “prevailing party” status because it awarded a substantial portion of the relief sought.

In *Li v. Keisler*, 505 F.3d 913, 918 (9th Cir. 2007), the court held that an order issued by a circuit mediator granting an unopposed motion to remand after the petitioner filed an opening brief is sufficient to satisfy *Buckhannon* because the orders advanced the petitioners’ goals and constituted material alterations of the parties’ legal relationship.

In *Aronov v. Chertoff*, 536 F.3d 30, 39-40 (1st Cir. 2008) (en banc rehearing pending),¹⁵ the court held that prevailing party status could be based on a district court order granting a joint motion to remand the petitioner’s naturalization application to USCIS. The court reasoned the

¹⁵ As of this writing, the First Circuit is considering the *Aronov* decision en banc, and may modify, withdraw, or adhere to the panel’s decision. Readers should confirm the case’s status before citing it.

order incorporated the terms of the joint motion, which provided that the petitioner could return to district court if the terms of the remand order were not met. Thus, the court concluded, the remand order in that case “was the functional equivalent of a consent decree.” *Id.* at 40. *Accord, Lord v. Chertoff*, 526 F. Supp. 435, 438 (S.D.N.Y. 2007) (court approved consent agreement for USCIS to approve naturalization application satisfied *Buckhannon* standard because court retained jurisdiction to enforce the agreement if necessary); *Berishev v. Chertoff*, 486 F. Supp. 2d 202, 204-05 (D.Mass. 2007) (conciliatory remand order for adjudication of naturalization application satisfied *Buckhannon* Court’s interpretation of “prevailing party”).

District courts have held that an order granting mandamus to adjudicate an adjustment application is sufficient to convey prevailing party status. *See, e.g., Aboushaban v. Mueller*, 475 F. Supp. 943, 946 (N.D.Ca. 2007). *Accord Osman v. Mukasey*, 553 F. Supp. 1252 (W.D.Wash. 2008) (prevailing party status established and fees granted where district court ordered adjudication of petitioner’s naturalization application pursuant to 8 U.S.C. § 1447(b)); *Liu v. Chertoff*, 538 F.Supp. 2d 1116 (D.Minn. 2008) (same); *Alghawi v. Mukasey*, 543 F. Supp. 2d 1252 (W.D.Wash. 2008) (same).

Examples of court entries that may not serve as the basis for an award of attorney’s fees include judicial pronouncements that the government has violated the INA or the Constitution without any grant of judicial relief. *Id.* at 606-607. In addition, changes in the actual circumstances of the parties that are not related to the federal court case may not be used as the basis for an EAJA fee award. *Id.* For example, if the BIA grants a motion to reopen or reconsider after the filing of federal lawsuit challenging the final removal order, the petitioner in the federal lawsuit cannot be considered a prevailing party for purposes of an EAJA fee award if the federal case has been mooted out by the BIA’s order. In the absence of an enforceable court ordered judgment or remedy, a court is not likely to find prevailing party status as defined by the Court in *Buckhannon*. *See, e.g., Zhaoxi Ma v. Chertoff*, ___ F.3d ___, 2008 U.S. App. LEXIS 22836 (2d Cir. Nov. 4, 2008) (plaintiff was not a prevailing party where USCIS corrected erroneous denial of adjustment application and adjusted plaintiffs’ status after case filed but before court acted); *Morillo-Cedron v. District Director for the U.S. Citizenship & Immigration Servs.*, 452 F.3d 1254, 1257-58 (11th Cir. 2006) (prevailing party status was not conferred where CIS voluntarily granted permanent resident status before the district court entered any final judgment); *Perez-Arellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (finding plaintiff was not a prevailing party where he naturalized during litigation and district court dismissed the case as moot).

In light of *Buckhannon*, if the government grants the relief sought before the court decides the case on the merits, memorializing the victory in a court-approved order or settlement will preserve eligibility for an award of EAJA fees. In this situation, counsel also may face tactical and ethical questions, including whether to attempt to negotiate attorney’s fees and costs in the order or settlement agreement or wait and file an EAJA fee request after the court approves the order or settlement agreement.

3. Court Ordered Remand

a. Remand Where the Court Enters Judgment

Whether a court-ordered remand to the Board confers prevailing party status can be tricky. The primary case on this issue is *Shalala v. Schaefer*, 509 U.S. 292 (1993). In *Shalala*, the Supreme Court held that a social security claimant who obtained a reversal and remand of a Secretary of Health and Human Services' administrative decision pursuant to sentence four of 42 U.S.C. § 405(g) was a prevailing party. 509 U.S. at 300-301. Significantly, in cases remanded under this section, the court enters judgment in the claimant's favor immediately and the litigation is terminated. In cases remanded under another social security provision, the court enters judgment after post-remand agency proceedings have been completed and their results are filed with the court. The Court's opinion in *Shalala* relied heavily on this distinction.

Therefore, *Shalala* supports finding prevailing party status when a court orders remand to the agency, enters a formal judgment immediately and does not retain jurisdiction over the federal court action. Arguably, the securing of the remand order is itself sufficient success on the merits to confer prevailing party status.

In *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997), the Ninth Circuit granted the petition for review of the denial of petitioners' asylum applications and remanded their case to the BIA for further proceedings in light of its decision. The court's order terminated the proceedings and the court did not retain jurisdiction over future appeals. Petitioners then sought attorney's fees under EAJA. The Ninth Circuit reasoned that, since it could "perceive no difference between a 'sentence four' remand under 42 U.S.C. § 405(g) [at issue in *Shalala*] and a remand to the BIA for further proceedings," petitioners who obtain such remand are prevailing parties. *Rueda-Menicucci*, 132 F.3d at 495. In *Li v. Keisler*, 505 F.3d 913, 918 (9th Cir. 2007), the court extended this ruling to allow the recovery of fees in cases where the government moves for remand to the BIA after briefing has commenced, although not completed, and remand is granted by a circuit mediator.

The Seventh and Third Circuits have similarly ruled that a petitioner who wins remand for further proceedings is a prevailing party within the meaning of EAJA. The courts reasoned that petitioners' situations were analogous to the Supreme Court's decision in *Shalala v. Schaefer* and also noted that their conclusions were consistent with *Rueda-Menicucci v. INS*. *Muhur v. Ashcroft*, 382 F.3d 653, 654-55 (7th Cir. 2004); *Johnson v. Gonzales*, 416 F.3d 205, 209-10 (3d Cir. 2005). See also, *Salem v. United States INS*, 122 F. Supp. 2d 980, 984 (C.D.Ill. 2000) (finding remand to the INS conferred prevailing party status under the rationale of *Rueda-Menicucci*).

As a practical matter, because the question of whether a party has prevailed on a significant issue in litigation potentially could be equated with whether the party requested the relief obtained, it is advisable to ask the court to vacate *and/or remand* the decision of the immigration service or court when drafting a request for relief.

b. Remand Where the Court Postpones Entering Judgment

If the court orders remand to the agency, postpones entering judgment until the completion of post-remand agency proceedings, and also retains jurisdiction over the federal court action, the petitioning party still may be eligible for prevailing party status if they are successful before the

agency on remand.¹⁶ In this situation, there is some authority – primarily in the non-immigration context - suggesting that it *might* be possible to recover fees for administrative work on remand.

In *Ardestani v. INS*, 502 U.S. 129, 135 (1991), the Supreme Court held that EAJA fees cannot be awarded for the initial work done in administrative immigration proceedings. However, some courts have held that fees and costs for administrative work done pursuant to a remand order where the court retains jurisdiction (and postpones entering judgment until the remand proceedings are complete) are recoverable. See *Sullivan v. Hudson*, 490 U.S. 877, 889-890 (1989); *Melkonyan v. Sullivan*, 501 U.S. 89, 97 (1991); *Pollgreen v. Morris*, 911 F.2d 527, 536 (11th Cir. 1990) (INS forfeiture case); *Hafner v. Sullivan*, 972 F.2d 249, 252 (8th Cir. 1992).

B. Substantial Justification

An initial EAJA fee application must, at a minimum, *allege* that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).¹⁷ However, as the government routinely attempts to demonstrate that its position was substantially justified, it is advisable to fully brief this important issue in the initial fee application rather than waiting to brief it in the reply brief when page space more limited.

Once the petitioning party establishes prevailing party status, the government can avoid payment of fees only if it can show that its pre-litigation conduct and litigation position were "substantially justified." In order to meet this heavy burden of proof, the government must show that its position has a reasonable basis both in law and in fact.¹⁸ The government should meet this threshold twice -- it must independently establish that the agency misconduct that gave rise to the litigation was substantially justified, and that its litigation positions were also substantially justified.¹⁹

¹⁶ *Shalala*, 509 U.S. 299-300, discussing *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989). See also, *Former Emples. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1361 (Fed. Cir. 2003) ("We hold that parties who secure a consent order remanding a proceeding to an administrative agency because of an alleged error on the merits (where the court also retains jurisdiction) are 'prevailing parties' under EAJA if they succeed on the merits in the remand proceeding."); *Davidson v. Veneman*, 317 F.3d 503, 505-506 (5th Cir. 2003) (where district court ordered remanded to Farm Services Agency and stayed motion for EAJA fees pending completion of remand proceedings and plaintiff was successful in remand proceedings, plaintiff was entitled to prevailing party status).

¹⁷ In *Scarborough v. Principi*, 541 U.S. 401 (2004), the Supreme Court held that a timely filed EAJA fee application may be amended after the 30-day filing period has run to cure an initial failure to allege that the government's position in the litigation lacked substantial justification.

¹⁸ See, *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (defining substantially justified as "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person").

¹⁹ 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 158-160 (1990); *Dantran, Inc. v. United States DOL*, 246 F.3d 36, 41 (1st Cir. 2001) ("To satisfy its burden, the government must justify not only its pre-litigation conduct but also its position throughout

Thus, if the court finds that the government's underlying, pre-litigation conduct lacks substantial justification, arguably the court need not consider whether its litigation positions were substantially justified.²⁰

In some cases involving petitions for review of a BIA decision, the government has tried to argue that the relevant “position of the United States” was the position of the Department of Homeland Security (DHS), not the IJ or BIA decisions, because the Executive Office for Immigration Review and DHS are no longer in the same executive department following the 2002 enactment of the Homeland Security Act. In *Thangaraja v. Gonzales*, 428 F.3d 870, 873 (9th Cir. 2005), the Ninth Circuit rejected this argument, finding that it “completely lacks justification.” 428 F.3d at 873. The court affirmed that the IJ’s decision, summarily affirmed by the BIA, constituted “the action . . . by the agency upon which the civil action is based” under the plain language of the EAJA statute, and thus, the relevant pre-litigation position. 428 F.3d at 873. The court also found that nothing in the government reorganization resulting from the Homeland Security Act affected this conclusion because the EOIR and the DHS both “are part of the executive branch of the United States government, despite their mutual independence” and “the manner in which responsibilities are divided within the executive branch is immaterial to determining” the underlying government action upon which the petition for review was based. 428 F.3d at 873.²¹

A court evaluates whether the government’s position is reasonable based on several factors, including the clarity of the governing law²²; the foreseeable length and complexity of the

litigation.”); *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988) (“The inquiry into the existence of substantial justification therefore must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court”).

²⁰ *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990) (“The single finding that the Government's position lacks substantial justification, like the determination that a claimant is a ‘prevailing party,’ thus operates as a one-time threshold for fee eligibility.”); *Roanoke River Basin Ass’n v. Hudson*, 991 F.2d 132, 138 (4th Cir. 1993) (“...*Jean* instructs that a single finding of governmental misconduct compelling a party to resort to litigation or to prolong litigation can open the door to recovery under the EAJA. . .”); *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993) (stating that “once a court determines that the government's position on the merits of the litigation is not substantially justified, it may not revisit that question as to any component of the dispute.”) (citations omitted).

²¹ *See also, Singh v. Gonzales*, 502 F.3d 1128 (9th Cir. 2007).

²² However, the government’s position is not *per se* justifiable simply because the case involves a new statute or an issue of first impression. *United States v. Real Prop. at 2659 Roundhill Drive*, 283 F.3d 1146, 1153 (9th Cir. 2002) *citing* *Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir. 2001) (“There is no *per se* rule that EAJA fees cannot be awarded where the government's position contains an issue of first impression”). *But see, Cornella v. Schweiker*, 741 F.2d 170, 172 (8th Cir. 1984) (holding government reasonable in defending a district court judgment where “all of the purely legal issues were questions of first impression”); *Vacchio v. Gonzales*, 404 F.3d 663, 675 (2d Cir. 2005) (holding that an unsettled question of law combined

litigation, the consistency of the government's position, views expressed by other courts on the merits, legal merits of the government's position, and the stage at which the litigation was resolved. *See, generally, Jean v. Nelson*, 863 F.2d 759, 767-768 (11th Cir. 1988) *affirmed by Commissioner, INS v. Jean*, 496 U.S. 154 (1990).

In some circuits, there may be case law finding a *per se* lack of substantial justification where the government's position violates the Constitution, a statute, or its own regulations. *See, e.g., Mendenhall v. National Transp. Safety Bd.*, 92 F.3d 871, 874 (9th Cir. 1996) (citation omitted). *See also, Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (concluding that "the agency's position lacked substantial justification because it was 'wholly unsupported by the text' of the applicable regulations.") (citation omitted).

Once the court determines that the government's position lacks substantial justification, the prevailing party is presumptively eligible for fees for all phases of the federal case unless the prevailing party has "unreasonably protracted" a portion of the litigation, which would warrant exempting fees for that portion of the litigation from the award.²³

C. Special Circumstances

The government has the burden of proving the existence of special circumstances that would make a fee award unjust.²⁴ This "special circumstances" exception to awarding attorneys fees was intended as a "safety valve" to allow the government to advance "novel but credible" legal theories and to give courts discretion to deny awards for equitable considerations. This provision of the EAJA is to be narrowly construed so as to not interfere or defeat Congress's purpose in passing the EAJA.²⁵

Special circumstances include close or novel questions.²⁶ Equitable considerations can mean that the "prevailing party" acted in bad faith or has "unclean hands."²⁷

D. Net Worth

If an individual plaintiff's net worth did not exceed \$2,000,000 at the time the lawsuit was filed, he or she has met the net worth requirement for EAJA fee eligibility. 28 U.S.C. § 2412(d)(2)(B). A corporation must establish that it did not have more than 500 employees and its net worth did not exceed \$7,000,000 at the time the lawsuit was filed. 28 U.S.C. § 2412(d)(2)(B). A non-

with a government position that was "far from unreasonable" amounted to substantial justification).

²³ 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 161 (1990).

²⁴ 28 U.S.C. § 2412(d)(1)(A); *Abela v. Gustafson*, 888 F.2d 1258, 1266 (9th Cir. 1989).

²⁵ *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985).

²⁶ *National Truck Equip. Ass'n v. NHTSA*, 972 F.2d 669, 671 (6th Cir. 1992); *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 431 (5th Cir. 1982).

²⁷ *Taylor v. U.S.*, 815 F.2d 249, 252-254 (3rd Cir. 1987); *Midwest Research Institute v. United States*, 554 F. Supp. 1379, 1392 (W.D. Mo. 1983), *aff'd*, 744 F.2d 635 (8th Cir. 1984); *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983).

profit entity must only show that it did not have more than 500 employees at the time the lawsuit was filed.

Net worth is calculated for each individual named party to the lawsuit. Net worth should, at a minimum, be documented by submitting a signed affidavit attesting that the petitioning party met the appropriate requirements at the time the lawsuit was filed.²⁸

VI. Calculating Fees, Rates and Adjustment for Inflation

EAJA fees are based upon “prevailing market rates for the kind and quality of the services furnished, except . . . attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A).

Thus, the statutory hourly rate of compensation for attorneys is \$125 for cases commenced on or after March 29, 1996. This amount can be “adjusted” or “enhanced” for inflation based on cost of living adjustments (COLA) or the presence of a special factor.

1. EAJA Statutory Rate Adjusted for Inflation

Most courts calculate the “adjustment” or “enhancement” for inflation by using the Consumer Price Index for All Urban Consumers (CPI-U).²⁹ The CPI-U is published by the Bureau of Labor Statistics and is updated monthly. It can be located on-line at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>. The courts measure the COLA as of March 1996, when the statutory hourly rate of attorney compensation was raised from \$75 per hour to \$125 per hour. The March 1996 CPI-U is 155.7, and also can be located on-line at the link above.

One formula that is often used for calculating the cost of living adjustment is:

$$\text{\$125} \times \frac{(\text{current CPI-U})}{(\text{March 1996 CPI-U})}$$

See Ramon-Sepulveda v. INS, 863 F. 2d 1458, 1463, fn. 4 (9th Cir. 1988); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004); *Edwards v. Barnhart*, 214 F. Supp. 2d 700, 702, n. 3 (W.D. Tex. 2002); *Walker v. Barnhart*, 302 F. Supp. 2d 1072, 1075 (S.D. Iowa 2002).

²⁸ *United States v. Heavrin*, 330 F.3d 723, 732 (6th Cir. 2003); *Shooting Star Ranch, LLC v. United States*, 230 F.3d 1176, 1178 (10th Cir. 2000).

²⁹ *See, e.g., Harris v. Sullivan*, 968 F.2d 263, 264-266 (2d Cir. 1992) and cases cited therein; *Dewalt v. Sullivan*, 963 F.2d 27, 27-30 (3d Cir. 1992); *Sullivan v. Sullivan*, 958 F.2d 574, 578 (4th Cir. 1992); *Begley v. Secretary of HHS*, 966 F.2d 196, 199-200 (6th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Ramon-Sepulveda v. INS*, 863 F. 2d 1458, 1463 (9th Cir. 1988).

Some case law suggests that the regional CPI-U, and not the national, is appropriate to use in computing the EAJA rate adjusted for inflation.³⁰ The Ninth Circuit has clarified that the national CPI-U, and not the regional, should be used in fee applications filed in that circuit.³¹ For individuals in areas with higher costs of living, the use of the regional CPI-U would mean a higher statutory rate of compensation.

Some courts have required that COLA calculation be done for the year of the fee award. In the equation set forth above, this would mean that the “current” CPI-U reflects the figure of the current year.³² More recently, however, courts have applied a COLA adjustment for each year in which the work was performed.³³ In the equation set forth above, this means that the hourly rate for each year attorney work was performed would require a separate COLA rate calculation using a different CPI-U figure for each year.

2. Enhanced Rates Based on Special Factors

Attorney rates also may be increased if a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A)(ii). The Supreme Court has addressed the meaning of the phrase “the limited availability of qualified attorneys for the proceedings involved” as follows:

We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of general lawyerly knowledge and ability useful in litigation. An example of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

Pierce v. Underwood, 487 U.S. 552, 572 (1988).³⁴

Some courts have recognized that a specialized knowledge of immigration law could warrant enhanced attorney rates.³⁵

³⁰ See, *Chen v. Slattery*, 842 F. Supp. 597, 600 n.2 (D.D.C. 1994); *Stanfield v. Apfel*, 985 F. Supp. 927, 931 (E.D. Mo. 1997); *Peterson v. Shalala*, 818 F. Supp. 241, 245 n. 3 (S.D. Ill. 1993).

³¹ See, *Thangaraja v. Gonzales*, 428 F.3d 870, 877 (9th Cir. 2005); see also, Ninth Circuit Notice Regarding Statutory Maximum Rates Under Equal Access to Justice Act, available at: www.ca9.uscourts.gov.

³² See, e.g., *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Garcia v. Schweiker*, 829 F.2d 396, 401-402 (3d Cir. 1987).

³³ See, e.g., *Sorenson v. Mink*, 239 F.3d 1140, 1143 (9th Cir. 2001); *Wilkett v. Interstate Commerce Com.*, 857 F.2d 793, 875 (D.C. Cir. 1998); *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992).

³⁴ In the Ninth Circuit, an enhanced rate may be warranted if the attorney possesses distinctive knowledge and skills developed through a practice specialty; the skills are needed in the litigation; and the skills are not available elsewhere at the statutory rate. *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (citation omitted).

Special factors do *not* include the limited availability of qualified attorneys, litigation that involves novel and difficult issues, the undesirability of the case, expertise of counsel, or the results obtained. These factors are considered “applicable to a broad spectrum of litigation” *Pierce*, 487 U.S. at 573.

When reviewing enhanced rate requests, courts will want to see evidence of the attorney’s particular qualifications and how those qualifications were needed in the litigation, and information regarding the lack of availability of attorneys who could litigate the case. *Florioiu v. Gonzales*, 498 F.3d 746 (7th Cir. 2007). Declarations from other attorneys will help document a claim for enhanced rates based on expertise in immigration law. The declarations could explain why immigration law expertise was necessary to litigating the case and further attest that petitioner/s would be unable to find an attorney with the requisite immigration expertise at the \$125 EAJA statutory rate.

3. Prevailing Market Rates

Attorneys Seeking Enhanced Rates

An attorney who has demonstrated entitlement to an enhanced rate based on special factors should be compensated based on prevailing market rates, 28 U.S.C. § 2412(d)(2)(A)(ii), without regard to whether the attorney is *pro bono* or retained for a fee. *Blum v. Stenson*, 465 U.S. 886, 895-6 (1984). The prevailing market rate need not reflect the rate charged to the client.

³⁵ See, e.g., *Muhur v. Ashcroft*, 382 F.3d 653, 656 (7th Cir. 2004) (noting “immigration lawyers are not *ipso facto* entitled to fees above the statutory ceiling” finding immigration expertise, “such as knowledge of foreign cultures or of particular, esoteric nooks and crannies of immigration law,” warranted a special factor rate adjustment); *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997) (stating “a specialty in immigration law could be a special factor warranting an enhancement of the statutory rate” if that specialty is “needful for the litigation in question”); *Pollgreen v. Morris*, 911 F. 2d 527, 537-38 (11th Cir. 1990) (recognizing that a “special factor” rate adjustment might be appropriate for attorneys who have a special expertise in immigration law); *Douglas v. Baker*, 809 F. Supp. 131, 135 (D.D.C. 1992) (awarding enhanced EAJA rate based, in part, on attorneys extensive experience in immigration law). *But see, Johnson v. Gonzales*, 416 F.3d 205, 213 (3d Cir. 2005) (enhancement not warranted in case involving “straightforward application of the substantial evidence and asylum standards...”); *Perales v. Casillas*, 950 F.2d 1066, 1078-79 (5th Cir. 1992) (immigration lawyers, unlike patent lawyers and experts in foreign law, are not *per se* specialized for special factor assessment purposes); *National Ass’n of Mfrs. v. United States DOL*, 962 F. Supp. 191 (D.D.C. 1997) (“Unlike patent law, no technical education is necessary to excel in either” immigration or administrative law). See also, *Thangaraja v. Gonzales*, 428 F.3d 870, 876 (9th Cir. 2005) (declining to adopt a *per se* rule that immigration law is a specialty area similar to practicing patent law); *Atlantic Fish Spotters Ass’n v. Daley*, 205 F.3d 488, 492-493 (1st Cir. 2000) (finding enhanced EAJA rate was improper because special experience in fisheries law was not required for competent representation in the case).

Market rate surveys are available to demonstrate prevailing rates of attorneys based on specialization, location, and years of experience. Declarations from other attorneys of similar expertise and years of experience attesting to their individual and/or firm's hourly rate can also be submitted to establish prevailing market rates. For example, an attorney in Los Angeles with 8-10 years of immigration experience who is claiming an enhanced rate of \$300 per hour could document the prevailing market rate for their services by submitting one or more declarations from other immigration lawyers in Los Angeles with 8-10 years of similar immigration experience attesting that they routinely charge an hourly rate of \$300 (or more).

Law Clerks, Paralegals and Expert Witnesses

Law clerks, paralegals and expert witnesses also may be compensated under EAJA at the prevailing market rate.³⁶ The Supreme Court recently affirmed that paralegal work is recoverable at prevailing market rates. *Richlin Sec. Serv. Co. v. Chertoff*, 128 S. Ct. 2007, 2019 (2008). The prevailing market rate need not reflect the rate charged to the client. The statute provides that expert witnesses cannot be compensated at a "rate in excess of the highest rate of compensation for expert witnesses paid by the United States." 28 U.S.C. § 2412(d)(2)(A)(i).

Market rate surveys often contain information on prevailing rates for law students and paralegals. Declarations from other attorneys attesting to the rates paid to law students and paralegals in the area also can be submitted to establish prevailing rates.

³⁶ 28 U.S.C. § 2412(d)(2)(A); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983); *Jordan v. U.S. DOJ*, 691 F.2d 514, 522-524 (D.C. Cir. 1982). See also, *Missouri v. Jenkins*, 491 U.S. 274, 281-289 (1989).

**USCIS ADJUSTMENT OF STATUS OF “ARRIVING ALIENS”
WITH AN UNEXECUTED FINAL ORDER OF REMOVAL**

By Mary Kenney

**Practice Advisory¹
Updated November 6, 2008**

This practice advisory is one of three which discuss interim regulations that give USCIS jurisdiction over the adjustment application of an “arriving alien”² parolee who is in removal proceedings.³ Additionally, USCIS has the authority to adjudicate an adjustment application by an “arriving alien” with an unexecuted final order of removal. USCIS instructed the field that an unexecuted final order of removal, in and of itself, is not a bar to admissibility and therefore not a bar to adjustment. See “Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status” (Jan. 12, 2007), <http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf>.

However, some local USCIS offices erroneously have refused to decide these applications, saying they have no jurisdiction because of the final removal order. Additionally, some local offices have denied these adjustment applications, erroneously finding that the individual is not eligible for adjustment because of the final order.

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² An “arriving alien” is defined at 8 C.F.R. §§ 1.1(q) and 1001.1(q).

³ The other two practice advisories are: “Arriving Aliens and Adjustment of Status: What Is the Impact of the Government’s Interim Rule of May 12, 2006” and “Adjustment of Status of ‘Arriving Aliens’ Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case.” See http://www.aifl.org/lac/lac_pa_index.shtml.

Moreover, the BIA has a policy of refusing to reopen cases where the noncitizen is eligible to adjust under the interim regulations, on the basis that USCIS, not EOIR, has jurisdiction over the adjustment applications.⁴ While reopening of removal proceedings is not required for USCIS to decide an adjustment application,⁵ it can prevent a parolee under a final order of removal from being prematurely removed before USCIS has decided the adjustment application. This BIA policy combined with the erroneous denials by some local USCIS offices, has placed some arriving alien parolees with final orders in a “catch 22:” although they may be eligible under the interim regulations to adjust status, the local USCIS office may refuse to decide the adjustment application because of the final order, while the BIA will refuse to reopen the case – which would eliminate the final order – because only USCIS has jurisdiction over the adjustment application. As a result, the interim regulations have not been implemented in these cases and eligible parolees have been deprived of the opportunity to adjust.

This practice advisory explains why USCIS has jurisdiction over these adjustment applications notwithstanding the final unexecuted order of removal. The analysis here applies to a parolee who has not actually left the U.S. subsequent to the final removal order. The practice advisory also outlines the arguments why such a parolee remains eligible for adjustment notwithstanding an unexecuted final order of removal.

1. Practical considerations.

The intent of the interim regulations is to give “arriving alien” parolees an opportunity to apply for adjustment even if they are in removal proceedings. *See* 71 Fed. Reg. 27585 (May 12, 2006). This is also what four courts of appeals concluded was required under the statute, which in turn prompted the adoption of the interim regulations. *Scheerer v. U.S. Attorney General*, 445 F.3d 1311 (11th Cir. 2006) (*Scheerer I*); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); and *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005). The January 12, 2007 USCIS memo recognizes that parolees with a final removal order also should have this opportunity. Consequently, adjustment applications filed by arriving alien parolees with a final order should be decided by USCIS. USCIS should not simply call in ICE to enforce the removal order.

Of course, any noncitizen with a final removal order is always at risk of removal. As in all cases, the client and attorney can evaluate the risks before making strategy decisions,

⁴ See, e.g., “Adjustment of Status of ‘Arriving Aliens’ Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case,” http://www.aifl.org/lac/lac_pa_index.shtml; see also *Ceta v. Mukasey*, 535 F.3d 639 (7th Cir. 2008) (remanding where BIA refused to reopen case); *Kalilu v. Mukasey*, 516 F.3d 777 (9th Cir. 2008) (same); *Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008) (same); but see *Scheerer v. U.S. Attorney General*, 513 F.3d 1244 (11th Cir.), cert. denied, No. 07-1555 (2008) (*Scheerer II*) (affirming BIA denial of a motion).

⁵ The one exception may be an in absentia removal order issued less than ten years prior to the adjustment application, because such an order – if issued with proper notice – carries a ten year bar to adjustment. 8 U.S.C. § 1229a(b)(7).

including the decision whether to apply for adjustment. Moreover, in some cases there may be additional steps that can be taken to protect the client from removal while the adjustment application is pending with USCIS. For example, ICE can be asked to stay the removal while USCIS decides the adjustment application.

2. USCIS has jurisdiction under the interim regulations.

On May 12, 2006, the Attorney General (through the Executive Office for Immigration Review (EOIR)) and the Secretary of the Department of Homeland Security (through DHS) jointly issued an interim rule that repealed former 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). *See* 71 Fed. Reg. 27585 (2006). These two former regulations barred all “arriving aliens” – including parolees – from adjusting to permanent resident status if they were in removal proceedings. Additionally, the interim rule set forth new regulations governing the jurisdiction of both EOIR and USCIS over adjustment applications in general and the adjustment applications of “arriving aliens” in particular.

The January 12, 2007 USCIS memo states that USCIS can decide an adjustment application of a parolee with a final order under these interim regulations. This is a correct statement, for the following reasons:

- Under the amended jurisdictional provisions of the interim regulations, USCIS has been given jurisdiction over the adjustment applications of *all* arriving aliens regardless of whether they are in removal proceedings, with a limited exception for certain advance parolees not relevant to this practice advisory.⁶
- Specifically, the amended regulations grant USCIS “jurisdiction to adjudicate an application for adjustment of status filed by any alien, unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1).” 8 C.F.R. § 245.2(a)(1). The regulations strip an immigration judge of jurisdiction over the adjustment application of an “arriving alien” in proceedings. 8 C.F.R. § 1245.2(a)(1). Consequently, since the immigration judge does not have jurisdiction over such applications, USCIS does, in accord with this regulation. *See also* 92 Fed. Reg. at 27587 (explaining that one purpose of the amendments to the regulations is to make clear that USCIS has jurisdiction over the adjustment applications of “arriving aliens” in proceedings).
- The interim regulations do not define whether a noncitizen remains “in proceedings” while under an unexecuted final order of removal.⁷ Either way it is

⁶ An immigration judge has jurisdiction over the adjustment applications of certain advance parolees in removal proceedings who are returning to complete previously filed adjustment applications. *See* 8 C.F.R. § 1245.2(a)(1)(ii)(A)-(D).

⁷ However, *see* 8 C.F.R. § 245.1(c)(9)(ii) defining when proceedings terminate for purposes of an alien seeking adjustment based upon a marriage that occurred while the individual was “in proceedings.” Under this regulation, an individual would be considered to remain “in proceedings” while under an unexecuted final order of removal.

defined, however, USCIS would retain jurisdiction in the case of an arriving alien: 1) if the arriving alien still is considered to be “in proceedings,” USCIS would have jurisdiction because it has jurisdiction over arriving aliens in proceedings; 2) if the arriving alien no longer is considered to be in proceedings – because the removal order is final, – USCIS would have jurisdiction because it has jurisdiction over adjustment applications of *all* aliens not in proceedings.

- Thus, a USCIS office that refuses to adjudicate the adjustment application of an arriving alien under an unexecuted final order, claiming lack of jurisdiction, is simply wrong. Where this occurs, USCIS’s refusal can be challenged either by a motion to reconsider or in a district court action in federal court. If your local USCIS office misunderstands its jurisdiction in such a case, please let AILF know by contacting mkenney@ailf.org.

3. An unexecuted final order of removal is not a bar to adjustment for an arriving alien and it does not render the individual ineligible for adjustment.

Some USCIS offices may refuse to adjudicate adjustment applications of arriving aliens under an unexecuted final order (or deny such applications) because they erroneously have determined that the final removal order renders the individual ineligible for adjustment. The following outlines why an unexecuted final order of removal, in and of itself, does not render a parolee ineligible under the adjustment criteria or inadmissible under the general admissibility criteria.

Individuals with a final order of exclusion, rather than removal: For those individuals with an unexecuted final order of exclusion, an INS precedent decision holds that the final order of exclusion does not render the individual ineligible for adjustment. *See Matter of C—H—*, 9 I&N Dec. 265, 266 (Regional Commissioner 1961) (“Although the applicant has been ordered excluded and deported from the United States, she is not precluded by that order from now establishing that she is eligible to receive an immigrant visa and that she is admissible to the United States as an immigrant...”). This decision remains binding precedent on USCIS with respect to exclusion orders. *See* 8 C.F.R. § 103.3(c).

Individuals with a final order of removal: The reasoning behind *Matter of C—H—* is applicable to final orders of removal as well as exclusion. Moreover, analysis of the statutory requirements for adjustment of status demonstrates that an unexecuted final order of removal – in and of itself – is neither a bar to adjustment nor a basis for a finding of ineligibility. Each of these arguments is discussed below.

a. *Matter of C—H—*, 9 I&N Dec. 265, 266 (Regional Commissioner 1961). In *Matter of C—H—*, the noncitizen applied for admission and was placed in exclusion proceedings. She was found inadmissible and ordered excluded on the basis that she was not in possession of a valid, unexpired immigrant visa.

Before the exclusion order was executed, she applied for adjustment of status under INA § 245(a) before the INS. In a precedent decision, the INS Regional Commissioner held that the final order of exclusion did not preclude her from establishing eligibility for adjustment of status. The Commissioner found that she was eligible for a visa and that a visa was immediately available. He also found that she was admissible to the U.S., specifically noting that the order of exclusion was based solely on the finding that she was not in possession of proper entry documents at the time of the hearing. Because—at the time of adjustment – the noncitizen was eligible for a visa, this ground of inadmissibility was no longer applicable to her.⁸ Thus, the Regional Commissioner found that she met the statutory requirements for adjustment of status.

The reasoning of *C—H—* is equally applicable to a case involving a final order of removal rather than exclusion. In fact, in adopting the interim regulations which give USCIS jurisdiction over adjustment applications of arriving aliens in removal proceedings, DHS made it clear that it was replicating the system as it existed prior to IIRIRA when exclusion and deportation proceedings were distinct. At that time, there was no bar to an individual in exclusion proceedings (the equivalent of an “arriving alien” in removal proceedings now) adjusting before USCIS. It was under this system that *C—H—* was decided.

b. There is no statutory or regulatory bar to the adjustment of status of an individual with a final order of removal. As USCIS correctly notes in its January 12, 2007 memo to the field, *supra*, an arriving alien parolee must meet all eligibility requirements for adjustment under either INA §§ 245(a) or (i).⁹ Both the INA and the implementing regulations contain certain bars to adjustment of status. *See, e.g.*, 8 U.S.C. § 1255(c) and 8 C.F.R. §§ 245.1(b) and (c). However, none of these provisions bars an individual from adjusting status because the individual is under a final order of removal. Thus, there is no outright bar to adjustment due to the existence of the final order of removal.

⁸ For the majority of arriving alien parolees, the final order of removal likely will be based on a lack of proper entry documents, as was the case with *C—H—*. *See* 8 U.S.C. § 1182(a)(7) (inadmissibility grounds based on lack of proper entry documents). In these cases, the noncitizen’s subsequent eligibility for a visa for purposes of adjustment will essentially cure this ground of inadmissibility, just as it did in *C—H—*. Should an arriving alien be subject to an additional ground of inadmissibility, however, he or she may remain ineligible for adjustment on that basis. As in all adjustment cases, all potential grounds of inadmissibility and/or bars to adjustment eligibility must be explored with the client. Note, however, that in such a case, it is not the final order of removal that would make the person inadmissible, but rather the underlying inadmissibility that supported the removal order.

⁹ Certain of the most common INA § 245(a) bars to adjustment are inapplicable to “immediate” relatives adjusting through a family-based immigrant visa petition. Thus, this category of family-based petitioners (and those eligible for 245(i) due to either a family or employment-based visa petition) will be those most likely to benefit from the interim regulations.

c. A final unexecuted order of removal is not, itself, a basis for ineligibility for adjustment. Under INA § 245(a), a non-citizen who has been inspected and admitted or paroled is eligible to adjust status to that of lawful permanent resident status if he or she meets three eligibility requirements. 8 U.S.C. § 1255(a). These include that the individual have made an adjustment application; that the individual be eligible for a visa and admissible; and that a visa be immediately available.

An unexecuted order of removal does not impact any of these eligibility requirements. However, some INS offices have reportedly denied adjustment applications on the erroneous basis that an unexecuted final order of removal renders the applicant inadmissible and therefore ineligible to adjust.

A review of the statutory grounds of inadmissibility shows that this is not correct. None of these grounds renders an individual inadmissible solely because he or she is under an unexecuted final order of removal.¹⁰ USCIS agrees that an unexecuted final order does not render an individual inadmissible. In its instruction memo to the field, it stated:

[N]ot all aliens who are subject to a final order of removal are inadmissible to the United States. An alien may be eligible for a waiver or consent to reapply notwithstanding the removal order. The removal order, itself, does not make the alien inadmissible until it is executed.

“Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status,” at 3, <http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf>.

Note that, just because the unexecuted removal order itself does not constitute a ground of inadmissibility, this is not the end of the analysis. The underlying basis for removability upon which the order is based may include a ground of inadmissibility that would continue to apply. If so, it must be determined whether a waiver of this ground of inadmissibility is available. Otherwise, the adjustment application could be denied on the merits.

¹⁰ Once the removal order has been executed, the individual’s return to the U.S. might implicate inadmissibility grounds. See, e.g., INA §§ 212(a)(9), 8 U.S.C. § 1182(a)(9). However, these provisions only apply after a noncitizen has departed or been removed and then returns to the United States. Thus, they are not applicable where there is an unexecuted final order of removal. See INS Memorandum, “Processing of Section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications” (May 1, 1997) (stating that 8 U.S.C. § 1182(a)(9) “applies only if the alien has departed or been removed from the United States subsequent to issuance of an order”). AILA InfoNet Doc. No. 97050191 (posted May. 1, 1997).

If you run into a problem with a local USCIS office refusing to decide an adjustment application of an arriving alien parolee because of an unexecuted final order, or denying an application solely because of the existence of a final order, please contact AILF at mkenney@ailf.org.

**“ARRIVING ALIENS” AND ADJUSTMENT OF STATUS:
WHAT IS THE IMPACT OF THE GOVERNMENT’S
INTERIM RULE OF MAY 12, 2006?**

By Mary Kenney

**Practice Advisory¹
Updated November 5, 2008**

This practice advisory is one of three which discuss interim regulations that give USCIS jurisdiction over the adjustment application of an “arriving alien” parolee who is in removal proceedings.² These regulations were adopted jointly by the Executive Office of Immigration Review (EOIR) and the U.S. Citizenship and Immigration Services (USCIS). 71 Fed. Reg. 27585 (May 12, 2006). Significantly, with the issuance of these interim regulations, EOIR and USCIS also repealed former 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). *See* 71 Fed. Reg. 27585 (2006). These two former regulations barred all “arriving aliens” – including parolees – from adjusting to permanent resident status if they were in removal proceedings.

The repeal of this former regulatory bar provides an opportunity for parolees in proceedings who are otherwise eligible for adjustment to apply for this benefit. This practice advisory will provide a brief history leading up to the interim regulation, will define key terms and will discuss the impact of the interim regulation and suggest steps that a parolee can take to benefit from the interim rule.

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² The other two practice advisories are: “USCIS Adjustment of Status of ‘Arriving Aliens’ With An Unexecuted Final Order of Removal” and “Adjustment of Status of ‘Arriving Aliens’ Under the Interim Regulations: Challenging the BIA’s Denial of a Motion to Reopen, Remand or Continue a Case.” *See* http://www.aifl.org/lac/lac_pa_index.shtml.

BACKGROUND

What is the background behind the interim regulation?

Prior to passage of IIRIRA in 1996, there were two major types of proceedings to expel a non-citizen from the United States: exclusion proceedings, which were brought against individuals who had never made an entry into the United States; and deportation proceedings, brought against individuals who had entered the United States. Under this former model, “arriving aliens” were subject to exclusion proceedings. A non-citizen in exclusion proceedings was not barred from applying for adjustment of status. Generally, however, only the former INS had jurisdiction over the adjustment applications of individuals in exclusion proceedings; with one limited exception, immigration judges did not have jurisdiction over these applications. *Matter of Castro*, 21 I&N Dec. 379 (BIA 1996). Moreover, an individual remained eligible to adjust even when there was a final order of exclusion against him. See *Matter of C—H—*, 9 I&N Dec. 265 (INS 1961).

With the passage of IIRIRA, Congress did away with exclusion and deportation proceedings and instead created removal proceedings. In 1997, the former INS adopted a regulation that barred all “arriving aliens” who were in removal proceedings from adjusting status. See former 8 C.F.R. § 245.1(c)(8); § 1245(c)(8).³ At the same time, INS also for the first time adopted a regulation defining the term “arriving alien.” After the adoption of this regulation, “arriving aliens” who were in removal proceedings were prohibited from applying for adjustment of status on any basis and in any forum – that is, before either an immigration judge or the immigration service. The regulation defining an arriving alien is broad and includes the majority of individuals paroled into the United States. As a result, under former 8 C.F.R. § 245.1(c)(8) and § 1245.1(c)(8), almost all parolees in removal proceedings were barred from adjustment of status.

These former regulations were challenged in litigation throughout the country. Four federal courts of appeals struck down the regulations after finding that they violated the adjustment of status statute, while two other courts upheld the regulations.⁴ The interim rule was specifically adopted in response to this litigation. See 71 Fed. Reg. 27587.

What is an “arriving alien” and does the interim rule change this definition?

³ 8 C.F.R. § 245.1(c)(8) applied to cases before INS (subsequently USCIS), while § 1245.1(c)(8) applied to cases before immigration judges.

⁴ The courts that struck down the regulations were: *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir. 2006) (*Scheerer I*); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). The courts that upheld the regulations were: *Momin v. Gonzales*, 447 F.3d 447 (5th Cir.), *vacated and remanded*, 2006 U.S. App. LEXIS 21923 (5th Cir. Aug. 25, 2006) and *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir.), *vacated and remanded*, 126 S. Ct. 2964 (2006). AILF appeared as *amicus curiae* or otherwise assisted with the briefing in each of these cases. See http://www.aifl.org/lac/lac_lit.shtml.

The INA, the regulations, and case law have long used the term “arriving alien.” In 1997, for the first time, the INS defined this term in a regulation promulgated to implement IIRIRA. See 62 Fed. Reg. 444 (Jan. 3, 1997). The relevant portion of the current regulatory definition, as amended by the May 12, 2006 interim rule, is:

The term *arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after such parole is terminated or revoked.

8 C.F.R. § 1.1(q).

Under this definition, an arriving alien is either someone who attempted an entry at a port-of-entry but was not admitted or someone who is interdicted at sea. Parolees fall within this definition because parole into the United States at a port of entry is not an admission. 8 U.S.C. §§ 101(a)(13)(B) and 1101(a)(13)(B). Consequently, a noncitizen who entered without inspection is *not* an arriving alien. Similarly, a noncitizen who was previously admitted after inspection is not an arriving alien, even if that person subsequently falls out of status.

Can I challenge DHS’ characterization of my client as an “arriving alien”?

Yes. In any case in which DHS alleges that an immigration judge does not have jurisdiction over an adjustment application because the noncitizen is an arriving alien, you may contest whether your client meets the definition of an arriving alien. If the individual is not an arriving alien, then the immigration judge would have jurisdiction over any adjustment application that your client might file while in removal proceedings. See 8 C.F.R. § 1245.2(a)(1)(i) (May 12, 2006). So long as your client satisfies the requirements for adjustment of status, she would be eligible to adjust before the immigration judge.

Generally, an ICE officer will check a box at the top of the Notice To Appear (NTA) indicating the allegation that the person is an arriving alien. This box is separate from the “charges” portion of the NTA. If you decide to challenge the “arriving alien” allegation, it may be advisable to do so explicitly and independently of any denial of the charges that you may be making. In some cases, the “arriving alien” issue may not arise until well after the Master Calendar hearing. In a case in which the client and/or practitioner already admitted to the allegation of “arriving alien,” you can move to withdraw this admission if it later becomes clear that the individual does not fit within the definition of an arriving alien.

THE MAY 12, 2006 INTERIM RULE

What does the interim rule consist of?

The interim rule consists of two parts. First, it includes changes to the regulations that are effective immediately. These changes are discussed in this advisory. Second, the rule suggests additional proposed changes to the regulations that may be made in the future. Without exception, the suggested future changes would limit the favorable exercise of discretion in the adjustment applications and removal proceedings of “arriving aliens” covered by the rule. The rule sought public comment on the suggested changes by June 12, 2006.⁵ Because the suggested changes are suggestions only – and have not been, and may never be, adopted – they are not discussed here.

What does the interim rule do?

The interim rule makes the following changes to the regulations:

- f* The interim rule repeals former 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). These former regulations barred an “arriving alien,” including a parolee, who was in removal proceedings from being eligible to file an adjustment of status application before either an immigration judge or USCIS. Several courts found that the majority of parolees were in removal proceedings and that these regulations thus barred most parolees from being able to adjust in proceedings. The courts found that this result violated the adjustment statute, which specifically states that parolees are eligible to adjust status. 8 U.S.C. § 1255(a); *Bona*, 425 F.3d at 669-670 (*quoting Succar*, 394 F.3d at 27); *Scheerer I*, 445 F.3d at 1321-22; *Zheng*, 422 F.3d at 118.

USCIS and EOIR repealed these regulations to resolve the split in the courts over the validity of the regulations. USCIS and EOIR explained that they decided to repeal the regulations because “having rules that apply nationwide is preferable to continuing to litigate the validity of the [regulations].” 71 Fed. Reg. 27587.

- f* The interim rule generally gives USCIS jurisdiction over the adjustment of status applications of parolees in removal proceedings. 8 C.F.R. § 245.2(a)(1), § 1245.2(a)(1)(ii). Thus, the fact that a parolee is in removal proceedings is no longer a bar to his or her filing an application for adjustment of status with USCIS. USCIS should also retain jurisdiction over an adjustment application of an “arriving alien” even when there is a final order of removal. *See Matter of C—H—*, 9 I&N Dec. 265 (INS 1961) (“Exclusion order does not bar eligibility [for adjustment] when alien has been inspected and paroled”); USCIS Memorandum, “Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment

⁵ AILF and AILA submitted comments strongly opposing the suggested future changes to the regulations. See http://www.aifl.org/lac/lit_issue_pages.shtml.

of Status and Jurisdiction to Adjudicate applications for Adjustment of Status” (Jan. 12, 2007), <http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf>.

- f The interim rule provides one exception for immigration judge jurisdiction, allowing such jurisdiction over adjustment applications of certain “arriving aliens” who have been granted advance parole. 8 C.F.R. § 1245.2(a)(1)(ii).

What is the effective date of the interim rule and how long will it remain effective?

The interim rule was effective on May 12, 2006, the date that it was published. The interim rule will continue in effect until a final regulation is published, at which time the final regulation will take effect. There is no way to predict when a final regulation will be published or what, if any, changes will be included in a final regulation.

How is jurisdiction over the adjustment applications of arriving aliens divided between USCIS and immigration judges under the interim regulations?

The interim regulation states that USCIS has jurisdiction to adjudicate an adjustment application of any alien “unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1).” 8 C.F.R. § 245.2(a)(1). Thus, USCIS has jurisdiction over *all* adjustment applications except those over which an immigration judge has jurisdiction.

The interim regulation also states that an immigration judge does not have jurisdiction over an adjustment application of an arriving alien placed in removal proceedings with one exception, discussed below. 8 C.F.R. § 1245.2(a)(1)(ii).

Under the interim regulations, when does USCIS have jurisdiction over an adjustment application of an “arriving alien” in removal proceedings?

USCIS now has jurisdiction over the adjustment applications of “arriving aliens,” including parolees, who are in removal proceedings. 8 C.F.R. § 245.2(a)(1).⁶ The fact that the individual is in removal proceedings is no longer a bar to the jurisdiction of USCIS over the adjustment application.

Similarly, an unexecuted final order of removal should not be a bar to USCIS’ ability to adjudicate an adjustment application.⁷ The interim regulations are modeled after the

⁶ The agency has always had jurisdiction over the adjustment application of an arriving alien who has *not* been placed in proceedings.

⁷ The one exception may be an in absentia removal order issued less than ten years prior to the adjustment application, because such an order – if issued with proper notice – carries a ten year bar to adjustment. 8 U.S.C. § 1229a(b)(7). For more on the issue, see AILF’s practice advisory “USCIS Adjustment of Status of ‘Arriving Aliens’ With An Unexecuted Final Order of Removal,” http://www.ailf.org/lac/lac_pa_index.shtml.

system as it existed prior to IIRIRA when exclusion and deportation proceedings were distinct. At that time, there was no bar to an individual in exclusion proceedings (the equivalent of an “arriving alien” in removal proceedings now) adjusting before USCIS. Although the immigration judge did not have jurisdiction over an adjustment application of someone in exclusion proceedings, USCIS retained jurisdiction over such an application notwithstanding the exclusion proceedings. Moreover, USCIS continued to have jurisdiction even after a final order of exclusion was issued, at least as long as the individual remained in the United States. *See, e.g., See Matter of C—H—*, 9 I&N Dec. 265 (INS 1961) (“Exclusion order does not bar eligibility [for adjustment] when alien has been inspected and paroled”]; *see also Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978) (legacy INS had a policy of “refraining from either deporting or instituting proceedings against the beneficiary of a prima facie approvable visa petition if approval of the visa petition would make the beneficiary immediately eligible for adjustment of status”).

The interim regulations also do not place any limits on the exercise of discretion over the adjustment application by USCIS decision-makers. While the rule *suggests* possible future limits on the exercise of USCIS discretion over these adjustment applications, the agency did not adopt any of these limits in the interim regulations. Thus, unless and until final regulations are issued that contain restrictions, USCIS decision-makers must apply the same standards to these adjustment applications as they would to any other adjustment application. The standards to be applied are those that have been developed by Board and federal court case law. *See* 71 Fed. Reg. at 27590.

When does an immigration judge have jurisdiction over the adjustment application of an “arriving alien” in removal proceedings?

In general, the interim regulations do not give an immigration judge or the BIA jurisdiction over an adjustment application of an “arriving alien.” 8 C.F.R. § 1245.2(a)(1)(ii). Thus, with one exception discussed below, an immigration judge generally will not be able to decide an adjustment application of a parolee in proceedings. However, an immigration judge or the BIA can continue or reopen a removal case so that a parolee can file an adjustment application with USCIS. With this relief, the parolee can protect against actual removal before USCIS has time to decide the adjustment application. The regulations do not limit the exercise of discretion by immigration judges or the BIA over requests for continuances or motions to reopen, but instead indicate that immigration judges and the BIA must apply the same standards to these requests as they would to similar requests under the standards developed by BIA and federal court case law. *See* 71 Fed. Reg. at 27590.⁸

⁸ For more on this issue, *see* AILF’s practice advisory “Adjustment of Status of ‘Arriving Aliens’ Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case,” http://www.ailf.org/lac/lac_pa_index.shtml; *see also Ceta v. Mukasey*, 535 F.3d 639 (7th Cir. 2008) (adopting these arguments); *Kalilu v. Mukasey*, 516 F.3d 777 (9th Cir. 2008) (same); *Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008) (same); *but see Scheerer v. U.S. Attorney*

The interim regulations, at 8 C.F.R. § 1245.2(a)(1)(ii), provide an exception allowing an immigration judge to exercise jurisdiction over the adjustment applications of an “arriving alien” in removal proceedings if:

- f* the individual properly filed an adjustment application with USCIS while in the U.S.;
- f* the individual departed from and returned to the U.S. pursuant to a grant of advance parole to pursue the previously filed adjustment application;
- f* the application for adjustment of status was denied by USCIS; and
- f* DHS placed the parolee in proceedings either upon the individual’s return to the U.S. pursuant to the advance parole or after USCIS denied the adjustment application.⁹

What steps can a practitioner take on behalf of a parolee in proceedings who seeks to adjust?

The following are suggested steps to take to assist your parolee client who is in proceedings with an adjustment application. These suggestions are based on reports that we have heard to date about how the regulation is being implemented as well as the one guidance memo issued to date by USCIS. See “Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status” (Jan. 12, 2007), <http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf>.

In all cases, adjustment-eligible parolees should apply for adjustment with USCIS. No matter the stage of the removal proceeding (e.g., whether before the immigration judge, the Board, or on appeal at federal court) a client eligible to file an adjustment application can do so with USCIS. USCIS has not indicated that there will be different filing procedures for parolees in removal proceedings who are applying for adjustment under this interim rule. Thus, unless USCIS instructs differently, we suggest that you follow the instructions on the Form I-485 as to where to file. This will vary depending on the type of adjustment application being filed. Remember, however, that the interim regulations impact only a parolee’s opportunity to apply for adjustment and agency jurisdiction over these applications. These regulations do not change the eligibility requirements for adjustment, which an “arriving alien” parolee still must meet in order to have an adjustment application granted.

General, 513 F.3d 1244 (11th Cir.), *cert. denied*, No. 07-1555 (2008) (*Scheerer II*) (rejecting these arguments).

⁹ This exception is arguably broader than that contained in the former regulations. The former version of 8 C.F.R. § 1245.2(a)(1) stated that an advance parolee could “renew” an adjustment application before an immigration judge after it had been denied by USCIS if the parolee met the exception. There is an argument that, because the interim regulation deleted the word “renew,” it is broader than the former regulations.

Perhaps the second most beneficial step that you can take on behalf of your client is to try and stay the removal proceedings so that your client is not actually removed prior to USCIS having an opportunity to adjudicate the adjustment application. Forestalling the entry of a final order, and certainly delaying execution of any final order that may be entered, can only increase your client's chances of succeeding with the adjustment application before USCIS. The following is a partial list of steps that can be taken to achieve the time necessary for USCIS to adjudicate the adjustment application.

- f* **If your client's case is on appeal at the federal court level:** In one circuit, attorneys were successful in getting cases put on a "suspended" docket pending issuance of the final regulations. In the interim, these attorneys filed adjustment applications for their clients with USCIS. If there are no other issues in the case, you also could try moving for a remand while your client applies for adjustment before USCIS. If you do this, be as specific as possible in the remand request with respect to what you are seeking. In addition to the remand, the relief you might seek could include a request for the case to be remanded to an immigration judge, where you could seek an administrative stay, an adjournment, a continuance or that the case otherwise be held in abeyance while the parolee's adjustment application is being adjudicated by USCIS. You could also seek to have the government agree to a stay of removal while the parolee's adjustment application is adjudicated.
- f* **If your client's case is on appeal at the Board:** You can move for a remand to an immigration judge where you could seek a continuance or that the case otherwise be held in abeyance while the parolee's adjustment application is being adjudicated by USCIS. In the alternative, you can ask the Board to continue the case pending USCIS' adjudication. See AILF's practice advisory "Adjustment of Status of 'Arriving Aliens' Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case," http://www.ailf.org/lac/lac_pa_index.shtml
- f* **If your client's case is before an immigration judge:** You can seek a continuance of the removal proceedings while the adjustment application is adjudicated by USCIS.
- f* **If there is a administratively final order of removal:** If within the regulatory timeframes for reopening you could ask the BIA or the immigration judge (whoever last heard the case) to reopen the removal proceedings. You could also ask the government to stay removal while the parolee's adjustment application is adjudicated by USCIS.

AILF is interested in hearing of any problems that practitioners may have with either USCIS or EOIR in getting adjustment applications adjudicated for parolees under the interim rule. If you run into problems, please contact Mary Kenney at mkenney@ailf.org.

What remedy is there if USCIS denies the adjustment application?

The statute and regulations do not provide for an administrative appeal of a denial of an adjustment application by USCIS. Moreover, with the limited exception of certain advance parolees, under the new interim regulation an immigration judge does not have jurisdiction over the adjustment application of a parolee in removal proceedings. If an adjustment application can not be filed with the immigration judge, the denial of adjustment can not be appealed to the BIA and also can not be included as an issue in a Petition for Review of a final order of removal before a court of appeals.

The judicial review that might be available over USCIS's denial of an adjustment application is an action in federal district court under the Administrative Procedures Act. If you have questions about bringing such an action, contact Mary Kenney at mkenney@ailf.org.

PRACTICE ADVISORY¹

“Finality” of Removal Orders for Judicial Review Purposes

By Trina Realmuto²

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The Immigration and Nationality Act (INA) authorizes the courts of appeals to review “final” removal orders. If an order is not final at the time the petitioner filed the petition for review, most court of appeals will dismiss the petition as prematurely filed. However, if the individual foregoes the opportunity to file a petition for review when one should have been filed, later review in the court of appeals may be precluded. This practice advisory addresses whether a removal order issued by the Board of Immigration Appeals (BIA) or by an immigration judge (IJ) is “final” for purposes of obtaining judicial review in the court of appeals.

The advisory first sets forth the statutes and regulations on finality and discusses the Second Circuit’s exception to prematurely filed petitions for review. The advisory then addresses the case law governing the following situations: (1) where the BIA denies relief and also remands the case to the IJ; (2) where the BIA orders the person removed in the first instance; (3) where the petition for review follows an IJ decision, bypassing a second BIA appeal; (4) where the Board orders voluntary departure with an alternative removal order; and (5) miscellaneous situations, including decisions to withhold removal, visa revocation decisions, and decisions denying asylum, withholding or Convention Against Torture (CAT) relief to Visa Waiver entrants in limited removal proceedings.

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I. Statutory Provisions and Regulations Addressing Finality

The general requirement that a removal order is “final” before it may be judicially reviewed is set forth in INA § 242(a)(1). This provision provides that, with the exception of expedited removal orders, “[j]udicial review of a final order of removal” is governed by 28 U.S.C. § 158. This statute, commonly known as the Hobbs Administrative Review Act, vests the courts of appeals with jurisdiction to review final orders of removal.

The “finality” requirement is repeated throughout INA § 242. *See, e.g.* INA §§ 242(a)(2)(C) (barring review of “any final order of removal” against criminal aliens), § 242(b)(1) (providing that a petition for review must be filed within 30 days “after the date of the final order of removal”); 242(b)(3)(A) (requiring service of the petition for review on the Service officer “in charge of the Service district in which the final order of removal” was entered”); 242(b)(9) (mandating consolidation of all questions of law and fact “in judicial review of a final order under this section”); 242(d) (court may review a final order of removal only if person exhausted administrative remedies); 242(f)(2) (limiting court’s ability to “enjoin removal of any alien pursuant to a final order”).

Determining whether a removal order exists is essential to determining whether an order of removal is final. The statutory definition of an “order of deportation” in INA § 101(a)(47) governs this analysis, despite the change in terminology to “order of removal.”³

Section 101(a)(47) of the INA provides:

(A) The term “order of deportation” means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of--

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

³ Congress enacted INA § 101(a)(47) in 1996 in § 440(b) of the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-207, 110 Stat. 3009 (April 24, 1996). A year later, through the enactment of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created “removal” proceedings with resulting removal orders. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). IIRIRA § 309(d)(2) provides that references to orders of removal are deemed to include references to orders of deportation. Accordingly, INA § 101(a)(47) applies to orders of removal.

This statutory provision was enacted in 1996, but the immigration service did not promulgate a regulation implementing it until nine years later. In 2005, DHS promulgated 8 C.F.R. § 1241.1, which states:

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

- (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
- (b) Upon waiver of appeal by the respondent;
- (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;
- (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;
- (e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or
- (f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period except where the respondent has filed a timely appeal with the Board. In such a case, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General. (*But see* Section VI, *infra*, discussing cases invalidating this subsection of the regulation).

8 C.F.R. § 1003.1(d)(7) addresses the finality of a BIA decision. It reads:

The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

In addition, 8 C.F.R. § 1003.39 addresses the finality of an IJ decision. It reads:

Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first.

II. Prematurely Filed Petitions for Review (Filed Before the BIA has Ruled on an Appeal)

Most circuit courts will dismiss a petition for review that is filed after IJ's decision but before the BIA has ruled on an appeal. *See, e.g., Moreira v. Mukasey*, 509 F.3d 709 (5th

Cir. 2007) (no jurisdiction over prematurely filed petition for review and issuance of a BIA decision while petition for review is pending does not cure want of jurisdiction); *Jaber v. Gonzales*, 486 F.3d 223 (6th Cir. 2007) (same); *Brion v. INS*, 51 F. App'x 732, 733 (9th Cir. 2002) (unpublished) (same).

However, the Second Circuit may exercise jurisdiction over a premature petition for review if the BIA affirms the petitioner's removal order while the petition for review is pending and the government has not shown prejudice by the premature filing. *Lewis v. Gonzales*, 481 F.3d 125, 129 (2d Cir. 2007). In *Lewis*, the Board failed to properly serve its decision on petitioner and, thus, he filed a late petition for review. Petitioner also filed a motion with the BIA asking it to reissue its decision. The Board recognized its service error and granted the motion. The Second Circuit exercised jurisdiction over the petition for review, noting that the government failed to demonstrate that it was prejudiced by the premature filing of the petition for review. *See also, Foster v. INS*, 376 F.3d 75, 77 (2d Cir. 2004) (reviewing prematurely filed petition for review by *pro se* petitioner where the BIA later affirmed the removal order and the government failed to demonstrate prejudice).

III. BIA Decisions Denying Relief and Ordering Remand to the IJ

The BIA often (1) affirms the denial of relief or reverses a grant of relief and (2) remands the case back to the IJ for resolution of another matter. For example, the Board might reverse an IJ decision granting cancellation of removal and remand the case to the IJ to determine eligibility for voluntary departure. Is the part of its decision denying cancellation judicially reviewable? Or must the person wait, appeal to the Board again after the IJ adjudicates the voluntary departure application, and then file a petition for review of the Board's second appeal decision?

In this situation, courts have looked to the purpose of the remand. If remand is ancillary to the main issue on appeal, most courts will adjudicate a petition for review without requiring resolution of the issue and a subsequent BIA appeal. If the Board remands for security checks, however, a subsequent BIA appeal may be required. *See discussion below.*

Some circuit courts have held that a BIA decision is final even if the Board remands for voluntary departure. *See, e.g., Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005) *cert denied*, 126 S.Ct. 1330 (2006) (BIA decision was final notwithstanding remand for voluntary proceedings); *Perez-Vargas v. Gonzales*, 478 F.3d 191, n.4 (4th Cir. 2007) (same); *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995) (same); *Moreno v. INS*, 2001 U.S. App. LEXIS 15907 (9th Cir. 2001) (unpublished). *And see, Zahren v. Gonzales*, 487 F.3d 1039, 1040 n.2 (7th Cir. 2007) (treating BIA decision as final where IJ ultimately granted voluntary departure but not deciding "whether an order of removal is 'final' if there remains an unresolved application for voluntary departure)

Circuit courts have said that other types of ancillary remand orders similarly do not impact finality. *See, e.g., De Pilar v. United States*, 326 F.3d 1154 (11th Cir 2003) (per

curiam) (BIA decision was final notwithstanding remand to allow petitioner to designate country of removal); *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994) (BIA decision final notwithstanding remand for IJ order designating country of deportation and adjudication of any application for voluntary departure); *Virachacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008) (BIA decision on asylum/withholding issue final notwithstanding remand for a background check to ensure eligibility for withholding of removal).

If the purpose of the remand might prevent deportation, however, courts are more willing to require the completion of remand proceedings and a second BIA appeal. *Perkovic v. INS*, 33 F.3d 615, 618 (6th Cir. 1994) (defining final order as extending “to any denial of discretionary relief during a deportation proceeding, where such relief, if granted, would foreclose deportation”); *De Pilar v. United States*, 326 F.3d 1154, 1157 (11th Cir. 2003) (per curiam) (BIA’s order is final where all of the issues were presented to the BIA and “the only thing left for the IJ to determine is the country to which [petitioner] will be removed...”).

For example, if the BIA reverses an asylum grant and remands the case for adjudication of an adjustment application, a court likely will not exercise jurisdiction over a petition for review challenging the BIA’s asylum decision. Such premature court review of the asylum decision might waste judicial and attorney resources because a favorable decision on the adjustment application would prevent deportation. *Singh v. Gonzales*, 432 F.3d 533, 537 n.4 (3d Cir. 2006) (requiring both IJ adjudication of withholding and CAT applications on remand and second BIA appeal before BIA’s first decision -- finding petitioner removable as an aggravated felon -- would be final); *Brion v. INS*, 51 F. App’x 732, 733 (9th Cir. 2002) (unpublished) (dismissing petition for review filed before the completion of remand proceedings to allow petitioner to apply for asylum, withholding, and voluntary departure).

If the BIA remands a case for completion of background and security checks, the applicable regulation requires the IJ to consider the results of the investigation. *In re Alcantara-Perez*, 23 I&N Dec. 882, 883 (BIA 2006), summarizing 8 C.F.R. § 1003.47(h). If new information is presented, the IJ may hold a hearing if necessary to consider any legal or factual issues. The IJ “shall then enter an order granting or denying” relief. Whether new information is presented or not, the BIA believes this latter IJ order “becomes the final administrative order in the case.” *Alcantara-Perez*, 23 I&N Dec. at 885. The parties have the right to appeal this IJ decision for the BIA’s review. *Id.* at 884.

Citing the Board’s decision in *In re Alcantara-Perez*, the Third Circuit noted that ordinarily, when the Board remands a case for completion of background and security checks and the results of those checks might impact the petitioner’s eligibility for withholding of removal, the IJ’s decision after remand is the “final” order. *Vakker v. Atty General*, 519 F.3d 143, 147-48 (3d Cir. 2008) *petition for cert. filed* (U.S. June 12, 2008) (No. 08-5). However, in another opinion filed the same day as *Vakker*, another panel of the Third Circuit held that the Board’s order is a final order for judicial review purposes, even though the Board also remanded for completion of background and security checks.

Yusupo v. Attorney General, 518 F.3d 185, 196 (3d Cir. 2008). The court explained that, unlike in *Vakker*, the petitioners in *Yusupov* had been denied withholding of removal but granted deferral of removal. Because a grant of deferral of removal may be withdrawn only if the likelihood of torture changes, the panel reasoned, “[n]othing in their background checks could affect” their eligibility for relief. The BIA order provided a “final adjudication of the substantive rights...” *Yusupov*, 518 F.3d at 196, n.19.

IV. BIA Decisions Ordering Removal in the First Instance

In many cases, the BIA reverses an IJ’s decision to grant a relief application. When the Board also concludes the person is not eligible for any other form of relief, it has ordered removal in the first instance. In this situation, to determine whether the BIA’s order is final, a court will look to whether the IJ previously found the person removable or issued a removal order.

If the IJ found the person removable, the courts have held that the BIA’s order is final for judicial review purposes. The courts reason that (1) the IJ’s finding of removability satisfies the definition of a removal order in INA § 101(a)(47); and (2) the BIA’s order essentially gives effect to the IJ’s previous ruling and/or eliminates the impediment to removal (*i.e.* the grant of relief). *Solano-Chicas v. Gonzales*, 440 F.3d 1050, 1053-53 (8th Cir. 2006); *Delgado-Reynua v. Gonzales*, 450 F.3d 596, 600-01 (5th Cir. 2006); *Lazo v. Gonzales*, 462 F.3d 53, 54-55 (2d Cir. 2006); *Cruz-Camey v. Gonzales*, 504 F.3d 28, 29-30 (1st Cir. 2007); *Lolong v. Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (*en banc*).⁴ See also *Sosa-Valenzuela v. Gonzales*, 483 F.3d 1140, 1145 (10th Cir. 2006). At least one court also noted that remand for entry of a removal order would waste judicial resources. *Solano-Chicas v. Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006).

Notably, at least one court requires the IJ’s removability finding (or removal order) to be explicit. See, *e.g.*, *Sosa-Valenzuela v. Gonzales*, 483 F.3d 1140, 1144-45 (10th Cir. 2006) (no final order because IJ’s implicit removability finding and granting of relief is not a substitute for the explicit removability finding/order of removal required by the INA). At least one other court does not. *Virachacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008) *petition for cert. filed* (U.S. April 28, 2008) (No. 07-1363) (reasoning that “[a]ny order withholding removal supposes that the alien is ‘removable’” and thus finding that the order was final for judicial review purposes) (citations omitted).

If the IJ concluded the person was not removable and terminated proceedings and the BIA reverses the IJ’s decision and orders removal, at least two courts have held that the BIA’s decision is not final. *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 880-81 (9th Cir. 2003); *James v. Gonzales*, 464 F.3d 505, 513-14 (5th Cir. 2006). These courts have held that the Board lacks authority to order removal in the first instance because INA §

⁴ In *Lolong*, the Ninth Circuit vacated its earlier panel decision in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004) (holding that the BIA action of ordering removal in the first instance was *ultra vires* to the statute).

101(a)(47) (definition of removal order) and INA § 240(a)(3) (immigration judge role in removal proceedings) vests this responsibility exclusively with the IJ.

V. Finality of IJ Decisions When Petitioner Bypasses a Second BIA Appeal

Petitioning for review of an IJ decision is generally prohibited. However, a circuit court might exercise jurisdiction over a petition for review of an IJ decision if the IJ decision follows a remand from the BIA and the BIA already fully resolved the issues covered by the petition for review. At least two courts have addressed this scenario. *Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005); *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994).

In *Popal*, the IJ terminated proceedings, finding that Mr. Popal was not removable. The BIA reversed the IJ's decision and remanded the case to permit him to apply for relief before the IJ. In the remanded proceedings, Popal did not apply for relief. Instead, he asked the IJ to issue a "Final Administrative Order" and stated in writing his intention to immediately seek federal court review of the IJ's order. The IJ issued the order. Popal then filed a petition for review of the IJ's decision. The government argued that the IJ's order was not final and that Popal failed to exhaust administrative remedies by not appealing to the BIA.

With respect to finality, the Third Circuit stated: "The government is plainly wrong that an IJ's order can *never* constitute a final order of removal." *Popal*, 416 F.3d at 252 (emphasis in the original). The court relied on the regulation at 8 C.F.R. § 1003.39, which provides that an IJ's decision "becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first." Although Popal filed the petition for review one day before the expiration of time to file a BIA appeal, the court found that he gave sufficient notice of his intention to file a petition for review of the IJ's decision.

With respect to exhaustion, the *Popal* Court found that a second BIA appeal essentially would be frivolous and not serve judicial economy, reasoning that the BIA already fully considered Popal's claim that he was not removable based on his criminal conviction. Thus, the court held that exhaustion was not required in this particular case.

Recently, and without explanation, the Third Circuit classified its holding in *Popal* as "concern[ing] exhaustion rather than what constitutes a 'final order,' ..." *Vakker v. Atty General of the US*, 519 F.3d 143, 148 (3d Cir. 2008) *petition for cert. filed* (U.S. June 12, 2008) (No. 08-5). In *Vakker*, the court rejected the government's reliance on *Popal* for the proposition that there were multiple final orders in that case. It is unclear what impact, if any, the *Vakker* court's comment may have on the viability of the *Popal* decision.

Similarly, in *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994), the BIA reversed an asylum grant and remanded the case. The IJ designated a country of deportation and granted voluntary departure. Perkovic then filed a petition for review following the IJ's decision without filing a second BIA appeal. The Sixth Circuit accepted the order as final and rejected the government's contention that petitioner was required to file a second BIA

appeal to exhaust administrative remedies. The court concluded the BIA definitively had reviewed and resolved the merits of the asylum claims and, therefore, the exhaustion requirement was satisfied.

These cases would support an argument that a second (or third or fourth) BIA appeal was not required if the BIA had already fully considered an issue and the person had no other relief available.⁵ If a person is detained, bypassing a second BIA appeal may limit the time in detention. To fit squarely within the rationale of *Popal*, however, a person may wish to give notice of their intention to file a petition for review of the IJ's decision. In addition, to fit within 8 C.F.R. § 1003.39 (IJ's decision becomes final upon the waiver of BIA appeal or upon expiration of appeal period), one must forego the right to appeal to the BIA.

In circuits other than the Third and Sixth, the person would need to decide whether to risk foregoing the appeal without knowing for certain how the court of appeals will rule on the finality and exhaustion issues.

VI. BIA Decisions Granting Voluntary Departure with an Alternative Removal Order

The Supreme Court has held that a BIA order granting voluntary departure, and ordering removal in the alternative should the applicant overstay the grant of voluntary departure, is a final order of removal subject to judicial review. *Foti v. INS*, 375 U.S. 217, 220 n.1 (1963). A 2005 regulation promulgated by DHS conflicts with this principle and, consequently, has been struck down by at least two circuit courts.

Under subsection (f) of 8 C.F.R. § 1241.1, a BIA decision denying long-term relief but granting voluntary departure and providing for an alternative removal order is not final unless and until the person overstays the voluntary departure period. Finding that this regulation is inconsistent with both the INA and common practice, the Third and Second Circuits have declined to enforce it. *Obale v. AG*, 453 F.3d 151, 157-58 (3d Cir. 2006); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006).

In *Obale*, an IJ found petitioner removable but granted voluntary departure. The BIA affirmed the IJ's decision and granted 30 days of voluntary departure. The court held that it had jurisdiction to grant a stay of the voluntary departure period pending judicial review provided that the BIA's grant of voluntary departure was part of the "final order" that the court was reviewing. The Third Circuit concluded that 8 C.F.R. § 1241.1(f) was inconsistent with Congress' intent to permit judicial review if the person has departed the country. The court also found it inconsistent with the common practice of the BIA and of courts of appeals to review claims when a person departs within the voluntary departure

⁵ If relief were available, most courts, including the Third Circuit, would not consider the order final. See, e.g., *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006) (order affirming removability for an aggravated felony was not final where BIA remanded to permit petitioner to pursue withholding and CAT relief). See also, § III, *supra*.

period. Thus, the court held that petitioner's removal order became final on the date the BIA dismissed it, not upon overstay of the voluntary departure period granted by the BIA.⁶

The Second Circuit's subsequent decision in *Thapa* relies on the *Obale* Court's analysis. In *Thapa*, the BIA had granted a 60-day voluntary departure period. The Second Circuit raised the legality of the regulation *sua sponte*. In addition to citing *Obale* with approval, the court also reasoned that 8 C.F.R. § 1241.1(f) "seems to conflict with Congress's intent in the IIRIRA to allow aliens to pursue petitions for review from abroad: If an alien complied with an order of voluntary departure and left the country within the allotted time, no final order of removal would ever come into existence under the new regulation, and thus the alien would be prohibited from appealing." *Thapa*, 460 F.3d at 334.

VII. Miscellaneous Cases

Decision to withhold removal. In *Virachacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008) *petition for cert. filed* (U.S. April 28, 2008) (No. 07-1363), the Seventh Circuit held that an order withholding removal is a final order because it "supposes that the alien is 'removable.'"

BIA decision affirming District Director decision to revoke visa. In *Hamilton v. Gonzales*, 485 F.3d 564 (10th Cir. 2007), the Tenth Circuit held that it lacked jurisdiction to review a BIA decision affirming a visa revocation by a District Director. The court reasoned that the BIA's decision was not a final order reviewable as defined by INA § 101(a)(47) due to the absence of IJ involvement.

BIA orders denying asylum, withholding or CAT relief to Visa Waiver entrants in limited removal proceedings. Persons who enter the United States without a visa pursuant to the Visa Waiver Program are not entitled to a full removal proceeding. However, they are entitled to apply for asylum, withholding and CAT relief before an immigration judge and to appeal any denial to the BIA. Reasoning that BIA decisions affirming the IJ denial of asylum, withholding and/or CAT relief in visa waiver proceedings is the functional equivalent of a final removal order, all courts to consider the issue have found that such orders are final for judicial review purposes. *See, e.g., Kanacevic v. INS*, 448 F.3d 129, 134-35 (2d Cir. 2006); *Nreka v. United States Attorney General*, 408 F.3d 1361, 1367 (11th Cir. 2005); *Shehu v. AG of the United States*, 482 F.3d 652, 656-57 (3d Cir. 2007); *Mitondo v. Mukasey*, 523 F.3d 784, 787 (7th Cir. 2008); *Ferry v. Gonzales*, 457 F.3d 1117, 1126 (10th Cir. 2006). *Accord Zine v. Mukasey*, 517 F.3d 535 (8th Cir. 2008) (implicitly accepting BIA decision as final and reviewing merits claims).

⁶ The *Obale* Court further noted: "§ 1241.1 may have been intended solely to specify when an order of removal may be executed, as opposed to when an order of removal is final for purposes of review. Indeed, this may explain the Government's failure to mention the regulation in its briefing." *Obale*, 453 F.3d at 160 n.9.



PRACTICE ADVISORY

ARREST, DETENTION AND BOND PROCEDURES FOR NON-CITIZENS WITHOUT CRIMINAL CONVICTIONS¹

Updated July 2008²

Immigration agents – most often agents of the Immigration and Customs Enforcement (ICE) within the Department of Homeland Security – arrest and detain on immigration charges many non-citizens who do not have criminal convictions. This practice advisory focuses on the law governing the arrest, detention and bond procedures for non-citizens who 1) are present in the United States and 2) do not have criminal convictions.³

Q. Who can arrest non-citizens for suspected immigration violations?

A: A wide range of immigration officials have the power to arrest and detain non-citizens.⁴ Immigration officials can arrest a non-citizen without a warrant if they have "reason to believe that the alien ... is in the United States in violation of any

¹ Copyright (c) 2002, 2010 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This advisory is intended for lawyers and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. The cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits.

² The Legal Action Center gratefully acknowledges law clerk Katrin Hussmann for her research and thoughtful contributions to the advisory's update.

³ For helpful materials on detention and bond procedures for non-citizens with criminal convictions and for "arriving" non-citizens, please see "other resources on detention and bond procedures" at the end of this practice advisory.

⁴ 8 C.F.R. § 287.5(c) (2008).

[immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest."⁵

Q. What happens after a non-citizen is arrested on a suspected immigration law violation?

A: Upon arrest for an alleged immigration law violation, a non-citizen should be examined "without unnecessary delay" by an immigration officer on his or her right to enter or remain in the United States.⁶ The officer examining the individual after arrest should not be the arresting officer unless another qualifying officer is not available and taking the person before another officer will cause unnecessary delay.⁷ If the examining officer finds *prima facie* evidence that the person arrested has violated the immigration laws, then the officer will place the non-citizen in removal proceedings or institute expedited removal, if applicable.⁸

If ICE initiates removal proceedings, it should notify the non-citizen of the reasons for his or her arrest.⁹ The examining officer also should inform the non-citizen of the right to counsel at no expense to the government and provide a list of free legal service providers.¹⁰ The officer also should warn the person that any statement made "may be used against him or her in a subsequent proceeding."¹¹

ICE may hold a non-citizen arrested without a warrant for 48 hours, or longer "in the event of emergency or other extraordinary circumstance."¹² On or before the conclusion of this period, ICE must determine whether the individual will continue to be detained or released on bond or on his or her own recognizance.¹³ It also must decide whether to issue a Notice to Appear (NTA) and an arrest warrant.¹⁴

Q: When are non-citizens entitled to be released?

A: The Immigration and Nationality Act (INA) provides for the release of non-citizens arrested for immigration violations on bond or on their own recognizance except for those subject to mandatory detention due to criminal or terrorist grounds specified in INA § 236(c)(1), 8 U.S.C. § 1226(c).¹⁵ The Attorney General may release non-citizens on a

⁵ INA § 287(a)(2), 8 U.S.C. § 1357(a)(2).

⁶ *Id.*

⁷ 8 C.F.R. § 287.3(a).

⁸ 8 C.F.R. § 287.3(b).

⁹ 8 C.F.R. § 287.3(c).

¹⁰ 8 C.F.R. § 287.3(c).

¹¹ *Id.*

¹² 8 C.F.R. § 287.3(d).

¹³ *Id.*

¹⁴ *Id.* The only exception is when ICE grants voluntary departure pursuant to subpart C of 8 C.F.R. part 240.

¹⁵ INA § 236(a)(2), 8 U.S.C. § 1226(a)(2).

minimum bond of \$1,500 or may grant conditional parole.¹⁶ However, bond or parole may be revoked at any time.¹⁷

Q: How does ICE determine who should be released and under what conditions?

A: The local ICE office makes the initial custody and bond determination.¹⁸ As long as the non-citizen is not subject to mandatory detention due to criminal or terrorist grounds specified in INA § 236(c)(1), 8 U.S.C. § 1226(c)(1), the arrested individual may be released on bond or on his or her own recognizance.¹⁹

In order to be released, a non-citizen "must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."²⁰ The factors commonly considered in making the determination to release and/or set bond include:²¹

- 1) Local family ties;
- 2) Prior arrests, convictions, appearances at hearings;
- 3) Membership in community organization;
- 4) Manner of entry and length of time in the United States;
- 5) Immoral acts or participation in subversive activities;
- 6) Financial ability to post bond.

Q: Can a non-citizen challenge the ICE's custody/bond determination?

A: Yes. Subject to significant exceptions discussed in the next question and answer, after the initial custody and/or bond determination by ICE, the non-citizen may apply for bond redetermination by an Immigration Judge (IJ)²² at any time until a removal order becomes final.²³ A request for custody and/or bond redetermination may be made orally, in writing, or by telephone, if the IJ permits in his or her discretion.²⁴ If the non-citizen is

¹⁶ *Id.*

¹⁷ INA § 236(b), 8 U.S.C. § 1226(b).

¹⁸ 8 C.F.R. § 236.1(d), § 1236.1(d).

¹⁹ 8 C.F.R. § 236.1(c)(8), § 1236.1(c)(8).

²⁰ *Id.*

²¹ See, e.g., *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

²² 8 C.F.R. § 1003.19(a), § 236.1(d), § 1236.1(d).

²³ 8 C.F.R. § 236.1(d)(1), § 1236.1(d)(1). A removal order is final when the Board of Immigration Appeals (BIA or Board) "renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired." *Matter of Lok*, 18 I&N Dec. 101, 105 (BIA 1981). See also 8 C.F.R. § 241.1, § 1241.1; INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B).

²⁴ 8 C.F.R. § 1003.19(b). After an initial bond redetermination, however, a subsequent redetermination can only be made in writing and upon a showing that "circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e).

detained, the request for custody and/or bond redetermination should be made to the Immigration Court that has jurisdiction over the place of detention.²⁵ If the non-citizen is not detained, the request should be made to the Immigration Court that has administrative control over the case or, if no court has been designated, to the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.²⁶

Q: Over what people does an IJ not have authority to review ICE's custody and/or bond decision?

The regulations prohibit an IJ from reviewing ICE's custody and/or bond determination of the following people:²⁷

- 1) Those considered to be "arriving aliens" under 8 C.F.R. § 1.1(q);²⁸
- 2) Those "described in" the terrorism and security related ground of deportability, INA § 237(a)(4), 8 U.S.C. § 1227(a)(4);
- 3) Those subject to mandatory detention under INA § 236(c)(1), 8 U.S.C. § 1226(c)(1);²⁹
- 4) Those in exclusion proceedings;
- 5) Those with final administrative orders of removal under INA § 242(a)(2), 8 U.S.C. § 1252(a)(2).

Even though an IJ does not have jurisdiction to redetermine custody and/or bond for the above groups, the IJ does have jurisdiction to review whether ICE correctly determined that a non-citizen does in fact belong to one of these groups.³⁰

Q: What if a non-citizen has been released from ICE custody but wants to challenge the conditions of release?

A: A non-citizen who has been released from detention but is seeking to lower the bond or otherwise ease the conditions of his or her release, may file a request to ameliorate the terms of release with the Immigration Court within seven days of release.³¹ Even if the

²⁵ 8 C.F.R. § 1003.19(c)(1).

²⁶ 8 C.F.R. § 1003.19(c)(2), (3).

²⁷ 8 C.F.R. § 236.1(c)(11), § 1236.1(c)(11); 8 C.F.R. § 1003.19(h)(2).

²⁸ Note that under 8 C.F.R. § 1.1(q), non-citizens who entered without inspection are *not* "arriving aliens." 8 C.F.R. § 1240.8(b) and (c) also distinguishes "arriving aliens" from "[a]liens present in the United States without being admitted or paroled."

²⁹ Non-citizens have succeeded in challenging their detention under § 236(c), 8 U.S.C. § 1226(c) by arguing that their case does not fall within the statutorily prescribed limits for mandatory detention. *See, e.g., Waffi v. Loisele*, 527 F. Supp. 2d 480 (E.D. Va. 2007); *Matter of West*, 22 I&N Dec. 1405 (BIA 2000). While the provision generally has been found constitutional, *Demore v. Kim*, 538 U.S. 510 (2003), its application in specific circumstances may be unconstitutional. *See, e.g., Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003); *Gonzalez v. O'Connell*, 355 F.3d 1010, 1019-21 (7th Cir. 2004).

³⁰ 8 C.F.R. § 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

³¹ 8 C.F.R. § 236.1(d)(1), § 1236.1(d)(1).

seven day period has expired, however, the non-citizen may nonetheless ask ICE to reconsider the conditions of release.³² If ICE refuses to reconsider, the non-citizen may appeal ICE's decision directly to the BIA within 10 days of ICE's decision.³³

Q: Can a non-citizen work with authorization after release from immigration custody?

A: A non-citizen who is a lawful permanent resident (LPR) is work-authorized incident to status, even if he or she is released from custody and is in removal proceedings.³⁴ A non-citizen who is a non-LPR also may be authorized to work.³⁵

Q: Can a non-citizen request the Immigration Court to redetermine custody and/or bond even though ICE has not filed a Notice to Appear with the Immigration Court?

A: Yes. An IJ can conduct a bond hearing even if ICE has not filed a Notice to Appear (NTA) with the Immigration Court.³⁶ This is important because ICE may delay issuing the NTA, or may issue the NTA but then delay filing it with the Immigration Court.

Q: How do bond proceedings differ from removal proceedings?

A: Bond proceedings are separate from, and not a part of, removal proceedings.³⁷ Unlike removal proceedings, bond hearings are not usually recorded by the IJ. Also, the IJ can conduct a bond hearing even if ICE did not file a charging document.³⁸ In a bond hearing, the non-citizen has the burden of proof and must show that she or he does not present a danger to persons or property, is not a threat to national security, and does not pose a risk of flight.³⁹ Furthermore, the IJ may consider "any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service."⁴⁰ While the IJ may explain the reasons for his or her decision orally, the written decision often is cursory. For these reasons, notes of the bond hearing will be helpful later if there is an appeal of the IJ's decision to the BIA.

Q: Can a non-citizen appeal an IJ's custody and/or bond redetermination?

³² 8 C.F.R. § 236.1(d)(2), § 1236.1(d)(2).

³³ 8 C.F.R. § 236.1(d)(3)(ii), § 1236.1(d)(3)(ii).

³⁴ INA § 236(a)(3), 8 U.S.C. § 1226(a)(3).

³⁵ For example, see, 8 C.F.R. § 208.7, § 245.13(j), § 245.15(n), § 241.5(c).

³⁶ 8 C.F.R. § 1003.14(a).

³⁷ 8 C.F.R. § 1003.19(d).

³⁸ 8 C.F.R. § 1003.14(a).

³⁹ *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

⁴⁰ 8 C.F.R. § 1003.19(d).

A: Either the non-citizen or ICE may appeal the IJ's custody and/or bond determination to the BIA within 30 days of the IJ's decision.⁴¹

Q: If an IJ orders the release of a non-citizen or lowers the bond required for release, can ICE stay that order during an appeal to the BIA?

A: An IJ's order authorizing release may be automatically stayed in any case where ICE had originally:

- 1) determined that the non-citizen should not be released; or
- 2) set a bond of \$10,000 or more⁴²

In order for the automatic stay to kick in, however, ICE must file an EOIR-43 Notice of Service Intent to Appeal Custody Determination within *one business day* of the IJ's order.⁴³ Moreover, the automatic stay ends if ICE does not file a notice of appeal within *ten business days* of the IJ's order.⁴⁴ Several courts have found the automatic stay provision unconstitutional as applied in the cases before them.⁴⁵

Even if the IJ's order is not automatically stayed, the BIA may stay the IJ's order pending the outcome of ICE's appeal, if ICE requests the Board to stay the IJ's order when ICE appeals.⁴⁶ ICE can request an emergency stay from the Board at any time.⁴⁷

Q: Can a non-citizen ask for more than one custody and/or bond redetermination?

A: Once the IJ has rendered an initial custody and/or bond redetermination, a subsequent request for bond redetermination will only be considered if the non-citizen's "circumstances have changed materially since the prior bond determination."⁴⁸ Successive requests for custody and/or bond redeterminations must be submitted in writing.⁴⁹

⁴¹ 8 C.F.R. § 236.1(d)(3)(i), § 1003.19(f). *See also* 8 C.F.R. § 1003.38.

⁴² 8 C.F.R. § 1003.19(i)(2).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See, e.g., Ashley v. Ridge*, 288 F.Supp.2d 662 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F.Supp.2d 842, 847 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F.Supp.2d 446, 449-450 (D. Conn. 2003); *Zavala v. Ridge*, 310 F. Supp.2d 1071 (N.D. Cal. 2004) (holding that the regulation violated substantive due process, procedural due process as applied in the particular case, and was ultra vires). *But see Pisciotto v. Ashcroft*, 311 F.Supp.2d 445, 453-56 (D.N.J. 2004) (upholding the automatic stay provision as constitutional under *Demore v. Kim*, 538 U.S. 510 (2003)).

⁴⁶ 8 C.F.R. § 1003.19(i)(1).

⁴⁷ *Id.*

⁴⁸ 8 C.F.R. § 1003.19(e).

⁴⁹ *Id.*

An IJ can consider subsequent bond redeterminations even if a prior bond decision is on appeal to the Board.⁵⁰ If the IJ grants the non-citizen's request for a subsequent bond redetermination, the appeal of the prior decision will become moot, and the BIA will return the record to the IJ unless ICE notifies the Board in writing within 30 days that it wishes to pursue the original appeal.⁵¹ If the non-citizen appeals the subsequent bond redetermination, the IJ must forward the new decision and the record to the BIA with any other recent submissions.⁵²

Other resources on detention and bond procedures:

For other helpful material and resources on immigration-related detention, see:

- People with criminal issues:

Manuel D. Vargas, New York State Defenders Association (NYSDA)'s Immigrant Defense Project, "Removal Defense Checklist in Criminal Charge Cases," pp. 1-2. The checklist can be found on the NYSDA website at <http://www.nysda.org/idp/webPages/deportation.htm> (follow "removal defense checklist" hyperlink).

- "Arriving" non-citizens:

Mark Davidson, Meredith Linsky, Lee Teran and Joe Vail, "Applications for Asylum at Ports of Entry," 1 Immigration and Nationality Law Handbook 294 (2002-03 ed.).

- Access to bond funds:

The National Immigrant Bond Fund (NIBF) provides access to funds for immigrant detainees swept up in ICE enforcement actions. The Fund seeks to reaffirm the values of dignity and due process by assisting these individuals to post bond quickly in order to secure a fair hearing in Immigration Court. Information on how the fund can be accessed is available at www.immigrantbondfund.org.

- Others:

Robert Pauw, "Mandatory Detention and Bond," Immigration and Nationality Law Handbook 407 (2007-08 ed.)

⁵⁰ *Matter of Valles-Perez*, 21 I&N Dec. 769 (BIA 1997).

⁵¹ *Id.*

⁵² *Id.*

Jeff Joseph, Holly S. Cooper, and David W. Leopold, "Getting Out: Strategies for Challenging Unlawful Detention in Federal Court" Immigration and Nationality Law Handbook 213 (2006-07 ed.)

Websites:

American Civil Liberties Union Immigrants' Rights Project

<http://www.aclu.org/immigrants/detention/index.html>

Detention Watch Network:

<http://www.detentionwatchnetwork.org/>

Families for Freedom:

<http://www.familiesforfreedom.org/httpdocs/deportation101.html>



LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY¹

June 17, 2008

DADA V. MUKASEY Q & A **PRELIMINARY ANALYSIS AND APPROACHES TO CONSIDER**

The Supreme Court's decision in *Dada v. Mukasey*, No. 06-1181, 554 U.S. ____ (June 16, 2008), addresses the interplay between the voluntary departure provision, INA § 240B, and the motion to reopen provision, INA § 240(c)(7). The INA permits a person to file a motion to reopen within 90 days of the final administrative order of removal. However, individuals with voluntary departure usually must depart within 30 or 60 days or risk being ineligible for suspension of deportation, adjustment of status, change of status, registry, and voluntary departure for ten years. Additionally, after a person departs, the government deems a motion to reopen withdrawn. Because the government generally does not adjudicate motions to reopen before the voluntary departure period expires, individuals granted voluntary departure who then become eligible for relief following the final order may have no means to pursue this relief.

The Supreme Court's decision in *Dada* recognized the tension between the motion to reopen and voluntary departure provisions and sought to safeguard the right to file a motion to reopen. Therefore, the Court said that individuals must be permitted to withdraw their voluntary departure request before the period expires. The Supreme Court, however, disagreed with several circuit courts that previously had held that the voluntary departure period is tolled (stops running) during the pendency of a motion to reopen.

This Practice Advisory offers *preliminary* analysis about the potential impact of *Dada* on individuals' cases and suggestions about immediate steps to take. Because the Legal Action Center is issuing this advisory the day after the Court announced its decision, readers are cautioned to check for new cases, legal developments, and updates to this advisory over the next weeks and months.

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1. What did the Supreme Court hold in *Dada*?

The Supreme Court held:

- Voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. In reaching this conclusion, the Court rejected the government's position that a person granted voluntary departure knowingly surrenders the opportunity to seek reopening. By allowing withdrawal prior to the expiration of voluntary departure, the Court's decision sought to safeguard the statutory right to file a motion to reopen.
- The voluntary departure period does not automatically toll when a motion to reopen is filed. The Court's decision resolves a circuit split. Four courts had found that the filing of a motion to reopen automatically tolls the voluntary departure period:
 - Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005)
 - Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005)
 - Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005)
 - Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006)Three courts concluded that the voluntary departure period is not tolled:
 - Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006), *petition for cert. pending*, No. 06-1252 (filed Mar. 22, 2007)
 - Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007)
 - Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007) (pet. for reh'g filed Oct. 15, 2007)

A full case summary is available on AILF's Supreme Court Update webpage at http://www.ailf.org/lac/supremecourt_112806.shtml.

2. If my client was granted voluntary departure and wants to reopen his or her case, what can he or she do?

Keep in mind, the Court's decision only affects individuals who filed or plan to file their motions to reopen before their voluntary departure period expires. The decision allows individuals to unilaterally withdraw their requests for voluntary departure. Therefore, individuals who wish to file a motion to reopen can withdraw their voluntary departure and avoid the consequences of overstaying the voluntary departure period if the motion to reopen is not adjudicated before the expiration of the period.

It is unclear from the decision whether the filing of a motion to reopen will be construed as a request to withdraw the voluntary departure. However, the Court noted that the government has issued a proposed regulation that construes the filing of a motion to

reopen during the voluntary departure period as an automatic termination of the voluntary departure grant,² and that the proposed regulation “warrants respectful consideration.” Nonetheless, until it is clear how the government and the courts are going to interpret this decision, individuals may consider explicitly requesting withdrawal of voluntary departure when they file a motion to reopen prior to the expiration of the departure period.

In addition, keep in mind, without voluntary departure, a person is subject to an order of removal. Therefore, individuals who withdraw their voluntary departure may want to file a motion to stay their removal during the pendency of the motion to reopen.

3. How will *Dada* affect a client whose case is in a circuit that previously held that voluntary departure tolled during the pendency of the motion to reopen? (Third, Eighth, Ninth, and Eleventh Circuits)

At this early stage, it is unclear how the government and the courts will interpret the decision and what effect it will have on cases in the Third, Eighth, Ninth, and Eleventh Circuits. However, if an individual’s case was reopened prior to *Dada*, we think the change in law should not affect your client. Contact AILF at clearinghouse@ailf.org if the government seeks reconsideration of a previously granted motion to reopen based on *Dada*.

The following suggestions presume that the client did not seek withdrawal of voluntary departure explicitly in the initial motion to reopen. If your client did explicitly seek withdrawal, you may advise the IJ or BIA of this fact, and this former withdrawal request should put your client’s case squarely within the holding of *Dada*. (In *Dada*, the petitioner requested withdrawal of voluntary departure when he filed his motion to reopen.)

If the motion to reopen is pending or on appeal, your client may argue that the initial motion should be construed as a request to withdraw the voluntary departure period. The government also may take this position, as it is consistent with its proposed regulation, providing for automatic termination of the voluntary departure grant upon the filing of a motion to reopen filed during the voluntary departure period. See 72 Fed. Reg. 67674 (Nov. 30, 2007) available at <http://www.aila.org/content/default.aspx?docid=23939>. As mentioned above, the Court noted that the proposed regulation “warrants respectful consideration.”

However, the government and the courts may ultimately conclude (1) that the initial motion to reopen was not a request to withdraw voluntary departure and (2) that the tolling ended on the date the Supreme Court issued *Dada* (June 16, 2008). As a precautionary measure, individuals may consider filing protective requests to withdraw

² See 72 Fed. Reg. 67674 (Nov. 30, 2007) available at <http://www.aila.org/content/default.aspx?docid=23939>.

voluntary departure.³ Presumably, such requests would be filed with the adjudicatory body (IJ or BIA) that currently has or last had jurisdiction (if the case is on review at the circuit court) over the case.

Be aware of the time remaining on the voluntary departure period. If the courts ultimately hold that the tolling ended on the date the Supreme Court issued *Dada*, an individual's voluntary departure period may begin running again on that date (June 16, 2008). For example, if in the Ninth Circuit, an individual filed a motion to reopen on day 20 of a 30-day voluntary departure period, his or her voluntary departure period may have ten days remaining as of June 16, 2008. If practicable, individuals may want to file any protective requests to withdraw within that remaining voluntary departure period. If the government adopts the position stated in its proposed voluntary departure regulation, and construes the filing of a motion to reopen as termination of voluntary departure (or if the courts so construe the filing of a motion to reopen), such protective requests will have been unnecessary. In the meantime, filing such requests may be prudent. If the voluntary departure period has run out, individuals may consider making a request to withdraw voluntary departure nunc pro tunc to the date of filing the motion to reopen.

In addition, as mentioned previously, without voluntary departure, a person is subject to an order of removal. Therefore, individuals who withdraw their voluntary departure request may want to file a motion to stay their removal during the pendency of the motion to reopen.

4. How will *Dada* affect a client whose case is in a circuit that previously held that voluntary departure did not toll during the pendency of the motion to reopen or had not addressed this issue? (First, Second, Fourth, Fifth, Sixth, Seventh, and Tenth)

Three circuits – the First, Fourth, and Fifth – have said that a pending motion to reopen does not toll the voluntary departure period. In the circuits that have not addressed this issue, the IJs and BIA generally followed the BIA decision *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), which rejected tolling.

The following suggestions presume that the client did not seek withdrawal of voluntary departure explicitly in the initial motion to reopen. If your client did explicitly seek withdrawal, you may advise the IJ or BIA of this fact, and this former withdrawal request should put your client's case squarely within the holding of *Dada*. In *Dada*, the petitioner requested withdrawal of voluntary departure when he filed his motion to reopen.

- A) Individuals with pending motions to reopen: Those individuals whose voluntary departure period *has not expired* may want to consider requesting withdrawal of

³ Even if a person files a protective request to withdraw, this would not preclude an argument that the initial filing of the motion to reopen constituted a request to withdraw voluntary departure.

their voluntary departure request. If the voluntary departure period *has expired*, individuals may argue that the initial motion to reopen should be construed as a request to withdraw the voluntary departure request. (See discussion above in 2 and 3.) In addition, individuals may consider making an explicit request to withdraw voluntary departure nunc pro tunc to the date of filing the motion to reopen.

- B) Individuals with motions to reopen denied for overstaying the voluntary departure period, no court of appeals cases pending: The BIA has recognized that a significant change in the law may warrant reconsideration. Individuals may consider filing a motion to reconsider based on *Dada* making the arguments described above for individuals with pending motions.
- C) Individuals with motions to reopen denied for overstaying the voluntary departure period, court of appeals cases pending: Individuals may consider filing a motion to remand to the BIA based on *Dada*. If the court of appeals already has issued an adverse decision, individuals could consider filing a petition for rehearing (if within rehearing period) or a motion to withdraw the mandate if the mandate already has issued.

5. Does the Supreme Court's decision affect stays of voluntary departure granted by the circuit courts?

No. The Supreme Court in *Dada* noted that “some courts of appeals have found that they may stay voluntary departure pending consideration of a petition for review on the merits.” However, the Court stated that the issue was not presented in the case and therefore, the Court would not address it in this decision. Moreover, the Court's analysis focused on the interplay between two statutory provisions, INA § 240(c)(7) (motion to reopen) and INA § 240B(b) (voluntary departure), and therefore did not implicate the provisions governing the circuit court's authority to issue stays of voluntary departure.

Nonetheless, the government may construe some of the Court's language regarding tolling as supporting arguments against the circuit court's authority to grant stays of voluntary departure. Of course it will be some time before the courts address whether to change their position in light of *Dada*. Individuals may want to take into account that the circuit courts may reconsider their case law regarding stays of voluntary departure and take appropriate steps in anticipation of this.

INTRODUCTION TO HABEAS CORPUS¹

June 2008

Introduction

This practice advisory is an introduction to the law of habeas corpus in the immigration context. This advisory is intended for lawyers and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. The cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits.

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless government action.² Historically, “[habeas corpus] has served as a means of reviewing the legality of Executive detention.”³ The right to habeas corpus is rooted in the U.S. Constitution's Suspension Clause.⁴ There also is a federal habeas corpus statute, 28 U.S.C. § 2241, which states, in pertinent part:

- (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .

- (c) The writ of habeas corpus shall not extend to a prisoner unless --

¹ Copyright (c) 2006, 2010 American Immigration Council. [Click here for information on reprinting this practice advisory.](#) The LAC gratefully acknowledges the contributions of law clerk Katrin Hussmann for her research and thoughtful contributions to the update of this practice advisory.

² *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969); *Boumediene v. Bush*, 128 S.Ct. 2229, 2244, 2008 WL 2369628, at *12 (2008) (“The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom”).

³ *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

⁴ U.S. Const. art. I, § 9, cl. 2 states: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.”

- (1) He is in custody under or by color of the authority of the United States . . .
- (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

Since its inclusion in the Judiciary Act of 1789, 28 U.S.C. § 2241 has given district courts jurisdiction to grant writs of habeas corpus to people who are held in “custody” by the federal government in violation of the Constitution, laws, or treaties of the United States. Under this statute, federal courts have considered both constitutional claims and claims of statutory interpretation.

When Can Habeas Corpus Be Used in the Immigration Context?

In the immigration context, often a petitioner filing a habeas corpus action seeks initial review of an administrative decision where no judicial proceeding has occurred and no other review may be available. Prior to the REAL ID Act of 2005, immigration habeas corpus petitions generally fell into two categories: challenges to the legality of a removal order and challenges to detention.

The REAL ID Act of 2005⁵ purports to eliminate habeas corpus jurisdiction over final orders of removal, deportation, and exclusion and consolidate such review in the court of appeals.⁶ This change became effective immediately on the Act’s enactment date, May 11, 2005.⁷ At the time of this writing, few courts of appeals have addressed the scope of the purported bar to habeas review over final orders of removal.⁸ It remains unclear

⁵ Pub. L. 109-13, 119 Stat. 231 (2005).

⁶ Real ID Act § 106, adding new subsection (a)(5) to 8 U.S.C. § 1252 (“Notwithstanding any other provision of law (statutory or non-statutory), including [habeas, mandamus, and all Writs Act] . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for juridical review of an order of removal entered or issued under any provision of this Act . . .”). At the same time that the Real ID Act limited habeas jurisdiction in certain immigration cases, it also expanded the jurisdiction of a court of appeals over constitutional claims and questions of law in a petition for review of a final order of removal. See 8 U.S.C. § 1252(a)(2)(D) (added by Real ID Act § 106). See also the Legal Action Center’s practice advisory titled “Judicial Review Provisions of the REAL ID Act” (June 7, 2005), at <http://www.legalactioncenter.org/sites/default/files/realid6705.pdf>.

⁷ REAL ID Act § 106(b), 8 U.S.C. § 1252 note (2005).

⁸ See, e.g., *Enwonwu v. Gonzales*, 438 F.3d 22 (1st Cir. 2006) (declining to address whether REAL ID’s repeal of habeas corpus violated the Suspension Clause because case presented only legal issues, which court has jurisdiction to review pursuant to INA § 242(a)(2)(D)); *Puri v. Gonzales*, 464 F.3d 1038, 1041-42 (9th Cir. 2006) (same); *Alexandre v. U.S. Attorney General*, 452 F.3d 1204, 1205-06 (11th Cir. 2006) (on the facts presented, court found a petition for review under 8 U.S.C. § 1252(a)(2)(D) to be an adequate and effective substitute for habeas review); *Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007) (same). See also, *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 n. 3 (9th Cir. 2005) (“we make no comment on what should be done in the more

whether habeas review may be available in the rare circumstance where there is a compelling reason that court of appeals review is inadequate.

The REAL ID Act, however, did not impact the ongoing availability of habeas corpus to challenge the length or conditions of immigration detention.⁹

Over the past several years, the Supreme Court has upheld the availability of § 2241 habeas corpus in cases challenging detention. The post-IIRIRA Supreme Court decisions involving such challenges are:

Zadvydas v. Davis, 533 U.S. 678 (2001) – The Court held that habeas corpus may be used to bring statutory and constitutional challenges to post-removal order detention. This case addressed whether the government could detain a removable person indefinitely beyond the removal period.

Demore v. Kim, 538 U.S. 510 (2003) – The Court held that habeas corpus may be used to bring a constitutional challenge to pre-removal order detention. The Court considered the constitutionality of the mandatory detention provision, INA § 236(c).

Clark v. Martinez, 543 U.S. 371 (2005) – The Court held that its decision in *Zadvydas v. Davis* also applied to government detention of persons found to be inadmissible.

unusual case where the pending habeas petition requires further factual development. In such a case, construing a pending habeas petition as a petition for review might bar this court from remanding the petition for further fact-finding.”).

⁹ Several courts have so held. See, e.g., *Kellici v. Gonzales*, 472 F.3d 416, 419-20 (6th Cir. 2006) (finding that when petitioner challenges only his detention in a habeas petition, rather than his removal, the case cannot be transferred to the court of appeals); *Bonhometre v. Gonzales*, 414 F.3d 442, 446 n.4 (3d Cir. 2005) (“An alien challenging the legality of his *detention* still may petition for habeas corpus [post-REAL ID].”) (emphasis in the original); *Hernandez v. Gonzales*, 424 F.3d 42 (1st Cir. 2005) (transferring case back to district court for habeas review where only issue was detention); *Channer v. DHS*, 406 F. Supp. 2d 204 (D. Conn. 2005) (finding habeas review over detention). *Accord Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (jurisdiction-stripping provision of REAL ID Act applies only to habeas corpus petitions that challenge a final order and is inapplicable where petitioner granted CAT relief in removal proceeding because there is no final order of removal); *Ali v. Gonzales*, 421 F.3d 795, 797 n.1 (9th Cir. 2005) (in habeas corpus action seeking an injunction preventing removal to Somalia, “[t]he Real ID Act of 2005, . . . , does not apply to this case because petitioners do not challenge or seek review of any removal order”). See also Joint Explanatory Statement of the Committee of Conference, H.R. Cong. Rep. No 109-72 at 175, 151 Cong. Rec. H2836, 2873 (2005) (“[REAL ID Act] section 106 will not preclude habeas review over challenges to detention that are independent of challenges to removal orders.”)

Must the Petitioner Be Physically Detained to File a Habeas Corpus Petition?

No. A common misconception is that only persons, who are physically detained, that is, in jail or prison, may file habeas corpus petitions. Although § 2241 says that habeas corpus is available only when a person is “in custody,” courts have interpreted the statute to not require actual physical restraint; rather other restrictions on liberty can satisfy the custody requirement.¹⁰ For example, a person who challenges the conditions of release under an order of supervision may be found to satisfy the “in custody” requirement.

Prior to the REAL ID Act, individuals subject to a final order of removal were considered “in custody” for purposes of the habeas corpus statute.¹¹ This concept of custody has remained the law in post-REAL ID habeas corpus cases.¹²

The “in custody” determination is made at the time the habeas corpus petition is filed.¹³ If the petitioner is in custody then, the federal court may pass on the merits of the petition even though the individual is free from custody before the petition is acted upon, provided the petitioner may still suffer collateral consequences.¹⁴

What Are the Procedures for Filing a Habeas Corpus Petition?

Habeas corpus petitions are most often filed in district court.¹⁵ The filing fee is \$5 unless the petitioner first obtains permission from the court to file in forma pauperis. The Federal Rules of Civil Procedure are applicable to these proceedings, but the local rules also will apply as well as any special local procedures for habeas corpus.

¹⁰ *Rumsfeld v. Padilla*, 542 U.S. 426, 437 (2004) (“[O]ur understanding of custody has broadened to include restraints short of physical confinement”).

¹¹ See, e.g., *Simmonds v. INS*, 326 F.3d 351, 354 (2d Cir. 2003); *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1291 (10th Cir. 2001); *Mustata v. U.S. Dep’t of Justice*, 179 F.3d 1017, 1021 n. 4 (6th Cir. 1999); *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995).

¹² See, e.g., *Rosales v. ICE*, 426 F.3d 733, 734-36 (5th Cir. 2005).

¹³ *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004) (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) (“The Supreme Court has made it clear that the “in custody” determination is made at the time the habeas petition is filed.”)

¹⁴ *Perez v. Greiner*, 296 F.3d 123, 125 (2d Cir. 2002) (“The Supreme Court has held that a habeas petition challenging a criminal conviction is not necessarily mooted when the petitioner is released from prison, as collateral consequences of that conviction may still impinge on the petitioner post-release, and therefore a case or controversy may continue to exist.”); *Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) (same).

¹⁵ 28 U.S.C.A. §2241(a) states: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.” The Supreme Court interprets this statute to require only that the court issuing the writ have jurisdiction over the prisoner’s custodian. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

District court decisions in habeas corpus proceedings are appealed to the appropriate court of appeals; the Federal Rules of Appellate Procedure (and the circuit court's local rules) govern appeals of habeas corpus decisions.

Jurisdiction over habeas corpus petitions exists where the petitioner's custodian can be reached by service of process from the court in which the petition has been brought.¹⁶

The habeas corpus statute requires a petitioner to allege "the name of the person who has actual custody over the petitioner."¹⁷ While a full discussion of naming the proper custodian in the habeas petition is beyond the scope of this introductory practice advisory, the following is a summary of the issue. Prior to 2004, a conflict in case law developed over who constituted the proper "custodian" to be named in habeas immigration cases: some courts held that it was the "immediate custodian" with day-to-day control over the petitioner's custody; other courts held that it was the person with authority to release the petitioner from custody.

In 2004, in a non-immigration case, the Supreme Court held that in a habeas case presenting a "core challenge" to the physical confinement of the petitioner, the actual or immediate custodian of the facility where the petitioner is confined is the only proper defendant in a habeas action.¹⁸ The Court specifically left open the question whether a different rule might apply to immigration-related habeas cases.¹⁹

Since *Padilla*, the REAL ID Act has limited when habeas corpus may be used in immigration cases. At least one court held in 2006 that a challenge to post-final order detention was a "core" habeas challenge, subject to the immediate custodian rule under *Padilla*.²⁰

What if the Client Cannot Afford Representation?

Individuals who are unable to afford representation in their habeas corpus proceedings may ask the court to appoint paid counsel under the Criminal Justice Act, 18 U.S.C. § 3006A. Many courts routinely appoint immigration counsel in immigration-related habeas cases.²¹

¹⁶ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁷ 28 U.S.C. § 2242 (2008).

¹⁸ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *see also* the Legal Action Center's practice advisory "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation" (May 13, 2010), at http://www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf.

¹⁹ *Padilla*, 542 U.S. at 436 n.8.

²⁰ *Kholavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006).

²¹ For information about the Criminal Justice Act see the Legal Action Center's practice advisory on "Requesting Attorney's Fees Under the Equal Access to Justice Act" (Dec. 15, 2008), at http://www.legalactioncenter.org/sites/default/files/EAJA_Fees_04_07_06.pdf.



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FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER REAL ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW

Practice Advisory¹

**By: Mary Kenney
Updated April 5, 2006**

Section 242(a)(2)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(2)(B), restricts federal court review of certain discretionary decisions in immigration cases. The REAL ID Act² made two changes to INA § 242(a)(2)(B). This practice advisory discusses the changes made by the REAL ID Act. It also outlines an analysis for determining whether § 242(a)(2)(B) applies to a particular case. This same analysis can be used for either removal or non-removal cases. Thus, the analysis is useful in mandamus actions or other affirmative suits, such as a claim under the Administrative Procedures Act (APA), or in an appeal of a final removal order brought by a Petition for Review.³

Courts are continuing to interpret the impact of the REAL ID Act – including the changes to § 242(a)(2)(B) – on their jurisdiction. The cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits. Practitioners will need to research the current case law in your own circuit to ensure that there is no new and/or conflicting precedent. The information contained in this practice advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

¹ Copyright (c) 2005, 2006, 2010 American Immigration Council. [Click here for information on reprinting this practice advisory.](#) This practice advisory updates an earlier advisory dated September 7, 2005.

² See REAL ID Act, P.L. 109-13, 119 Stat. 231 (May 11, 2005).

³ This practice advisory does not address jurisdiction over discretionary decisions in habeas cases, as other considerations come into play in these cases. For a discussion of how the REAL ID Act impacted habeas petitions, see AILF's practice advisory "Judicial Review Provisions of the REAL ID Act," http://www.ailef.org/lac/lac_pa_index.shtml.

What is INA § 242(a)(2)(B)?

INA § 242(a)(2)(B), entitled “Denials of Discretionary Relief,” restricts when federal courts have jurisdiction to review certain types of discretionary decisions and action by the government in immigration cases.

INA § 242(a)(2)(B) includes two subparts. For § 242(a)(2)(B) to apply, a case must fall within one of these two subparts. The first limits federal court jurisdiction over a “judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245.” 8 U.S.C. § 1252(a)(2)(B)(i). The second subpart restricts federal court jurisdiction over “any other decision or action ... the authority for which is specified under this title [Title II] to be in the discretion of the Attorney General or the Secretary of Homeland Security.” 8 U.S.C. § 1252(a)(2)(B)(ii). Asylum decisions are specifically exempted from this bar on jurisdiction. *Id.*

How did the REAL ID Act amend INA § 242(a)(2)(B)?

The following is the amended version of § 242(a)(2)(B). The amendments made by the REAL ID Act are identified in bold.

(B) Denials of Discretionary Relief.-Notwithstanding any other provision of law **(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings,** no court shall have jurisdiction to review –

- (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or
- (ii) any other decision or action of the Attorney General **or the Secretary of Homeland Security** the authority for which is specified under this title to be in the discretion of the Attorney General **or the Secretary of Homeland Security**, other than the granting of relief under section 208(a).

The REAL ID Act did not change the language of either subpart (i) or (ii), other than by adding a reference to the Secretary of Homeland Security. The Act did make two substantive changes to the paragraph preceding these subparts. First, it specified that the phrase “notwithstanding any other provision of law” applied to “statutory and nonstatutory” law and included the habeas corpus statute, the mandamus statute, and the All Writs Act. REAL ID Act § 106(a)(1).⁴

⁴ This amendment was effective May 11, 2005 and applies to cases in which the final order of removal was issued before, on, or after May 11, 2005. REAL ID Act § 106(b). Of course, in a non-removal case, there will be no final order of removal. Thus there is a question as to how this effective date provision will be interpreted in the non-removal context.

Second, the REAL ID Act also expanded the scope of § 242(a)(2)(B) so that it now applies “regardless of whether the [discretionary] judgment, decision, or action is made in removal proceedings.” REAL ID Act § 101(f)(2).⁵ Prior to the REAL ID Act, some – though not all – courts had held that § 242(a)(2)(B) was applicable only in removal cases.⁶ Presumably, this amendment was intended to reverse these earlier court decisions.

Do these amendments eliminate all mandamus and other types of affirmative suits in non-removal cases?

No, these changes do not eliminate all jurisdiction over mandamus and other affirmative lawsuits in non-removal cases. To determine whether jurisdiction remains available in a particular case, a practitioner may carry out a several step analysis. This analysis is essentially the same as the analysis to determine whether jurisdiction exists in a removal case involving agency discretion. Consequently, court decisions interpreting § 242(a)(2)(B) in the removal context will be helpful in determining whether the provision applies in a non-removal case.

What steps are involved in determining whether a court has jurisdiction under § 242(a)(2)(B) in a removal or non-removal case?

The following is an outline of the analysis that can be used to determine whether a court has jurisdiction under § 242(a)(2)(B), whether in a petition for review of a final removal order, or in a mandamus or APA challenge in a non-removal case. A more detailed explanation follows this outline.

1. Does the issue/case fall completely outside the scope of INA § 242(a)(2)(B)?
 - A. INA § 242(a)(2)(B) only limits jurisdiction over certain discretionary actions and decisions.
 - B. INA § 242(a)(2)(B) does not apply to asylum decisions.
 - C. INA § 242(a)(2)(B) also does not apply to naturalization decisions.
 - D. INA § 242(a)(2)(B) does not apply to other discretionary decisions that fall outside of Title II, including discretionary decisions required in INA § 101, 8 U.S.C. § 1101.
2. Does the case fall under INA § 242(a)(2)(B)(i)?
 - A. Has there been an actual exercise of discretion?
 - B. Where the application for relief was addressed by the IJ, does the issue on appeal involve an exercise of discretion?

⁵ This amendment was effective May 11, 2005 and applies to all cases pending before any court on or after the date of enactment. REAL ID Act § 101(h)(4).

⁶ See, e.g., *Ana International Inc. v. Way*, 393 F.3d 886, 891 and n. 3 (9th Cir. 2004) (declining to resolve this issue, but listing both cases that found INA § 242(a)(2)(B) was limited to removal and those that applied it in the non-removal context).

3. Does the case fall under INA § 242(a)(2)(B)(ii)?
 - A. Is the challenged action or decision discretionary?
 - B. Is the decision or action *specified by Title II of the statute* to be discretionary?
 - C. Is the grant of discretion one of pure discretion unguided by legal principles? (9th Circuit cases).

How is this analysis applied?

The following is a discussion of each of these steps in the analysis:

1. Does the issue/case fall completely outside the scope of INA § 242(a)(2)(B)?

INA § 242(a)(2)(B) does not apply to every immigration-related case. Thus, the first step is to determine if the case is entirely outside the reach of § 242(a)(2)(B). There are at least four general categories of cases that arguably fall outside the reach of this section.

A. INA § 242(a)(2)(B) only limits jurisdiction over certain discretionary actions and decisions. Neither this section nor the REAL ID Act stripped federal courts of jurisdiction where the government has a nondiscretionary duty to act. In mandamus cases in particular, the existence of a mandatory, non-discretionary duty on the part of the government is an essential element of the claim. Thus, mandamus actions by definition generally should not fall within the restrictions of INA § 242(a)(2)(B).⁷ For more on mandamus actions, see “Mandamus Actions: Avoiding Dismissal and Proving the Case,” http://www.aifl.org/lac/lac_pa_index.shtml.

B. INA § 242(a)(2)(B) does not apply to asylum decisions. As noted, for § 242(a)(2)(B) to apply, a case must fall within one of its two subsections. Asylum cases do not fall within either subsection. Asylum is not one of the forms of discretionary relief specifically mentioned in § 242(a)(2)(B)(i). Additionally, asylum is specifically exempted from § 242(a)(2)(B)(ii). Consequently, § 242(a)(2)(B) should never be an issue with respect to federal court jurisdiction over asylum cases, even if the challenged agency action is a discretionary one. Of course, in any case there may be other bars to federal court jurisdiction, and a practitioner must thoroughly consider all other possible bars.

C. INA § 242(a)(2)(B) also does not apply to naturalization decisions. Similarly, neither subsection of § 242(a)(2)(B) covers naturalization cases.

⁷ The REAL ID restriction on mandamus jurisdiction in § 242(a)(2)(B) is identical to six other amendments that the REAL ID Act made to sub-sections of INA § 242. See amended INA §§ 242(a)(2)(A) and (C); new §§ 242(a)(4) and (5); amended § 242(b)(9); and amended § 242(g). These other amendments all relate to removal proceedings. It is likely that Congress simply inserted the same language in all of the subsections for the sake of consistency, even though the mandamus restriction in § 242(a)(2)(B) should have – at most – limited application.

Naturalization is not among the benefits specifically listed in § 242(a)(2)(B)(i). Additionally, § 242(a)(2)(B)(ii) states that it applies to agency decisions or action, “the authority for which is specified *under this title*” to be discretionary. The “title” referred to is Title II of the INA.⁸ Naturalization provisions do not appear in Title II but rather in Title III of the INA. See INA § 310 et seq., 8 U.S.C. § 1421 et seq. Consequently, INA § 242(a)(2)(B) should never be an issue in federal court jurisdiction over a naturalization decision, even one involving discretion.

D. INA § 242(a)(2)(B) should not apply to other discretionary decisions that fall outside of Title II, including discretionary decisions required in INA § 101, 8 U.S.C. § 1101. There are a number of discretionary decisions that are authorized in provisions that fall within Title I of the INA, rather than Title II. As with naturalization cases, because these decisions fall outside of Title II they are not covered by INA § 242(a)(2)(B)(ii). Examples of these include (this is not an exhaustive list):

- „ Special Immigrant Juvenile Status (SIJS): The criteria for granting special immigrant juvenile status are contained in INA § 101(a)(27)(J). The government has argued that district courts do not have jurisdiction under § 242(a)(2)(B) to review the agency’s denial of “consent” required as part of SIJS proceedings, because the decision to grant consent is discretionary. A district court has rejected this argument because § 101(a)(27)(J) – which contains the consent requirements – is found in *Title I* of the INA, not in Title II. See *Young Zheng v. Pogash*, 2006 U.S. Dist. LEXIS 9383 (S.D. Tex. 2006).
- „ S, T, and U visas: The definition of the non-immigrant “T” visa category includes as an eligibility requirement that the Attorney General determine if the individual “would suffer extreme hardship involving unusual and severe harm upon removal.” INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T). The determination of extreme hardship has been held to be a discretionary determination. The exercise of the Attorney General’s discretion with respect to a T visa should not fall within the bar to jurisdiction in § 242(a)(2)(B)(ii), however, because the statutory authority for this discretion is found in Title I, not Title II. The definitions of the “S” and “U” visa categories contain similar grants of discretion that fall outside the scope of § 242(a)(2)(B). See INA §§ 101(a)(15)(S) and (U), 8 U.S.C. §§ 1101(a)(15)(S) and (U). To date, there have been no cases addressing this issue.

2. Does the case fall under INA § 242(a)(2)(B)(i)?

If the issue/case does not fall completely outside of the scope of INA § 242(a)(2)(B), the next step is to determine if it falls under the bar found in subsection (i) of INA §

⁸ The codified version of the statute refers in 1252(a)(2)(B)(ii) to the term “title” II while the INA refers to “subchapter” II. Regardless of which name is used, the referenced provisions are the same.

242(a)(2)(B). This subsection restricts jurisdiction over “any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245.”

Where your case involves an application for relief under one of the provisions specified in § 242(a)(2)(B)(i), you must first consider whether jurisdiction is barred by this subsection. The following questions are relevant to this inquiry:

A. Has there been an actual exercise of discretion? The majority of courts that have interpreted this provision have found that the phrase “judgment regarding the granting of relief” applies only to the discretionary portion of the decision. *See, e.g., Iddir v. INS*, 301 F.3d 492, 497 (7th Cir. 2002); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003). Where there has been no exercise of discretion, there is no bar on jurisdiction.

Thus, under the majority line of cases there would be no bar either to the filing of a mandamus action or to the court’s ability to grant the mandamus and compel CIS to adjudicate a long-delayed case, since no discretionary decision had yet been made by the agency. *See Iddir*, 301 F.3d at 497.

B. Where the application for relief was addressed by the IJ, does the issue on appeal involve an exercise of discretion?

If it does, then jurisdiction will likely be barred under § 242(a)(2)(B)(i). *See, e.g., De la Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006) (citing cases) (hardship determination for cancellation is discretionary and therefore unreviewable); *Martinez-Rosas v. Gonzales*, 424 F.3d 926 (9th Cir. 2005) (same); *Bugayong v. INS*, ___ F.3d ___, 2006 U.S. App. LEXIS 6230 (2d Cir. 2006) (denial of an INA § 212(h) waiver in connection with an adjustment application was discretionary and therefore unreviewable).

In many cases, however, the issue will *not* be an exercise of discretion, but instead will be a non-discretionary eligibility issue involving a question of law. Ten Courts of Appeals have unanimously held that § 242(a)(2)(B)(i) does not apply to non-discretionary questions of statutory eligibility for the enumerated immigration benefits.⁹ The following are examples of issues over which courts found jurisdiction even though the underlying application for relief was specified in § 242(a)(2)(B)(i):

⁹ *See Singh v. Gonzales*, 413 F.3d 156, 160, n.4 (1st Cir. 2005); *Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7th Cir. 2004); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140 (9th Cir. 2002); *Schroeck v. Gonzales*, 429 F.3d 947, 950 n.2 (10th Cir. 2005); *Gonzales-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1332 (11th Cir. 2003). The only court that has not yet ruled on the issue is the Fourth Circuit. *Jean v. Gonzales*, 435 F.3d 475 (4th Cir. 2006).

- „ Whether a person has satisfied the continuous presence eligibility requirement for cancellation. *See Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2005); *Reyes-Vasquez v. Ashcroft*, 395 F. 3d 903 (8th Cir. 2005); *Tapia v. Gonzales*, 430 F.3d 1330 (11th Cir. 2005).
- „ Whether an adult daughter is a qualifying relative for purposes of the hardship requirement for cancellation. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2001).
- „ Whether a regulation violates INA § 245 (adjustment of status). *See Succar v. Ashcroft*, 394 F.3d 8, 19-20 (1st Cir. 2005).
- „ Whether a person lacks good moral character as a matter of law. *See Sepulveda v. Gonzales*, 407 F.3d 59 (2d Cir. 2005).
- „ Denials of motions to reopen, reconsider or remand where the agency has not yet made a discretionary decision on the underlying application. For example, courts agree that where the motion seeks reopening to apply for the discretionary relief in the first instance, the court has jurisdiction – because no application has yet been filed, the agency has not yet made a discretionary decision. Where the motion to reopen seeks review of the underlying discretionary determination, courts agree that there is no jurisdiction. *See, e.g., Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006) (setting forth a detailed explanation of when motions to reopen are reviewable and when they are not); *Obioha v. Gonzales*, 431 F.3d 400 (4th Cir. 2005); *Pilica v. Ashcroft*, 388 F.3d 941 (6th Cir. 2004); *Martinez-Maldonado v. Gonzales*, 437 F.3d 679 (7th Cir. 2006).

3. Does the case fall under INA § 242(a)(2)(B)(ii)?

In all other cases involving the exercise of agency discretion, a practitioner should finally consider whether subpart (ii) of § 242(a)(2)(B) applies. This subpart bars federal court jurisdiction over “any other decision or action” the “authority for which is specified under this title” to be in the agency’s discretion.

The Supreme Court has made clear that this subpart does not apply to issues that do not involve the exercise of discretion, such as a determination of the extent of the Attorney General’s authority under the INA. *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). Thus, for example, courts would retain jurisdiction to determine if the agency action was *ultra vires*. *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) (citing *Zadvydas*, 533 U.S. at 688).

Beyond this, there is disagreement among the courts as to how narrowly subpart (ii) should be interpreted. The following questions are relevant to an analysis of whether subpart (ii) of § 242(a)(2)(B) precludes jurisdiction.

A. Is the challenged action or decision discretionary?

An initial question is whether the challenged action is actually a discretionary one. The government is quick to argue that many actions and decisions have been left to agency discretion, but courts do not always agree. While the term “discretion” does not actually have to be used, courts have held that it must be clear that the agency is free to exercise its independent judgment.

For example, some courts have found that there is no grant of discretion where the statute *mandates* a certain result if the individual meets the eligibility requirements. *See e.g., Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d 683, 691 (9th Cir. 2003) (the statute mandates that immigrant investor visas “shall be made available ... to qualified immigrants); *Camphill Soltane v. U.S. DOJ*, 381 F.3d 143, 147 (3d Cir. 2003) (the statute “makes clear that the Attorney General is required to grant preference visas to those who fall within certain numerical limitations and qualify as ‘special immigrants’”); *Shokeh v. Thompson*, 369 F.3d 865, 868 (5th Cir. 2004) (“Nowhere is it ‘specified’ that the bond determination is a ‘discretionary’ decision of the Attorney General”). Similarly, courts have found that the agency is not exercising discretion where there are specific legal guidelines that must be applied to reach a decision. *See e.g., Nakamoto v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004) (the question of whether marriage fraud exists is a factual issue determined through the application of traditional legal standards).

Even where the statute does authorize discretion on the part of the agency, one court has found that jurisdiction remains if the agency has not satisfied a statutorily mandated prerequisite to the exercise of discretion. *See Firstland v. INS*, 377 F.3d 127 (2d Cir. 2004) (interpreting prior version of the statute).

In contrast, there are other decisions which courts have found to be clearly discretionary. *See, e.g., Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999) (no jurisdiction over discretionary decision as to where to detain non-citizen); *CDI Information Services, Inc., v. Reno*, 278 F.3d 616 (6th Cir. 2002) (no jurisdiction over discretionary denial of an extension of a non-immigrant visa); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154 (3d Cir. 2004) (denial of a waiver of the joint filing requirement to lift conditional residency for lack of good faith marriage is a discretionary decision); *Zhu v. Gonzales*, 411 F.3d 292 (D.C. Cir. 2005) (denial of a waiver of the labor certification requirement is a discretionary decision); *Saloum v. USCIS*, 437 F.3d 238 (2d Cir. 2006) (no jurisdiction over denial of a smuggling waiver under INA § 212(d)(11)).

B. Is the decision or action specified by Title II of the statute to be discretionary?

INA § 242(a)(2)(B)(ii) requires that the action or decision be *specified* by Title II of the statute to be in the agency’s discretion. Thus, even where the challenged action or decision is clearly discretionary, it is important to evaluate whether the authority for the

action is “specified” by statute.¹⁰ Some courts have interpreted this language very strictly, holding that for the subpart to apply, the “language of the statute must provide the discretionary authority.” *Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d at 689.

Several courts have held that INA § 242(a)(2)(B)(ii) does not preclude jurisdiction over a motion to reopen because the *statute* does not specify a grant of discretion to the Attorney General with respect to motions to reopen. See *Zhao v. Gonzales*, 404 F.3d 295, 302-03 (5th Cir. 2005) (as it is only the regulations that specifically authorize discretion over these motions, there is no bar to jurisdiction); *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005); *Infanzon v. Ashcroft*, 386 F.3d 1359 (10th Cir. 2004) (reaching the same result but relying on slightly different reasoning).

Courts are divided with respect to this same issue as it applies to continuances. Two courts have held that they retain jurisdiction to review the denial of a continuance since only the regulations – not the statute – address continuances. *Manzano-Garcia v. Gonzales*, 413 F.3d 462 (5th Cir. 2005); *Zafar v. Attorney General*, 426 F.3d 1330 (11th Cir. 2005). Two other courts have also found jurisdiction, though based on different reasoning. See *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004); *Abu-Khalil v. Gonzales*, 436 F.3d 627 (6th Cir. 2006). At least two courts have reached the opposite conclusion. Both of these courts found that INA § 242(a)(2)(B)(ii) was applicable because the regulations governing continuances were promulgated pursuant to INA § 240, 8 U.S.C. § 1229a. *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004).

C. Third, is the grant of discretion one of pure discretion unguided by legal principles?

Finally, in at least the Ninth Circuit, the *degree* of discretionary authority is relevant. The Ninth Circuit has held that § 242(a)(2)(B)(ii) “applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines.” *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1142 (9th Cir. 2005) quoting *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004). Under this standard, the Ninth Circuit has found § 242(a)(2)(B) to be inapplicable if “there are legal and factual questions that are not subject to the pure discretion of the [agency].” *Oropeza-Wong*, 406 F.3d at 1142. Explained another way, “if the statutory provision granting the Attorney General power to make a given decision also sets out specific standards governing that decision, the decision is not “in the discretion of the Attorney General.”” *Ana International Inc. v. Way*, 393 F.3d 886, 892 (9th Cir. 2004). Under this standard, the court has found that the following issues do not involve “pure” discretion and thus are not subject to the bar on jurisdiction found in § 242(a)(2)(B)(ii):

¹⁰ As noted earlier, an initial step in the analysis is also to determine whether the case involves Title II of the INA. Where it does not, INA § 242(a)(2)(B) should not apply. See page 4-5, *infra*.

- „ The authority to revoke a visa under the statutory standard of “good and sufficient cause,” *Ana International Inc. v. Way*, 393 F.3d at 893-94 (this refers to a meaningful standard that the Attorney General may “deem” applicable or inapplicable in a particular case, but which he does not manufacture anew in every case”); *but see El Khader v. Monica*, 366 F.3d 562 (7th Cir. 2004) (a visa revocation was a discretionary decision over which jurisdiction was barred by INA § 242(a)(2)(B)(ii)).
- „ A determination as to whether a marriage was entered in good faith for purposes of a waiver of the joint filing requirement to remove conditional residency, *Oropeza-Wong v. Gonzales*, 406 F.3d 1135 (9th Cir. 2005); *accord Cho v. Gonzales*, 404 F.3d 96 (1st Cir. 2005); *but see Urena Tavarez v. Ashcroft*, 367 F.3d 154 (3d Cir. 2004) (the good faith waiver was explicitly discretionary).

Although other courts have not adopted this “pure discretion” standard, practitioners can argue that it should be adopted in any circuit where the issue has not yet been decided.

What is the impact of INA § 242(a)(2)(D)?

INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), was added to the statute by the REAL ID Act. It restores jurisdiction to federal courts over legal and constitutional issues where such jurisdiction would be otherwise precluded by other statutory provisions such as INA § 242(a)(2)(B). As relevant here, § 242(a)(2)(D) states that:

Nothing in [INA § 242(a)(2)](B) . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In essence, this section codifies for purposes of petitions for review the court decisions that held that § 242(a)(2)(B) did not apply to statutory eligibility issues and similar questions of law. It thus provides an additional basis for demonstrating to a court that it has jurisdiction over legal issues in a petition for review.

AILF believes that § 242(a)(2)(D) only applies to petitions for review of final orders of removal and has no applicability in non-removal cases in district court. The government has argued in district court APA cases that this new section strips district courts of jurisdiction over the action. AILF believes that this interpretation is wrong. If you have a non-removal case in district court where this issue has been raised, please contact Mary Kenney at mkenney@ailf.org.

In interpreting this new provision, several courts have held that a constitutional claim must be colorable to restore jurisdiction under INA § 242(a)(2)(D). *See Saloum v. USCIS*, 437 F.3d 238 (2d Cir. 2006) (alleged due process claim was actually a claim of abuse of discretion which was not reviewable under INA § 242(a)(2)(B)); *Elysee v.*

Gonzales, 437 F. 3d 221 (1st Cir. 2006) (no colorable constitutional claim where claims concern factual findings and balancing of factors behind discretionary decision).

The following are examples of constitutional or legal issues over which courts have found that they have jurisdiction under INA § 242(a)(2)(D):

- „ Whether the Board applied the correct legal standard to determine if a crime was “particularly serious” for purposes of withholding of removal. *Afridi v. Gonzales*, ___ F.3d ___, 2006 U.S. App. LEXIS 8073 (9th Cir. 2006).
- „ Whether the withdrawal of an application for admission constitutes a break in physical presence for cancellation. *Mendez-Reyes v. Attorney General*, 428 F.3d 187 (3d Cir. 2005).
- „ Whether the IJ’s denial of an adjustment application violated res judicata. *Hamdan v. Gonzales*, 425 F.3d 1051 (7th Cir. 2005).
- „ Whether the agency’s interpretation of the hardship standard for cancellation violated international treaties. *Cabrera-Alvarez v. Gonzales*, 423 F. 1006 (9th Cir. 2005)

JUDICIAL REVIEW PROVISIONS OF THE REAL ID ACT

Practice Advisory¹

**By: Legal Action Center
June 7, 2005**

The REAL ID Act of 2005 was signed into law on May 11, 2005 as part of a military spending bill. This article discusses the provisions of the REAL ID Act that pertain to judicial review of immigration decisions under the Immigration and Nationality Act (INA). These judicial review provisions became effective on May 11, 2005, the date that the President signed the Act. The new provisions apply to final orders of removal, deportation and exclusion issued before, on, or after the enactment date. Significantly, the amendments to INA § 242 expand the court of appeals jurisdiction so that many individuals who were barred from bringing petitions for review prior to the REAL ID Act (including individuals with certain criminal convictions) now may file petitions for review in the court of appeals.

The REAL ID Act also includes amendments to the INA relating to: burdens of proof and procedure for asylum-seekers and for other forms of relief from removal; the definition and removability provisions for terrorism and terrorist-related activities; and requirements for federally approved identification cards. These provisions are not discussed here.

The information contained in this advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. This article is accurate as of June 7, 2005. Moreover, suggestions and strategies relating to the REAL ID Act are likely to evolve as the law is implemented.

¹ Copyright (c) 2005, 2010 American Immigration Council. [Click here for information on reprinting this practice advisory](#). The LAC thanks the REAL ID working group for assistance with this practice advisory, including Lee Gelernt, Nancy Morawetz, Lory Rosenberg, and David Leopold.

What changes to judicial review are included in the REAL ID Act?

The REAL ID Act amends the judicial review provisions relating to immigration cases in the following ways:

- It purports to eliminate all habeas corpus review of final orders of removal, deportation, and exclusion;
- It does not address habeas corpus review of detention;
- It expands judicial review of final orders of removal, deportation and exclusion via a petition for review in place of habeas corpus review, allowing some review of previously non-reviewable cases and issues; and
- It expands the bar on judicial review of discretionary decisions and actions to include certain agency decisions and actions outside of the removal context.

A. Habeas Corpus review

The REAL ID Act purports to eliminate all habeas corpus review under 28 U.S.C. § 2241 of final orders of removal, deportation and exclusion. Congress has amended seven subsections of INA § 242 to include a specific restriction on review by habeas corpus.² These amendments will affect what issues, if any, may be reviewed via habeas corpus. They also will affect what happens to a habeas petition that is already pending. These amendments, however, do not eliminate habeas jurisdiction over detention challenges.

--Can I file a new habeas petition challenging a final removal order for my client?

No. The amendments eliminating habeas corpus review of final orders of removal, deportation or exclusion apply upon enactment and apply to *all* final orders of removal, deportation or exclusion issued before, on, or after the enactment date. Thus, as of May 11, 2005, the REAL ID Act provides that challenges to final orders of removal, deportation or exclusion must be filed in the appropriate court of appeals via a petition for review. See § B, below.

The REAL ID Act expands the jurisdiction of the courts of appeals so that they may review certain issues previously precluded by IIRIRA. See *Fernandez-Ruiz v. Gonzalez*, No. 03-74533, ___ F.3d ___ (9th Cir. May 31, 2005). A new INA § 242(a)(2)(D) states that nothing in the INA “which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with the appropriate court in accordance with this section.” 8 U.S.C. § 1252(a)(2)(D) (as amended).

Thus, courts of appeals now will have jurisdiction to review *all* constitutional issues and questions of law related to a final order of removal. In a case involving removal based

² These are: amended INA §§ 242(a)(2)(A), (B) and (C); new § 242(a)(4); new § 242(A)(5); amended § 242(b)(9); and amended § 242(g).

upon a criminal offense or a discretionary decision, review of legal issues will now be in the court of appeals rather than in the district court by habeas corpus. See § B below. Consequently, while habeas review has been eliminated, review over most – if not all – of the issues that would have been available in habeas proceedings under IIRIRA now should be available via petition for review in the courts of appeals.

--What happens to habeas corpus petitions challenging a final order that were filed prior to enactment of the REAL ID Act and that is pending?

The new law provides that district courts “shall” transfer pending habeas corpus petitions (or the part of the case challenging a final removal, deportation or exclusion order) to the court of appeals in which a petition for review could have been filed (i.e. the circuit having jurisdiction over the place the immigration judge completed proceedings). The courts of appeals must treat the transferred case as if it was filed as a petition for review, with one exception.

The one exception is that the requirement that a petition for review must be filed within 30 days of the final removal order does not apply to these transferred cases. This means that a habeas petition challenging a final order that was pending in district court on May 11, 2005 will be transferred to the court of appeals even if the habeas petition was not filed within 30 days of the final removal order. However, the 30 day deadline continues to apply to all other petitions for review.

This will create a serious problem for some individuals. Prior to the REAL ID Act, an individual barred from filing a petition for review might have been able to get review through a habeas corpus petition. For example, many individuals with criminal convictions were barred from filing a petition for review under INA § 242(a)(2)(C). However, these individuals previously could have filed a habeas corpus petition. There is no deadline for filing a habeas petition. There will be individuals who will not have filed a petition for review within 30 days of their final order because there would have been no jurisdiction under pre-REAL ID Act law. If, as of May 11, 2005, they did not file a habeas petition, they now may be barred from any judicial review under the REAL ID Act. They will no longer be able to file a habeas petition and will have missed the thirty-day deadline for filing a petition for review. Practitioners with clients in this situation may want to consult the Legal Action Center’s (LAC) Practice Advisory that focuses on late-filed petitions for review. See “Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court” (April 20, 2005) http://www.legalactioncenter.org/sites/default/files/lac_pa_042005.pdf.

-- Can I file a habeas corpus petition challenging my client’s detention?

The REAL ID Act does not address detention challenges. Individuals may continue to challenge their detention by filing a habeas corpus petition in district court.

In cases where a petitioner had a pending habeas corpus petition pending on May 11, 2005 challenging both removability and detention, the transfer provision of the REAL ID

Act says that the district courts shall transfer only “the part of the case that challenges the order of removal, deportation, or exclusion” to the appropriate court of appeals. Thus, to the extent that a petitioner is challenging his or her detention, that part of the case should remain at the district court.³

B. Petitions for Review

-- If I would have filed a petition for review prior to REAL ID, do I still file a petition for review?

Yes. All cases that would have been reviewed by a petition for review prior to the REAL ID Act will continue to be reviewed by a petition for review. Thus, in all cases in which – prior to the passage of the REAL ID Act – you would have filed a petition for review under INA § 242, 8 U.S.C. § 1252, you will continue to do so in the future. The general rules regarding when and where to file the petition for review remain unchanged, with one exception. The REAL ID Act states that a petition for review filed under IIRIRA’s transitional rules (IIRIRA § 309) shall be treated as if it had been filed under INA § 242.

-- If I would have filed a habeas petition prior to REAL ID, do I file a petition for review now?

Yes, at least in the majority of cases. The REAL ID Act expands the jurisdiction of the courts of appeals to cover much – if not all – of the habeas review that is being eliminated. The Act adds a new section (a)(5) to INA § 242 (8 U.S.C. § 1252(a)(5)) that states that “a petition for review filed with the appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act.” The only exception to this pertains to review of an order of expedited removal under INA § 242(e), 8 U.S.C. § 1252(e). Keep in mind that the petition for review, unlike the habeas petition, must be filed within 30 days of the final removal order.

The Real ID Act also adds a new section (a)(2)(D) to INA § 242 (8 U.S.C. § 1252(a)(2)(D)) which clarifies that review of all constitutional claims or questions of law shall be by petition for review. The courts of appeals retain jurisdiction over constitutional questions and questions of law regardless of any other restrictions on review contained in INA § 242. See *Fernandez-Ruiz v. Gonzalez*, No. 03-74533, __ F.3d __ (9th Cir. May 31, 2005). Thus, the following are examples of individuals who now may bring legal or constitutional claims in the courts of appeals:

- *Petitioners who were found removable based on a criminal conviction and also were denied relief from removal, such as a section 212(c) waiver, withholding of removal or CAT.* Under pre-REAL ID law, these petitioners could not challenge the denial of relief in a petition for review (INA § 242(a)(2)(C)).

³ The government has taken this position in numerous habeas corpus petitions that were pending on May 11, 2005.

- *Asylum applicants whose applications were denied because they did not file their applications within one year of entering the United States.* Under pre-REAL ID law, these petitioners could not seek judicial review of the decision to deny asylum based on the one year filing deadline (INA § 208(a)(3)).

The final bill deleted an amendment that would have qualified the term “questions of law” with the word “pure.” Because Congress deleted the term “pure” from the final bill, it can be argued that its intent was to insure that *all* questions of law remained subject to review, even in situations where the decision-maker has to apply fact to law to reach a decision. The LAC encourages practitioners to become familiar with existing case law on what constitutes a question of law; to note differences in how courts interpret the phrase depending on the context in which the term is being used; and to propose a broad definition to suit the context of the REAL ID Act.

In addition, courts retain jurisdiction to determine whether they have jurisdiction over the petition for review. Such issues may include, but are not limited to: (1) whether petitioner has been charged with and found deportable for a criminal offense; (2) whether the offense constitutes an aggravated felony or a crime involving moral turpitude; and (3) whether petitioner meets certain non-discretionary statutory eligibility requirements for discretionary relief. The LAC believes that such questions are reviewable regardless of how the courts ultimately construe the phrase “questions of law” in new subsection D of section 242(a)(2).

-- How can I challenge the denial of a CAT claim?

The REAL ID Act also amends INA § 242 by adding a new section (a)(4). 8 U.S.C. § 1252(a)(4). This section provides that a petition for review will be the sole and exclusive means for reviewing a CAT claim. The REAL ID Act eliminates review of CAT claims by habeas.

-- Has there been any change to the standard for getting a stay of removal?

No. While amendments to the standard for a stay were proposed in the REAL ID Act, these were deleted from the final bill.

C. Non-removal cases and discretionary relief

The Act also amends INA § 242(a)(2)(B) which limits judicial review of certain discretionary decisions and actions. The amended language purports to eliminate review by habeas and mandamus over these discretionary decisions and actions.⁴ This section also states that judicial review is eliminated “regardless of whether the judgment, decision, or action is made in removal proceedings.” It is not yet clear what impact this

⁴ A mandamus action is only appropriate where the challenged action is non-discretionary. Because of this, it is unclear how significant this restriction on mandamus will actually be.

change will have on the jurisdiction of the courts to review immigration cases outside of the removal context, such as cases challenging the denial of family or employment-based applications and petitions. In the removal context, a number of courts have narrowly construed the scope of this provision in accord with the specific language chosen by Congress. These decisions should help define exactly what type of discretionary decisions or action in the non-removal context are covered by this amendment.



LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY¹

Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court

By Trina Realmuto²
April 20, 2005

I. Introduction

A petition for review of a final removal, exclusion, deportation order must be filed not later than thirty days after the date the Board of Immigration Appeals (BIA) issues the order.³ The deadline for filing a petition for review⁴ is usually held to be “mandatory and jurisdictional” and “not subject to equitable tolling.”⁵ In general, courts will dismiss untimely petitions for review for lack of jurisdiction.

This practice advisory first addresses narrow situations in which a court might excuse a late-filed petition for review. The advisory then discusses other potential administrative and federal court options for remediating the failure to timely file a petition for review. Finally, the advisory provides an overview of the federal statute, 28 U.S.C. § 1631, that

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³ See INA § 242(b)(1) (removal orders); IIRIRA § 309(c)(4)(C) (deportation and exclusion orders). Final orders after immigration court proceedings are generally issued by the BIA unless the person waived appeal or the order was issued *in absentia*. Final orders also may be issued by U.S. Immigration and Customs Enforcement under certain INA provisions, e.g., INA § 241(a)(5) (reinstatement) (except in the Ninth Circuit, see *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) and 238(b) (administrative removal of aggravated felons). For ease of reference, this advisory refers to the BIA.

⁴ For information regarding when and how to file a petition for review, see AILF’s Practice Advisory “How to File a Petition for Review” (April 2005), located at http://www.ailf.org/lac/lac_pa_041105.pdf.

⁵ *Stone v. INS*, 514 U.S. 386, 405 (1995). See also Federal Rule of Appellate Procedure (FRAP) 26(b) (court may not extend the time to file a petition for review unless specifically authorized by law).

authorizes courts to transfer a case to cure a lack of jurisdiction when an action is filed in the wrong federal court.

Practitioners may be more likely to obtain some relief for a client, notwithstanding a missed 30-day deadline, if they vigorously pursue both available administrative and federal court remedies.

This advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. The information in this document is current as of the date of issuance. However, as future court decisions may change the existing law or create new law on these issues, counsel are advised to independently confirm whether the law in their circuit has changed since the date of this advisory.

II. Counting the 30 Day Deadline

A petition for review must be received by the court of appeals clerk's office on or before the 30th day after the date of the final order and not merely mailed by that date. If the 30th day falls on a Saturday, Sunday, or legal holiday, the petition is due the following business day. See Federal Rule of Appellate Procedure (FRAP) 26(a)(3) (Computing Time).

In counting the 30 days for a detained *pro se* petitioner, the petition must be "deposited in the institution's internal mailing system on or before the last day for filing." FRAP 25(a)(2)(C). See, for example, *Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001) and *Arango-Aradondo v. INS*, 13 F.3d 610, 612 (9th Cir. 1994), citing *Houston v. Lack*, 487 U.S. 266, 270 (1988).

Where a petition for review arrived at the court's post office box on the 30th day but the court clerk did not physically receive it and stamp it as "filed" until the 31st day, it nevertheless was considered "received" and timely filed. *Sheviakov v. INS*, 237 F.3d 1144 (9th Cir. 2001). Because the petitioner had complied with the local rule instructing litigants to use the post office box address and had evidence that the petition arrived at the post office address on the 30th day, the court reasoned that it could not fault the petitioner for the clerk's office's inability to timely stamp it as "filed." *Id.* at 1148.

III. "Exceptions" to the Petition for Review Deadline

As discussed in more detail below, courts have excused the failure to file a timely petition for review in two situations:

where the BIA fails to comply with the applicable regulations regarding mailing the decision to petitioner or petitioner's counsel (in which case, the court may find that 30-day filing deadline did not begin until the petitioner or counsel received actual notice); and

where the court or the BIA provides misleading information regarding appellate review (in which case, the reviewing court may deem the petition for review constructively filed within the 30-day period).⁶

The rationale for these two “exceptions” was that petitioners should not be penalized for errors by the BIA or the courts.

A. BIA Fails to Properly Mail the Decision to Petitioner or Counsel

The applicable regulations provide that the Board must serve its decision on the alien or party affected. 8 C.F.R. § 1003.1(f). In addition, if the individual is represented by counsel, the decision must be mailed to the attorney of record. 8 C.F.R. § 292.5(a). Attorneys representing individuals before the BIA are required to file notices of appearance containing their correct address. 8 C.F.R. § 1003.38(g). Attorneys, as well as *pro se* respondents, are obligated to notify the BIA of address changes. 8 C.F.R. § 1003.38(e). Notifying the immigration service of an address change does not fulfill the obligation to notify the BIA.⁷

If the Board failed to comply with service regulations by, for example, not properly serving its decision on the last known address of petitioner or counsel, or by mailing it to an incorrect or incomplete address,⁸ or failing to mail it at all, some courts have held that the 30-day deadline for filing a petition for review did not begin until the petitioner or counsel received actual notice of the BIA's decision.

⁶ Some courts have recognized the existence of exceptions to the petition for review deadline but found that the petitioner did not qualify for the exception. *Singh v. Immigration & Naturalization Serv.*, 315 F.3d 1186 (9th Cir. 2003) (noting exceptions). See also *Gaur v. Ashcroft*, 2003 U.S. App. LEXIS 6861 (3d Cir. 2003) (unpublished) (expressing agreement with exceptions recognized in *Singh*); *Nahatchevska v. Ashcroft*, 317 F.3d 1226 (10th Cir. 2003) (noting that “unique circumstances” may excuse untimely petition for review) (citations omitted).

⁷ For example, in *Lee v. INS*, 685 F.2d 343, 344 (9th Cir. 1982) (per curiam), petitioners' counsel changed his address while the appeal was pending before the BIA and notified the INS of the address change but failed to notify the BIA. The Board subsequently mailed its decision to the address of record for counsel. The Ninth Circuit held that the BIA satisfied its service obligation and dismissed petitioners' untimely filed petition for review, stating “[p]etitioners' attorney should have undertaken the minimal effort necessary to notify the BIA, a tribunal separate from and independent of the INS, petitioners' adversary in this case, of his correct address.” *Id.*

⁸ Where the BIA mailed the briefing schedule to an address that was missing the name of the counsel's company, the First Circuit held that the BIA erred by failing to send the briefing schedule to the counsel's proper address. Thus, the court reversed the BIA's denial of a motion to reconsider based on non-receipt of the briefing schedule. *Hossain v. Ashcroft*, 381 F.3d 29 (1st Cir. 2004).

Where the petitioner claimed he "was never advised of the Board's decision, or provided a copy of the Board's decision," the record did not document when the BIA mailed its decision to the petitioner and the government could not establish when the BIA's decision was mailed, the Fifth Circuit declined to dismiss the petition for review as untimely. *Ouedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989).

In another illustrative example, the petitioner's attorney properly notified the BIA of his change of address. Nevertheless, the BIA mailed its decision to counsel's former address. After the BIA learned of its error, it mailed a second copy of the decision to counsel's correct address. In this situation, the Second and Ninth Circuits held that service was not properly effectuated until the decision was mailed to petitioner or counsel at the address recorded with the BIA. *Zaluski v. INS*, 37 F.3d 72, 73 (2d Cir. 1994); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258-59 (9th Cir. 1996).⁹

If the petition for review is not filed within 30 days of actual notice of the BIA's decision, it seems less likely that a court would be willing to recognize equitable tolling.

B. Court or the BIA Provides Misleading Information Regarding Appellate Review

If the immigration court or BIA provides wrong information about the petition for review deadline, a court could deem a late-filed petition for review constructively filed within the 30-day filing period.

Where an Immigration Judge mistakenly believed that he could grant petitioner an extension of the appeal period, the Ninth Circuit found that the BIA improperly dismissed the petitioner's appeal as untimely. *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1355 (9th Cir. 1980). The court examined Supreme Court cases extending the time for federal court appeals¹⁰ and concluded that "[i]n each case, the appellant was misled by the words or conduct of the trial court into believing that the time for appeal was extended beyond that prescribed by the applicable rules." *Id.* "In such unique circumstances, where there has been official misleading as to the time within which to file a notice of appeal, the late notice may be deemed to have been constructively filed within the jurisdictional time limits," the court held. Although *Hernandez-Rivera* involved an exception to the deadline for timely filing a *notice to appeal* to the BIA, the Ninth Circuit later cited to the decision as a situation in which a late *petition for review* "arguably filed after expiration of the

⁹ See also *Radkov v. Ashcroft*, 375 F.3d 96, 99 (1st Cir. 2004) (citing *Martinez-Serrano* and *Ouedraogo* with approval). But see *Nowak v. INS*, 94 F.3d 390, 391-92 (7th Cir. 1996) (finding *Ouedraogo* and *Zaluski* inconsistent with the Supreme Court's decision in *Stone v. INS* which held that petition for review deadline begins when the Board issues its decision).

¹⁰ See e.g. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964).

time limitation may nevertheless confer jurisdiction on a court of appeals.” *Singh v. Immigration & Naturalization Serv.*, 315 F.3d 1186, 1188 (9th Cir. 2003).¹¹

Non-immigration cases permitting the extension of deadlines for appeals, motions, or briefs where there has been actual, though not necessarily intentional, misleading by a court may further support an argument that a late-filed petition for review has been constructively timely filed. *See, for example, Clark v. CFTC*, 126 F.3d 424, 426 (2d Cir. 1997) (excusing late filed petition for review in commodities case, citing *Hernandez-Rivera* with approval).

Where governing case law effectively misled a petitioner to file suit in district court, rather than filing a petition for review in the court of appeal, one court of appeals permitted direct review in the context of reviewing the district court’s decision on appeal. *Singh v. Reno*, 183 F.3d 504 (7th Cir. 1999). In a “highly unusual” case, the Seventh Circuit found that a petitioner was entitled to seek direct review *even though he did not file a petition for review at all*. The court reviewed the dismissal of a habeas petition filed by a criminal alien. Relying on its prior decision in *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), the court affirmed the district court’s dismissal for lack of subject-matter jurisdiction. Under the case law at the time, the Seventh Circuit believed it could review the claims of criminal aliens if they presented substantial constitutional issues. The petitioner had presented substantial due process claims warranting direct review.

Significantly, the court excused the petitioner’s failure to file a petition for review because the jurisdiction issue was not settled at the time he filed his habeas corpus petition. The petitioner could not have known that he should have filed a petition for review, the court said, because the governing case law at the time suggested that habeas review was the proper procedural route. *Singh*, 182 F.3d at 508, 511. The court reasoned that “[s]ince Singh could not have known that he was headed for the wrong court, we think it unfair that he be prejudiced for failing to seek review in this Court within the statutory 30-day deadline.” *Singh*, 182 F.3d at 511.

After the Seventh Circuit issued its decision in *LaGuerre*, the Supreme Court held that the proper forum for federal court review of a BIA decision issued to individuals found removable based on certain criminal grounds is in district court via habeas corpus. *INS v. St. Cyr*, 533 U.S. 289 (2001). Thus, based on *St. Cyr*, the petitioner in *Singh* was actually correct to have filed a habeas corpus petition rather than a petition for review.

The important aspect of the *Singh* decision, however, is that the court excused the 30 day deadline to avoid prejudicing the petitioner. The court found that then-governing case law effectively misled the petitioner to file in the wrong court.

¹¹ Examples of cases where courts have accepted untimely notices of appeal to the BIA based on affirmative misleading include: *Vlaicu v. INS*, 998 F.2d 758, 760 (9th Cir. 1993) (per curiam); *Atiqullah v. INS*, 39 F.3d 896, 898 (8th Cir. 1994); and *Naderpour v. INS*, 52 F.3d 731, 733 (8th Cir. 1995).

It seems unlikely that courts would be willing to exercise direct review in cases that do not present as highly unusual fact pattern as the one presented in *Singh*.

IV. Other Administrative and Federal Court Review Remedies

A. Administrative Remedies

1. *Types of Administrative Motions*

i. *Motions to Reopen*

A motion to reopen may be filed within ninety days of the final order provided no prior motion to reopen has been filed. See INA § 240(c)(6); 8 C.F.R. § 1003.2(c). A motion to reopen must be based on new or previously unavailable evidence such as the ineffective assistance rendered by prior counsel in failing to timely file a petition for review.

ii. *Motions to Rescind and Reissue*

If filing a motion to reopen is not possible due to the time or number limits on such motions, counsel could consider filing a motion to rescind and reissue. Such a motion requests that the BIA rescind its prior decision (for which the review deadline has expired) and re-issue the *identical* decision to allow petitioner to seek judicial review.

Pursuant to 8 C.F.R. § 1003.1(d)(ii), the BIA is authorized to “take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.” The BIA’s authority to rescind and reissue a prior decision is further supported by the Seventh Circuit’s decision in *Firmansjah v. Ashcroft*, 347 F.3d 635 (7th Cir. 2003). In *Firmansjah*, the BIA affirmed a removal order but the respondent did not receive notice of it until after the 30-day delay deadline for filing a petition for review had expired. *Id.* at 626. The petitioner requested that the Board “reissue” this order, which it did. *Id.* The petitioner then filed a petition for review within 30 days of the reissued order. The court held that the 30-day petition for review deadline starts anew when the BIA “reissues” its decision, stating “nothing prevents the Board from entering a new removal order, which is subject to a fresh petition for review.” *Id.* at 627. See also *Dearinger v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) (ordering government to reenter the BIA’s order denying appeal and restart thirty-day period for filing the petition for review in the court of appeals) (also discussed below).

In addition, the Board has discretionary equitable powers to serve the interests of justice. See e.g., *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (stating that as long as the Board has jurisdiction, its “discretionary powers are not limited, restricted, or qualified.”); *Matter of X-G-W-*, 22 I.&N. Dec. 71 (BIA 1998) (exercising *sua sponte* authority to reopen proceedings to pursue certain asylum claims based on coerced population control policies to “serve the interest of justice”). Rescission of a prior decision and reissuance with a new effective date arguably serves the interests of justice if it remedies an error by

the BIA or prior counsel which caused petitioner to miss the deadline for filing a petition for review.

2. Possible Basis for an Administrative Motion

i. Ineffective Assistance of Counsel

A motion to reopen or motion to reissue and rescind based on ineffective assistance of counsel is more convincing if it is filed by new counsel, rather than by existing counsel at the time the deadline for filing a petition for review expired. The motion must fully comply with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff'd* 857 F.2d 10 (1st Cir. 1988) and demonstrate that the petitioner has been prejudiced by the deprivation of the opportunity to seek federal court review. For further information on ineffective assistance of counsel claims, see AILF's Practice Advisory, "Protecting Your Client When Prior Counsel Was Ineffective" (April 2002), located at: www.ailf.org/lac/lac_pa_050202c.pdf.

ii. Improper Service of the BIA's Decision

A motion to reopen or motion to rescind and reissue based on the BIA's failure to properly serve its decision on the petitioner or petitioner's counsel may allege that the BIA violated due process and the applicable service regulations.

The failure to provide proper notice of a BIA decision due to defective service infringes on an individual's due process right to notice and his/her statutory and constitutional right to federal court review. Defective service also violates the applicable regulations, which require that the Board serve its decision on petitioner or counsel at the correct and complete address. 8 C.F.R. §§ 292.5(a) and 1003.1(f).¹²

B. Federal Court Remedies

1. Review of Timely Filed Motions to Reopen/ Reconsider

If a petition for review of a Board decision is not timely filed but a motion to reopen/reconsider is filed, the petitioner may eventually have court of appeals review over some of the original issues in a petition for review of the BIA's denial of the motion to reopen/reconsider.

¹² As discussed above, improper service of the BIA's decision is one of two implied exceptions to the rules requiring timely filing of petitions for review. Even if litigating this argument in the court of appeals, it is prudent to also file a motion with the BIA. The BIA has an incentive to correct its administrative errors. Moreover, if the BIA corrects its service error (by reissuing the decision or reopening the case), the correction likely would moot the petition for review that is pending at the court of appeals.

For example, in *De Jimenez v. Ashcroft*, 370 F.3d 783 (8th Cir. 2004), the Board denied the petitioner's appeal but the petitioner did not file a petition for review of the Board's decision. Rather, the petitioner filed a motion to reopen, which the Board subsequently denied. The petitioner again did not file a petition for review. Rather, the petitioner filed a motion to reconsider the BIA's denial of the motion to reopen, which the Board also denied. The petitioner then filed a timely petition for review. The Eighth Circuit accepted jurisdiction over the petition for review of the motion to reconsider denial. The court held the BIA's decisions denying the petitioner's appeal and her motion to reopen were "not *res judicata* with respect to issues raised by the motion to reconsider." *Id.* at 789. The court further noted that "although we are not directly reviewing the BIA's order denying petitioner's motion to reopen, our review of the denial of the motion to reconsider may require us to consider the validity of that order."

Where the issues in the original BIA order differ from the issues in the motion to reopen, however, some courts have refused to review the BIA's original order. For example, the BIA affirms the denial of cancellation on the merits and petitioner does not file a timely petition for review. Instead, petitioner files a motion to reopen based on ineffective assistance of prior counsel. The BIA then denies the motion to reopen based on a deficiency in the ineffective assistance of counsel claim. Petitioner then timely files a petition for review of the BIA's denial of the motion to reopen. The court of appeals will not likely reach the cancellation claim when reviewing the motion to reopen denial since the merits of the issues (cancellation eligibility v. a defective ineffective assistance of counsel claim) do not overlap. *See, e.g. Infanzon v. Ashcroft*, 386 F.3d 1359, 1361 (10th Cir. 2004) (where petitioner did not file a petition for review of original BIA order denying asylum and withholding of removal, court lacked jurisdiction to review the order in context of its review of the BIA's subsequent denial of motion to review based on ineffective assistance of counsel).

2. *Habeas Review*

At least one circuit court has held explicitly that ineffective assistance of counsel does *not* excuse the failure to file a timely petition for review.¹³ However, as described below, where petitioner alleges ineffective assistance of counsel caused them to miss the deadline, some courts have held that habeas corpus review is available. In addition, the Second Circuit has permitted habeas review where a *pro se* petitioner filed an untimely petition for review. These courts have applied the rationale of the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

i. *Post-St. Cyr Theories*

In *INS v. St. Cyr*, the Court held that habeas corpus review remains available to individuals found removable based on certain criminal grounds and who are barred under INA § 242(a)(2)(C) from filing petitions for review in the courts of appeals. The Court in *St. Cyr* interpreted IIRIRA and AEDPA not to preclude federal habeas jurisdiction because such preclusion raised serious constitutional concerns under the Suspension Clause and because there was no clear, unambiguous, and express statement of congressional intent to preclude habeas review.

Courts that have permitted habeas corpus review where the person failed to timely file a petition for review reasoned that there was no indication that Congress intended to retain habeas corpus jurisdiction for criminal deportees but repeal it for non-criminal deportees.

In *Chmakov v. Blackmun*, 266 F.3d 210 (3d Cir. 2001), the petitioners alleged that they failed to timely file a petition for review due to ineffective assistance of prior counsel. They subsequently filed a habeas corpus petition, which was dismissed by the district court for lack of jurisdiction. On appeal, the Third Circuit held that it was “beyond dispute that Congress did not explicitly state its intention to repeal the district courts' 28 U.S.C. § 2241 jurisdiction over habeas petitions filed by aliens subject to a final order of removal.” *Chmakov*, 266 F.3d at 214 (citations omitted). Thus, the absence of specific and unambiguous congressional intent to repeal habeas jurisdiction, which was determinative of its continued existence for individuals found removable on criminal grounds, was equally determinative of the writ's continued existence for individuals found removable on non-criminal grounds, the court held. The court rejected the government's argument that although the *St. Cyr* Court had interpreted IIRIRA and AEDPA not to repeal federal habeas jurisdiction over *criminal* deportees, the Court's interpretation of those statutes did not apply to petitioners because, as *non-criminal*

¹³ See *Malvoisin v. INS*, 268 F.3d 74, 75 (2d Cir. 2001) (holding that attorney's failure to inform petitioner of BIA decision did not excuse untimely filing of petition for review). See also *Gaur v. Ashcroft*, 2003 U.S. App. LEXIS 6861, *7-11 (3d Cir. 2003) (unpublished) (finding that the BIA did not erred in sending decision to attorney's last known address where the attorney failed to notify the BIA of his address change and noting that alien's proper recourse was to request sua sponte reopening from the BIA).

deportees, the Suspension Clause could not be a cause for constitutional concern. *Chmakov*, 266 F.3d at 214. The court reasoned that the provisions of IIRIRA and AEDPA at issue in *St. Cyr* “have a particular meaning, and that meaning does not indicate a congressional intent to repeal habeas jurisdiction. It simply cannot be that the meaning will change depending on the background or pedigree of the petitioner.” *Chmakov*, 266 F.3d at 215. Thus, the court held that “Congress has preserved the right to habeas review for both criminal and non-criminal aliens.” *Id.*

In *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002), the petitioner filed a habeas corpus petition two years after his deportation order became final. Petitioner alleged, in part, that prior counsel’s ineffective assistance of counsel rendered his deportation order unlawful. The district court exercised habeas jurisdiction and the Tenth Circuit, adopting the rationale of the *Chamkov* and *Luya Liu* courts, affirmed the availability of habeas jurisdiction to non-criminal deportees.

In *Luya Liu v. INS*, 293 F.3d 36 (2d Cir. 2002), the petitioner filed a *pro se* habeas petition after the Second Circuit dismissed her petition for review as untimely. Concluding that petitioner’s “sole means to obtain review of the BIA’s decision consisted of a direct appeal,” the district court dismissed the petition for lack of jurisdiction. *Luya Liu*, 293 F.3d at 38. The Second Circuit reversed, stating that “[n]othing in *St. Cyr* suggests that its holding – in substance, an extended exercise in statutory construction – applies only to criminal aliens.” *Luya Liu*, 293 F.3d at 40. Thus, the court concluded that habeas corpus jurisdiction remained regardless of the petitioner’s status or grounds of removability. *Luya Liu*, 293 F.3d at 41.

In addition, in an unpublished decision, the Ninth Circuit noted that ineffective assistance of counsel for failure to file an appeal brief to the BIA and a petition for review might permit habeas review. *Harmeet Singh v. BIA*, 2003 U.S. App. LEXIS 20794 (9th Cir. 2003) (unpublished). Citing *Chamkov* and *Luya Liu*, the court noted that “[i]t remains open to Petitioner to raise this Fifth Amendment claim in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.”

Some district courts have been receptive to exercising habeas jurisdiction despite the availability of direct review in the court of appeals. *See, for example, Kaweesa v. Ashcroft*, 345 F. Supp. 2d 79, 2004 U.S. Dist. LEXIS 24503, *41 (D.Mass. 2004) (“the provisions in 8 U.S.C. § 1252 limiting ‘judicial review’ to direct review in the courts of appeals do not foreclose habeas jurisdiction in the district courts.”); *Saba v. INS*, 52 F. Supp. 2d 1117, 1123 (N.D.Cal. 1999) (habeas jurisdiction exists where “no other avenue of judicial review” available to petitioners due to the ineffective assistance rendered by counsel).

ii. Pre-St. Cyr Habeas Jurisdiction Case

The Ninth Circuit has expressed an inclination to find that habeas jurisdiction remains available to non-criminal deportees seeking review after untimely filing of the petition for review. In *Dearinger v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000), a pre-*St. Cyr*

published decision, petitioner's prior counsel filed a petition for review of a BIA order one day late and the court dismissed the petition as untimely. Petitioner's friends then filed a habeas petition as next of friends based on the ineffective assistance rendered by counsel in failing to timely file a petition for review. The district court granted the petition and ordered the government to reenter the BIA's order denying the appeal and restart the thirty-day period for filing the petition for review in the court of appeals. Relying on its earlier decision in *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999), the court found that neither AEDPA nor IIRIRA repealed statutory habeas for individuals challenging executive detention and affirmed the district court's grant of jurisdiction and the court's order granting the writ.

iii. *Exhaustion of Administrative and Judicial Remedies*

On the other hand, a petitioner who did not timely file a petition for review but who files a habeas corpus petition may face exhaustion problems. Some courts have held that the filing a petition for review constitutes a *judicial* remedy which, absent certain extenuating circumstances, must be exhausted before a petitioner may obtain habeas review in district court.¹⁴ In addition, a court may require that a habeas petitioners to exhaust *administrative* remedies with respect to ineffective assistance of counsel claims by filing a motion to reopen with the Board prior to proceeding in federal district court.¹⁵

¹⁴ See e.g. *Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004) (holding that failure to file a timely petition for review challenging aggravated nature of felony conviction bars habeas review); *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539 (9th Cir. 2004) (same), but see *Nakaranurack v. United States*, 68 F.3d 290, 294 (9th Cir. 1995) (district court should have waived the exhaustion requirement and exercised habeas jurisdiction because it was unfair to impute the negligence of the alien's attorney in filing an untimely petition for review to the alien himself).

¹⁵ See, e.g. *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001) ("... to the extent that the Board does provide currently available remedies as a matter of grace, a court is free to require exhaustion of such remedies--not because of any jurisdictional objection or statutory command but simply because it makes sense.") (citations omitted). See also *Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001) ("we require, as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before seeking relief under § 2241").

V. Requesting Transfer to Cure Lack of Jurisdiction

Under 28 U.S.C. § 1631, a court may transfer an action filed in the wrong court to cure a lack of jurisdiction. The transfer statute is meant to help parties who are confused about which court has jurisdiction by preserving the opportunity to present the merits of their claim.¹⁶ Thus, the transfer statute may be invoked to obtain court of appeals review of claims raised in an improperly filed district court action or to obtain district court review of claims raised in an improperly filed petition for review. A court of appeals can transfer an improperly filed district court action to itself. Transfer can be requested or invoked *sua sponte* by a court.

The transfer statute states:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

In sum, transfer is appropriate under § 1631 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. Importantly, the statute provides that the court “shall” transfer the case to the appropriate court if these conditions are met.

The first requirement – that the transferring lacks jurisdiction – depends on the individual facts of the case and the governing jurisdiction law.

The second requirement -- that the action or appeal could have been brought in the transferee court – means that the action or appeal must have been *timely filed*, even if it was brought before the wrong court. Thus, a district court can only transfer a case that

¹⁶ The courts are split over whether the transfer statute cures a lack of personal jurisdiction or only cures a lack of subject matter jurisdiction. See *Roman v. Ashcroft*, 340 F.3d 314, 328-329 (6th Cir. 2003) (discussing circuit split and finding that transfer statute may be invoked to cure lack of personal jurisdiction).

should have been filed in the court of appeals if the district court action was filed within thirty days of the final order.¹⁷ Similarly, the court of appeals can only exercise its authority to *sua sponte* transfer a case to itself if the district court action was filed within thirty days of the final order.

For example, two of the petitioners in *Castro-Cortez v. INS*, 239 F.3d 1037, 1046-1047 (9th Cir. 2001) filed habeas corpus petitions seeking review of their final reinstatement orders. The district court exercised jurisdiction. On appeal, the Ninth Circuit concluded that reinstatement orders are reviewable via petitions for review. However, because petitioners' habeas corpus petitions were filed within thirty days of their final reinstatement orders, the court transferred the cases to itself and construed them as if they were filed as petitions for review. *Id.* at 1046 (the transfer statute "permits us to transfer the cases to this court and consider the petitions as though they had never been filed in the district court.").

Moreover, at least one court has held that the transferee court must have been able to exercise jurisdiction over the specific *type of action or appeal* that was brought in the wrong court. In *Dragenice v. Ridge*, 389 F.3d 92, 100 (4th Cir. 2004), the Fourth Circuit concluded, *sua sponte*, that the district court improperly transferred a habeas corpus petition to the court of appeals because only district courts, the Supreme Court and a *single* circuit judge have authority to entertain habeas petitions. Thus, the court held that that the requirement of § 1631 that a case be transferred to a *court* in which it could have been brought was not satisfied in that case. To avoid this issue, a petitioner who asks the district court to transfer a habeas petition to the court of appeals may want to specifically request that the district court first construe the habeas corpus petition as a petition for review before ordering transfer.

The third requirement – that transfer is in the interest of justice – also is fact-based. Some courts have invoked the transfer statute where filing in the wrong court was reasonable due to ambiguity in the law regarding jurisdiction¹⁸ or justifiable reliance on a statute or court decision.¹⁹ Other courts have ordered transfer to preserve review that

¹⁷ Where a district court action was not filed within 30 days of the final order but was filed within 30 days of another event that reactivated or triggered the final order, it might be possible to successfully argue that this requirement has been met. See *Castro-Cortez*, 239 F.3d 1046, n. 10 (finding that the reactivation of the reinstatement order, not the actual reinstatement order, triggered the petition for review deadline in the case of Petitioner Salinas-Sandoval).

¹⁸ *Matthews v. United States*, 810 F.2d 109, 113 (6th Cir. 1987) (ordering transfer where jurisdictional issue had not yet been decided by the circuit court).

¹⁹ See *Castro-Cortez v. INS*, 239 F.3d 1037, 1046-1047 (9th Cir. 2001) (transferring habeas action seeking review of a reinstatement order to court of appeals 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").

would otherwise be time barred for failure to file a timely petition for review²⁰ or to prevent undue delay.²¹

A district court order transferring a case to circuit court is generally not considered a final order that can be appealed because the propriety of the transfer can be reviewed by the transferee circuit court.²²

²⁰ See, e.g. *Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003) (transferring habeas action seeking review of a reinstatement order to court of appeals because, without transfer “the petitioner will have lost his opportunity to present the merits of the claim due to a statute of limitations bar”).

²¹ *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 965 (9th Cir. 2004) (transferring petition for review seeking collateral review in reinstatement case to district court where petitioner raised a “colorable constitutional claim” and transfer would prevent unnecessary delay that would be caused by requiring petitioner to file a habeas petition). See also *Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir. 2003) (noting district court transfer of habeas action seeking review of a reinstatement order to court of appeals), at 16 (retransferring case to the district court for further proceedings on habeas challenge to detention).

²² *Cruz v. Ridge*, 383 F.3d 62, 65 (2d Cir. 2004).

UPDATED PRACTICE ADVISORY¹

**SPECIAL IMMIGRANT RELIGIOUS WORKERS: HOW TO
DEMONSTRATE THAT AN IMMIGRANT SEEKS
EMPLOYMENT IN A “RELIGIOUS OCCUPATION.”**

By Mary Kenney and Deborah Morgan²
September 29, 2004

The Immigration and Nationality Act (INA) authorizes visas for the following three categories of religious workers to immigrate to the United States to work for a qualifying religious organization: (1) ministers; (2) professionals working in a religious vocation or occupation; and (3) other individuals working in a religious vocation or occupation. 8 U.S.C. §§ 1101(a)(27)(C); 1153(b)(4). This practice advisory will address the term “religious occupation” as it is used in the second and third category of religious workers. See 8 U.S.C. §§ 1101(a)(27)(C)(ii)(II) and (III).

In deciding whether a position constitutes a “religious occupation” for religious workers, U.S. Citizenship and Immigration Services (USCIS) and the Administrative Appeals Office (AAO) frequently impose requirements in excess of those required by statute and regulation. This practice advisory will explain why federal courts have overturned AAO decisions that erroneously imposed three types of heightened requirements for the term “religious occupation”: (1) religious training requirements; (2) distinctions between secular and non-secular duties; and (3) salary and hour requirements.

This practice advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client’s case.

¹ Copyright (c) 2004, 2010 American Immigration Council. [Click here for information on reprinting this practice advisory.](#) This practice advisory was originally published on June 22, 2004. It has been updated to incorporate discussion of the recent decision *Camphill Soltane v. US Dep’t of Justice*, No. 03-1626, 2004 U.S. App. LEXIS 18147 (3d Cir. Aug. 26, 2004).

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What are the requirements for a Special Immigrant Religious Worker visa?

An immigrant will qualify as a special immigrant religious worker by demonstrating that he or she:

- 1) has, for at least two years before applying for admission, been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;
- 2) seeks to enter the U. S. to work:
 - i. as a minister for this religious denomination
 - ii. as a professional in a religious occupation or vocation for this organization, or
 - iii. in a religious occupation or vocation for this organization or an affiliated bona fide tax exempt organization; and
- 3) has been carrying on such vocation, professional work or other work continuously for at least two years before applying for admission.

8 U.S.C. § 1101(a)(27)(C). Either the immigrant or a person on his or her behalf may file a form I-360 petition for classification as a special immigrant religious worker. 8 U.S.C. § 1154(a)(1)(G); 8 C.F.R. § 204.5(m)(1). In most cases, the sponsoring religious organization will file the application for the immigrant religious worker. *See, e.g., Perez v. Ashcroft*, 236 F. Supp. 2d 899, 902 (N.D. Ill. 2002).

Each year, no more than 5,000 visas are made available for religious workers other than ministers – that is, for both professionals and non-professionals seeking admission to work in a religious occupation or vocation. 8 U.S.C. § 1153(b)(4). The visa provisions for these two categories of religious workers will sunset on September 30, 2008, unless extended by Congress.³

How is “religious occupation” defined?

For two of three categories of special immigrant religious workers, the INA requires that the intending immigrant work for the sponsoring organization in a “religious vocation or occupation.” *See* 8 U.S.C. §§ 1101(a)(27)(C)(ii)(II) (professional capacity work); 1101(a)(27)(C)(ii)(III) (other [non-professional] work). The INA does not define a “religious occupation.” The regulations define the term as follows:

³ For more on the statutory and regulatory requirements and for practice pointers on how to develop and present an application, see Rodney M. Barker & Priscillia Suntoso, *Permanent Religious Workers Under the Immigration and Nationality Act*, in *Immigration and Nationality Law Handbook*, Vol. 2 (AILA 2004-05 ed.); Martina M. Keller, Christine H. Blum & Robert L. DeMoss II, *Preparing Special Immigrant Visa Petitions for Religious Workers: A Practical Guideline*, in *Immigration and Nationality Law Handbook*, Vol. 2 (AILA 2004-05 ed.).

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

8 C.F.R. § 204.5(m)(2) (emphasis added).

This definition does not require that the immigrant have any specific training or education. Rather, it defines “religious occupation” solely on the basis of “the nature of the work that a person performs.” *Perez*, 236 F. Supp. 2d at 905; *see also Tenacre Foundation v. INS*, 78 F.3d 693, 697 (D.C. Cir. 1996) (interpreting the same definition in the non-immigrant religious worker regulations, the legacy INS conceded in litigation that no prior training or experience was necessary to function in a religious occupation).

This interpretation is underscored by a comparison of the regulatory requirements for “professional” and non-professional work in a religious occupation. To work in a professional capacity in a religious occupation, an immigrant must have the equivalent of a United States bachelor’s degree. 8 C.F.R. § 204.5(m)(2) (defining “professional capacity”). In contrast, to demonstrate qualification for non-professional work in a religious occupation, the regulation simply requires “evidence establishing . . . that the type of work to be done relates to a traditional religious function.” 8 C.F.R. § 204.5(m)(3)(ii)(D). In other words, an immigrant can demonstrate that he or she is qualified to work in a non-professional religious occupation simply by demonstrating that the work itself satisfies the definition of a religious occupation. The regulations require a specific educational background *only* to demonstrate that a person qualifies as a “professional;” this educational requirement has nothing to do with whether the work is a religious occupation.

I. Religious Training Requirements

Does USCIS erroneously impose specific training requirements for work to qualify as a “religious occupation”?

Yes. Despite the absence of any religious training requirement in the statute or regulations, the AAO and the regional service centers of the USCIS – the offices that adjudicate religious worker petitions – interpret the definition of a “religious occupation” as requiring specific religious training or theological education. Thus, these offices routinely deny religious worker petitions for religious occupations if either the position does not require formal religious training or education, or the immigrant applicant lacks such training. The AAO bases this requirement on its interpretation of the term “traditional religious function.” The AAO claims that “*specific prescribed religious training or theological education is required*” to demonstrate that work constitutes a

traditional religious function. *See, e.g., Matter of [name not provided]* (AAO Sept. 30, 2003), *posted at* http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/sep3003_39c1203.pdf.

The AAO rationalizes this requirement using faulty and unsupported logic. The AAO claims, without citing any authority, that the positions listed in the regulation as examples of religious occupations – such as cantor, missionary or religious instructor – all require “prescribed courses of training established by the governing body of the denomination.” The AAO then states that the regulatory examples that do not qualify as religious occupations – such as janitor and fund raiser – do not require specific religious training or education. From this, the AAO concludes that specific religious training or education is required for religious occupations. *See, e.g., id.* As a consequence, the AAO and the service centers routinely deny visa petitions for work in religious occupations where there is no evidence that the duties of the job require specific religious training or that the individual seeking the visa has specific religious training.

Why did a federal court reject the AAO’s requirement of specific religious training?

A federal court rejected the agency’s imposition of a religious training requirement on the term “religious occupation,” and overruled the AAO’s denial of a religious worker visa on this basis because the requirements were in excess of the statute and the regulations. *See Perez v. Ashcroft*, 236 F. Supp. 2d 899, 906 (N.D. Ill. 2002). In *Perez*, a church filed a special immigrant religious worker visa petition on behalf of the church’s full-time, paid music director. In the position of music director, Perez ran the church’s music program by organizing and directing several choirs; directing youth music activities; purchasing and maintaining instruments; coordinating the music for religious services; teaching the Bible to the church’s youth group; and providing spiritual leadership and guidance to the congregation. *Id.* at 901-902.

Both the Nebraska Service Center and the AAO denied the petition on the ground that the position of music director did not clearly qualify as a religious occupation. The AAO stated that the church failed to show that the position of music director was a religious occupation because Perez had no formal religious training. *Id.* at 903.

The church and Perez filed suit in federal district court, challenging the AAO’s decision under the Administrative Procedures Act (APA). In their suit, they made two claims that are relevant here: first, they argued that the AAO’s requirement of formal religious training was invalid because it was contrary to the agency’s own regulation defining a religious occupation; second, they also argued that this requirement of formal religious training could not be enforced as an agency rule because it was never adopted as a formal regulation. *Id.*

The district court agreed with the plaintiffs on both claims. First, the court concluded that nothing in the existing regulation even remotely suggests that the background or qualifications possessed by an applicant might play any part in determining whether that person qualifies for a visa. Rather, the court held that the regulation defines a religious

occupation solely on the basis of the nature of the work a person performs and its relationship to a religious function. *Id.* at 906; *see also Kent First Korean Church v. USCIS*, 2002 U.S. Dist. LEXIS 27081 (W.D. Wash. 2002) (unpublished) (adopting the reasoning of *Perez* in a non-immigrant religious worker context). In *Perez*'s case, the court found uncontroverted evidence that his work played an integral role in the church's worship service, and thus concluded that it was "beyond dispute" that his work qualified as a religious occupation. *Perez*, 236 F. Supp. 2d at 904.

The *Perez* court next rejected the AAO's argument that the formal training requirement was simply an agency interpretation of its own regulation and therefore entitled to deference. Because the formal training requirement was unrelated to the regulation, the court determined that it could not reasonably be considered an interpretation of the existing regulation. *Id.* at 906. Instead, the court found that the formal training requirement was an independent rule setting forth substantive requirements. As a substantive rule, the agency was required to adopt it formally, as it would any regulation – that is, by means of publication in the Federal Register, with an opportunity for the public to comment prior to adoption of a final regulation. The court concluded that because INS had failed to adopt the rule in compliance with the Administrative Procedures Act, 5 U.S.C. § 553, it was invalid. *Id.* Additionally, the court also held that the AAO's denial of the petition based upon this invalid rule was also invalid. *Id.*

II. Distinction between Secular and Non-Secular Duties

Does USCIS erroneously impose restrictions on the types of tasks permissible for a "religious occupation"?

Yes. The regulations define a religious occupation as one "which relates to a traditional religious function." 8 C.F.R. § 204.5(m)(2). However, the AAO has narrowly interpreted this to mean that religious occupations must involve *only* religious functions, to the exclusion of secular functions, even when the secular functions are performed in furtherance of a religious mission. *See, e.g., Perez*, 236 F. Supp. 2d at 904 (AAO erroneously found that the position of church music director is not a "religious occupation" because it includes administrative duties such as service rehearsals). Moreover, the AAO has also made erroneous factual determinations as to what duties are included in a particular job, omitting all references to the religious functions of the job. *See e.g., Camphill Soltane*, No. 03-1626, 2004 U.S. App. LEXIS 18147, at *15 (3rd Cir. Aug. 26, 2004). The AAO's attempts to define occupations in such a way as to exclude any religious import, and then to use that definition to determine that the occupation is secular is inconsistent with the intent of the regulation.

Why have federal courts rejected the AAO's restrictions?

The Third Circuit rejected the AAO's interpretation of the term "religious occupation" because of its circular reasoning. *See Camphill Soltane v. US Dep't of Justice*, No. 03-1626, 2004 U.S. App. LEXIS 18147, at *15 (3d Cir. Aug. 26, 2004). In *Camphill Soltane*, a non-profit dedicated to "Christianizing the ordinary aspects of life for the

mentally handicapped” sought a religious worker visa for the position of house-parent, music instructor, and religious instructor. *Id.* at *2. The AAO found that the caretaker duties of house-parent were purely secular and the position did not qualify as a religious occupation. *Id.* at *13-14. The court noted that, under AAO reasoning, many of the occupations specifically listed in the regulations are secular (for example, a religious translator performs the function of translation, a secular occupation). *Id.* at *15. The court interpreted the regulation to mean that a qualifying job must have “some religious significance,” and rejected the AAO interpretation that the job must involve *only* religious functions. *Id.* at *16. The court held that there was no support in the record for the AAO claim that the job was “wholly secular” since the tasks of the house-parent included a number of “clearly religious responsibilities.” *Id.* at *16-17.

The *Perez* court also rejected an argument by the government that, because Perez’s church music director position included certain administrative duties such as sound system setting, it was not a religious occupation. The court stated that it was “difficult to imagine” any position with a religious organization that would not include some administrative duties, and concluded that the regulations “impose no requirement that for someone to qualify as a religious worker, he or she must never engage in any secular or administrative duties.” *Perez*, 236 F. Supp. 2d at 904; *see also Kent*, 2002 U.S. Dist. LEXIS 27081, at *17 (favorably comparing the position of church music director to a cantor – a job which the regulations specifically recognized as a religious occupation – and distinguishing it from the positions cited in the regulations as not constituting religious occupations).

As these cases demonstrate, and despite AAO’s insistence to the contrary, a religious occupation does *not* have to exclude all secular functions in order to fall within the scope of the regulatory definition. Although the job must have some religious significance, it can – and frequently will – also include some secular duties.

III. Salary and Hour Requirements

A sponsoring organization must submit to USCIS a letter from an authorized official of the religious organization that states “how the alien will be paid or remunerated” and which “clearly indicate[s] that the alien will not be solely dependent on supplemental income or solicitation of funds for support.” 8 C.F.R. § 204.5(m)(4). The AAO has interpreted this to mean that the religious occupation must be a “traditionally full-time salaried position.” *See, e.g., Camphill Soltane*, 2004 U.S. App. LEXIS 18147, at *17. The Third Circuit questioned this interpretation. The court noted that many of the occupations listed in the regulations, such as missionary, do not always receive salaries, and that the final rules explicitly included “uncompensated volunteers, whose services are engaged but who are not technically employees.” *Id.* at *18 (quoting 56 Fed. Reg. 66,965 (Dec. 27, 1991)). Thus, the court invalidated an interpretation of the regulations that requires monetary compensation in order for a position to be considered a qualifying “religious occupation.”

No regulation appears to address the number of work-hours required for a person engaged in a “religious occupation.” However, the AAO has required that the position must be full-time. See *Camphill Soltane*, 2004 U.S. App. LEXIS 18147, at *19. The court questioned whether the regulations support this requirement, but did not reach the issue because the case involved an applicant who was working full time without additional supplemental employment. *Id.* Thus, the question of whether a part-time position (paid or volunteer) would qualify under the regulations as a “religious occupation” remains unresolved.

How has the AAO responded to *Perez* and *Camphill Soltane*?

The AAO has made it very clear that it does not consider *Perez* to be binding in districts outside of the Northern District of Illinois. See *Matter of [name not provided]* (AAO Sept. 30, 2003), posted at http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/sep3003_33c1203.pdf. Moreover, the AAO has raised the question of whether it will even follow *Perez* in cases arising within the Northern District of Illinois. *Id.* As a result, the AAO and the service centers have refused to apply *Perez*, and instead continue to require proof of religious training or education for work in religious occupations. It is too soon to see how the AAO will respond to *Camphill Soltane*.

What steps can be taken to overcome the AAO’s erroneous interpretations of the term “religious occupation?”

Attorneys can rely on *Perez* to argue before the service centers and the AAO that a formal religious training requirement is invalid under the statute and regulations. Unfortunately, it is unlikely that the AAO will change its position on this issue without further litigation. Raising the issue before the agency will nevertheless ensure that the religious worker and/or religious organization have exhausted all administrative remedies prior to any subsequent federal court action and will preserve the issue for a federal court appeal.⁴ Moreover, with a well-documented record, it is more likely that the agency may back down in a federal court challenge under *Perez*.

⁴ It is wise to exhaust administrative remedies prior to federal court action. In some situations, a federal court will not have jurisdiction if the plaintiff/petitioner has not exhausted administrative remedies. See, e.g., *McCarthy v. Madison*, 503 U.S. 140, 144 (1992) (“Where Congress specifically mandates, exhaustion is required.”). Even where it is not a jurisdictional issue, a court may nevertheless retain discretion to dismiss a case in which administrative remedies were not exhausted. See *id.* (“where Congress has not clearly required exhaustion, sound judicial discretion governs”) (internal citations omitted). Thus, the safer practice is to exhaust all administrative remedies where possible. Note, however, that in some federal court cases brought under the Administrative Procedures Act, a court may not have the authority to impose an exhaustion requirement if one was not mandated by Congress. See *Darby v. Cisneros*, 509 U.S. 137 (1993). For more on this argument, see the AILF Practice Advisory “Failure to Appeal to the AAO: Does it Bar all Federal Court Review of the Case?” at http://www.aifl.org/lac/lac_pa_072704.asp.

Where an immigrant has actually had formal religious training or education, evidence of that training and education can be submitted to the AAO. When submitting this evidence, the attorney should make clear that the immigrant does not concede that training or education is required under the statute or regulations. It is particularly important to preserve this legal point because the AAO does not appear to have set a standard as to what constitutes sufficient training or education under its interpretation of the regulations. Thus, even where an individual has had some formal training, the AAO might still deny the case on the basis of insufficient training.

For example, the AAO has rejected on-the-job training as insufficient to qualify a position as a religious occupation. Similarly, the AAO has rejected religious study as insufficient, without actually explaining what training would have been sufficient in the case. *See, e.g., Matter of [Name not provided]* (April 17, 2003), posted at http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/apr1703_01c1203.pdf (rejecting religious study by characterizing it as merely taking “requisite steps to be indoctrinated into the precepts of the religion”). The AAO also has rejected cases where it found that the position consists of activities “normally expected of an active, studied member of the particular religion” rather than being career religious work. *See, e.g., Matter of [Name not provided]* (Mar. 27, 2003), posted at http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/MAR2703_01C1203.pdf.

The more detailed and complete the evidence is regarding the nature and extent of training or education, the stronger the case will be. In general in the employment-based cases, the best evidence is letters from current or former employers/trainers that describe the employment or training. *See* 8 C.F.R. § 204.5(g)(1). The AAO has rejected cases on the ground that assertions as to training were not supported with a letter from the employer or trainer. *See, e.g., Matter of [Name not provided]* (Sept. 30, 2003), posted at http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/sep3003_01c1203.pdf (simply going on record without supporting documentation is insufficient to meet applicant’s burden of proof); *Matter of [Name not provided]* (Oct. 8, 2003), posted at http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/OCT0803_03C1203.pdf (assertions of counsel are not evidence). However, the court in *Camphill Soltane* admonished INS for denying a petition without providing an explanation for why it was rejecting uncontradicted documentary evidence and without requesting additional evidence. *See Camphill Soltane*, 2004 U.S. App. LEXIS 18147, at *21-22. Thus, while the burden of proof remains with the applicant, USCIS should not simply deny a petition without explaining why the evidence is not credible or without providing an opportunity to supplement.

It is critical in all cases to submit evidence that demonstrates that the position consists of work that relates to a traditional religious function. *See* 8 C.F.R. §§ 204.5(m)(2); (3)(ii)(D). By submitting this evidence, you will be building a record for a federal court challenge should the service center and/or the AAO deny the case on the ground that the immigrant does not have sufficient formal training or education. This evidence will demonstrate that the position sought by your client satisfies the regulatory definition of a

“religious occupation,” regardless of the presence or absence of any religious training or education on the part of the immigrant. 8 C.F.R. § 204.5(m)(2).

While there is no definition of “traditional religious function,” the term is generally considered in the context of the specific religious denomination for which the immigrant will be working. Thus, to constitute a traditional religious function, the work should relate to the particular doctrines or practices of the sponsoring religious organization. Moreover, while it is the applicant’s burden to demonstrate that work does relate to a traditional religious function of the particular organization, the legacy INS conceded in litigation that it must accept the good faith explanation of a religious organization as to what it means to be functioning within a religious occupation for that organization. *Tenacre Foundation*, 78 F.3d at 697.

In *Perez*, the record contained detailed evidence of the many ways in which Perez, as the musical director for the church, performed religious functions related to the church’s practices and doctrines. Based upon this evidence, the court found that the position of music director was a religious occupation due to the “integral role that so many of Perez’ musically oriented activities play in the worship services” of the church. *Perez*, 236 F. Supp. 2d at 904; *see also Kent*, 2002 U.S. Dist. LEXIS 27081 at *16-17 (finding the petitioner engaged in traditional religious functions by incorporating music into the church’s religious programs). In *Camphill Soltane*, the record indicated how the house-parent was responsible for religious tasks such as prayer, festival celebrations, and Bible readings, as well as how the task of caring for the mentally-handicapped residents involved religious aspects. *Camphill Soltane*, 2004 U.S. App. LEXIS 18147, at *16-17. The court concluded that such evidence contradicted AAO’s findings that the job was “wholly secular.” *Id.* at *17.

Conclusion

As the above discussion indicates, without further litigation the service centers and the AAO are unlikely to admit that neither the statute nor the regulations require a showing of specific religious training or education for a position to constitute a “religious occupation.” Nevertheless, there are some steps that you can take to strengthen your client’s case before the agency. Additionally, in these cases, it is important to build a record for possible federal court review. As *Perez*, *Kent*, and *Camphill Soltane* illustrate, the federal court system often is the best forum for fairly adjudicating religious worker petitions.

PRACTICE ADVISORY¹
July 22, 2004

By: Mary Kenney

**FAILURE TO APPEAL TO THE AAO:
DOES IT BAR ALL FEDERAL COURT REVIEW OF THE CASE?**

Generally, before seeking federal court review of a decision of an administrative agency, an individual is first required to exhaust all administrative remedies. If the individual fails to do this, the court may refuse to review the decision. In fact, in some situations, the court will have no jurisdiction over a case if the administrative remedies were not first exhausted.

What about appeals to the Administrative Appeals Office (“AAO”)?² Can a person get review of a U.S. Citizenship and Immigration Services (USCIS) decision in federal court if he or she failed to appeal the decision to the AAO?³

Possibly. The Supreme Court has held that in federal court cases brought under the Administrative Procedures Act (APA), a plaintiff is not required to exhaust non-mandatory administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993). For a case

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² The AAO is an administrative body that considers appeals from decisions of officers of the USCIS in certain types of cases. *See generally* 8 C.F.R. § 103.3. The USCIS website uses the designations Administrative Appeals Office (AAO) and Administrative Appeals Unit (AAU) interchangeably. *See, e.g.*, <http://uscis.gov/graphics/howdoi/pepeal denial.htm>; <http://uscis.gov/graphics/howdoi/aa u.htm>. This practice advisory will refer to the agency as the AAO as that is the more widely known designation. Note, however, that the regulations use the name AAU. *See, e.g.*, 8 C.F.R. § 103.3(a)(1)(iv).

³ This practice advisory is limited to a discussion of exhaustion and the AAO. The exhaustion requirements related to an appeal to the BIA are different.

to be exempt under *Darby* from the requirement that administrative remedies be exhausted, the following criteria must be met:

- „ The federal court suit is brought pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq.;
- „ There is no statute that mandates an administrative appeal;
- „ Either: a) there is no regulation that mandates an administrative appeal; or b) if there is a regulation that mandates an administrative appeal, it does not also stay the agency decision pending the administrative appeal; and
- „ The adverse agency decision to be challenged is final for purposes of the APA.

This practice advisory will discuss the *Darby* decision and how it may apply to cases involving administrative appeals to the AAO. The arguments suggested here can be used where a client has already missed the deadline for appealing to the AAO or for some other reason is prevented from pursuing an AAO appeal.⁴ Note, however, that we know of no case in which a court has yet applied *Darby* in the context of exhaustion of an administrative appeal to the AAO. There is always a risk that a court will misapply *Darby* and find that exhaustion of an appeal to the AAO is a prerequisite to an APA federal court challenge. If that happens, the federal court case could be dismissed for failure to exhaust. Until there is clear case law on the issue, clients should be counseled fully about the risk involved in deliberately bypassing the AAO and immediately challenging an adverse USCIS decision in federal court.

This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Moreover, the case law relating to exhaustion is not limited to immigration cases and varies from circuit to circuit. Attorneys are thus advised to research the case law in their circuits.

What is meant by “exhaustion of administrative remedies”?

The doctrine of exhaustion of administrative remedies governs the timing of federal-court decision-making. *McCarthy v. Madison*, 503 U.S. 140, 144 (1992). When the exhaustion doctrine applies, a party must pursue administrative remedies before seeking relief from a federal court. As a general rule, exhaustion of administrative remedies is required in two circumstances: where 1) Congress mandates exhaustion in the relevant statute;⁵ or 2) a court exercises its discretion and requires that non-mandatory

⁴ There may be situations, for example, where the delay resulting from an appeal to the AAO will cause the individual to lose eligibility for the benefit in question. In this situation, an individual may choose to file suit without first appealing to the AAO.

⁵ An example of a statutory exhaustion requirement is 8 U.S.C. § 1252(d) (“A court may review a final order of removal only if ... the alien has exhausted all administrative remedies available to the alien as of right”).

administrative appeals be exhausted.⁶ As the Supreme Court has explained: “[w]here Congress specifically mandates, exhaustion is required ... Where Congress has not clearly required exhaustion, sound judicial discretion governs.” *McCarthy*, 503 U.S. at 144 (citations omitted).

What did the *Darby* court say about exhaustion of administrative remedies under the APA?

In *Darby*, the Court stated an important exception to the general rules requiring exhaustion. In cases brought under the APA, *Darby* holds that exhaustion of administrative remedies can only be required if a statute or regulation mandates exhaustion prior to judicial review. In APA cases, where there is no statute or regulation that requires that an administrative appeal be pursued prior to judicial review, a federal court does not have the discretionary authority to require exhaustion. *Darby*, 509 U.S. at 154 (1993).

The Court based its holding on Section 10(c) of the APA, 5 U.S.C. § 704, which establishes when judicial review is available under the APA. *Darby*, 509 U.S. at 146.⁷ The Court explained that this section “by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.” *Id.*

Why is *Darby* significant?

Darby is significant because it eliminates a potential barrier to judicial review in APA cases. As one way to control their expanding dockets, courts are dismissing cases in which the plaintiff did not exhaust all available administrative appeals – even optional appeals not mandated by statute or regulation. As a result, in cases in which a court has this discretionary authority, there is always a risk that the federal court suit will be

⁶ For cases discussing exhaustion as being within a court’s discretion, see, e.g., *Iddir v. INS*, 301 F.3d 492 (7th Cir. 2002); *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003).

⁷ Section 10(c) states that “final agency action” is reviewable under the APA in federal court. 5 U.S.C. § 704. This section further explains that:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to a superior agency authority.

5 U.S.C. § 704.

dismissed if the individual did not exhaust all optional administrative remedies. Where *Darby* applies, however, a court cannot dismiss an APA case on this basis.⁸

Does *Darby* apply to a case involving an administrative appeal to the AAO?

We are not yet aware of any case considering how *Darby* would apply to a case in which an appeal to the AAO was available. There is a strong argument, however, that under the *Darby* analysis, exhaustion of many AAO appeals should not be required. If a court were to accept this argument, then the federal court case could not be dismissed solely because the individual did not first appeal to the AAO.

For your client to be exempted, under *Darby*, from an appeal to the AAO, you will need to demonstrate that your client's case satisfies numbers 1, 2, and 4 below as well as the criteria of *either* number 3(a) or 3(b):

1. That the federal court case has been brought pursuant to the APA;
2. That there is no statute that mandates an appeal to the AAO;
3. That either:
 - a. There is no regulation that mandates an appeal to the AAO; or
 - b. If there is a regulation that mandates an appeal, it does not also stay the agency decision pending the appeal to the AAO; and
4. That the agency decision is final for purposes of the APA.

Each of these criteria is discussed below.

1. The federal court case must be brought pursuant to the APA.

For the *Darby* exception to exhaustion to apply, the first requirement is that the suit must be brought under the APA. Because *Darby* is based upon specific language in the APA, it only applies to APA cases.

Thus, you will only be able to argue that exhaustion to the AAO is not required under *Darby* if your federal case is brought under the APA. In many cases relevant here, the APA is the appropriate cause of action for a challenge to the agency denial of your client's immigration application. The APA provides a cause of action for judicial review of agency action where a person has suffered a "legal wrong" or been "adversely affected or aggrieved by" agency action. 5 U.S.C. § 702. Thus, the APA provides the statutory basis for challenges to many USCIS decisions outside of the removal context. *See, e.g.,*

⁸ Note, however, that exhaustion is only one of several issues related to whether a federal court will hear a case. Thus, even if there is no exhaustion problem, there may be other barriers to judicial review. For example, there is a statutory bar to federal court review in at least two types of cases that can be appealed to the AAO. INA §§ 212(h) and 212(i) both specifically limit judicial review. 8 U.S.C. §§ 1182(h) and (i). A full discussion of jurisdiction and other requirements for federal court review is beyond the scope of this practice advisory.

Spencer Enterprises, Inc. v. U.S.A., 345 F.3d 683 (9th Cir. 2003) (APA challenge to denial of immigrant investor visa); *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002) (APA challenge to denial of a religious worker visa); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800 (E.D. La. 1999) (APA challenge to denial of H-1B specialty visa); *Yeboah v. U.S. DOJ*, 223 F. Supp. 2d 650 (E.D. Pa. 2002) (APA challenge to denial of Special Immigrant Juvenile Status).

If a case is not brought under the APA, the *Darby* exception will not apply. As the Supreme Court specifically noted, courts will continue to have discretion to require exhaustion in cases not governed by the APA. *Darby*, 509 U.S. at 154-55. Thus, *Darby* will not apply if the suit is solely a mandamus action under 28 U.S.C. § 1361 or one for declaratory relief under 28 U.S.C. § 2201. In these cases, a court clearly would retain the discretionary authority to require a plaintiff to first appeal to the AAO. See, e.g., *Volvo GM Heavy Truck Corp v. U.S. DOL*, 118 F.3d 205 (4th Cir. 1997) (Applying *Darby* to plaintiff's APA claim but not to its declaratory judgment and constitutional claims); *Henriquez v. Ashcroft*, 269 F. Supp. 2d 106 (E.D.N.Y. 2003) (mandamus petition dismissed for failure to exhaust where petitioner did not appeal to the AAO).

2. You must show that there is no statute that mandates an AAO appeal.

The *Darby* exception will not apply if there is a statute that *mandates* that a particular administrative appeal be exhausted prior to federal court action. In cases in which an AAO appeal is available, this requirement is easily met. There is no statutory reference to the AAO in the INA at all, and thus no statutory mandate that AAO appeals be exhausted prior to federal court review.

3. You must also show that either there is no regulation that mandates an appeal, or if there is a regulation mandating an appeal, that it does not explicitly stay the agency decision while the appeal is pending at the AAO.

This requirement consists of two subparts. If you can demonstrate *either* subpart you will have satisfied this requirement.

a. You must show that there is no regulation that mandates exhaustion to the AAO.

This requirement can be met by showing that no regulation mandates an appeal to the AAO. There are numerous regulations that address AAO appeals from specific types of cases.⁹ As discussed below, the majority of these regulations do not mandate exhaustion

⁹ The AAO can hear appeals in approximately 40 different types of cases, including, for example: certain employment-based visa petitions; special immigrant visa petitions, such as for religious workers and juveniles; VAWA self-petitions; non-immigrant visa petitions for certain temporary workers and for fiancées/fiancés; and orphan petitions.

of an appeal to the AAO prior to federal court review. This practice advisory does not discuss every AAO regulation, however, and attorneys are advised to identify the regulation relevant to the particular case to ensure that it does not mandate an AAO appeal prior to judicial review.

For a regulation to mandate exhaustion, courts generally have held that the regulatory language must be explicit.¹⁰ Where there is no explicit mandate, any administrative appeal that may be available is considered optional. Under *Darby*, a court will not have discretion to require exhaustion of such an optional administrative appeal.

Much of the regulatory language concerning AAO appeals permits these appeals but does not explicitly mandate them.¹¹ Under these regulations, an appeal would be optional rather than mandatory. For example, the general regulation governing the AAO is explicitly permissive, stating simply that certain unfavorable agency decisions “may be appealed” to the AAO. 8 C.F.R. § 103.3(a)(1)(ii). A number of the regulations pertaining to appeals of specific types of cases repeat this same language. See, e.g., 8 U.S.C. § 223.2 (denial of refugee travel document); 8 C.F.R. § 204.4(g)(1) (denial of Amerasian petition). Another regulation also states that the denial of a petition “shall be appealable” to the AAO. 8 C.F.R. § 204.5(n)(2) (employment based and special immigrant visas).

The Ninth Circuit has considered language that is almost identical to that described above, and held that this language permits an appeal but does not mandate exhaustion of administrative remedies. *Young v. Reno*, 114 F.3d 879 (9th Cir. 1997). Consequently, the court in that case found that the *Darby* exception applied. In *Young*, the plaintiff in an APA lawsuit challenged the revocation of her fourth preference visa petition. The regulations in existence at the time stated that a petitioner “may” appeal a revocation

¹⁰ See, e.g., *Shawnee Trail Conservancy v. U.S.D.A.*, 222 F.3d 383 (7th Cir. 2000) (exhaustion mandatory where regulation stated that federal district court review would be premature unless the plaintiff exhausted administrative remedies); *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409 (D.C. Cir. 1998) (exhaustion mandated where the statute allowed review of “final” orders and the regulations defined a final order “for purposes of judicial review” as being an order following an administrative appeal); see also *Glisson v. U.S. Forest Service*, 55 F.3d 1325 (7th Cir. 1995) (considering similar regulatory language); *U.S. v. Menendez*, 48 F.3d 1401, 1412 n.15 (5th Cir. 1995) (identifying statutes that might impose a mandatory exhaustion requirement).

¹¹ DHS has indicated that it is considering proposing a regulation that would mandate exhaustion of AAO appeals as a prerequisite to judicial review. See 69 Fed. Reg. 37504, 37526-27 (June 28, 2004). This item has been on the agency’s regulatory agenda for several years without any action, however, so there is no way to predict if or when the agency will actually publish a proposed rule.

decision and that such “appeal[] shall lie to the Board of Immigration Appeals.” *Young*, 114 F.3d at 882. The court found that while these regulations “allow” a petitioner an administrative appeal, and direct that such an appeal will be to the BIA, they “provide that the appeal itself is optional.” *Id.* Moreover, the court found that because it was an optional administrative appeal, the plaintiff could proceed with the APA suit without having pursued the administrative appeal to the BIA.

A number of other AAO regulations state only that an individual is to be notified of his or her “right to appeal” to the AAO. *See e.g.*, 8 C.F.R. § 204.6(k) (investor visa); 214.2(k)(4) (fiancée). Considering exactly this language in another context, the Ninth Circuit has held that this constitutes an “optional” appeal only and does not mandate exhaustion. *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998) (concerning optional appeal to the BIA of a denial of a family-based visa petition).

b. If there is a regulation mandating an appeal, you must show that it does not explicitly stay the agency decision while the appeal is pending at the AAO.

Even were there a regulation mandating exhaustion of an appeal to the AAO, exhaustion still would not be required under *Darby* unless that regulation also required a stay of the agency decision pending the administrative appeal. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 826 (9th Cir. 2002) (*Darby* exception to exhaustion applied where mandatory exhaustion provision did not also make the agency decision inoperative while the appeal was pending); *DSE, Inc. v. USA*, 169 F.3d 21 (D.C. Cir. 1999) (Applying *Darby* and finding exhaustion not required where the filing of an administrative appeal did not render the agency determination inoperative while the appeal was pending).

One regulation appears to render the agency decision inoperative while the AAO appeal is pending. *See* 8 C.F.R. § 214.11(r) (application for a T non-immigrant visa). However, this provision does not also mandate an AAO appeal as a prerequisite to judicial review. Thus, the *Darby* exception should still apply. *Accord Young*, 114 F. 3d at 882 (*Darby* applied where the regulations rendered the agency decision inoperative during the administrative appeal but did not also mandate the administrative appeal).

4. You must show that the agency decision is final under the APA.

Distinct from the question of exhaustion, the APA also requires that an agency decision be final before it can be challenged in federal court. 5 U.S.C. § 704; *see also Darby*, 509 U.S. at 144 (distinguishing between doctrines of finality and exhaustion of administrative remedies). A decision is final when a “decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Id.* In most cases, the adverse CIS decision denying a petition or application will be a final decision under this standard.

Several courts have refused to apply *Darby*, however, where an individual pursued an optional administrative appeal and then also filed an APA action while this appeal remained pending. *Ma v. Reno*, 114 F.3d 128 (9th Cir. 1997); *Acura v. Reich*, 90 F.3d

1403 (9th Cir. 1996); *Wilt v. Gilmore*, 2003 U.S. App. LEXIS 6876 (4th Cir. 2003) (unpublished); *Cossio v. Hawk*, 1998 U.S. Dist. LEXIS 2433 (D.D.C. 1998) (unpublished). Presumably, the courts in these cases would not have been able to require exhaustion had the individuals bypassed the administrative appeal altogether, since the administrative review was optional. Because the administrative review was underway, however, each court held that there was not yet a “final” agency decision, and dismissed the suits on this basis.

Thus, it is likely that a court would find that the agency decision was not final if an AAO appeal was pending at the time that the APA suit was filed. There may also be other situations in which adverse agency action is not final for purposes of the APA. For example, a notice of intent to revoke a visa petition most likely would not be a final agency decision subject to challenge in federal court under the APA. Thus, prior to filing suit, you must be sure that you are challenging a final agency decision.

How have lower courts applied *Darby* in other contexts?

As far as we know, no court has yet considered whether an administrative appeal to the AAO is required prior to an APA suit under the *Darby* analysis. A number of circuit courts have applied the *Darby* analysis in cases involving regulatory language similar to that governing appeals to the AAO. These decisions can be used to support an argument that, under *Darby*, an administrative appeal to the AAO is not required in an APA suit.

There also have been court decisions that found that particular statutory or regulatory provisions mandate exhaustion. These decisions are helpful to demonstrate that the regulatory language pertaining to an AAO appeal falls far short of the mandatory language contemplated by *Darby*. The following lists relevant cases applying *Darby* by circuit.

First Circuit: There does not yet appear to be a published decision applying the *Darby* standard in an APA case. However, in *Trafalgar Capital Assoc., Inc. v. Cuomo*, 159 F.3d 21 (1st Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999), the Court considered, in the context of determining when a statute of limitations accrues, the distinction made in *Darby* between “permissive” and “mandatory” administrative appeals.

Second Circuit: The Second Circuit has found a mandatory exhaustion requirement where the regulation states that an administrative review procedure is a “prerequisite to seeking judicial review.” *S.E.C. v. Stewart*, 374 F.3d 184 (2d Cir. July 6, 2004); *see also Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90 (2d Cir. 1998) (finding that the statute mandates exhaustion); *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 46 n.4 (2d Cir. 1993) (mandatory exhaustion language in regulation). More troubling, the Second Circuit also held that, with regard to the denial of an adjustment of status, exhaustion is required once proceedings have begun. The Court based its holding on the regulation that allows an individual to renew an adjustment application in proceedings, apparently finding – without any analysis of the regulation in question – that it was a mandatory exhaustion requirement. *Howell v. INS*, 72 F.3d 288 (2d Cir. 1995). *But see*

Pozdniakiv v. INS, 354 F.3d 176 (2d Cir. 2003) (requesting further briefing in APA case challenging denial of advance parole where there was no statutory or regulatory exhaustion requirement).

Third Circuit: There does not yet appear to be a published decision applying the *Darby* standard in an APA case.

Fourth Circuit: See *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1334 n.2 (4th Cir. 1995) (In APA suit, court cites *Darby* and notes that there is no statute mandating exhaustion of administrative remedies). In an unpublished decision, the Fourth Circuit has also held, however, that *Darby* does not apply where an individual pursued an optional administrative appeal and then also filed an APA action while this appeal remained pending. *Wilt v. Gilmore*, 2003 U.S. App. LEXIS 6876 (4th Cir. 2003) (unpublished).

Fifth Circuit: The Fifth Circuit has found that regulatory provisions that permit an individual to “seek wholly discretionary review within the agency but do not require this as a prerequisite for judicial review,” do not trigger the exhaustion requirement of the APA. *U.S. v. Menendez*, 48 F.3d 1401 (5th Cir. 1995). In a footnote, the Court provided examples of statutory and regulatory language that would mandate exhaustion in APA claims under *Darby*. Among these examples were the former judicial review provisions of the INA, former 8 U.S.C. § 1105a(c), and a regulation relating to appeals before the BIA. *Menendez*, 48 F.3d at 1411, n.15.

Sixth Circuit: The Sixth Circuit relied on *Darby* when it determined that a statute and regulations that simply provide an administrative avenue that a party “may” pursue, do not mandate exhaustion prior to an APA suit. *Dixie Fuel Co. v. Commissioner, SSA*, 171 F.3d 1052 (6th Cir. 1999).

Seventh Circuit: The Seventh Circuit has been clear about what statutory or regulatory language will trigger an exhaustion requirement under *Darby*. In *Shawnee Trail Conservancy v. U.S.D.A.*, 222 F.3d 383 (7th Cir. 2000), the regulations in question stated that federal district court review would be premature unless the plaintiff had exhausted administrative remedies. The Court found this to be a mandatory exhaustion requirement. See also *Glisson v. U.S. Forest Service*, 55 F.3d 1325 (7th Cir. 1995) (considering similar regulatory language).

Eighth Circuit: See *Coteau Properties Co. Department of the Interior*, 53 F.3d 1466 (8th Cir. 1995) (finding that under *Darby* there was no need to exhaust optional administrative remedies).

Ninth Circuit: The Ninth Circuit has been clear that permissive regulatory language regarding an administrative appeal does *not* constitute the mandatory exhaustion requirement necessary in an APA case. See *Young v. Reno*, 114 F.3d 879, 882 (9th Cir. 1997) (finding that regulations that “allow a petitioner to seek intra-agency review ... and direct that such review will be by the BIA,” to be “optional.”); *Abboud v. INS*, 140 F.3d

843, 847 (9th Cir. 1998) (1987 immigration regulations at issue which provided petitioner with a “right to appeal” to the BIA, was optional and did not trigger an exhaustion requirement for an APA suit); *Chang v. U.S.*, 327 F.3d 911, 922 (9th Cir. 2003) (statutory provision stating that an LPR “may” request review of a decision did not expressly mandate review). The Ninth Circuit has also been clear, however, in holding that *Darby* does not apply where an individual pursues an optional administrative appeal and then also filed an APA action while this appeal remained pending. *Ma v. Reno*, 114 F.3d 128 (9th Cir. 1997); *Acura v. Reich*, 90 F.3d 1403 (9th Cir. 1996).

Tenth Circuit: See *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1055 n.3 (10th Cir. 1993) (noting that under *Darby*, exhaustion was mandated by regulation that stated that agency decision not final under the APA if it is subject to an administrative appeal).

Eleventh Circuit: There does not yet appear to be a published decision applying the *Darby* standard in an APA case. In *National Parks v. Conservation Association v. Norton*, 324 F. 3d 1229 (11th Cir. 2003), however, the Court discussed *Darby* in the context of the “finality” requirement of the APA.

D.C. Circuit: See *Atlantic Tele-Network v. F.C.C.*, 59 F.3d 1384 (D.C. Cir. 1995) (finding that because an administrative appeal was optional, exhaustion prior to an APA suit was not required); but cf. *Marine Mammal Conservancy, Inc. v. Department of Agriculture*, 134 F.3d 409 (D.C. Cir. 1998) (exhaustion under the APA required where regulations made exhaustion a prerequisite to judicial review and the finality of the ALJ decision was suspended pending the administrative appeal).



AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY¹

ICE's Detention After Removal Hearing (DARH) Program Practical Suggestions and Legal Analysis for Potential Challenges

April 9, 2004

By the Legal Action Center

I. INTRODUCTION

In August 2003, Immigration and Custom Enforcement (ICE) officers began arresting respondents in Hartford, Connecticut who did not win their merits hearings immediately after completion of their hearings instead of allowing them to remain free while they appealed their cases to the Board of Immigration Appeals (BIA). The results from the Hartford Pilot Project were reported to be inconclusive and arrests and detentions in Hartford reportedly have ceased.

ICE very recently began implementing a similar pilot program in Denver and Atlanta.² There are rumors that ICE is considering expanding the program nationwide. For the purposes of this advisory, we are calling the program "Detention After Removal Hearing" or DARH. AILA members in Denver and Atlanta report that the following respondents are subject to detention under the program:

- * Respondents who are issued an order of removal by an Immigration Judge (IJ) regardless of whether they intend to file an appeal with the BIA.
- * Respondents who are granted voluntary departure with a condition of posting a bond.³

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² See "ICE Announces Expansion of Pilot Detention Project to Atlanta and Denver," AILA Infonet Dec. No. 04032614 (March 26, 2004).

³ Note, reports to date are that ICE claims that once the voluntary departure bond is posted, the respondent will be released without having to pay an additional bond.

There are reports that ICE also plans to subject to DARH respondents who are granted relief by an IJ but in whose case ICE reserves appeal or appeals on an error of law made by the IJ.⁴

This practice advisory provides some basic nuts and bolts suggestions for lawyers with clients subject to DARH, then outlines the statutes and regulations governing the detention of respondents subject to DARH, and sets out potential legal challenges. We caution that the suggested legal challenges are untested and will be affected by how ICE implements the program in general and in any particular case.

II. NUTS AND BOLTS SUGGESTIONS FOR ATTORNEYS AND CLIENTS IN AFFECTED AREAS

To date, ICE is applying the DARH Program in immigration courts in Denver and Atlanta. These suggestions are for lawyers representing clients in removal proceedings in those areas:

Before the hearing:

If clients are warned ahead of time about the DARH program, they will be able to prepare themselves, their families, and their employers for the possibility they may be arrested.

There are many unknowns and ICE's responses are not predictable.

If clients are taken into custody after the hearing, they have the right to demand an immediate bond redetermination hearing. However, it remains to be seen how "immediate" that bond redetermination hearing will be held or whether it will be held while the client and lawyer are in the same building or via telephone later.

Clients can direct you as to how to proceed after the hearing if ICE moves to take them into custody. Here are some issues you may want to discuss (in addition to the family and employment disruptions):

Are there issues or factors that may come up at the hearing that may affect the detention decision? Obviously these are things the lawyer would want to know about in any event, but ICE may ask especially probing questions or may have done more investigation than normal in preparation for the detention evaluation.

How does the client want you to proceed? Of course, you will object to any change in their release status, but specifics will help. Would they want to pay an additional bond? How soon could they pay an additional bond? Could they pay a voluntary departure

⁴ *But see* February 9, 2004 Memorandum from Michael J. Garcia, ICE Assistant Secretary, regarding Detention Policy Where IJ has Granted Asylum and ICE has Appealed, available on AILA InfoNet Document # 04022462 (web address: <http://www.aila.org/infonet/fileViewer.aspx?docID=12356>).

bond? Are they prepared to depart if granted voluntary departure and if any BIA appeal is unsuccessful?

Did the client already post a pre-hearing bond, and if so, what are the details and the contact information with the bonding company?

Should you demand that ICE obtain an arrest warrant? What are the implications and possible consequences? (see below in this advisory). Should you or your client ask the ICE agent if the client is “under arrest?” “Free to go?”

If there were a legal and factual basis and a need for filing a habeas corpus petition in federal district court, would the client want you to take that step? How soon could you prepare the petition? How much will this legal work cost the client? District court judges may not be able to accommodate requests for immediate hearings, so reducing expectations may prove helpful. Also, exhaustion of administrative remedies (an IJ bond redetermination hearing) may be required and is advisable unless those administrative remedies are unavailable or futile.

It may be helpful before the hearing to prepare the “bond worksheet” that ICE will use to evaluate the respondent’s custody status. Counsel and the respondent can describe the positive and negative factors and provide supporting documents to the ICE agent either before or after the hearing. The bond worksheet currently used by Denver ICE is attached to this advisory (or in a separate PDF document accompanying the electronic version of this advisory). Presumably the respondent may include additional information and is not limited to the space on the bond worksheet itself.

At the hearing:

If it appears the IJ is going to issue an adverse decision on the merits or relief, particularly if it is late in the afternoon (after ICE officers may be unavailable to take bonds) consider asking the IJ to delay rendering the decision until the following morning. This will give your client time to make arrangements. However, expect ICE to object that the client may not reappear for the decision or to demand assurances that the client will appear.

If ICE agents are in the courtroom or enter the courtroom at or near the end of the hearing, you may want to ask the IJ to continue operating the audiotape so that a record is made of what the Trial Attorney, the ICE agents, and you and your client say.⁵ In some situations, the IJ may be willing to remain to conduct an immediate bond redetermination hearing or return to the courtroom after ICE interviews your client.

⁵ See attached October 10, 2003 Memorandum from The Office of the Chief Immigration Judge regarding “Procedures for Going Off-Record During Proceedings,” available on AILA’s InfoNet as Document # 03121714 (web address: <http://www.aila.org/infonet/fileViewer.aspx?docID=11825>).

III. STATUTORY AND REGULATORY AUTHORITY

Authority to Detain

Respondents who are not subject to mandatory detention under INA § 236(c) based on certain criminal convictions, may be detained pursuant to INA § 236(a) while removal proceedings are pending before the immigration judge or the BIA. That section provides:

(a) Arrest, Detention, and Release.—

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) [relating to mandatory detention] and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but . .

INA § 236(a) (emphasis added). Detention under INA § 236(a) is discretionary. Both DHS and the immigration courts⁶ “may,” in the exercise of discretion, decide to continue a respondent’s detention or “may,” in the exercise of discretion, decide to release the respondent.

The custody procedures are set forth in the regulations. 8 C.F.R. § 236.1; 8 C.F.R. § 1003.19. *See also* 8 C.F.R. § 287. DHS officials are authorized to arrest individuals and make initial custody determinations. These decisions are subject to review by an immigration judge in a bond redetermination hearing. The IJ’s decision is appealable to BIA.

Authority to Rearrest and Revoke Bond

With respect to rearrests and change in custody status, INA § 236(b) states,

Revocation of Bond or Parole. —The Attorney General at any time may revoke bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

⁶ INA § 236(a) was added by IIRIRA § 305. At the time of IIRIRA’s enactment, the Attorney General – as head of the Department of Justice – referenced both the former INS and the immigration courts. The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the INS and transferred the agency’s functions to bureaus within the newly established Department of Homeland Security (DHS). HSA §§ 101, 102, 441, 451, 455, 456, 471. The HSA also provided that where the Act transferred a function to the Secretary of Homeland Security, any reference in the law to another official shall be deemed to refer to the Secretary. HSA § 1517. These changes took effect on March 1, 2003. Congress has not yet amended the INA to reflect the delegation of authority to the DHS.

The regulation regarding revocation, 8 C.F.R. § 236.1(c)(9), states,

When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled.

The BIA has interpreted this regulation, previously codified at 8 C.F.R. § 242.2(b) (1981), to mean that INS could revoke a bond even if there was a redetermination hearing by the IJ. *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981). See also *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997); *Matter of Chew*, 18 I&N Dec. 262 (BIA 1982).

Also regarding bond, detention and release, see also AILF's Practice Advisory at: http://www.aifl.org/lac/lac_pa_011303.asp and resources referenced therein.

Definition of an “Administratively Final” Removal Order

INA § 101(a)(47)(A) defines “order of deportation” [removal] and says that such an order becomes final upon the earlier of a BIA determination affirming the order, or the expiration of the period to appeal an IJ decision (30 days from the date of that decision). Thus, a decision issued by an IJ is not “final” until the time for appeal lapses.

IV. POTENTIAL LEGAL CHALLENGES

Individual legal challenges will depend upon the facts and circumstances of individual cases. General challenges to the DARH program will depend upon how DHS implements it.

No Changed Circumstances

* *Qualifying ICE's Authority to Revoke Bond – Changed Circumstances*

Arguably, an IJ's finding of removability is not a changed circumstance warranting the arrest and detention of a respondent who (1) was not previously detained; or (2) was previously detained but eligible for release on bond.

The BIA's decision in *Matter of Sugay*, 17 I&N Dec. 637 (BIA 1981) could be interpreted to mean that INS may revoke an IJ's bond determination *only* where there are changed circumstances relating to the bond decision. In that case, the IJ had redetermined the respondent's bond amount. At a subsequent merits hearing, the IJ ordered respondent deported; the district director immediately revoked the bond decision and set bond at a higher amount. The BIA found that the fact that the IJ ordered respondent deported and denied relief contributed to a finding of changed circumstances. The BIA noted that INS' actions did not undermine an impartial and independent determination by an IJ because respondent had the right to appeal the

bond amount to the Immigration Judge. Importantly, however, there were other factors (including new evidence about criminal activity) that contributed to the finding of changed circumstances.⁷ Arguably, in the absence of other factors that would support a finding of changed circumstances, *Matter of Sugay* should not justify the revocation of bond or setting a higher bond.

Notably, some number of respondents who are found removable by the IJ will win their appeals to the BIA and, those who lose before the BIA, may win their appeals in federal court. In these cases, the IJ's finding of removability is neither definitive nor final. Moreover, respondents granted relief by the IJ (where DHS appeals a legal error) have already won their case before an IJ and therefore, DHS should be hard pressed to demonstrate changed circumstances.

Where DHS cannot prove changed circumstances in an individual case, the respondent could argue that the arrest and detention is unlawful. Even if the person is later released, this theory may support a false imprisonment or other type of tort claim under the Federal Tort Claims Act (to recover damages for time in detention). This theory is untested.

Where An IJ Had Set Bond Prior to the Merits Hearing

The following arguments may be applicable in individual cases where the IJ previously had set a bond prior to the merits hearing. Some of these arguments are similar to those used to challenge the automatic stay regulation at 8 C.F.R. § 1003.19(i)(2). In automatic stay cases, the IJ's bond decision is rendered meaningless by the mere act of the DHS attorney filing a notice staying that ruling pending the government's BIA appeal. Arguably, in DARH cases, the IJ's custody decision issued before the individual's removal hearing is rendered meaningless by a subsequent DHS decision to detain the individual after the removal hearing. The following cases address this issue in the context of the automatic stay regulation and may support the arguments set forth in this section of the practice advisory. *Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446, 448 (D. Conn. 2003); *Uritsky v. Ridge*, 286 F. Supp. 2d 842 (E.D. Mich. 2003); *Zavala v. Ridge*, 2004 U.S. Dist. LEXIS 3620 (N.D. Cal. 2004); *Almonte-Vargas v. Elwood*, 2002 U.S. Dist. Lexis 12387 (E.D. Pa. 2002).

NOTE: If an individual is afforded a second bond redetermination hearing, it may weaken or moot these legal challenges because the person may have obtained the very relief he or she was seeking in the habeas corpus petition.

*** Statutory/Regulatory Argument Regarding ICE's Authority to Revoke Bond**

The INA is silent about the procedures for making custody determinations. However, the regulations (as interpreted by the BIA) permit ICE to revoke the bond. Potentially, there is an

⁷ In addition, the respondent in *Matter of Sugay* was ordered released on bond, and therefore, the case does *not* support the proposition that an adverse decision by the IJ justifies continued detention without bond. See *Noorani v. Smith*, 810 F. Supp. 280, 284 (W.D. Wash. 1993).

argument challenging ICE's authority based on 8 C.F.R. § 1003.19(e). This regulation says that a respondent can only request subsequent bond redetermination hearings when there are changed circumstances. Arguably, it follows that ICE also should have to go to the IJ to request a change in custody status. However, this argument is weakened by the fact that the regulations do not seem to prevent the respondent from seeking a change in custody status by going directly to the district director. See *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997); *Matter of Chew*, 18 I&N Dec. 262 (BIA 1982).

* *Claims Regarding INA § 236(a)*

Especially where the respondent is not afforded a bond redetermination hearing, it could be argued that DHS' implementation of the DARH program violates INA § 236(a). DARH vests in DHS the unfettered authority to nullify the ordered release of the respondent and, therefore, eliminate the effect of any individualized determination by an impartial adjudicator.

At least absent a change in circumstances, INA § 236(a) does not contemplate the detention of respondents after an IJ has already conducted an individualized determination and ordered release. The IJ made the initial custody evaluation anticipating not just IJ proceedings but also potential appeals.

At least where the respondent is detained, not released on bond, and not afforded a bond redetermination hearing, it can be argued that Congress did not intend for low-level DHS officers to override an IJ's discretionary determination under § 236(a). In that situation, DARH contravenes § 236(a)'s mandate that detention and release determinations are discretionary by making detention mandatory – albeit temporarily. If Congress wanted to make detention mandatory for these individuals, it would have done so as it did in INA § 236(c). Congress' decision not to do so must be given effect.

* *Claims Regarding Substantive Due Process*

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that government detention violates due process *unless* there are “certain special and ‘narrow’ non-punitive ‘circumstances,’ [citation omitted], where a special justification, such as harm-threatening mental illness, outweighs the ‘respondent's constitutionally protected interest in avoiding physical restraint.’” *Id.* (citations omitted).⁸ The *Zadvydas* Court further stated that civil confinement of noncitizens must be limited with respect to both the length of detention and the underlying purpose justifying the detention. 533 U.S. at 671.

Thus, government detention is not permissible if the respondent's liberty interest outweighs the government's justification for the detention. It is well established that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Zadvydas*, 533 U.S. at 690 (citation omitted).

⁸ However, in *Demore v. Kim* the Supreme Court distinguished post-order detention, which was at issue in *Zadvydas*, from pre-order detention, and upheld mandatory pre-order detention. 538 U.S. 510 (2003).

Where there are no changed circumstances and the respondent is not afforded a second bond redetermination hearing, it can be argued that an arrest under the DARH program eviscerates the IJ's prior decision to release an individual from detention while their removal hearing is pending. In rendering the prior decision, the IJ necessarily determined the respondent is neither a flight risk nor a danger to the community. Thus, DHS – which is both the initial adjudicator and the prosecutor (in the bond hearing) and the prosecutor (in the removal hearing) – is unilaterally overriding and nullifying the determination of an IJ.

Depending upon how the DARH program is implemented, there may be an argument that it does not achieve its stated purpose in the least restrictive way. Rather, it may have the effect of classifying certain respondents or types of respondents as *per se* absconders even though an impartial IJ has already found that the respondent is not a flight risk or a public danger. The Supreme Court has “explicitly stated that a ‘purpose to injure [society] could not be imputed generally to all aliens subject to deportation,’” *Leader v. Blackman*, 744 F. Supp. 500, 508 (S.D.N.Y. 1990) (quoting *Carlson v. Landon*, 342 U.S. at 538). Similarly, detention based on imputed rather than actual characteristics (of being a flight-risk) is not justifiable.

Finally, it could be argued that the DARH program is not narrowly tailored to further the government's interest in protecting pre-removal flight. Many respondents subject to DARH will win their BIA or federal court appeals. Detaining a broad scope of respondents based on imputed characteristics cannot be characterized as narrow or applying only to special circumstances. The government likely will respond to this argument by citing unfavorable statistics of the number of non-detained respondents who fail to depart after a removal order. See, e.g., *Demore v. Kim*, 538 U.S. 510 (2003) (citing statistics about the risk of flight of non-detained individuals with criminal convictions).

* *Claims Regarding Procedural Due Process*

Depending upon how the program is implemented and particularly where the respondent is not afforded a second bond redetermination hearing, it could be argued that DARH violates procedural due process. The determination of whether government conduct violates procedural due process requires consideration of three factors: (1) the nature of the private interest affected; (2) the risk of an erroneous deprivation of the interest as a result of the procedures used and the probable value of additional or substitute safeguards; and (3) the government's interest in using its own procedures and the fiscal and administrative burdens entailed by additional or substitute safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976).

Review of these factors supports finding DARH violates procedural due process. First, the private liberty interest affected by detention is among the most fundamental and valued in our society.

Second, the DARH program would subject respondents to an extremely high risk of erroneous deprivation of their liberty interest because both Congress, in enacting the statutory detention provisions, and an IJ, in ordering bond following a hearing, have already determined that such respondents are eligible for release during removal proceedings (including appeal to the BIA).

Due process cannot be satisfied when the individualized determination initially provided by the IJ was merely a charade. Respondents subject to DARH who previously had a bond hearing before an IJ, were afforded an opportunity to present witnesses and documentary evidence and cross-examine DHS' evidence. Based on all the evidence presented at the hearing, the IJ ordered these respondents released on bond. Yet this order has been rendered completely meaningless by the DARH program. By rearresting, detaining and setting a higher bond, DHS has rendered the IJ's decision a nullity. The DARH program vests more control over custody status in low-level DHS officers than in an IJ.

Third, the cost to the government of respecting the IJ's initial bond determination – in which the IJ arguably already considered whether the person should be detained if found removable – is low compared to the consequences of subjecting respondents (some of whom will ultimately win their cases) to arrest and detention.

Where Respondent is Denied a Timely Bond Hearing

*** *Challenge to Timely Bond Redetermination Hearing***

If, after revoking their bond, respondents are not afforded bond redetermination hearings, they may be able to challenge the immigration court's failure to provide a timely bond hearing. This challenge may be aided by the fact that the Office of the Chief Immigration Judge has said that 100% of all custody hearings shall be completed within three days. See Memo, OCIJ, *Case Completion Goals* (April 26, 2002) (Posted on AILA InfoNet at Doc. No. 03070847 (July 8, 2001)).

Matter of Sugay lends additional support to this challenge. In that case, it appears that the IJ conducted the bond redetermination hearing at the same hearing where he made a decision on the merits of respondent's case. EOIR, however, has announced that IJs will not conduct bond hearings at the conclusion of merits hearings:

Any request for custody redetermination must first be addressed to the DHS. Once the DHS has made an initial custody determination – which, by regulation, they have generally 48 hours to make [8 C.F.R. § 287.3(d)] – only then can an immigration judge review the determination. However, EOIR has and will continue to adjust bond hearing schedules as necessary.⁹

Conflict With the Statutory Right to Voluntary Departure

If respondents are granted voluntary departure, but ICE arrests or rearrests them, and detains them without bond or on a high bond, so that the respondents cannot depart within the voluntary

⁹ This was EOIR's response to a question posed at the September 25, 2003 AILA/EOIR Liaison Meeting. Specifically, AILA asked EOIR about the Hartford Pilot Project and whether an IJ could conduct a custody hearing immediately at the close of the merits hearing to avoid automatic detention.

departure period, the respondents may be able to argue this action violates their statutory right to voluntary departure under INA § 240B. This argument is untested.

Challenge to Arrest Under DARH As Executed Without a Warrant

INA § 236(a) authorizes arrest and detention only “[o]n a warrant issued by the Attorney General.” INA § 236(b) authorizes “rearrest . . . under the original warrant.” Where no arrest warrant has been issued, DARH arguably violates the statute. Presumably, DHS would attempt to remedy this alleged violation by issuing the warrant, which could moot the claim. However, attorneys might consider requesting proof of the warrant during the arrest/rearrest. In some cases, where DHS is unable to produce the warrant, it *might* delay or deter arrest.

However, INA § 287(a)(2) authorizes warrantless arrests if the arresting officer has reason to believe that the respondent is in the US in violation of law and is likely to escape before a warrant can be obtained for his or her arrest. *See also* 8 C.F.R. § 287.7(c)(2)(ii)(stating that a warrant should be obtained whenever possible prior to an arrest). Where the respondent is arrested after the IJ has granted relief (even if DHS appeals), arguably DHS has no basis to contend that the person is in the US in violation of law. Where the IJ has issued a removal order, the respondent may argue that he or she is not likely to escape before a warrant can be issued and, thus, should not be detained without a warrant.

Practice Advisory¹

Objecting to Video Merits Hearings

By Traci Hong and Mary Kenney²

Updated December 2003

The use of video hearings is on the rise. More immigration courts now have the technology and are using it for all types of hearings, including merits hearings and master calendar hearings in which the respondent's credibility is at issue. As one court has indicated, however, video hearings raise serious due process concerns and their use may deprive a respondent of a full and fair hearing. *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002).

Practitioners should consider the risks that a video hearing will pose in each particular case, particularly those in which credibility likely will be an issue. If the fairness of a hearing may be jeopardized by a video hearing, the respondent or representative can object and request an in-person hearing. Whether to do so is a strategy decision that will vary from case to case. This practice advisory discusses the problems arising from the use of video hearings, and suggests ways to protect the respondent's rights and move for in-person hearings where that strategy is selected.

This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Additionally, cases are cited as examples only and are not intended to replace individual research relevant to a particular case.

¹ Copyright (c) 2005, 2010 American Immigration Council. [Click here](#) for information on reprinting this practice advisory. This practice advisory was originally posted on the AILA InfoNet on April 25, 2001 and published in November 2001 issue of Immigration Law Today. It has been updated to reflect continuing developments in the law.

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I. Use of Video Hearings in Removal Proceedings Must Comport with Due Process

Section 240(b)(2)(A)(iii) of the Immigration and Nationality Act (INA) authorizes the use of video hearings in removal hearings. The statute is silent on the need to obtain the respondent's consent before conducting a merits hearing by video. The regulation on the use of video hearings is more explicit than the statute, and states that an Immigration Judge may conduct video hearings “*to the same extent as he or she may conduct hearings in person.*” 8 CFR §3.25(c) (emphasis added).³ The statute and regulation can be read as setting a floor against which to measure video hearings: that is, that video hearings must provide at least the same level of procedure as is required of an in-person hearing.

Moreover, we submit that video hearings can be used in removal proceedings only when their use will not violate a respondent's due process and statutory rights. Thus, video hearings cannot be used in an identical manner as in-person hearings. The Fourth Circuit Court of Appeals affirmed this principle in the only decision to examine the legality of video hearings in removal proceedings. In *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002), the court determined that video hearings have the potential of violating due process by depriving an individual of a full and fair hearing.

Due process requires, at a minimum, that immigration courts adopt procedures to ensure that noncitizens be heard at a meaningful time and in a meaningful manner. *Rusu*, 296 F.3d at 321-22; *see also* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1952); *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000). Where video hearing procedures interfere with an individual's statutory right to be represented by an attorney of her choice, to present evidence, or to cross examine witnesses and examine adverse evidence, and where prejudice results, the individual has failed to receive a full and fair hearing consistent with due process. *Rusu*, 296 F.3d at 321 n.7.

Video hearings also should not be used in any case in which the credibility of the respondent or a witness is at issue, for this procedure “may render it difficult for a fact finder in adjudicative proceeding to make credibility determinations and to gauge demeanor.” *Rusu*, 296 F.3d at 322. In most removal hearings, the respondent's testimony will be the most important evidence presented. *See, e.g., Ladha v. INS*, 215 F.3d 889, 900-01 (9th Cir. 2000) (where an asylum petitioner is found to be credible, there may be no need for corroborative evidence). Deference is generally accorded an IJ's credibility determination because the IJ is the only tribunal to observe the respondent's testimony in person. *See, e.g., Matter of A—S—*, 21 I&N Dec. 1106 (BIA 1998) (*en banc*); *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994); *Kaur v. INS*, 237

³ More than two years ago, EOIR took the position in a liaison meeting that, under the statute, a respondent does not have the right to object to the use of a video hearing. March 22, 2001 EOIR/AILA Liaison Meeting Questions, Posted on AILA InfoNet at Doc. No. 01050902 (May 9, 2001). As far as we know, however, there is no official EOIR policy adopting this position. We believe that a blanket policy that allows for no exceptions would conflict with the constitutional requirement that a removal hearing comport with due process.

F.3d 1098, 1101 (9th Cir. 2001); *Efe v. Ashcroft*, 293 F.3d 899, 903 (5th Cir. 2003); *Perinpanathan v. INS*, 310 F.3d 594 (8th Cir. 2002). Thus, an IJ's credibility determination is often critical to the success of the case.

Because an accurate assessment of credibility frequently turns on the direct observation of the witness, federal courts in other types of civil proceedings have expressed concern about allowing a party to testify over video where the party's credibility is at issue. See, e.g., *U.S. v. Baker*, 45 F.3d 837, 845 (4th Cir. 1995) (allowing testimony by video because case did not turn on judge's impression of the witness). As one court has noted, a video hearing "is not the same as actual presence, and ... the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing." *Edwards v. Logan*, 38 F.Supp. 2d 463, 467 (W.D. Va. 1999); see also, *Crickard v. Department of Veteran's Affairs*, 92 MSPB 625, 2002 MSPB LEXIS 1129 (2002) (holding that when an ALJ must make a credibility determination, an appellant's request for an in person hearing cannot be denied absent good cause). Even the former INS recognized the importance of the respondent's presence to assess credibility, and thus agreed that telephone hearings should not take place where credibility was at issue. *Bigby v. INS*, 21 F.3d 1059, 1064 (11th Cir. 1994); *Purba v. INS*, 884 F.2d 516, 518 (9th Cir. 1980).

Video hearings also may interfere with due process by interfering with an attorney's ability to fully represent the respondent. As the Fourth Circuit stressed, video hearings put the respondent's lawyer in "a 'Catch-22' situation" because the lawyer must choose between being with the client at the detention facility or being at the Immigration Court with the IJ and, frequently, the trial attorney; "under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option." *Rusu*, 296 F.3d at 323. The INA and due process encompass more than representation by counsel in name only – they guarantee "meaningful access to counsel." *Garcia-Guzman v. INS*, 65 F.Supp. 2d 1077, 1081 (N.D. Cal. 1999). In the context of a telephonic hearing, the court in *Garcia-Guzman* found that the respondent's statutory and due process right to counsel was violated, in part because the respondent and the attorney had no way of privately conferring during the hearing. *Id.* at 1090.

While the *Rusu* Court recognized these potential due process problems, it held that the petitioner in that case had not been prejudiced by any due process violation.⁴

⁴ To succeed on a due process claim, a petitioner must frequently show prejudice as the result of a procedural due process violation. While the standard for prejudice varies depending on the court and the issue involved, an individual must generally demonstrate that the deficient procedure could have impacted the outcome of the case. See e.g., *Reyes-Melendez v. Ashcroft*, 342 F. 3d 1001, 1006 (9th Cir. 2003); *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003); *Lopez v. Heinauer*, 332 F.3d 507 (8th Cir. 2003); *Moi Chong v. Dist. Dir.*, 264 F. 3d 378 (3d Cir. 2001). Further research on the prejudice standard in a particular circuit may be necessary to ensure that the standard is met.

Nevertheless, *Rusu* firmly stands for the proposition that the use of video hearings in removal proceedings must comport with due process.

II. What to Do before a Video Hearing

When faced with a video hearing in which witness credibility is essential, the respondent may file a pre-hearing motion objecting to a video hearing and asking the IJ to hold the hearing in person. The motion should inform the IJ of the various ways in which the video hearing will jeopardize the respondent's right to a full and fair hearing. If the respondent has already experienced difficulties during a video master calendar hearing, attach a declaration that describes these problems.

III. What to Do during a Video Hearing

If the Immigration Judge denies the motion and the hearing proceeds by video, the respondent or representative can again object on the record to the video hearing. Additionally, objections can be made on the record whenever the respondent is unable to fully present the case because the hearing is taking place by video.

By objecting on the record, the respondent/representative will preserve the issue for any appeal that may be necessary. The Board is generally prohibited from engaging in fact-finding during the course of an appeal. 8 C.F.R. § 3.1(d)(3)(iv). Consequently, detailed and descriptive objections on the record will ensure that there is evidence before the Board of the problems created by the use of video hearings.⁵ Similarly, objections will serve as evidence of the problems for federal court review, since federal courts are limited to reviewing only the record of the proceeding and cannot take additional evidence. 8 U.S.C. § 1252(b)(4)(A).

Following are some potential problems that may arise during the hearing as the result of video hearings:

- **The respondent cannot testify effectively over video.** The video hearing may interfere with the respondent's statutory right to present evidence on her own behalf. INA § 240(b)(4)(B); *see also Matter of Torres*, 19 I&N Dec. 464 (BIA 1987). Technological problems with the video equipment may make it difficult for the judge to hear and understand the respondent, and for the respondent to understand questions asked of her. She may also be confused if the camera in the courtroom is not focused on the person asking the questions.

⁵ There may be circumstances in which it is impossible to fully describe the extent of the problem during the hearing itself. If the Board cannot properly resolve the respondent's appeal without additional evidence of the problems, the respondent/representative can file a request for a remand. *See* 8 C.F.R. § 3.1(d)(3)(iv). The respondent/representative can support the motion with the additional evidence sought to be admitted, such as an affidavit describing in detail problems resulting from the videoconferencing that were not apparent in the record.

Additionally, the respondent may be intimidated by the camera equipment. She may look at the screen when answering questions, rather than at the camera, and thus may appear evasive and unwilling to make eye contact. Where a “witness becomes camera conscious, and either ‘grandstands’ or becomes nervous, videoconferencing may make the witness appear more or less confident and thus affect his believability.” Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. Rev. 185, 204 & n.107 (October 2000) (citing David M. Doret, *Trial by Videotape - Can Justice Be Seen To Be Done?*, 47 Temp. L.Q. 228, 245-46 (1974); Joanne Cleaver, *Videoconferences Not the Place to Put Candid in Front of Camera: Everyone Sees Small Gestures, Nervous Habits*, Crain's Chi. Bus. Feb. 2, 1998, available at WL 7284407).

- **Inadequate translation.** A number of courts have held that an inadequate translation in deportation hearings can violate the respondent’s due process rights. *See, e.g., Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000); *Amadou v. INS*, 226 F.3d 724 (6th Cir. 2000); *Matter of Tomas*, 19 I. & N. Dec. 464 (BIA 1987). As these cases demonstrate, obtaining an acceptable interpretation of removal proceedings can be challenging even in live hearings. Satisfactory translation of the respondent's testimony becomes even more difficult in a video hearing. In addition to any sound problems that the video equipment may cause, the respondent will not be able to see the interpreter because the courtroom camera will be directed at the person asking the questions rather than the interpreter. Thus, the interpreter and the respondent will not be able to exchange visual clues to enhance the translation. In some cases, the interpreter will be appearing telephonically, which will make communication even more difficult.
- **Representative and client cannot communicate directly and privately.** If the representative is in Immigration Court and the respondent is at the detention facility, they will not be able to communicate freely. For example, the respondent will not be able to let the representative know if a document presented by INS is faulty in some way and therefore needs to be objected to, or if she disagrees with a witness's account of events, thereby preventing effective cross-examination of that witness. The representative will also be unable to discuss changes in strategy with the respondent, or to explain to the respondent what is happening and what the IJ and the trial attorney are discussing .
- **Cannot examine physical evidence presented by INS.** When located at a remote facility, the respondent/representative may be unable to review a document or other physical evidence presented by the trial attorney at the immigration court.
- **Cannot effectively examine and/or cross-examine witnesses.** When located at a remote facility, the respondent/representative may be unable to effectively examine or cross-examine witnesses present in Immigration Court. It may be

difficult to hear the witness or for the witness to hear the respondent/representative. It may also be hard to observe the witnesses' demeanor through a television screen. In some cases, the witness may not even be visible to those located at the remote facility because, for example, the camera is focused exclusively on the IJ.

- **Cannot present respondent's physical injuries.** Because she is testifying by video, the respondent may not be able to clearly show any physical injuries that may be relevant to the case. While photographs of any wounds or scars can be admitted into evidence, she may also have injuries, such as a limp or limitation in mobility that can only be demonstrated in person.
- **Technical difficulties.** As the *Rusu* court explained, video hearings can cause numerous technical problems. Audio and/or video transmissions may drop or freeze for several minutes at a time. Even when they work, the picture and/or the sound may fade in and out or be fuzzy. Also, the person operating the cameras at either the detention facility or the immigration court may not know how to do so properly, resulting in blurry or incomplete pictures.

In each of these circumstances, the respondent/representative can object on the record, describe what the problem is for the record, and ask the IJ to stop the proceedings and reschedule as an in-person hearing. If the Immigration Judge denies this request, the respondent/representative can again object on the record that the continued use of a video hearing violates the respondent's statutory and constitutional right to present evidence on her own behalf, to cross-examine witnesses presented by the Government, to examine evidence used against her, and/or to be represented by counsel of her choice. INA §240(b)(4), 8 U.S.C. § 1229a(b)(4).

IV. What to Do after a Video Hearing

If the respondent is denied relief in a video merits hearing and the denial is attributable at least in part to the fact it was a video hearing, then the prejudice caused by the video hearing should serve as one or more grounds of appeal to the Board of Immigration Appeal. Describe the harms suffered by the respondent with specificity in the notice of appeal, as required under 8 C.F.R. §1003.3(b).

Where a pre-hearing motion was filed and objections were made on the record throughout the hearing, the respondent/representative will have preserved the issue for appeal and also insured that the record reflects the problems that occurred during the hearing. Even where no motion was filed, or objections were raised during the hearing, the respondent/representative can still raise the issue of the deficient video hearing procedures in the appeal to the Board.⁶ When preparing the brief for the BIA, carefully

⁶ Where the issue is not raised in the appeal to the Board, however, the respondent may be precluded from raising it in any subsequent federal court appeal on the basis that she

review the transcript of the hearing and use excerpts to point out the various ways in which the respondent was hampered from presenting her case effectively because the hearing was held by video.

The *Rusu* Court identified a number of factors that demonstrate problems with video hearings. Look for similar problems in the transcript of the respondent's hearing:

- Whether the respondent had difficulty understanding questions;
- Whether and how often the respondent asked for questions to be repeated;
- Whether the respondent was confused when the person speaking was not on camera;
- Whether the respondent and the interpreter had trouble understanding one another;
- Whether a speech impediment or accent made it more difficult to understand the respondent over the video recording;
- Whether hearing testimony was “indecipherable”;
- Whether the transcript reflects technical problems, such as the hearing being stopped and restarted due to problems with the equipment; the judge not being able to see the respondent clearly; the respondent not being able to see the judge, etc; and
- Whether an adverse credibility finding was due to any degree to the video hearing.

All of these problems can be raised in the brief to the Board. Additionally, the representative can emphasize any problems that the representative had representing his or her client during the hearing as a result of the respondent's absence from the hearing.

Finally, please contact the American Immigration Council's Legal Action Center (LAC) and let us know if you have an appeal based on a video merits hearing. The LAC may be able to act as a co-counsel on the appeal or file an amicus brief, depending on the facts of your case.

either waived the issue or failed to exhaust available administrative remedies. *See, e.g.*, 8 USC § 1252(d)(1) (requiring exhaustion of administrative remedies).