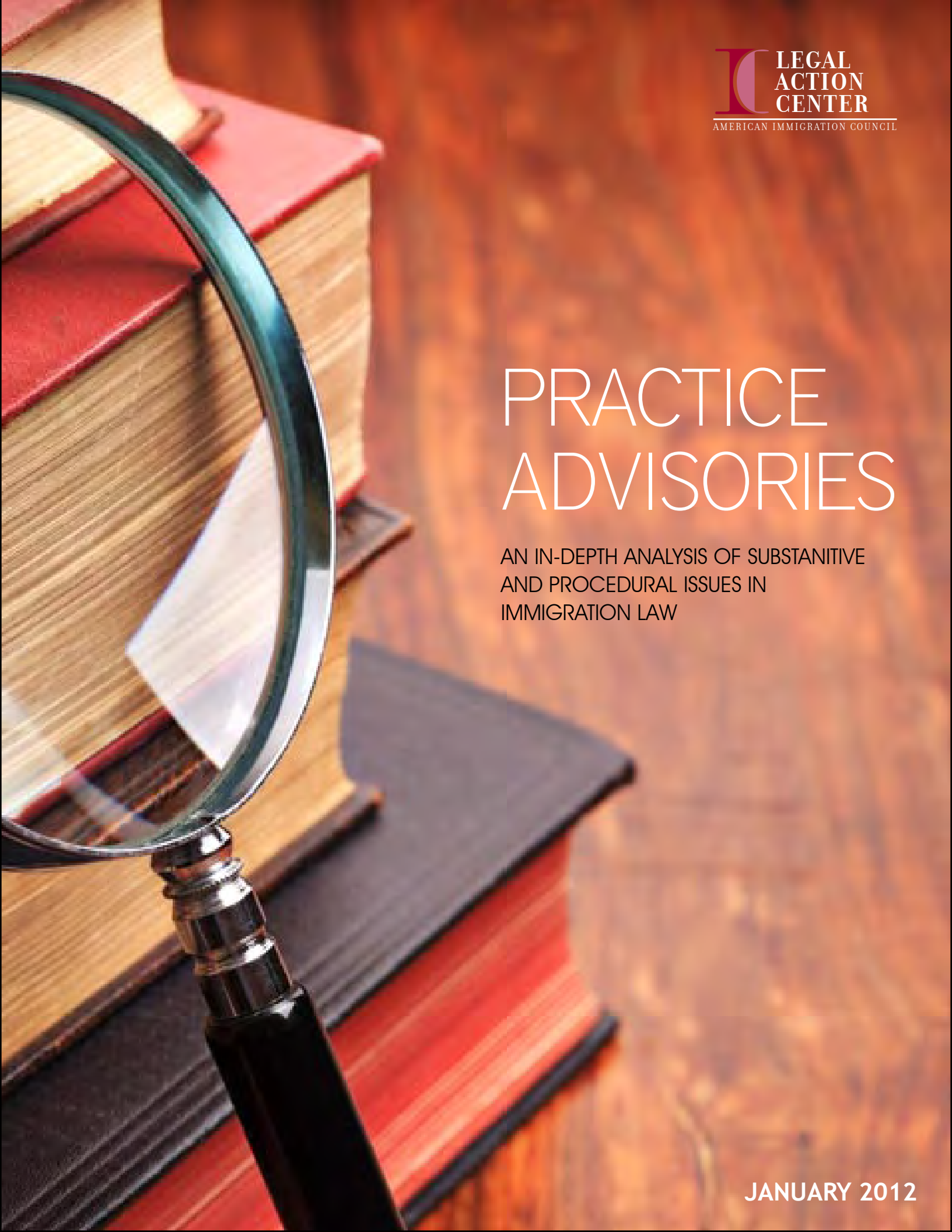

LEGAL ACTION CENTER
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PRACTICE ADVISORIES

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

JANUARY 2012

TABLE OF CONTENTS

Implications of *Judulang v. Holder* for LPRs Seeking § 212(c) Relief and for Other Individuals Challenging Arbitrary Agency Policies (December 16, 2011). This Practice Advisory describes the Supreme Court's decision in *Judulang v. Holder*, which rejected the BIA's "comparable grounds" test for § 212(c) relief, and offers strategies for lawful permanent residents and others who may be affected by it …….9

DHS Review of Low Priority Cases for Prosecutorial Discretion (December 12, 2011). This Practice Advisory addresses the implementation of DHS's prosecutorial discretion guidelines and provides detail about how DHS's new joint working group will determine low priority immigration cases…….43

Representing Clients with Mental Competency Issues under *Matter of M-A-M-* (November 30, 2011). This Practice Advisory provides a detailed analysis of the BIA's precedent decision in *Matter of M-A-M-* and offers strategic advice on how to address issues that may arise in the context of representing noncitizens with mental competency issues …….52

Motions to Suppress in Removal Proceedings: A General Overview (October 12, 2011). This Practice Advisory provides a general overview of motions to suppress, a tool used to prevent the introduction of evidence obtained by federal immigration officers in violation of the Fourth Amendment, Fifth Amendment, and related provisions of federal law…….....74

Mandamus Litigation against DOL to Address Delays in Prevailing Wage Determinations and Labor Certifications (August 18, 2011). This Practice Advisory provides basic information about mandamus actions and suggests strategies and practice tips for bringing a mandamus action against the Department of Labor (DOL)……...104

Prosecutorial Discretion: How to Advocate for Your Client (June 24, 2011). 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 influence the favorable exercise of prosecutorial discretion by ICE and USCIS officers…….114

Protecting and Preserving the Rights of LGBT Families: DOMA, *Dorman*, and Immigration Strategies (June 13, 2011). This Practice Advisory provides ideas for attorneys representing noncitizens in removal proceedings whose cases are affected by DOMA…….134

How To File A Petition For Rehearing, Rehearing En Banc And Hearing En Banc In An Immigration Case (April 29, 2011). This Practice Advisory discusses the procedures and requirements for filing a petition for rehearing, rehearing en banc or hearing en banc in the court of appeals…….142

How to File a Petition for Review (February 28, 2011). Noncitizens may file a petition for review in the court of appeals to seek judicial review of a final removal order. This Practice Advisory addresses the procedures and general requirements for filing and litigating a petition for review……..151

Mandamus Jurisdiction over Delayed Applications: Responding to the Government's Motion to Dismiss (August 30, 2010). This Practice Advisory outlines arguments to make in response to the government's arguments that the court should dismiss a mandamus or Administrative Procedure Act case brought to remedy the delayed adjudication of an immigration application ……...172

How to get Judicial Relief Under 8 USC 1447(b) for a Stalled Naturalization Application (August 25, 2010). Section 336(b) of the INA, 8 U.S.C. § 1447(b), 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. This Practice Advisory discusses the nuts and bolts of bringing a suit under INA § 336(b). It also discusses when attorneys fees under the Equal Access to Justice Act are available……..184

The Fugitive Disentitlement Doctrine: FOIA and Petitions for Review (August 19, 2010). The fugitive disentitlement doctrine arises in the immigration context when courts of appeals use the doctrine to dismiss petitions for review and when government agencies invoke the doctrine to deny FOIA requests. This Practice Advisory examines how the courts and the agencies apply the doctrine in these contexts…….192

Whom to Sue and Whom to Serve (May 13, 2010). This Practice Advisory addresses who is the proper respondent-defendant and recipient for service of process in immigration-related litigation in district court. The advisory covers whom to sue in specific types of immigration-related actions, including mandamus, Federal Tort Claims Acts (and administrative claims), Bivens, and habeas actions…….....205

Rescinding an *In Absentia* Order of Removal (March 31, 2010). 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. This Practice Advisory addresses the elements and requirements for an *in absentia* motion to reopen in both contexts……217

The Child Status Protection Act (November 4, 2009). This Practice Advisory provides a comprehensive overview of the CSPA and its effective date, with a discussion of the most recent agency interpretations and court cases…….228

Terminating Removal Proceedings to Pursue Naturalization before DHS: Strategies for Challenging *Matter of Acosta Hidalgo* (October 1, 2009). This Practice Advisory discusses 8 C.F.R. § 1239.2(f) and the BIA's interpretation of it in *Matter of Acosta Hidalgo*. In *Matter of Acosta Hidalgo*, the BIA said that IJs and the BIA lack jurisdiction to determine prima facie eligibility for naturalization in order to terminate removal proceedings. The advisory sets out legal arguments for challenging the BIA's decision……239

Mandamus Actions: Avoiding Dismissal and Proving the Case (August 6, 2009). This Practice 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 jurisdictional concerns that may arise……...245

The Criminal Justice Act: Appointment of Counsel in Habeas Corpus Proceedings (August 1, 2009). This Practice Advisory presents a short introduction to the Criminal Justice Act (CJA), which authorizes U.S. district courts to appoint counsel to represent financially eligible individuals in habeas corpus actions brought pursuant to 28 U.S.C. § 2241…….....256

Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart (July 6, 2009). 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…….259

The § 237(a)(1)(H) Fraud Waiver (June 24, 2009). This Practice Advisory discusses the § 237(a)(1)(H) waiver for fraud or misrepresentation at admission that would otherwise render deportable certain LPRs and Violence Against Women Act (VAWA) self-petitioners. The advisory addresses contexts in which the waiver is available, the statutory eligibility requirements, and the relief that results from a grant of the waiver……...272

Return to the United States after Prevailing on a Petition for Review (May 28, 2009). This Practice Advisory contains practical and legal suggestions for attorneys representing clients who have prevailed on a petition for review or other legal action and who are outside of the United States…….283

Electronic Filing and Access to Electronic Federal Court Documents (April 13, 2009). 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 discusses restrictions on electronic access to court documents in immigration cases…….296

Voluntary Departure Q&A (December 22, 2008). This Q&A provides an overview of EOIR's regulations on voluntary departure, issued December 18, 2008. The regulations, which went into effect on January 20, 2009, address various aspects of voluntary departure, including what happens to voluntary departure when motions to reopen and reconsider and petitions for review are filed……303

Equal Access to Justice Act (EAJA) Fee Application (December 15, 2008). This Practice Advisory addresses the deadline for filing an Equal Access to Justice Act (EAJA) fee application, the statutory requirements for eligibility, and procedural aspects of filing an application, including documenting and calculating fees…….308

USCIS Adjustment of Status of "Arriving Aliens" with an Unexecuted Final Order of Removal (November 6, 2008). This Practice Advisory explains why USCIS has jurisdiction over adjustment applications of an arriving alien parolee with an unexecuted final order of removal. It also outlines the arguments why such a parolee remains eligible for adjustment notwithstanding an unexecuted final order of removal. This Practice Advisory supplements an earlier practice advisory addressing the adjustment of paroled "arriving aliens" under the interim regulations adopted on May 12, 2006……..326

"Arriving Aliens" and Adjustment of Status: What is the Impact of the Government's Interim Rule of May 12, 2006? (November 5, 2008). This Practice Advisory discusses the impact of an interim rule repealing two former regulations which barred all "arriving aliens" from adjusting status if they are in removal proceedings. This advisory provides a brief history leading to the rule, defines key terms, discusses the impact of the rule, and suggests steps that a parolee can take to benefit from the rule.....333

"Finality" of Removal Orders for Judicial Review Purposes (August 5, 2008). The Immigration and Nationality Act authorizes the courts of appeals to review "final" removal orders. This Practice Advisory addresses whether a removal decision issued by an Immigration Judge or the BIA is a "final" removal order for purposes of federal court review……...342

Arrest, Detention, and Bond Procedures for Noncitizens *Without* Criminal Convictions (July 1, 2008). This Practice Advisory focuses on the law governing the arrest, detention and bond procedures for noncitizens who are present in the United States and do not have criminal convictions ……351

***Dada v. Mukasey* Q&A: Preliminary Analysis and Approaches to Consider** (June 17, 2008). In *Dada v. Mukasey*, the Supreme Court protected the right to file a motion to reopen by holding that voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. This Q&A offers preliminary analysis about the potential impact of *Dada v. Mukasey* on individuals' cases and offers suggestions about immediate steps to take……..359

Introduction to Habeas Corpus (June 1, 2008). This Practice Advisory offers a short introduction to habeas corpus, addressing when and how a petitioner may file a petition for writ of habeas corpus in the immigration context …….364

Reinstatement of Removal (April 23, 2008). A person who has been removed and unlawfully reenters the United States may be subject to reinstatement of removal under INA § 241(a)(5). This Practice Advisory provides an overview of the reinstatement statute and implementing regulations. It also addresses where to obtain federal court review of reinstatement orders and which arguments are available to challenge the legality of reinstatement orders in federal court, including challenges to the underlying removal order……...369

§ 212(h) Eligibility: Case Law and Potential Arguments (February 19, 2008). This Practice Advisory addresses statutory requirements for § 212(h) waivers; availability of § 212(h) waivers in removal proceedings for both LPRs and non-LPRs; and situations when a "stand-alone" § 212(h) waiver can, or arguably might, be filed. The advisory also discusses the regulation imposing a heightened hardship standard in cases involving violent or dangerous crimes…….389

Immigration Lawsuits and the APA: The Basics of a District Court Action (May 9, 2007). This Practice Advisory discusses the primary issues involved in a suit brought under the Administrative Procedure Act (APA) to challenge an unlawful agency action. The advisory provides 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……..401

Federal Court Jurisdiction Over Discretionary Decisions After REAL ID: Mandamus, Other Affirmative Suits and Petitions for Review (April 5, 2006). This Practice Advisory discusses the changes that the REAL ID Act made to INA § 242(a)(2)(B) and outlines an analysis for whether §242(a)(2)(B) applies to a particular case. It also discusses federal court jurisdiction over discretionary decisions after the REAL ID Act in the removal and non-removal contexts……416

Employment Authorization and Asylum: Strategies to Avoid Stopping the Asylum Clock (February 28, 2006). This Practice Advisory discusses how the asylum employment authorization document (EAD) clock operates, both in theory and in practice. The advisory addresses EOIR's interpretation and implementation of the asylum clock and provides an analysis of and strategies around clock-stopping events…….427

Judicial Review Provisions of The REAL ID Act (June 7, 2005). On May 11, 2005, the REAL ID Act was signed into law. This Act contains numerous provisions related to federal court review of immigration cases. This Practice Advisory discusses the provisions of the Act that pertain to judicial review of immigration decisions under the INA……..448

BIA "Affirmance Without Opinion": What Federal Court Challenges Remain? (April 27, 2005). This Practice Advisory discusses the types of Affirmance Without Option (AWO) challenges that have failed and those that remain available. The advisory also includes a chart identifying the primary cases in each circuit and how they have decided various AWO issues……...454

Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court (April 20, 2005). 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 remedying 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……464

EOIR Background and Security Check Regulations (April 6, 2005). On April 1, 2005, EOIR's Background and Security Check regulations went into effect. The interim rule bars IJs and the BIA from granting most forms of relief until DHS has informed them that security checks are completed. This Practice Advisory provides basic information about the requirements and procedures under the interim rule and highlights the major changes to BIA procedures…….....478

***St. Cyr* Regulations and Strategies for Applicants Who Are Barred From Section 212(C) Relief Under The Regulations** (October 19, 2004). Pursuant to the Supreme Court's decision *INS v. St. Cyr*, the Department of Justice (DOJ) published its final rule on procedures for applying for section 212(c) relief. This Practice Advisory summarizes the rule and describes who can apply for § 212(c) relief under the rule. In addition, it discusses strategies and arguments to assist individuals who are barred under the rule……...482

Special Immigrant Religious Workers: How to Demonstrate that an Immigrant Seeks Employment in a "Religious Occupation." (September 29, 2004). This practice advisory addresses the term "religious occupation," as it is used with respect to certain categories of religious workers. It also addresses federal courts cases overturning AAO decisions that erroneously imposed heightened requirements for "religious occupation."……496

Failure to Appeal to the AAO: Does it Bar all Federal Court Review of the Case? (July 22, 2004). This Practice Advisory discusses whether and how a person can get review of a U.S. Citizenship and Immigration Services decision in federal court if he or she did not appeal the decision to the Administrative Appeals Office (AAO). The advisory addresses the Supreme Court case *Darby v. Cisneros*, holding that a plaintiff is not required to exhaust non-mandatory administrative remedies in certain situations, and how it may apply to cases involving appeals to the AAO……...505

ICE's Detention After Removal Hearing Program: Practical Suggestions and Legal Analysis for Potential Challenges (April 9, 2004). 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……...515

Objecting to Video Merits Hearings (December 12, 2003). 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…….525

Export Licensing Requirements for Foreign Nationals (July 17, 2003). This Practice Advisory focuses on the "deemed export" rule under the Commerce Department's Export Administration Regulations ("EAR"), which governs exports of non-military technology. ……..532

Practicing Before the BIA Under the "Procedural Reforms" Rule (January 10, 2003). The BIA's "procedural reforms" rule went into effect on September 25, 2002. Notably, under the new rule, most cases are decided by a single member of the BIA, as opposed to a three-member panel. This Practice Advisory highlights the changes made by this rule, including changes to summary dismissals, adjudication on the merits, briefing schedules, standards of review, evidence on appeal, timeframes for adjudications, and board membership…….....539

How to Challenge an Affirmance Without Opinion by a BIA Member (September 27, 2002). Pursuant to 8 C.F.R. § 3.1(e)(4), single BIA members are deciding summarily thousands of cases using the "affirmance without opinion" (AWO) procedure. This Practice Advisory discusses arguments that challenge a BIA Member's use of this procedure to deny an appeal…….....546

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PRACTICE ADVISORY[1]
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.

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[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-Gebru 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 facilitiate a person's return. *See* American Immigration

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[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.)

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 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*.

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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.

SAMPLE A

Motion to Reconsider with the Immigration Judge

This motion is <u>not</u> 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 RECONSIDER IN LIGHT OF
JUDULANG v. HOLDER

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby moves the Immigration Judge to reconsider 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.[1] Specifically, the

[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 pretermitting 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 <u>not</u> 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. <u>INTRODUCTION</u>

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 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.

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[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 pretermitting 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,

_____

SAMPLE C

Motion to Reconsider with the BIA

This motion is <u>not</u> 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. DO NOT TREAT THIS SAMPLE MOTION AS 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 RECONSIDER IN LIGHT OF
JUDULANG v. HOLDER

I. <u>INTRODUCTION</u>

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 *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.[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 pretermitting 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 <u>not</u> 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 <u>not</u> 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 pretermitting 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,

_____

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
Updated: December 12, 2011

DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION

By The Legal Action Center and Alexsa Alonzo[2]

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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[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] Alexsa Alonzo is an Associate Director of Advocacy with the American Immigration Lawyers Association (AILA).

[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 Memorandum[5] 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 headquarters[11] 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.)

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[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. Under current law, a case cannot be administratively closed unless both parties agree to the closure. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996). 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?

[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.

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, it is not clear whether individuals whose cases are administratively closed will be able to apply for work authorization. In early December – at stakeholder meetings in Baltimore and Denver in connection with the pilot projects – DHS said 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

[14] For more on preparing a request for prosecutorial discretion, *see* Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client.

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!

[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.

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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 Clinic[2]

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

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[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 disorders[4] — 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.

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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

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[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]

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[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 closure[11] — 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

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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.

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[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

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[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 BENCHBOOK 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 guardian[21] 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.

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[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).

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[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]

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[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

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[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.

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[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

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[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]

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[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]

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[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

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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

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[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

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[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).

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
Updated October 12, 2011

MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW

By The Legal Action Center[2]

"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, state and local law enforcement officers. Nor does it discuss issues that only arise along the border. These subjects will be addressed in future practice advisories.

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[2] Ben Winograd was the principal author of this practice advisory. Mary Kenney and Melissa Crow provided assistance in drafting. The Legal Action Center thanks Rex Chen, Matthew Guadagno, Dan Kesselbrenner, and Michael Wishnie for their helpful comments on previous drafts. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

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 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 also is 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,[3] a requirement that the Constitution does not impose.[4]

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. For example, regulations require that examining officers inform noncitizens arrested without a warrant that any statement they make could be used against them in a subsequent proceeding,[5] a requirement not imposed by the Constitution or federal law. Immigration officers may also be bound by "subregulations" contained in Operating Instructions and other internal guidance.

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[3] 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).

[4] *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).

[5] 8 C.F.R. § 287.3(c).

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

A: A motion to suppress may target any evidence the government attempts to introduce, whether physical, documentary, or testimonial. When filing a motion to suppress, respondents charged with being in the United States without being admitted or paroled should attempt to exclude the government's evidence of *alienage* (assuming it was illegally obtained). Because the government has the burden of proof with regard to this threshold issue,[6] 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."[7] 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."[8] By contrast, the Court found that the other respondent filed a proper motion to suppress because he objected "to evidence offered at that proceeding."[9]

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. As one court has explained, however, *Lopez-Mendoza* requires parties to object to the introduction of evidence, but does not limit the type of evidence they may seek to suppress.[10]

> **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: 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

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[6] 8 C.F.R. § 1240.8(c).
[7] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984) .
[8] *Lopez-Mendoza*, 468 U.S. at 1039.
[9] *Lopez-Mendoza*, 468 U.S. at 1040.
[10] See, e.g., *United States v. Olivares-Rangel*, 458 F.3d 1104, 1112 (10th Cir. 2006).

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.[11]

In some cases, the causal nexus between the unlawful conduct and the resulting evidence is clear. For example, if immigration agents illegally enter a home without a warrant and question a resident about his immigration status, any concession of unlawful alienage normally would be subject to suppression.[12] At other times, intervening events can 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.[13]

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 information in government databases that might establish a respondent's alienage.[14] Some courts take the position that government records can be excluded like any other object or statement introduced for an evidentiary purpose.[15] Other courts take the position that pre-existing governmental records are not suppressible under *Lopez-Mendoza* because they are "identity-related."[16]

For cases arising in circuits in which this issue is undecided, there are several strong arguments why such evidence should be excluded. First, the result is compelled by two Supreme Court decisions where fingerprint samples were suppressed because police had no legal justification to obtain them in the first place.[17] Second, it is consistent with the fruit-of-the-poisonous tree doctrine: records are suppressible if discovered by "exploitation" of an unconstitutional investigation, even if the information originally came into the government's possession innocently, but not if happened upon during a routine booking procedure. Finally, the contrary position undercuts the bar against investigative techniques prohibited under the Fourth Amendment —such as taking suspects "downtown" for questioning, or random identity checks and vehicle stops— because otherwise the results of any government database search could still be introduced in court.

[11] *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).
[12] *Wong Sun*, 371 U.S. at 485-86.
[13] *Wong Sun*, 371 U.S. at 491.
[14] The Supreme Court recently agreed to resolve the split in a non-immigration related criminal case, but dismissed the petition without rendering a decision. *Tolentino v. New* York, 131 S. Ct. 1387 (2011) (dismissing writ of certiorari as improvidently granted).
[15] *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. Garcia-Beltran*, 389 F.3d 864, 865 (9th Cir. 2004); *United States v. Guevara-Martinez*, 262 F.3d 751, 753-55 (8th Cir. 2001).
[16] *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).
[17] *Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811 (1985).

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.[18] 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.[19] Consequently, for the exclusionary rule to apply, a court must weigh the cost of excluding evidence against the benefit of deterring future government misconduct.[20]

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.[21] 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.[22] Finally, the Court cited the existence of alternative remedies for redressing constitutional violations, such as seeking declaratory relief against unlawful agency practices.[23]

The Court also found the costs of applying the rule to be "unusual and significant."[24] Citing ***Matter of Sandoval***, 17 I&N Dec. 70 (BIA 1979), the Justices noted that failing to remove otherwise unlawfully present respondents would effectively sanction ongoing violations of federal

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[18] See Part III for a discussion of suppression motions challenging post-arrest conduct under the Fifth Amendment.
[19] *Elkins v. United States*, 364 U.S. 206, 217 (1960).
[20] *Illinois v. Krull*, 480 U.S. 340, 352-353 (1987) (internal quotation marks omitted).
[21] 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.
[22] *Lopez-Mendoza*, 468 U.S. at 1044-45.
[23] *Lopez-Mendoza*, 468 U.S. at 1045.
[24] *Lopez-Mendoza*, 468 U.S. at 1046.

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.[25]

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."[26] 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."[27]

Meanwhile, four dissenting Justices argued that the exclusionary rule *always* should be available in removal proceedings for Fourth Amendment violations,[28] 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.[29] Three circuits have adopted the exception as the law within their jurisdiction, and five circuits and the BIA[30] have acknowledged the possibility that it may exist. By contrast, no circuit has explicitly rejected the exception.

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

A: The Second, 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.

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[25] *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).

[26] *Lopez-Mendoza*, 468 U.S. at 1050 (Opinion of O'Connor, J.).

[27] *Lopez-Mendoza*, 468 U.S. at 1050-51 (Opinion of O'Connor, J.).

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

[29] *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).

[30] *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996).

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."[31] 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.[32]

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."[33] The court emphasized this list was *not* exhaustive, but stressed that technical Fourth Amendment violations would not merit suppression.

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.[34] 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."[35] 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.[36] 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.[37]

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

[31] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-37 (2d Cir. 2006).
[32] *Melnitsenko v. Mukasey*, 517 F.3d 42, 48 (2d Cir. 2008).
[33] *Puc-Ruiz*, 629 F.3d at 778-779.
[34] *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).
[35] *Gonzalez-Rivera*, 22 F.3d at 1449 (emphasis in original).
[36] *See, e.g.*, *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018-1019 (9th Cir. 2008).
[37] *See, e.g.*, *Lopez-Rodriguez*, 536 F.3d at 1018-19.

petitioner's home without consent or a judicially issued warrant.[38]

Generally speaking, the Ninth Circuit's "bad faith" test for egregiousness is more favorable than the standard employed by the Second and Eighth Circuits, insofar as it does not 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***, 616 F.3d 1011, 1017 (9th Cir. 2010), the court declined to even 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. 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.[39]

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 Circuit[40] and Third Circuit[41] have acknowledged the exception but have not expounded upon its meaning. 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."[42] The Seventh Circuit, while not officially adopting the exception, has repeatedly noted that the Supreme Court left open the question.[43] 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.[44] The validity of the exception remains an open question in the Fourth, Fifth, and Eleventh Circuits. [45]

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)

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[38] *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).

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

[40] *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).

[41] *United States v. Bowley*, 435 F.3d 426, 431 (3d Cir. 2006). Before filing or appealing a motion to suppress in the Third Circuit, attorneys should check the status of *Oliva-Ramos v. Att'y Gen*, No. 10-3849 (3d Cir. *appeal docketed* Sept. 24, 2010), which remained pending at the time of this writing.

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

[43] *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).

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

[45] *United States v. Oscar-Torres*, 507 F.3d 224, 227-28 n.1 (4th Cir. 2007); *Mendoza-Solis v. INS*, 36 F.3d 12, 12 (5th Cir. 1994); *Escobar v. Holder*, 398 F. App'x 50, 53-54 (5th Cir. 2010); *Ghysels-Reals v Att'y Gen.*, No. 10-12666, 2011 U.S. App. LEXIS 6154 at *4 (11th Cir. Mar. 24, 2011).

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 Amendment violation is considered egregious regardless of the probative value of the evidence obtained."[46]

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 (IJ) 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.[47]

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.[48] 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.[49] 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."[50] Lamentably, but perhaps not surprisingly, much evidence exists that such violations have occurred with growing frequency, particularly within the last decade.[51] To date, however, we are not aware of any court to have excluded evidence on this

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[46] *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.

[47] *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.

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

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

[50] *Lopez-Mendoza*, 468 U.S. at 1050 (opinion of O'Connor, J.).

[51] 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. *See also* Brief of *Amici Curiae* LatinoJustice PRLDEF, No. 10-1479, *Argueta, et al. v. ICE, et al.* (3rd 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://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf.

ground.[52] 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,[53] 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*.[54]

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."[55] 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.[56] Section 287 of the INA contains numerous provisions relating to the collection of evidence that implicate important Fourth and Fifth Amendment interests. Prior to the Supreme Court's decision in *Lopez-Mendoza*, circuit courts and the BIA frequently considered motions to suppress stemming from violations of these provisions.

It is unsettled to what extent the rule for suppression in the criminal context carries over to the civil immigration context. 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. The INA's various statutory requirements will be discussed in the relevant sections of Parts II and III of this practice advisory; attorneys with potential 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

[52] 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.

[53] *INS v. Lopez-Mendoza*, 468 U.S. at 1051 (Opinion of O'Connor, J.).

[54] 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).

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

[56] *Sanchez-Llamas*, 548 U.S. at 348-350.

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."[57] 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."[58]

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*.[59] 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).[60] 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.[61] 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.

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

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[57] *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.
[58] *Matter of Garcia-Flores*, 17 I&N Dec. at 329.
[59] *Michigan v. Fisher*, 130 S. Ct. 546 (2009).
[60] *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).
[61] *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

privacy was objectively reasonable.[62] 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."[63] 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.[64] 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.[65] Note, however, that government agents are not required to inform individuals of their constitutional right to walk away or ignore questioning.[66]

In determining whether a reasonable person would have felt free to end an encounter, courts presuppose an innocent person[67] and employ a "totality of the circumstances" approach.[68] 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 tone of voice indicating that compliance with the officer's request might be compelled."[69] 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.

> **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.

[62] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
[63] *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal citations omitted).
[64] *United States v. Mendenhall*, 446 U. S. 544, 553 (1980) (Opinion of Stewart, J.); *Florida v. Bostick*, 501 U.S. 429, 534-35 (1991).
[65] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 232 (2d Cir. 2006).
[66] *United States v. Drayton*, 536 U.S. 194, 206-07 (2002).
[67] *Bostick*, 501 U.S. at 438.
[68] *Bostick*, 501 U.S. at 439.
[69] *Benitez-Mendez v. INS*, 760 F.2d 907, 908-09 (9th Cir. 1985) (citation omitted).

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.[70] 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 16-17.
- *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 18.
- *Searches based upon consent*. Any search made after receiving valid consent is considered "reasonable." This exception is discussed on pages 19-20.
- "*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.[71]
- *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.[72]
- *Automobile searches*. When an officer possesses "probable cause" to believe an automobile contains evidence of a crime, he may search the car.[73]
- *Plain view*. Officers may seize criminal contraband if it is in "plain view" in an area where they have a right to be.[74]
- *"Special needs" or administrative searches*. Officers may conduct warrantless searches in numerous contexts divorced from normal law enforcement needs, such as at the border.[75]

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.[76] Probable cause is always required for a government officer to obtain a search warrant or arrest someone. On review,

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[70] *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).
[71] *Brigham City v. Stuart*, 547 U.S. 398 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978)).
[72] *Chimel v. California*, 395 U.S. 752 (1969).
[73] *Carroll v. United States*, 267 U.S. 132 (1925).
[74] *Washington v. Chrisman*, 455 U.S. 1 (1982).
[75] *United States v. Ramsey*, 431 U.S. 606 (1977).
[76] *Wong Sun*, 371 U.S. at 480 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

courts examine the facts known to the officer at the time the search or arrest occurred.[77] As will be discussed on page 18, 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."[78] However, courts need not weigh the sufficiency of each individual factor but instead consider the "totality of the circumstances."[79] 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 16-17.

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."[80] 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.[81]

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.[82] Moreover, the Ninth Circuit has given foreign appearance little weight as a factor supporting reasonable suspicion in areas with high concentrations of racial or ethnic minorities.[83]

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."[84] 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.

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[77] *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).
[78] *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968).
[79] *United States v. Arvizu*, 534 U.S. 266, 274 (2002); *Florida v. Bostick*, 501 U.S. 429, 439 (1991).
[80] *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).
[81] *Arvizu*, 534 U.S. at 274.
[82] *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).
[83] *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 n.21-22 (9th Cir. 2000).
[84] *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

Nervousness

"Nervous, evasive behavior" may serve as a relevant factor in establishing reasonable suspicion,[85] 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.[86]

Flight from immigration officers

The Supreme Court has held that flight from law enforcement officers, standing alone, provides reasonable suspicion of illegal activity,[87] and courts have long held that attempts to evade immigration officers provide justification to temporarily detain them for questioning.[88]

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,[89] the Supreme Court subsequently held its appropriateness depends on the context in which it arose.[90]

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

A: Only individuals who possess 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 possess a reasonable expectation of privacy. For example, invited overnight guests always possess a reasonable expectation of privacy in the home where they sleep.[91] While employees have no expectation of privacy in public areas of their worksites,[92] they can challenge searches in nonpublic areas.[93] And while car passengers ordinarily lack standing to challenge *searches* of vehicles they neither own nor lease,[94] if law enforcement agents stop or obstruct a car, both the driver and passenger have been seized.[95]

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[85] *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).
[86] *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1447 (9th Cir. 1994).
[87] *Wardlow*, 528 U.S. at 124-125.
[88] *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630 (BIA 1974).
[89] *Gonzalez-Rivera*, 22 F.3d at 1446-1447.
[90] *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)").
[91] *Minnesota v. Olson*, 495 U.S. 91 (1990).
[92] *Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978).
[93] *Mancusi v. DeForte*, 392 U.S. 364 (1968).
[94] *Rakas v. Illinois*, 439 U.S. 128 (1978).
[95] *Brendlin v. California*, 551 U.S. 249 (2007).

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.[96] However, persons approached for questioning possess no corresponding obligation to answer and may simply walk away.[97] As discussed in section A, 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."[98] 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."[99] 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 possess 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 alone is not sufficient to create reasonable suspicion that a person is a noncitizen,[100] it may, in combination with other factors, provide justification for an officer to question an individual about his immigration status.[101]

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

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[96] *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).

[97] *Brown v. Texas*, 443 U.S. 47 (1979).

[98] INA § 287(a)(1) (emphasis added).

[99] *United States v. Flores-Sandoval*, 422 F.3d 711, 714 (8th Cir. 2005). Also see *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); *see also La Duke v. Nelson*, 762 F.2d 1318, 1327 (9th Cir. 1985).

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

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

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

A: Fourth Amendment

A request for identification does not, by itself, constitute a seizure.[102] Nor does the voluntary production of identification transform the encounter into a seizure.[103] 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.[104] 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,"[105] 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).[106]

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 possess a "reasonable suspicion of alienage" before asking for documents. *See* previous discussion on page 15.

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 a "*Terry* stop" qualifies as a seizure under the Fourth Amendment,[107] it is less intrusive than a full-blown arrest and may thus be supported by "reasonable suspicion" rather than "probable cause."[108] 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.[109] 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.[110]

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102 *Delgado*, 466 U.S. at 216.
103 *Florida v. Royer*, 460 U.S. 491 (1983).
104 *Royer*, 460 U.S. at 504 n.9 (Opinion of White, J.).
105 *Katris v. INS*, 562 F.2d 866, 869 (1st Cir. 1977).
106 *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).
107 *Terry*, 392 U.S. at 16.
108 *Brown*, 443 U.S. at 51.
109 *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).
110 *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Arvizu*, 534 U.S. 266 (2002).

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.[111] Federal regulations likewise authorize immigration officers to briefly detain individuals for questioning whom they have reasonable suspicion to believe are in the country illegally.[112]

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.[113] During such a stop, the seizing agents must diligently pursue a means of investigation that is likely to quickly confirm or dispel their suspicions.[114] 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."[115]

The Supreme Court has not specified any rigid time limitations on investigative detentions but repeatedly has said they should be "temporary" or "brief."[116] In *Brignoni-Ponce*, the Court emphasized that inquiries into immigration status ordinarily last no longer than one minute.[117] In a subsequent case, the Court noted than it had never approved a stop lasting ninety minutes.[118]

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

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.[119] "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."[120] 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.[121] If the frisking officer exceeds these limitations, any fruits of the search are obtained in violation of the Fourth Amendment.[122]

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

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

112 8 C.F.R. § 287.8(b)(2).

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

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

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

116 *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).

117 *Brignoni-Ponce*, 422 U.S. at 880.

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

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

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

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

122 *Dickerson*, 508 U.S. at 373.

States illegally, in which case the officer may conduct a full search incident to arrest, one of the aforementioned exceptions to the warrant requirement.[123]

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,[124] as has placing a person in a confined area, even for a limited period.[125] 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.[126] 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.[127]

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,[128] and regulations state that immigration officers must possess the requisite level of suspicion as to both the unlawfulness of a noncitizen's presence *and* the likelihood of his escape.[129]

Where either factor is absent, the admissibility of evidence obtained as a result of a warrantless arrest may be subject to challenge.[130] While the Sixth Circuit has found that suppression is not an appropriate remedy for violations of INA § 287(a)(2),[131] 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 9. Warrantless arrests implicate important Fourth Amendment interests because a warrant serves to ensure, even if it does not guarantee,[132] that the arrest is supported by probable cause. Attorneys considering motions to suppress under INA § 287(a)(2) are encouraged to contact us at clearinghouse@immcouncil.org.

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123 *Chimel v. California*, 395 U.S. 752 (1969).
124 *Dunaway v. New York*, 442 U.S. 200 (1979).
125 *Florida v. Royer*, 460 U.S. 491 (1983).
126 *United States v. Watson*, 423 U.S. 411, 417 (1976).
127 *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001).
128 *United States v. Sanchez*, 635 F.2d 47, 63 n.13 (2d Cir. 1980); *Au Yi Lau*, 445 F.2d at 222.
129 8 C.F.R. § 287.8(c)(2)(i)-(ii); *see also Matter of Chen*, 12 I&N Dec. 603, 605-07 (BIA 1968).
130 *United States v. Quintana*, 623 F.3d 1237, 1241 (8th Cir. 2010); *Martinez-Angosto v. Mason*, 344 F.2d 673, 680 (2d Cir. 1965).
131 *United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006).
132 See, e.g., *El Badrawi v. United States*, No. 07-1074, 2011 U.S. Dist. LEXIS 39857 (D. Conn. 2011).

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 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 DHS[133] rather than judicial officers. Thus, even if they possess an administrative immigration arrest warrant, federal immigration officers may not enter a residence without receiving valid consent from the occupant(s).

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. The government bears the burden of showing valid consent.[134] 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 object to the entry."[135] 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."[136] 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.[137] Consent may be deemed involuntary where agents falsely claim to possess a warrant or authority to search.[138]

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.[139]

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133 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").

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

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

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

137 *Schneckloth*, 412 U.S. at 228, 232-33.

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

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

Both landlords[140] and hotel clerks[141] 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.[142] Importantly, if the movant was himself present and refused consent, the search generally would be found unreasonable, even if another party provided consent.[143]

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.[144] 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."[145] 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.[146]

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 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,"[147] and that any questioning which prolongs the period of detention must have independent support under the Fourth Amendment.[148]

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140 *Chapman v. United States*, 365 U.S. 610 (1961).
141 *Stoner v. California*, 376 U.S. 483 (1964).
142 *Rodriguez*, 497 U.S. at 181.
143 *Georgia v. Randolph*, 547 U.S. 103 (2006).
144 *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).
145 *Jimeno*, 500 U.S. at 251.
146 *United States v. McWeeney*, 454 F.3d 1030, 1034-37 (9th Cir. 2006).
147 *Michigan v. Summers*, 452 U.S. 692, 701 (1981).
148 *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 proceedings[149] and mandates that evidence be used in a "fundamentally fair" manner.[150] 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."[151] In numerous cases, the Board and federal circuit courts have ordered the exclusion of statements obtained in violation of the Due Process Clause.[152]

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.[153] More recently, in ***Singh v. Mukasey***, 553 F.3d 207 (2d Cir. 2009), the Second Circuit excluded the confession of a noncitizen who was interrogated for four

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149 *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.").

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

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

152 *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)).

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

hours in the middle of the night; repeatedly threatened him with imprisonment; and denied the opportunity to read the statement before signing it.[154]

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.[155] 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.[156] 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.[157]

INA

The INA states that all persons arrested without a warrant be taken for "examination" before a qualified immigration officer,[158] 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 concluded that "any statements made prior to the initiation of formal proceedings are not obtained

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154 *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).

155 8 C.F.R. § 287.8(c)(2)(vii).

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

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

158 INA § 287(a)(2).

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."[159] 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."[160] 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).[161]

Notwithstanding the Board's decision, a strong case 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 indeed 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,"[162] 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 us 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 rendered his

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159 *Id*. at 588.

160 *Id*. at 583.

161 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).

162 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.").

subsequent statements involuntarily made and therefore subject to suppression under the Due Process Clause.[163]

INA and CFR

INA § 292 gives persons the privilege of being represented by counsel (at no expense to the government) during all proceedings before IJs 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."[164] 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).[165] Attorneys considering motions to suppress under 8 C.F.R. § 292.5(b) are encouraged to contact us at clearinghouse@immcouncil.org.

[163] *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)).

[164] INA § 287(a)(2); 8 C.F.R. § 287.3(c).

[165] 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: 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.[166] Thus, 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.[167] 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.[168] 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 be (a) specific and detailed, (b) contain allegations based on the respondent's personal knowledge, and (c) list the articles of evidence to be suppressed.[169]

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.

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 sworn affidavits from the respondent and any witnesses that detail the factual basis for the motion.[170] 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

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166 8 C.F.R. § 1240.8(c); *Matter of Cervantes-Torres*, 21 I&N 351, 354 (BIA 1996).
167 *Matter of Tsang*, 14 I&N Dec. 294, 295 (BIA 1973).
168 *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971).
169 *Matter of Wong*, 13 I&N Dec. at 822.
170 *Matter of Wong*, 13 I&N Dec. at 822. Note that such evidence may not need to be presented in a sworn statement. *Id*. at 821 n.1.

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 IJ can grant the motion to terminate and dismiss the charges against the respondent.[171]

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, IJs 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.[172] 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.[173] 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 as illegal entry.[174] 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.[175]

In general, the respondent must assert the privilege against self-incrimination on a question-by-question basis.[176] However, some IJs 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.[177] Importantly, a witness cannot be compelled to state why an answer might tend to incriminate him;[178] nor can an IJ or trial attorney validly offer immunity to respondents to prevent

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

172 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.

173 *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.").

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

175 *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).

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

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

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

them from invoking the privilege.[179] If asked a question whose 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.[180] However, until the government presents evidence of alienage, such silence is not alone sufficient to establish removability.[181] 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.[182] 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.[183] 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 respondent does not admit his or her alienage or deportability."[184] 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 IJ to subpoena or order a deposition of the agent who prepared the form so that he may be cross-examined.[185] 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.[186]

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,"[187] or if other circumstances indicate lack of trustworthiness.[188] In many suppression cases, the alleged misconduct itself may provide a basis to question the reliability of the Form I-213—for example,

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179 *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979).
180 *Lopez-Mendoza*, 468 U.S. at 1043-44.
181 *Matter of Guevara*, 20 I&N Dec. 238, 244 (1991).
182 *Matter of Carrillo*, 17 I&N Dec. at 32.
183 *Matter of Velasquez*, 19 I&N 377, 382 (BIA 1986).
184 8 C.F.R. § 1240.11(e).
185 8 C.F.R. § 1003.35(a)-(b) (granting IJs power to order depositions and issue subpoenas).
186 8 C.F.R. § 1003.35(b)(2).
187 *Barradas v. Holder*, 582 F.3d 754, 763 (7th Cir. 2009).
188 *Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995) (quoting Fed. R. Evid. 803(8)(C)).

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."[189]

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

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

	Fourth Amendment	INA § 287	8 C.F.R. 287
"Consensual" questioning	*Not a seizure*. 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. See page 15.	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. See page 15.	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. See page 15.
Investigative (*Terry*) stop	*Seizure*. 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). See pages 13-14, 16-17.	INA 287(a)(1). Has been construed to authorize investigative detentions upon reasonable suspicion of *unlawful* alienage. Same standard as Fourth Amendment. See page 17.	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. See page 17.
Arrest	*Seizure*. 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. See pages 12-13, 18.	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. See page 18.	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. See page 18.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
August 18, 2011

MANDAMUS LITIGATION AGAINST DOL TO ADDRESS DELAYS IN PREVAILING WAGE DETERMINATIONS AND LABOR CERTIFICATIONS

by Kristen Harris, Megan Kludt and Mary Kenney[2]

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

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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

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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, 2011and through this writing[7] 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.

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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

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[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

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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.

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[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.

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[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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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").

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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;
        - A much greater emphasis on family relationships; thus, for example, consideration is now to be given to the military service

[2] Previously, the Meissner memo had articulated the standard as whether a "substantial federal interest" was present.

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).

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[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 s 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

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[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;

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[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.

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[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

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[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.

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
June 13, 2011

Protecting and Preserving the Rights of LGBT Families: DOMA, *Dorman*, and Immigration Strategies

By The Legal Action Center and Immigration Equality

Introduction

Lesbian and gay noncitizens face serious impediments to obtaining legal immigration status through marriage. The Board of Immigration Appeals (BIA or Board) relies on Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, which defines marriage as a union between one man and one woman, in determining whether a marriage is valid for immigration purposes. *See Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005). Pursuant to 8 C.F.R. § 103.37(g), all officers and employees of the Department of Homeland Security as well as immigration judges are bound by Board decisions and decisions of the Attorney General.[2] Accordingly, the immigration agencies bar lesbian and gay U.S. citizens and permanent residents from successfully petitioning for their spouses. Similarly, noncitizens are precluded from obtaining other immigration benefits or relief from removal – such as a waiver or cancellation of removal – based on a marriage involving a gay or lesbian couple.

In February 2011, the Obama Administration (through the Attorney General) announced that it would not defend Section 3 in federal court challenges.[3] Nonetheless, the Attorney General said that the Department of Justice would still "enforce" DOMA pending a legislative repeal of

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The LAC and Immigration Equality are grateful for the assistance of the National Immigration Project of the National Lawyers Guild and Lambda Legal.

[2] *See also* U.S. Citizenship and Immigration Service's Adjudicator's Field Manual § 21.3(a)(2)(I) (DOMA governs).

[3] *See* Letter from Eric H. Holder, Jr., Attorney General, to John H. Boehner, Speaker, U.S. House of Representative, Re: Defense of Marriage Act (Feb. 23, 2011) *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

DOMA[4] or a "final judicial decision." Advocates are urging the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) to adopt interim measures that would preserve the status quo until there is final resolution.[5] To date, these entities have not changed their policies. Significantly, however, the Attorney General remanded a case involving immigration relief based upon a civil union between two gay men to the BIA to determine "whether and how the constitutionality of DOMA is implicated." *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011).

Outside of the immigration context, there are several pending federal court cases challenging DOMA. The Gay & Lesbian Advocates & Defenders (GLAD) achieved the first victory, convincing the district court in Massachusetts that DOMA is unconstitutional; the case now is pending in the First Circuit and the U.S. House of Representatives has moved to intervene to defend DOMA.[6] *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. filed Oct. 18, 2010). There also are pending cases in the district courts in Connecticut, New York, and California, in which plaintiffs are represented by GLAD, ACLU's Lesbian, Gay, Bisexual, and Transgender (LGBT) Project, Lambda Legal, and the Legal Aid Society-Employment Law Center, respectively. *Pedersen v. Office of Pers. Mgmt*, No. 10-1750 (D. Conn. filed Nov. 9, 2010); *Windsor v. United States*, No. 10-8435 (S.D.N.Y. filed Nov. 9, 2010); *Golinski v. Office of Pers. Mgmt*, No. 10-257 (N.D. Cal. filed Jan. 20, 2010); *Dragovich v. United States Dep't of the Treasury*, No. 10-1564 (N.D. Cal. motion to dismiss denied Jan. 18, 2011). It is likely that the Supreme Court ultimately will decide one of these cases. Although none of these cases involves immigration benefits, the resolution of these cases will have a considerable – perhaps dispositive – impact on the application of DOMA in immigration cases.[7]

Undoubtedly, the law surrounding DOMA is in flux. This Practice Advisory provides ideas for attorneys representing noncitizens in removal proceedings whose cases are affected by DOMA. Such individuals may seek to have their cases closed, continued, or held in abeyance. In the

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[4] Legislation has been introduced that would repeal DOMA. *See* Respect for Marriage Act, H.R. 1116, 112th Cong. (2011); Respect for Marriage Act of 2011, S. 598, 112th Cong. (2011).

[5] As part of this effort, advocates have made a formal request by submitting letters to the Secretary of Homeland Security, Director of EOIR, and DOJ's Office of Immigration Litigation. The letters are available at http://www.americanimmigrationcouncil.org/sites/default/files/docs/DOMA-letters-4-6-2011.pdf.

[6] Following the Attorney General's announcement that it would no longer defend DOMA, Members of the House Bipartisan Legal Advisory Group voted along party lines to intervene in DOMA litigation. Congress has similarly intervened in other instances where an administration has declined to defend the constitutionality of a law. *See*, *e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983).

[7] It is important to understand that the successes to date in DOMA litigation have been the result of a carefully crafted and coordinated strategy. At this point, we are not advising anyone to bring a federal DOMA challenge without first coordinating with the groups litigating these cases.

alternative, noncitizens may take steps to resolve other, non-DOMA issues so that their cases can be fully developed pending final resolution of judicial and legislative challenges to DOMA. As discussed at the end of this Practice Advisory, lesbian and gay noncitizens who are not in removal proceedings generally are advised to postpone taking steps to obtain legal status based on their marriage.

Ways in Which DOMA May Be Implicated

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 U.S. Citizenship and Immigration Services (USCIS) or in an application for relief from removal filed with an immigration judge (IJ). The following are examples of situations where section 3 of DOMA may be implicated.

- Adjustment of status based on a family-based visa petition
- Adjustment of status 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) and § 212(i))
- Derivative beneficiary of an asylum application
- VAWA
- NACARA

Attorney General's Decision in *Matter of Dorman*

Mr. Dorman, a citizen of the U.K., entered into a New Jersey civil union with his U.S. citizen partner. An IJ found that he was removable because he overstayed his visa. Mr. Dorman applied for non-lawful permanent resident (LPR) cancellation of removal (INA § 240A(b)), but the IJ found him ineligible because he did not have a qualifying relative. As a result, the IJ did not schedule an individual hearing on the cancellation application and pretermitted his application. The Board affirmed the IJ's order, and Mr. Dorman subsequently filed a petition for review in the Third Circuit Court of Appeals.

On April 26, 2011 – before the Third Circuit could decide the petition for review – the Attorney General issued a precedent decision in *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011). The Attorney General vacated the underlying removal order and remanded the case to the Board "to make such findings as may be necessary to determine whether and how the constitutionality of DOMA is implicated." [8] Further, the Attorney General specified four questions for the Board to consider:

(1) whether respondent's same-sex partnership or civil union qualifies him to be considered a "spouse" under New Jersey law;

[8] Following the Attorney General's decision, the government filed an unopposed motion to dismiss the petition for review for lack of jurisdiction.

(2) whether, absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a "spouse" under the Immigration and Nationality Act;

(3) what, if any, impact the timing of respondent's civil union should have on his request for that discretionary relief; and

(4) whether, if he had a "qualifying relative," the respondent would be able to satisfy the exceptional and unusual hardship requirement for cancellation of removal.

Importantly, the Attorney General indicated that the Board is not limited to addressing solely these issues.

These questions go to aspects of the case that were not developed factually and which do not necessarily require the Board to address the applicability of section 3 of DOMA.[9] As of the date of this Practice Advisory, the Board had not yet set a briefing schedule in *Matter of Dorman*. Given the Board's limited authority to make findings of fact,[10] it is quite possible – if not likely – that the Board will remand the case to the IJ for factfinding before addressing the Attorney General's questions. Thus, it may be over a year before the Board issues a decision.

Until the BIA issues a decision, it is unclear how it will answer these questions and what other questions it may find necessary to address. It also is unclear what direction it ultimately might provide to IJs about how to handle removal cases implicating DOMA pending a judicial resolution on the constitutionality of the law.

Steps to Take if Client Is in Removal Proceedings or Has a Final Order of Removal

Pending removal proceedings

If you have a client in removal proceedings and DOMA is implicated in one of the ways described above, there are steps your client may take to try to protect himself or herself and preserve all issues pending a final judicial resolution of DOMA. Importantly, EOIR has said that although the President has instructed federal agencies to continue to enforce DOMA, "EOIR

[9] The first question requires an analysis of state law. The second question asks the Board to analyze current law regarding the validity of a marriage (absent DOMA), and similarly the third question suggests that the Board should apply current standards with respect to marriages entered into during the course of removal proceedings (and the presumption that the marriage is not bona fide). Finally, the fourth question relates to the extreme hardship requirement for cancellation of removal.

[10] Pursuant to 8 C.F.R. § 1003.1(d)(3)(iv), "the Board will not engage in factfinding in the course of deciding appeals."

continues, where appropriate to exercise discretion in individual cases based on the unique factors presented by that particular case."[11]

1. Move for Administrative Closure, a Continuance, or to Hold the Case in Abeyance

For most individuals with pending removal cases, the best course of action is for the immigration court or Board to administratively close or continue the removal case pending a judicial resolution or legislative repeal of DOMA or, at a minimum, the Board's decision in *Matter of Dorman*. Administrative closure temporarily removes a case from an IJ calendar or from the Board's docket. *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996).[12] Alternatively, an IJ may continue or adjourn a case until a later date "for good cause shown." *See* 8 C.F.R. § 1003.29; *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). In *Matter of Hashmi*, the Board set forth factors the IJ may consider in adjudicating a continuance motion to await the adjudication of a pending family-based visa petition. [13] Although one factor is whether the visa petition is prima facie approvable, importantly, these factors are not exclusive and the Board has advised IJs to "consider any other facts that [they] deem[] appropriate." *Matter of Hashmi*, 24 I&N Dec. at 794. As discussed below, the unique posture of cases implicating DOMA is an appropriate factor the IJ should consider. Some individuals already have had success obtaining continuances.

If the case is on appeal at the Board, the Board also can hold the case in abeyance.[14] The Board has taken such actions in other similar situations. For example, in 2001, former INS issued a proposed rule that would amend the asylum regulations. Subsequently, the Attorney General vacated the Board's decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999; A.G. 2001) (a case

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[11] Letter from Juan P. Osuna, Director, Executive Office for Immigration Review, to Crystal Williams, American Immigration Lawyers Association (June 6, 2011) *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Osuna-AILA-6-6-2011.pdf.

[12] Although "[a] case may not be administratively closed if opposed by either of the parties," *Matter of Gutierrez-Lopez*, 21 I&N Dec. at 480, the Board has ordered supplemental briefing on whether it should reconsider this policy. *See Matter of Huerta-Soto*, A093 219 001 (BIA supplemental briefing ordered May 9, 2011). Thus, if DHS opposes administrative closure, you may want to request it nonetheless and note that the issue is pending before the BIA.

[13] The factors are: (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 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.

[14] Although the Board "does not normally entertain motions to hold cases in abeyance while other matters are pending (e.g., waiting for a visa petition to become current, waiting for a criminal conviction to be overturned)," the Practice Manual leaves open the possibility that certain cases warrant such action. Board of Immigration Appeals Practice Manual, § 5.9(i) *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf. Importantly, the basis of the motion described here is distinguishable from the examples provided in the manual.

addressing asylum eligibility for an applicant who was a victim of domestic violence) and directed the Board to stay the case pending issuance of a final asylum rule. The Board not only stayed R-A-'s case, but also stayed a number of similar cases.[15]

The following are some of the reasons why administrative closure or a continuance is appropriate and may be included in a motion to the IJ or Board:

- The law surrounding DOMA is developing. As discussed in the introduction to this Practice Advisory, the Attorney General has opined that Section 3 of DOMA is unconstitutional. He also has directed the Board to address a variety of issues in a case potentially implicating DOMA, *see Matter of Dorman*. Furthermore, there are several pending federal court cases raising the constitutionality of DOMA.

- Currently, there is no Board precedent addressing DOMA with respect to a state-sanctioned relationship between a U.S. citizen and a gay or lesbian noncitizen. By issuing a precedent decision directing the Board to consider a wide variety of factual and legal issues, *see Matter of Dorman*, it seems likely that the Attorney General intended for the Board's resolution of the case to serve as a blueprint for deciding other immigration cases involving DOMA issues (not only cases involving cancellation of removal). As such, it is very likely that the Board's decision in *Matter of Dorman* will affect how the IJ or Board will decide the case.

- Given the current state of the law, administrative closure or a continuance serves the interest of judicial economy.

In addition, it is helpful to highlight the favorable and unique equities in your client's case. You also may want to contact the DHS trial attorney to ask if the government will join, consent to, or not oppose your motion. See the discussion below about prosecutorial discretion.

2. Request a merits hearing or remand for findings regarding non-DOMA aspects of the case.

If the IJ declines to close or continue the case, an alternative course of action is to ask the IJ to resolve all aspects of the case before rendering a decision. If the case is pending at the Board, you can ask the Board to remand the case to the IJ for a hearing on any unresolved issues.[16]

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[15] The Attorney General acknowledged this policy of staying cases in a 2008 order lifting the stay in light of other developments. *See Matter of R-A-*, A073753922 (A.G. Sept. 25, 2008) available at http://www.legalactioncenter.org/sites/default/files/docs/lac/AG-CertificationRemand-9-29-2008.pdf.

[16] 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). A motion to remand generally must comply with the substantive requirements for a motion to reopen. *See Matter of Coelho*, 20 I&N Dec.

The Attorney General's decision in *Matter of Dorman* supports such a request, as the Attorney General has directed the Board to dispose of all issues in the case. In *Dorman*, which involves cancellation of removal, the Board (and likely the IJ on remand) will address the hardship requirement and the existence of a qualifying relative (but for DOMA). Thus, the Attorney General's questions provide a roadmap for cancellation cases. In other cases, the issues the IJ and Board should address may be somewhat different. For example, for adjustment of status cases, the IJ should address such issues as whether the marriage is bona fide, whether the applicant has shown that he or she is not likely to become a public charge, whether any other grounds of inadmissibility are at issue and if so, whether the person qualifies and warrants a waiver in the exercise of discretion.

Final Order of Removal

1. Petition for Review at the Court of Appeals

If you have a client with a petition for review pending at the court of appeals, and DOMA is implicated in one of the ways described above, please contact the American Immigration Council's Legal Action Center (clearinghouse@immcouncil.org). In collaboration with other national organizations, we are tracking other federal court litigation on DOMA and are available to help strategize on options for such cases.

In light of recent developments, petitioners may seek remand to the Board. Given that the Attorney General has directed the BIA to consider, in the first instance, whether and how the constitutionality of DOMA is implicated in *Dorman*, remand is appropriate. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (finding that remand is appropriate "for decision of a matter that statutes place primarily in agency hands"). The courts of appeals have a track record of remanding petitions for review in light of intervening Attorney General or Board precedents. The Department of Justice, Office of Immigration Litigation, may even support or join in a remand motion.

2. No Pending Petition for Review

If you have a client with a final order of removal, but there is no pending petition for review, please contact the American Immigration Council's Legal Action Center (clearinghouse@immcouncil.org). The Legal Action Center and our colleague organizations are available to help strategize on options for final order cases. Some clients may want to consider filing a motion to reopen in light of recent developments on DOMA. In most cases, it probably is not advisable to do so given that the law is not settled. However, there may be situations where an individual may decide that filing a motion is appropriate (e.g., client faces imminent removal or client is still within 90 day statutory period for reopening). In addition, as discussed below, it may be advisable to ask DHS to exercise prosecutorial discretion.

464, 471 (BIA 1992); *see also* 8 C.F.R. §§ 1003.23(b)(3) (setting forth substantive requirements for motion to reopen).

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. Examples of the favorable exercise of prosecutorial discretion in the immigration context include granting a stay of removal; 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. Particularly relevant here, DHS attorneys have authority to exercise prosecutorial discretion to agree to join or oppose a motion (including a motion to continue, a motion to remand, or a motion to hold the case in abeyance). DHS also has discretion to grant deferred action in cases with strong humanitarian factors. There are strong arguments that DHS should not allow spouses of U.S. citizens to be removed from the United States based on a law that the Administration has determined is unconstitutional.

The American Immigration Council's Practice Advisory on prosecutorial discretion discusses the options described above (as well as others), lays out the factors DHS considers in deciding whether to favorably exercise prosecutorial discretion, and offers suggestions for how to go about seeking a favorable exercise of discretion. *See Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client* (Nov. 30, 2010) *available at* http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf. In addition, Penn State Law's Center for Immigrants' Rights, in collaboration with Maggio + Kattar and Duane Morris LLP, issued a toolkit for seeking deferred action. *See Private Bills and Deferred Action Toolkit available at* http://law.psu.edu/news/immigration_toolkit.

Affirmative Applications with USCIS

Noncitizens who are not in removal proceedings generally should be advised to postpone taking steps to obtain legal status based on a marriage involving a gay or lesbian couple. Given that the Attorney General has said he will continue to "enforce" DOMA and that to date, DHS has not adopted a policy of holding cases (such as visa petitions and adjustment applications) in abeyance, it generally is not advisable to file a petition or application. Likewise, it generally is not advisable to file a lawsuit challenging a denied immigration benefit, particularly without coordinating with other LGBT and immigrant rights litigators who have developed and continue to develop litigation strategies for challenging DOMA. Read more about who should and should not marry now and when it may make sense to take affirmative steps to file applications with USCIS in the Immigration Equality/AILA practice alert, *What Does the Department of Justice Defense of Marriage Act (DOMA) Announcement Mean for Immigration Cases?*, available at http://www.aila.org/content/default.aspx?docid=34986

If you have a pending administrative appeal of a denied application or have filed or are planning to file a suit in district court, please contact the American Immigration Council's Legal Action Center at clearinghouse@immcouncil.org.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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]

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[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.

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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.

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[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.

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[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.

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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

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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.

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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.

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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]

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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).

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY

HOW TO FILE A PETITION FOR REVIEW

Legal Action Center
Updated by Debbie Smith February 28, 2011[1]

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 – Counseled 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 law[9], whether the individual has met the continuous presence requirement[10] 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

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[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

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[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 Remedying 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;

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[23]For further information regarding motions to rescind and re-issue, see the LAC's Practice Advisory, "Suggested Strategies for Remedying 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-AEDPA[25] 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 if 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 July 31, 2008 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

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

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

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LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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.

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[2] For more on mandamus suits, see the Legal Action Center's (LAC) mandamus issue page at http://www.legalactioncenter.org/clearinghouse/litigation-issue-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]

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[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

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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

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[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.

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AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
Updated August 25, 2010

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). 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. Because of extensive delays in naturalization application processing in recent years – caused in large part by delayed security checks – dozens of naturalization applicants have sought federal court review under § 1447(b).

Section 1447(b)[2] includes five general elements:

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

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[2] 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, judicial review of a denied naturalization application is available under 8 U.S.C. § 1421(c), but only if the applicant first files an administrative appeal of the denial. *See also* 8 C.F.R. § 336.9(d). The administrative appeal process is set forth at 8 U.S.C. § 1447; *see also* 8 C.F.R. § 336.2. [3] There is no comparable administrative exhaustion requirement for delayed naturalization decisions under § 1447(b).

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.

[3] Although the statute does not have a deadline for filing a federal court appeal of a denied naturalization application, the regulation attempts to impose a 120 day deadline. 8 C.F.R. § 336.9(b). The Tenth Circuit struck down this regulatory deadline, holding that the agency did not have the authority to impose restrictions on judicial review. *Nagahi v. INS,* 219 F.3d 1166 (10th Cir. 2000); *see also Acosta v. INS,* No. 05-9019, 2006 U.S. Dist. LEXIS 72680 (S.D.N.Y. Oct. 5, 2006) (following *Nagahi*); *Montero v. U.S. DHS,* No. 05-5839, 2006 U.S. Dist. LEXIS (E.D.N.Y. Apr. 10, 2006) (same).

2007) (citing cases)[4]; *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 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 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.

[4] 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.

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 action in district court might be appropriate. In a mandamus action, however, the sole relief available would be for the court to order USCIS to act on the application. Unlike § 1447(b), mandamus does not give the court the jurisdiction to actually decide the application. For more on mandamus actions, including citations to naturalization cases, *see* the LAC's practice advisories on mandamus, http://www.legalactioncenter.org/practice-advisory-topics; 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, it 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); *cf. Chavez v. INS*, 844 F. Supp. 1224 (N.D. Ill. 1993) (finding no jurisdiction to reinstate § 1447(b) suit where agency denied application following remand; applicant had to exhaust administrative remedies before seeking judicial review under 8 U.S.C. § 1421(c)).

Three courts of appeals and a number of district courts reject USCIS' position and instead hold that a district court has exclusive jurisdiction upon the filing of a § 1447(b) action and that 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.

Other district courts, however, 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).*[5]

Where, after the § 1447(b) action is filed, USCIS indicates that it would approve the naturalization application, you and the government can submit a joint motion to remand to the district court. The motion may stipulate that, upon remand, USCIS agrees to approve the naturalization application and the motion may ask for 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 two courts of appeals addressed this jurisdiction question, but found it unnecessary to resolve in those cases because both 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); *Saba-Bakare v. Chertoff*, 507 F.3d 337 (5th Cir. 2007). In reaching this conclusion, both courts 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)"); *Saba-Bakare,* 507 F.3d. at 340 ("§ 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"). In those cases, both courts of appeals affirmed the dismissal of the § 1447(b) actions because the district courts did not have jurisdiction.

5. The district court may either decide the naturalization application or remand

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[5] The LAC is following this issue. Please contact us at clearinghouse@immcouncil.org if you are litigating in the court of appeals the issue of whether a district court has exclusive jurisdiction under § 1447(b).

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).[6]

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 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,

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[6] 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)).

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*, 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.).

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); *Irahim 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. 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.

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THE FUGITIVE DISENTITLEMENT DOCTRINE: FOIA AND PETITIONS FOR REVIEW

By Emily Creighton

Practice Advisory[1]
Updated August 19, 2010

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 v. United States*, 507 U.S. 234, 240-42 (1993). 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 a fugitive nonetheless"); *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); *Nnebedum v. Gonzales*, No. 05-2801, 2006 U.S. App. LEXIS 28340 (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?

A. 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 (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 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

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[3] *See, e.g.*, 2009 Annual FOIA Report to the Att'y Gen. pt. V B, "Explanation of Disposition of Initial FOIA/PA Requests," 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).

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.

B. 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 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).

C. 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 appellant practice." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 240-42 (1993). 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 1089, 1093 (9th Cir. 2003) (expressing concern that the fugitive appellant possess 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 prejudice 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).

d. 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

III. Petitions for Review

a. When Do Courts Apply the Fugitive Disentitlement Doctrine to Deny Petitions for Review in Immigration Cases?

A. 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, 1207 (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").

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, 443 (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).

B. 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 Sapoundjiev's obligation to surrender, so that removal could be implemented if the stay should be lifted." *Id*. at 728.

C. 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).

D. The Merits of the Appeal are Connected to Events that Took Place When Petitioner was a "Fugitive"

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 nexis 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. <u>What are the Arguments Against the Application of the Doctrine to Petitions for Review?</u>

A. 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*, No. 09-2564, 2010 U.S. App. LEXIS 16101, *7 (2d Cir. Aug. 4, 2010) (stating that, after determining a person is a fugitive, a court's "decision on whether to dismiss an appeal should be informed by the reasons for the doctrine and the equities of the case"). *See also Armentero v. INS*, 412 F.3d 1088, 1095-96 (9th Cir. 2005) (Berzon, dissenting) (arguing that the court should not have considered the fugitive disentitlement argument because the government improperly raised the doctrine as a basis for dismissal in its supplemental reply brief and because the doctrine is a discretionary, not a legal, requirement).

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.

B. The Petitioner is not Intentionally Evading the Jurisdiction of the Court

1. 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 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 applied denied a motion to reopen only after the agency had attempted to locate respondents at "their last known address, the male respondent's last know place of employment, the postal service, the California Department of Motor Vehicles, and the local gas and phone companies").

2. 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 although the petitioner did not comply with a bag and baggage letter and was therefore a fugitive in a "technical" sense, he should be able to pursue his appeal. *Wu*, 2010 U.S. App. LEXIS 16101 at *10. The court reasoned that the government did not adequately demonstrate petitioner's intent to evade the law because it did not disclose initial or ongoing government efforts to locate the petitioner or evidence that petitioner attempted to "flee authorities" (other than his failure to respond to a bag and baggage letter). *Id*. at *13. In the Ninth Circuit case *Sun v. Mukasey*, the court 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, 804 (9th Cir. 2009). Thus, she was not "currently a fugitive," and it was not appropriate to apply the doctrine to dismiss her case. *Id*. at 805 (9th Cir. 2009); *see also Brar v. Holder*, No. 08-71471, 2009 U.S. App. LEXIS 12843 (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").

C. Petitioner's Existing Fugitive Status is not Sufficiently Connected to Issue on Appeal

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 *Wu*, the Second Circuit decided not to apply the doctrine after concluding that the government failed to demonstrate how it would be "unduly prejudice[d]" by the appeal. 2010 U.S. App. LEXIS 16101 at *14. The court concluded that further briefing was necessary to determine if petitioner had "taken advantage of his fugitive status…to contrive…a new basis for challenging deportation," *Id*. (citations omitted). 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. *See* 412 F.3d 1088, 1094 (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.* at 1094. Note, however, that the majority in *Armentero* found the doctrine applied. *Id*. at 1088

D. 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 cf. 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).

E. The Petitioner Voluntary 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) (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:

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.
  - *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

Declined to Apply the Doctrine:

- 2d Cir.
  - *Wu v. Holder*, No. 09-2564, 2010 U.S. App. LEXIS 16101 (2d Cir. Aug. 4, 2010) – 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

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PRACTICE ADVISORY[1]
Updated May 13, 2010

WHOM TO SUE AND WHOM TO SERVE IN IMMIGRATION-RELATED DISTRICT COURT LITIGATION

By Trina A. Realmuto[2]

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.

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[2] Trina Realmuto is a Staff Attorney with the National Immigration Project. She wrote this advisory while a consultant to American Immigration Council's Legal Action Center and updated it at the National Immigration Project.

[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 Hilary 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.*

[4] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005); HR Conf. Rep. No. 2813, 2873, 109th Cong., 1st Sess., (May 3, 2004).

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. S*ee* 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*

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[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

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> 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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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-IIRIRA))***

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

[3]Section 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*,

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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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
September 9, 2009
Amended November 4, 2009

THE CHILD STATUS PROTECTION ACT[2]

By Mary Kenney

The Child Status Protection Act (CSPA), Pub. L. No. 107-208 (Aug. 6, 2002), provides relief to children who "age-out" as a result of delays by the U.S. Citizenship and Immigration Services (USCIS) in processing visa petitions and asylum and refugee applications. A child "ages-out" when he or she turns 21 and loses the preferential immigration treatment provided to children. The Immigration and Nationality Act (INA) defines a "child" as an unmarried individual less than 21 years of age. 8 U.S.C. § 1101(b)(1). The CSPA does not change this definition, but instead establishes a formula for determining "age" that is not based solely on chronological age.[3]

Prior to the CSPA, a child who turned 21 before the relevant application for immigration benefits was adjudicated would age-out. As the result of agency backlogs and delays, many children aged out before their cases were complete. For cases to which it pertains,

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[2] This practice advisory updates and replaces three earlier advisories: "2006 Update on the Child Status Protection Act: New Administrative Interpretations" (Sept. 26, 2006); "Aging Out: Recent Developments Related to the Child Status Protection Act and Other Provisions" (Feb. 24, 2005); and Updated Practice Advisory on the Child Status Protection Act (Mar. 8, 2004).

[3] To be considered a "child," the individual also must be unmarried at the relevant time. 8 U.S.C. § 1101(b)(1); *see also* 8 U.SC. § 1101(a)(39). The CSPA did not change this requirement.

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 (LPR); and
- Derivative beneficiaries of family-based, employment-based and diversity visas.

According to USCIS, the CSPA does not apply to 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. *See* "Revised Guidance for the CSPA" (April 30, 2008), http://www.uscis.gov/files/nativedocuments/CSPA_30Apr08.pdf; *see also Midi v. Holder*, 566 F.3d 132 (4th Cir. 2009) (CSPA does not apply to HRIFA cases). While, USCIS states that the CSPA does not apply to K visas because these are non-immigrant visas, USCIS also has outlined limited circumstances where it finds that the CSPA will cover K2 and K4 beneficiaries. *See* "Revised Guidance for the CSPA" (April 30, 2008), *supra*.[4]

This practice advisory provides an overview of the CSPA, its effective date, and its interpretation and implementation by USCIS, the Department of State (DOS), the Board of Immigration Appeals (BIA) and the courts. Practitioners should be aware that the CSPA is complex and there are a number of unresolved issues. Although the CSPA has been law for seven years, there still are no regulations implementing it. Instead, both USCIS and DOS are relying on interpretative memoranda and cables.[5] Moreover, some of these interpretations construe the CSPA narrowly, even where an expansive interpretation is more consistent with the statute's purpose and language.

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. 8 U.S.C. §§ 1157(c)(2) and 1158(b)(3). 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 approved. CSPA §§ 4 and 5

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[4] For information on nonimmigrant V visas and aging-out, *see* "Adjudication of Form I-539 for V-2 and V-3 extension" (January 10, 2005), http://www.uscis.gov/files/pressrelease/V2V3extn011005.pdf.

[5] These and other resources are collected on the CSPA Featured Topic page of AILA InfoNet, http://www.aila.org/issues/issue.aspx?docid=21697. For a comprehensive discussion of the CSPA, *see* Charles Wheeler, "AILA's Focus on the Child Status Protection Act," http://www.ailapubs.org/cspa.html.

(codified at 8 U.S.C. §§ 1157(c)(2)(B) and 1158(b)(3)(B)). Thus, a child who is 20 when the parent files for asylum will retain the status of a child even if he or she is 22 when the asylum application is approved.

USCIS has issued several memoranda explaining how the CSPA is applied to the children of asylees and refugees. These memoranda are "HR 1209 – Child Status Protection Act" (August 7, 2002), http://www.uscis.gov/files/pressrelease/cspa_memo_pub.pdf; "Processing Derivative Refugees and Asylees under the Child Status Protection Act" (July 23, 2003), http://www.uscis.gov/files/pressrelease/refcspa072303.pdf; and "The Child Status Protection Act – Children of Asylees and Refugees" (August 17, 2004), http://www.uscis.gov/files/pressrelease/CSPA081704.pdf.

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). *See* "The Child Status Protection Act – Children of Asylees and Refugees" (August 17, 2004), *supra.*

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. *See* "HR 1209—Child Status Protection Act" (Aug. 7, 2002), *supra.* 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 officer. *See* "Processing Derivative Refugees and Asylees under the Child Status Protection Act" (July 23, 2003), *supra*.

Second, a child not included in the asylum or refugee application (or in asylum cases, 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. As in all asylum and refugee cases, however, the child must have been under 21 at the time that the asylum application was filed. Moreover, the USCIS memos cited above indicate that, in asylum cases, for the CSPA to apply to an I-730 petition, the child's name must have been added to the asylum application before it was granted. This interpretation appears inconsistent with the statute, which applies without limit to children who are following-to-join their asylee parents.

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:

- 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.

See "Processing Derivative Refugees and Asylees under the Child Status Protection Act" (July 23, 2003), *supra*.

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. *Id*.

Finally, with respect to asylum adjustment cases under INA § 209, USCIS indicates that when the adjustment application is being adjudicated, the applicant is already an asylee based on classification as a child. *See* "The Child Status Protection Act – Children of Asylees and Refugees" (August 17, 2004), *supra* at n. 2. Thus, USCIS concludes that the applicant remains eligible to retain the classification of asylee for an I-485 application filed on or *after* this date. (Emphasis in the original).

2. IMMEDIATE RELATIVE—CHILD OF A U.S. CITIZEN

As a general rule, the CSPA freezes the age of a child of a United States 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). CSPA §2; 8 U.S.C. §§ 1151(f)(1) and (4); *see also* "Revised Guidance for the CSPA" (April 30, 2008), *supra*. Thus, if a U.S. citizen 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 petitions for a child under the 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. 8 U.S.C. § 1151(f)(2); s*ee also* "Revised Guidance for the CSPA" (April 30, 2008), *supra.*

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, 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. 8 U.S.C. § 1153(f)(3); s*ee also* "Revised Guidance for the CSPA" (April 30, 2008), *supra.*

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. *See* "Child Status Protection Act: ALDAC 2" (January 17, 2003), http://travel.state.gov/visa/laws/telegrams/telegrams_1369.html. 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. CSPA §3; * U.S.C. §§ 1153(h)(1) and (2). This CSPA benefit also applies to self-petitioners and to derivatives of self-petitioners. 8 U.S.C. § 1153(h)(4).

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 INS memoranda and DOS cables cited in this practice advisory contain examples illustrating how this formula applies in a variety of case situations. DOS also provides a worksheet to calculate age. *See* "Child Status Protection Act: ALDAC 2" (January 17, 2003), *supra.*

When calculating the child's age, remember that the U.S. Patriot Act provides extended "child" status to those who turned 21 during or after September 2001. USA PATRIOT

Act, Pub.L. No. 107-56, 115 Stat. 272 (2001). Beneficiaries 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 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. "Revised Guidance for the CSPA" (April 30, 2008), *supra*; "Child Status Protection Act: ALDAC 1" (August 26, 2002), http://travel.state.gov/visa/laws/telegrams/telegrams_1429.html. 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" (*published on* AILA InfoNet at Doc. 03040340 (*posted* Apr. 3, 2003)).

If a visa availability date retrogresses after the individual has filed an application for adjustment of status (Form I-485) based upon 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. *See* "Revised Guidance for the CSPA" (April 30, 2008), *supra.* 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 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. *Id.*

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 is filed (the receipt date) and not the priority date. "Revised Guidance for the CSPA" (April 30, 2008), *supra.*

Both USCIS and DOS state that for a derivative of a diversity visa, a petition is considered pending between the first day of the DV mail-in application period for the program year in which the principal has qualified and the date on the letter notifying the principal applicant that the application was selected. *See id.*; "Child Status Protection Act: ALDAC 1" (August 26, 2002), *supra.*

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 above—will freeze only if the beneficiary sought to acquire the status of an LPR within one year of the visa availability. For a child beneficiary who is adjusting status, USCIS interprets the phrase "sought to acquire' LPR status narrowly. USCIS limits this phrase to filing an I-485 application for adjustment. *See* "Revised Guidance for the CSPA" (April 30, 2008), *supra*.

DOS indicates 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 stresses 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. *See* "Child Status Protection Act: ALDAC 2" (January 17, 2003), *supra.* In cases in which no record of Part I of the visa packet for a derivative child exists at the post, DOS places the burden on the derivative to demonstrate sufficient alternate proof. *Id.*

In cases in which the principal beneficiary adjusted status in the United States and the derivative is applying for a visa abroad, the derivative will be considered to have sought LPR status on the date that the principal filed Form I-824 to initiate the child's follow-to-join application. Because Form I-824 is not the only way to initiate this process, DOS instructed posts to seek an advisory opinion in cases in which some other "concrete" step was taken. *Id.* What constitutes a "concrete" step has not been delineated.

In a 2004 unpublished decision involving adjustment of status, the BIA rejected USCIS's narrow interpretation of the phrase "sought to acquire." *See In re Kim*, 2004 WL 3187209 (BIA Dec. 20, 2004). The Board considered the exact statutory language as well as Congress's intent to promote family unification, and held that the phrase "sought to acquire" was broader than the word "filed" and thus could not be limited to the one discrete step of filing an adjustment of status application. The BIA held that the CSPA was applicable in Kim's case even though the adjustment application was not filed until 17 months after the visa petition was approved. Despite this time period, the BIA found that the beneficiary sought to acquire LPR status within one year of visa approval because her parents hired an attorney to start preparing the adjustment application within the one year period, the adjustment application was filed within a reasonable time thereafter, and the child was still under the age of 21 when the application was filed.

More recently, in *In re Castillo-Bonilla*, 2008 WL 4146759 (BIA Aug. 20, 2008) (unpublished), the BIA held that a respondent in proceedings had "sought to acquire"

permanent residence within the one year period when, during this time, he informed both the immigration judge and the BIA that he wished to file an adjustment application, even though he never actually filed this application.

In re Kim and *In re Castillo-Bonilla* are unpublished and thus not precedential. However, practitioners may make the same arguments in their cases – before USCIS, in immigration court, and before the Board – and may submit the decisions in support.

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. However, CSPA § 3 provides other benefits for certain of these aged-out individuals. 8 U.S.C. § 1153(h)(3).

If after applying the CSPA formula the age of a beneficiary is determined to be 21 years or older for purposes of 8 U.S.C. §§ 1153(a)(2) (petitions filed by LPRs) or 1153(d) (derivative beneficiaries of family, employment and diversity visa petitions), § 1153(h)(3) states that "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."

In *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), the BIA narrowly interpreted § 1153(h)(3) by holding that its priority date retention and automatic conversion provisions do not apply to a derivative beneficiary of a 4th preference family-based visa petition. Instead, the BIA found that these provisions only apply to visa petitions filed by an LPR parent for a child as either a direct or derivative beneficiary (i.e., in the family 2A category). Thus, the BIA found that Wang's aged-out daughter – who had been named as a derivative beneficiary in 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*, §1153(h)(3) only would apply to direct or derivative beneficiaries of the family 2A preference category. This interpretation ignores the plain language of § 1153(h)(3), which by referencing § 1153(d) covers all derivative beneficiaries, including those in other family-based petitions and in employment-based and diversity petitions.[6]

Even before *Matter of Wang*, USCIS was interpreting § 1153(h)(3) in the same restrictive manner. A national class action challenging DHS' narrow interpretation of § 1153(h)(3) is pending in the District Court for the Central District of California. *Costelo v. Chertoff*,

[6] An earlier unpublished BIA decision had interpreted this provision more liberally, in accord with precise language of the statute. *See Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006).

No. 08-688 (C.D. Cal. *filed* June 20, 2008). The district court has certified a class consisting of LPR parents:

- Who gained their LPR status through 3d and 4th preference family-based visa petitions;
- Whose children had been named as derivative beneficiaries on the original 3d and 4th preference visa petitions;
- Who subsequently filed 2d preference visa petitions for their now adult, unmarried children; and
- Whose 2d preference visa petitions have not been accorded the benefits of § 1153(h)(3) (automatic conversion and retention of priority date) by USCIS.

See http://www.ailf.org/lac/chdocs/costello-classcert.pdf. [7] Updates on this case will be posted on AILF's website. *See* http://www.ailf.org/lac/lac_index.shtml.

5. CONVERSION FROM 2d PREFERENCE TO 1ST PREFERENCE; OPT OUT PROVISION

CSPA § 6 addresses what happens to a visa petition for an unmarried son or daughter of an LPR when the parent naturalizes. 8 U.S.C. § 1154(k). 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 1st preference petition if the LPR naturalizes while the petition is still pending. 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.

Section 1154(k) also allows the beneficiary to elect not to have the petition converted to 1st preference, 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 – that is, as a 2B preference petition. *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), http://www.uscis.gov/files/pressrelease/CSPA6andV061406.pdf. 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 2B preference category. *See, e.g.*, DOS Visa Bulletin (September 2009), http://travel.state.gov/visa/frvi/bulletin/bulletin_4558.html.

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[7] The court's class definition reads as follows:
Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153(h)(3)].

UCIS 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. *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), *supra.* UCIS 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. [8]

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.[9] The statute has an effective date provision (CSPA § 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. 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.

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.[10] In contrast, the Ninth

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[8] Previously, CIS interpreted the statutory phrase "initially filed" as limiting the opt-out election to beneficiaries of petitions that *originally* were filed in the 2B preference category. Thus, in earlier guidance on this issue, CIS stated that it would not allow a beneficiary to exercise the opt-out election if the petition was filed originally as a 2A petition for the child of an LPR and then converted to a 2B petition because the child aged-out prior to the parent's naturalization.

[9] 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 after this date, it is important to remember the 45-day extension contained in the USA PATRIOT Act. Under this provision, the child beneficiary of a petition filed prior to September 11, 2001, will remain eligible for child status for 45 days if they turn 21 after September 11, 2001. Children who turn 21 during September 2001, will remain eligible for child status for an additional 90 days. USA PATRIOT Act of 2001, Pub.L. No. 107-56, 115 Stat. 272.

[10] 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" (April 30, 2008), *supra*, replacing "The Child Status Protection Act --

Circuit in *Padash v. INS*, 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. *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004).

The BIA also has resolved an issue relating to CSPA § (8)(1). In *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007), the BIA held that the CSPA applied where a visa petition for an immediate relative was approved prior to August 6, 2002 and an adjustment application was not pending on that date but was subsequently filed. 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*. "Revised Guidance for the CSPA" (April 30, 2008), *supra*. 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. This fact sheet does not offer any new interpretation but instead attempts to explain the April 30, 2008 memorandum. "Questions and Answers, USCIS Guidance on the Applicability of the Child Status Protection Act" (June 15, 2009), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=10409fed09eb9110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

Memorandum Number 2" (February 14, 2003), http://www.uscis.gov/files/pressrelease/CSPA2_pub.pdf.

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PRACTICE ADVISORY[1]

TERMINATING REMOVAL PROCEEDINGS TO PURSUE NATURALIZATION BEFORE USCIS: STRATEGIES FOR CHALLENGING *MATTER OF ACOSTA HIDALGO*

By Mary Kenney and Trina Realmuto
October 1, 2009

Section 318 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1429, precludes the Attorney General from adjudicating a naturalization application while the applicant is in removal proceedings. However, the regulation at 8 C.F.R. § 1239.2(f) authorizes immigration judges to terminate removal proceedings to permit a noncitizen to pursue a naturalization application before the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS). Specifically, it authorizes immigration judges to terminate removal proceedings to allow a person to pursue naturalization if two elements are met: (1) the alien establishes prima facie eligibility for naturalization; and (2) the case involves exceptionally appealing or humanitarian factors. In *Matter of Acosta Hidalgo*, 24 I&N Dec. 103 (BIA 2007), the BIA held that immigration judges lack jurisdiction to determine whether a respondent is prima facie eligible for naturalization, and that only DHS could make this determination. *Matter of Acosta Hidalgo*, 24 I&N Dec. at 106. DHS has no procedure in place to make such a determination and generally does not do so.

This practice advisory discusses 8 C.F.R. § 1239.2(f) and the BIA's interpretation of it in *Matter of Acosta Hidalgo.* It suggests legal arguments challenging the decision that practitioners may raise before the immigration courts and Board to preserve these issues. As of the date of this advisory, both the Second and Ninth Circuits have upheld *Matter of Acosta Hidalgo*. *Perriello v. Napolitano,* No. 05-2868, __ F.3d __, 2009 U.S. App. LEXIS 19595 (2d Cir. Sept. 1, 2009); *Hernandez de Anderson v. Gonzales,* 497 F.3d 927

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(9th Cir. 2007). Although *Perriello* and *Hernandez de Anderson* are binding precedent for cases which arise within the Second and Ninth Circuits, *Matter of Acosta Hidalgo* remains open to challenge in all other circuits.

What did the BIA hold in *Matter of Acosta Hidalgo*?

The Board held that immigration judges lack jurisdiction to assess whether a person is prima facie eligible for naturalization for purposes of terminating a removal proceeding under 8 C.F.R. § 1239.2(f). *Acosta Hidalgo*, 24 I&N Dec. at 106. According to the Board, only DHS may make this assessment and therefore meet the regulatory burden of proving this element. The Board further advises that DHS must provide affirmative proof of prima facie eligibility before an immigration judge may exercise the regulatory authority to terminate proceedings. Thus, under the Board's interpretation, DHS has conflicting roles in the removal proceedings: as a prosecutor; as an adjudicator of prima facie eligibility for naturalization; and finally, as a presenter of evidence.

The Board heavily relied on its prior decision in *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1975). Although the Board acknowledged that, in adjudicating other relief applications, immigration judges routinely adjudicate some of the same statutory requirements as those for naturalization, *Acosta Hidalgo*, 24 I&N Dec. at 106 n.8, it somehow concluded that, because the Board and immigration judges do not have jurisdiction to ultimately decide a naturalization application, they therefore must lack jurisdiction to determine whether a person has made a prima facie showing of eligibility for naturalization. *Acosta Hidalgo*, 24 I&N Dec. at 106.

What is the impact of *Matter of Acosta Hidalgo*?

As a result of the BIA's decision, absent an affirmative communication from DHS, immigration judges are without authority to terminate removal proceedings against persons who can otherwise demonstrate both prima facie eligibility for naturalization and compelling humanitarian circumstances. In these cases, immigration judges can only adjudicate other existing applications for relief from removal. Where no alternative relief exists, they are compelled to order the non-citizen's removal no matter how strong the naturalization case or how compelling the humanitarian circumstances. From a practical standpoint, the result is that few cases will be terminated under the regulation.[2] As *Matter of Acosta-Hidalgo* demonstrates, USCIS does not have a procedure for determining prima facie naturalization eligibility - and certainly has no procedure that can be invoked by a person in removal proceedings - and USCIS has no funds to take on this additional adjudicatory role.

[2] In compelling cases, it may be possible for a representative to negotiate with DHS for resolution of the case in the exercise of the DHS trial attorney's prosecutorial discretion. *See* ICE Memo on Prosecutorial Discretion (10/24/2005), http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122.

Can I challenge the Board's interpretation of 8 C.F.R. § 1239.2(f)?

Yes. Challenges to the decision can be raised both before the immigration judge and/or the BIA. If not raised there, the government may argue the respondent failed to "exhaust" the issue and thus cannot challenge the BIA's interpretation before the courts of appeals on petitions for review. However, even if the issue was not raised before the immigration judge and/or BIA, some circuit courts nonetheless may review the issue under the futility exception to exhaustion. That is, a court could find that challenging the BIA's interpretation of 8 C.F.R. § 1239(f) set forth in *Matter of Acosta Hidalgo* before the immigration judge or BIA is futile, and thus not required, because immigration judges are bound by the decision and the BIA already has a position on the issue (*i.e.* the *Matter of Acosta Hidalgo* decision).

What legal arguments can I raise to challenge the Board's interpretation of 8 C.F.R. § 1239.2(f) as set forth in *Matter of Acosta Hidalgo*?

A practitioner seeking to challenge the Board's interpretation may raise the following legal arguments:

1. *Acosta-Hidalgo* violates the plain language of 8 C.F.R. § 1239.2(f).

An agency's construction of a regulation is not entitled to deference by a reviewing court where it is plainly erroneous or inconsistent with the language of the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Here, there are several reasons why the BIA's decision in *Acosta-Hidalgo* violates the plain language of 8 C.F.R. § 1239.2(f).

a. *Acosta-Hidalgo* denies the non-citizen the opportunity to meet his or her burden of establishing prima facie eligibility for naturalization.

The plain language of the regulation authorizes an immigration judge to terminate removal proceedings so that the non-citizen can pursue naturalization "when the alien has established" prima facie eligibility for naturalization. 8 C.F.R. § 1239.2(f). Thus, the regulation fixes the burden of showing prima facie eligibility on the non-citizen.

Acosta-Hidalgo violates this plain language in that it deprives the non-citizen of the ability to meet this regulatory burden independently. This decision provides that the only evidence sufficient to establish prima facie eligibility must come from DHS. Thus, the non-citizen is entirely dependant on DHS for the "affirmative communication" of eligibility. However, there is no procedure for DHS to adjudicate prima facie eligibility, and no procedure for the respondent to seek such adjudication. The BIA's construction of the regulation contorts its plain meaning by requiring that DHS decide prima facie eligibility and by forbidding the non-citizen from establishing prima facie eligibility to the satisfaction of the immigration judge.

b. *Acosta-Hidalgo* confuses the ultimate determination of eligibility with prima facie eligibility.

In *Acosta-Hidalgo,* the BIA reasoned that neither it nor an immigration judge has jurisdiction to determine a non-citizen's eligibility for naturalization. *Acosta-Hidalgo*, 24 I&N Dec. at 105-06. This reasoning violates the plain language of the regulation in that it fails to recognize the distinction between the immigration judge's jurisdiction to terminate proceedings, which includes as one element a review of a non-citizen's prima facie eligibility for naturalization, and DHS's ultimate jurisdiction over the merits of the naturalization application.

The regulation requires only a showing of facial eligibility, not a final determination of eligibility. "Prima facie" means "[a]t first sight, on the first appearance but subject to further evidence or information …. Sufficient to establish a fact or raise a presumption unless disproved or rebutted." Black's Law Dictionary, 7th edition, p. 1209 (1999). In assessing whether a person established prima facie eligibility for asylum, the Board has defined it as a "'realistic chance' that [the applicant] will be able to establish eligibility." *Matter of S—Y—G—*, 24 I&N Dec. 247 (BIA 2007). In *Matter of Acosta Hidalgo,* the BIA misunderstood the distinction and equated a determination of whether the applicant had established prima facie eligibility with an adjudication of the naturalization application. The fact that DHS can make the ultimate determination on naturalization has no bearing on the immigration judge's jurisdiction to determine a non-citizen's *prima facie* eligibility for naturalization as one element of a decision whether to terminate proceedings under 8 C.F.R. § 1239.2(f).

In a somewhat parallel situation, the Fourth Circuit Court of Appeals held that the BIA erred when it ruled that an immigration judge lacked jurisdiction to adjudicate a factual predicate to the ongoing validity of a visa petition simply because DHS has ultimate jurisdiction over the visa petition itself. The court found that the BIA failed to distinguish between the immigration judge's jurisdiction to determine the ongoing validity of a visa petition versus DHS's jurisdiction to grant or deny the visa petition. *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007) (vacating *Matter of Perez-Vargas,* 23 I&N Dec. 829 (BIA 2005)); *see also Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007) (reaching same conclusion); *Sung v. Keisler,* 505 F.3d 372 (5th Cir. 2007) (agreeing with and adopting Fourth Circuit's reasoning).

The BIA has exhibited the same confusion here between an immigration judge's jurisdiction over a motion to terminate – which includes as an element a determination that the applicant has adduced sufficient evidence to establish prima facie eligibility – and USCIS's jurisdiction to ultimately grant or deny a naturalization application.

c. *Acosta-Hidalgo* violates the regulation by eliminating the immigration judge's discretion to terminate removal proceedings.

Under its plain language, 8 C.F.R. § 1239.2(f) gives an immigration judge discretion to terminate proceedings when a non-citizen has established prima facie eligibility for naturalization and when the case involves certain exceptional factors. The BIA's interpretation of this regulation eliminates an immigration judge's discretion, in violation of the plain language of the regulation, in every case in which DHS fails to submit prima facie evidence of naturalization. In practical terms, this will be in the vast majority, if not all, cases since DHS has no procedural mechanism in place to make such a prima facie determination. The BIA decision gives DHS, the prosecutor in the case, the unfettered authority to prevent termination simply by failing to produce affirmative evidence of prima facie eligibility for naturalization, and eliminates both the immigration judge's discretion over the issue and the opportunity of an individualized determination of the issue by an impartial adjudicator.

2. The BIA's claim in *Acosta-Hidalgo* that the Board and immigration judges lack the necessary expertise to decide prima facie naturalization eligibility is baseless.

Although acknowledging that the BIA has jurisdiction (and expertise) over citizenship claims, the BIA erroneously claims that immigration judges and the BIA have no expertise to determine whether the applicant has established prima facie eligibility for naturalization. Such determinations only require that an adjudicator interpret the law and consider the weight of the evidence in light of legal standards, something immigration judges do every day. Moreover, in other contexts, immigration judges often adjudicate many of the same statutory requirements as those for naturalization, such as good moral character and continuous physical presence. Finally, immigration judges regularly adjudicate citizenship claims which are often more complex than naturalization claims.

3. *Acosta-Hidalgo's* interpretation of the regulation conflicts with 8 U.S.C. § 1229a(a).

Under the INA, immigration judges have exclusive authority to conduct removal proceedings. 8 U.S.C. § 1229a(a). *Acosta-Hidalgo* conflicts with the plain language of the statute and Congressional intent by divesting immigration judges of their authority to conduct and terminate removal proceedings.

Have any Courts of Appeals Addressed *Matter of Acosta Hidalgo*?

The Second and Ninth Circuits have upheld *Matter of Acosta Hidalgo. Perriello v. Napolitano,* No. 05-2868, __ F.3d __, 2009 U.S. App. LEXIS 19595 (2d Cir. Sept. 1,

2009); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007). In *Perriello*, the BIA upheld the immigration judge's refusal to terminate removal proceedings so that Perriello could file and pursue a naturalization application before the immigration service. The BIA also affirmed the order of removal. In the court of appeals, Perriello challenged *Matter of Acosta Hidalgo.* The Second Circuit reviewed the history of amendments to the naturalization statute and suggested that the regulation was not in accord with these statutory amendments.[3] Nonetheless, it then denied the petition for review for two reasons.

First, it deferred to the BIA's interpretation of the regulation in *Matter of Acosta Hidalgo*, finding that this interpretation was neither "plainly erroneous [n]or inconsistent with the regulation." *Perriello*, 2009 U.S. App. LEXIS 19595 at *17 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Second, the court relied upon 8 U.S.C. § 1429, the statutory bar to the Attorney General's consideration of naturalization applications while removal proceedings were pending. The court stated that that "[i]t would be odd if the Attorney General and the district courts were barred from considering naturalization applications while removal proceedings are pending, yet the BIA and IJs – who have no jurisdiction over such applications in any case – were not." *Id.* at *17-18. The court left open the question of whether a noncitizen could benefit from 8 C.F.R. § 1239.2(f) if the naturalization application was pending at the time that removal proceedings commenced.

The Ninth Circuit also upheld *Matter of Acosta-Hidalgo* in *Hernandez de Anderson*, specifically finding that the Board's interpretation of the regulation was not plainly erroneous and also not inconsistent with behind the regulation. *Hernandez de Anderson*, 497 F.3d at 933-35.

Perriello and *Hernandez de Anderson* are binding precedent for cases which arise within the Second and Ninth Circuits. No other court of appeals has decided the issue, however, and thus *Matter of Acosta Hidalgo* remains open to challenge in all other circuits.

[3] The court also suggested that it was up to DHS or Congress to reconcile the regulation with the statute. *Perriello*, 2009 U.S. App. LEXIS 19595, at 18.

LEGAL ACTION CENTER
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. Mozhcorak*, 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 Przhebelskaya 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]

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[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.

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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 Przhebelskaya 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 2005[14] 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. *Chapinksi 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 regulation[17] 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]

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[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.

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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).

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

THE CRIMINAL JUSTICE ACT
Appointment of Counsel in Habeas Corpus Proceedings[1]

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:

- Likelihood of success on the merits of the petition
- Complexity of the factual or legal issues raised
- Need for an evidentiary hearing vs. resolution of case based on the record
- Petitioner's ability to present forcefully and coherently his or her contentions
- 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.*

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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.

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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 Ngarurih 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

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[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 require proper notice. *See generally Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

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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 Zmijweska*, 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 Zmijweska*, 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 Hegyi 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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY [1]

THE § 237(a)(1)(H) FRAUD WAIVER

By the Legal Action Center[2]

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;

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[2] The Legal Action Center wishes to thank D. Jackson Chaney and Gail Pendleton for providing their expertise on this issue.

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- 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-

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[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

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[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.

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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

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[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

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[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]

Return to the United States after Prevailing in Federal Court

By Trina Realmuto[2]

May 28, 2009

This practice advisory contains practical and legal suggestions for attorneys representing clients who have prevailed on a petition for review or other legal action and who are outside of the United States. In general, these clients are outside the United States either because the court of appeals and/or Board of Immigration Appeals denied their request for a stay of removal or the person chose to leave the country. The advisory is divided into five steps: formulating a return plan; contacting opposing counsel to propose the return plan; determining litigation forum and format; articulating litigation arguments; and obtaining payment by or attorney fees from the government.

There are no formal procedures for arranging the return of someone who has been deported. This advisory contains suggestions based on AILF's experience with this and similar situations. These suggestions may be used as a guide but should not be used as 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 new cases and legal developments.

STEP 1 - Formulate a Return Plan.

Confirm client's intention to return. Contact the client abroad to inform him or her of the court's decision and verify whether he or she still wishes to return to the United States. Detention is often an important factor for clients in making this decision. If the person would be subject to mandatory detention, and the court's decision does not change this, the person should expect to be detained upon return. If the person is not subject to mandatory detention, counsel

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may attempt to find out in advance whether the client will be detained, whether release on bond is possible and the amount of bond.

Determine client's location and nearest port of entry. Based on the client's location, he or she generally either will return by airplane or by crossing at a land border.

If returning by airplane. Airlines will not permit passengers to board international flights without proper travel documents. The client may need to go to the nearest U.S. Embassy or consulate to obtain travel documentation. To determine the nearest embassy or consulate to the client's location abroad, consult the Department of State webpage listing of U.S. Embassies, Consulates and Diplomatic Missions, located at http://usembassy.state.gov.

If returning by crossing at a land border. Determine the nearest land border to the client's location. A list of U.S. ports of entry is located at: http://cbp.gov/xp/cgov/toolbox/ports/.

Travel documentation. If the person was a lawful permanent resident (LPR) and the effect of the court's ruling is to restore such status, then he or she arguably should be able to enter using their existing LPR card.[3] (If the government took the person's LPR card, see the discussion below about transportation letters). Such a situation may exist where the immigration judge and/or Board of Immigration Appeals (BIA) found the permanent resident removable solely based on a criminal conviction and the court of appeals held that the conviction does not constitute a removable offense.

In cases where the person was not a LPR before removal proceedings, a favorable court ruling arguably restores pre-removal status. However, the person's pre-removal status may not be acceptable for boarding an aircraft or other type of transport vessel. In this situation, consider obtaining the following:

> ***Transportation Boarding Letters***. Transportation boarding letters are addressed to a passenger transportation company and supervisory immigration inspector at the intending U.S. port of entry. The letters generally state that the letter holder is considered properly documented to travel to the Unites States and assure the carrier that it will not be subject to liability for transporting the person.
>
> Transportation letters often are issued to permanent residents whose LPR card is lost, stolen or expired.[4] They also can be issued to parolees under INA § 212(d)(5), asylees, refugees, and certain returning temporary residents.[5] AILF has found no legal authority

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[3] The government acknowledges that a person who prevails on a petition for review may be accorded pre-removal status. *See,* Brief for Respondent at p. 44 in *Nken v. Holder,* No. 08-681, 556 U.S. __, 2009 U.S. LEXIS 3121 (2009).

[4] *See* 22 C.F.R. § 22.1, 9 FAM 42.22 N2 and PN6, 9 FAM Appendix N, Exhibits VI A & B (sample letters for LPRs).

[5] *See* 9 FAM Appendix E, 301.1-2 (parolees, asylees, refugees); 9 FAM 42.1 PN4 and 9 FAM Appendix N, Exhibit V (parolees); 9 FAM Appendix O, Exhibit III (asylees), 9 FAM

limiting the use of transportation letters to these situations. Thus, transportation letters arguably could be issued to deportees seeking to return to the United States, including those whose LPR card or other government issued documentation of pre-removal status was taken by the government prior to removal.

Procedures for applying for transportation boarding letters vary. The Foreign Affairs Manual (FAM) contemplates that consular officers may issue transportation letters. *See* n. 3 and 4, *supra*. Some embassies and consulate websites contain information on requesting transportation letters.[6]

However, Department of Homeland Security offices overseas also may issue transportation letters. Some overseas offices of US Citizenship & Immigration Services (USCIS) issue the letters (Rome, for example). Other USCIS offices overseas (Frankfurt, for example) refer people to the appropriate overseas office of Immigration and Customs Enforcement (ICE) for issuance of the letters. To locate a specific USCIS overseas office, consult the Immigration Overseas Offices locator available on USCIS's website, www.uscis.gov.

Visas. AILF believes that a person who has prevailed on a petition for review should not have to apply for a tourist or other nonimmigrant visa. Given that the court has deemed the removal order unlawful, it would be unfair to make the person pay the required $100 visa application fee, any reciprocity fee and endure an often lengthy wait for a visa appointment. Moreover, in some cases, the costs associated with visa processing may prevent the person from applying. In addition, it would be manifestly unjust to permit the government to benefit financially (through the visa application and issuance fees) from the wrongful deportation of non-citizens.

However, applying for a visa might be a viable option in certain types of cases. For example, where the government is willing to facilitate visa processing and the person could apply for an immigrant visa.[7]

Appendix O, Exhibits I and II (refugees); 8 C.F.R. § 264.1(c)(1)(iv) (certain temporary residents); 9 FAM Appendix R, 300 (Special Agricultural Workers).

[6] *See, e.g.*, the website of the U.S. Embassy in London, located at: http://www.usembassy.org.uk/dhs/cbp/lostprc.html.

[7] If the court of appeals has ruled that the person is entitled to apply for adjustment of status, it may be worth exploring the possibility of obtaining an immigrant visa at a U.S. embassy or consulate abroad. Entry with an immigrant visa eliminates the need for further adjustment proceedings in the United States. An immigrant visa holder becomes a lawful permanent resident upon inspection and admission. INA §§ 101(a)(13) and (20). One risk, however, is that the discretionary denial of an immigrant visa by a consular officer generally is not reviewable. Thus, if an application reasonably could be denied based on negative discretionary factors, immigrant visa processing may not be advisable. In addition, because the consular non-reviewability doctrine insulates most consular determinations from judicial review, immigrant visa processing is not advisable for someone who might be inadmissible based on an

Parole. Unless the person was a parolee at the time of the decision, any entry as a parolee may create significant problems. For example, because parolees are subject to the grounds of inadmissibility, not deportability, entering as a parolee may negatively impact the charges in the Notice to Appear and the type of relief available.

Notwithstanding these potential problems, parole may be a workable option in some cases. Notably, the USCIS Adjudicator's Field Manual suggests that "significant public benefit parole" covers admission as a parolee to participate in "legal proceedings," which should include immigration proceedings.[8]

In cases where the government offers to parole an individual into the country, attorneys should be aware that the government recently has represented to the Supreme Court that a parolee still may be accorded their pre-removal status upon return. *See,* Brief for Respondent at p. 44 in *Nken v. Holder,* No. 08-681, 556 U.S. __, 2009 U.S. LEXIS 3121 (2009) ("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"). However, as AILF is aware of cases where the government has not taken this position, we strongly suggest obtaining written confirmation that the government will accord pre-removal status.

Waiver of entry documentation requirement. DHS district and port directors may grant a request to waive the requirement of presenting a valid, unexpired visa and passport in cases involved unforeseen emergencies. INA § 212(d)(4); 22 C.F.R. § 41.2(j). The court's order might not be considered an unforeseen emergency but, in cases where there

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inadmissibility ground not addressed by the court. Presumably, the government could agree to forego discretionary or legal objections to issuance of an immigrant visa to avoid protracted removal proceedings in the United States. In this case, AILF suggests getting the government to put its non-objections in writing.

[8] The Manual reads:

> Significant public benefit reasons - This type of parole (which is normally referred to by its initials, SPBP) is authorized for an alien who is needed to participate in a law enforcement investigation, prosecution, or other legal proceedings. The initial authorization must be made by the Immigration and Customs Enforcement Parole and Humanitarian Assistance Branch (PHAB) upon a request from a recognized law enforcement entity. After the alien has been paroled into the United States, a re-parole may be authorized by the local DHS office having jurisdiction over the alien's location in the U.S. for requests initiated by DHS entities. All other extensions are authorized by PHAB. As an adjudicator, you will not be involved in the consideration of this type of parole.

Adjudicator's Field Manual, § 54.1(b), located at: www.uscis.gov/propub/ProPubVAP.jsp?dockey=724ce55f1a60168e48ce159d286150e2.

are compelling reasons for the person's immediate return, requesting a waiver of entry documents may be an option.

Travel expenses. AILF believes that a person who has been removed under an unlawful removal order should not have to pay the travel expenses associated with their return. Indeed, the cost of such travel could prohibit return.

STEP 2 – Contact Opposing Counsel to Propose the Return Plan.

An attorney representing a deportee should not have to wait for the mandate to issue for the court's order to take effect.[9] 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.[10]

When a case is "in litigation," an attorney representing one party must refrain from communicating about the case with another party who also is represented by counsel (unless opposing counsel has consented or the attorney is authorized to do so by law or a court order). Model Rule of Professional Conduct 4.2. In an immigration petition for review, since the Board of Immigration Appeals and/or U.S. Immigration and Customs Enforcement are technically represented parties, attorneys should initiate contact with opposing counsel to propose the return plan.[11]

Having a paper trail memorializing efforts to arrange return may be helpful if efforts fail and the issue must be brought to the court's attention. Thus, it is advisable to make the initial proposal in writing and keep notes detailing any follow-up conversations with opposing counsel.

In the written return request, you may wish to:

- briefly remind opposing counsel about the case and the court's decision;

- set forth the specific return route the works best for your client (land, air, sea);

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[9] The mandate will issue approximately fifty-two days after the issuance of a decision entering judgment unless the government has sought, and the court has granted, an extension of time for seeking rehearing or a stay of the mandate pending a petition for a writ of certiorari. Federal Rules of Appellate Procedure 40(a)(1) and 41(b).

[10] *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 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).

[11] Attorneys from the Office of Immigration Litigation (OIL), a division within the Civil Division of the Department of Justice, litigate on behalf of the Board (removal cases) or ICE (reinstatement or administrative removal cases).

- suggest appropriate travel documentation (and ask for an appointment at the U.S. Embassy/consulate if appropriate);

- ask about the logistics of arranging travel (for example, ask where the client should pick up the airplane ticket);

- request the name of the supervising officer to whom the client should report upon arrival at a land border or the airport;

- seek confirmation that the government will pay transportation expenses; and

- confirm whether the client will be detained upon arrival, whether release on bond is possible and, if so, the amount of bond.

See sample letter requesting return at end of the advisory.

STEP 3 – Determining Litigation Forum and Format.

After informing opposing counsel of the return proposal, the next step is deciding whether to negotiate or litigate. This decision will depend largely on the government's response to the return proposal. The government may be willing to comply with the return proposal in whole or in part, not at all, or may not respond at all.

If the government is willing to negotiate, it is advisable to pursue negotiations seriously and quickly. Government counsel could suggest contacting DHS directly to arrange return. In this event, AILF still suggests copying government counsel on all written correspondence since OIL has an interest in ensuring compliance with the court's order.

If the government is unwilling to facilitate return, is non-responsive, or negotiations fail, then litigation options should be considered. An express or constructive refusal to return the client to the United States arguably constitutes a refusal to comply with the court's order granting the petition for review. After all, prevailing on a petition for review or other legal action is meaningless unless the client can obtain the benefit of the court's order.

Deciding to litigate leads to the questions "where and what do I file?" These questions do not have definitive answers. Below are a few suggestions.

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 court should have jurisdiction to entertain motions related to the main case. Thus, the court should have jurisdiction over 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, 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.

Mandamus (Circuit Court)

Mandamus is appropriate to maintain the integrity of an earlier court decision.[12] For example, in *Ramon-Sepulveda v. Immigration & Naturalization Service*, the Ninth Circuit issued a writ of mandamus to preserve the effectiveness of its prior decision to grant a non-citizen's petition for review. 824 F.2d 749 (9th Cir. 1987). In the first case, the court reversed an immigration court's decision to reopen deportation proceedings because the evidence of alienage on which reopening was based (a birth certificate) was not "newly discovered" as required by the immigration regulations. *Id.* at 750. Following the Ninth Circuit's first decision, the Immigration and Naturalization Service initiated new deportationproceeding based solely on the same birth certificate that the court held could not be used to reopen proceedings. *Id.* The petitioner filed a mandamus action with the court of appeals, seeking to terminate the new deportation proceedings because the new proceedings violated the court's prior order. 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.

Arguably, the government flouts a circuit or district court decision by failing to return a petitioner to the United States for execution of that decision. Thus, in this situation, the court should have the authority and the duty preserve the effectiveness of their earlier decision by exercising mandamus jurisdiction.

For further information on mandamus actions, *see* AILF's practice advisories on this topic, located at http://www.ailf.org/lac/lac_pa_topics.shtml#section6.

Actions for Declaratory Judgment and Injunctive Relief (District Court)

District courts regularly review declaratory judgment and injunctive relief actions and, therefore, may be more comfortable with exercising their equitable authority to order someone back to the

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[12] *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).

United States. Thus, even if the petitioner prevailed on a petition for review, a district court may still have jurisdiction to entertain an action seeking to enforce the circuit court's decision.

Whether filing a motion, mandamus petition or a complaint for declaratory and injunctive relief, the filing should inform the court of its authority to order petitioner's return to the United States (see next section), the efforts made to arrange for petitioner's return, the reasonableness of petitioner's proposed return plan, the government's actions/position (and/or noncompliance), and it should ask the court to order petitioner's return. Document the filing with written correspondent to the extent possible. If the only evidence of the government's refusal to return the client is oral, submit a sworn declaration from a person with personal knowledge, attesting to the conversation.[13] While attorneys generally should avoid becoming witnesses for their clients, alternative evidence of the government's refusal to return petitioner may not be available.

STEP 4 – Articulating Litigation Arguments.

The filing, whatever it is labeled, also should explain why the court has jurisdiction and/or authority to order petitioner's return in conjunction with the petition for review. AILF offers the following as grounds for the court's authority. Additional arguments may be available in non-petition for review cases.

The inherent equitable powers of federal courts.

As part of the court's traditional equitable authority, the court should have authority to order petitioner's return. *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction"); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the [federal courts] are available for the proper and complete exercise of that jurisdiction"); *Obale v. Attorney General*, 453 F.3d 151, 156 (3d Cir. 2006) ("It follows that we have jurisdiction over all matters related to a particular proceeding except where Congress has explicitly stated otherwise"). In *Zalawadia v. Ashcroft*, 371 F.3d 292 (5th Cir. 2004), the Fifth Circuit held that a habeas court could not order someone returned to the United States after removal. However, the court distinguished habeas jurisdiction from petition for review jurisdiction, stating "[t]his case is not the direct appeal of the BIA's decision, in which we could review the full scope of Zalawadia's claims and order the BIA to correct its mistakes."

Equitable relief contemplates granting all relief, including ancillary relief, necessary to fully accomplish justice. For example, several courts have held that courts of appeals have equitable power to stay the voluntary departure period pending judicial review. *See Obale v. Attorney*

[13] Declarations attesting to return efforts or the position of the government should be scrupulously accurate. Declarations should be professionally written in that the tone should be detached and written to provide the court with information supporting the facts on which the motion is based. Such declarations should not overstate the facts or give personal opinions about actions of government actors or opposing counsel. An unprofessional declaration could undermine (rather then corroborate and bolster) the motion.

General, 453 F.3d 151, 155 n. 1 (3d Cir. 2006) (listing cases). *See also Xiao v. Reno*, 930 F. Supp. 1377, 1380 (N.D. Cal. 1996) (ordering INS to provide documents necessary to allow Xiao to remain lawfully and work in United States). Thus, as petitioner's presence in the United States is necessary to implement the court's decision, the court should have jurisdiction to order petitioner's return.

The authority to adjudicate removal orders under INA § 242(a).

The circuit courts' statutory jurisdiction, under INA § 242(a), to review final immigration orders would be meaningless if the court also did not have the power to enforce its orders. When construing statutes, courts must avoid interpretations that would lead to an absurd result. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting government's reading of statutory provision where it "would produce an absurd and unjust result which Congress could not have intended") (citation omitted). Interpreting INA § 242(a) to authorize the courts of appeals to vacate a removal order but not remedy the person's unlawful removal would lead to an absurd result.

In *Nken v. Holder*, No. 08-681, 556 U.S. __, 2009 U.S. LEXIS 3121 (April 22, 2009), the Supreme Court addressed the inherent equitable power of appellate courts to stay removal pending review, noting "Congress's failure expressly to confer the authority in a statute allowing appellate review should not be taken as an implicit denial of that power." *Id.* at *15 *citing Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). The Court viewed its equitable authority to grant a stay, despite the absence of express statutory authority, as "a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process." *Id.* at *17. This rationale applies equally to the courts' inherent power to order a person returned to the United States even without an explicit grant of statutory authority to do so. Without the ability to carry out their orders, the courts of appeals cannot responsibly fulfill their role in the judicial review process.

In addition, the court's authority to order a petitioner's return is consistent with and should be presumed from Congress' repeal of the departure bar to judicial review. Prior to IIRIRA,[14] the courts of appeals lost jurisdiction to review a final immigration order if the person was deported. *See* former INA § 106a(c), 8 U.S.C. § 1105a(c). Through IIRIRA § 306(b), Congress repealed the departure bar. Thus, in the post-IIRIRA era, the courts of appeals continue to have jurisdiction over a petition for review even after the person has been deported.[15] Given that Congress authorized the courts of appeals to adjudicate petitions for review after departure, Congress must have intended that courts have authority to issue orders to effectuate their decisions and that petitioners benefit from a favorable decision.

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[14] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 (Sept. 30, 1996).

[15] *See, e.g., Ngarurih v. Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); *Tapia-Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001).

Courts must have the authority to order return to preserve the uniform application of law.

While DHS has admitted it has the authority to facilitate a litigant's return from abroad, it exercises this authority at its discretion: facilitating return in some cases while refusing to arrange return or simply doing nothing in other cases. Moreover, if the litigant is *pro se*, the likelihood of DHS arranging return is greatly diminished. Thus, the federal courts must step in to ensure that their decisions are uniformly enforced.

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court considered the case of an immigration petitioner who had been deported. The Court held that the conviction underlying Lopez's removal order had not been an aggravated felony. In footnote 2 of the decision, the Court expressly stated that Lopez's deportation did not render the case moot because he "can benefit from relief in this Court by pursuing his application for cancellation of removal, which the Immigration Judge refused to consider after determining that [he] had committed an aggravated felony." As immigration judges consider cancellation of removal applications in the first instance, a necessary implication of the Court's statement is that the petitioner should be returned to the United States for that purpose.

Since the *Lopez* decision, the government sometimes but not always has acknowledged its ability to return a prevailing litigant.

For example, in *Nken v. Holder*, No. 08-681, 556 U.S. __, 2009 U.S. LEXIS 3121 (2009), the government's brief at p. 44 provided:

> 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.

The Supreme Court relied on the government representation, stating:

> 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, 2009 U.S. LEXIS 3121 at *30-31.

The Sixth Circuit Court of Appeals relied on a similar government admission:

> … the government indicated in a footnote to its brief that, should we decide that further administrative proceedings are required (a point it now explicitly argues in favor of), "there is no basis for assuming that the Government would not return [Rashid] to the United States, if necessary to conduct those proceedings." Based on the government's apparent concession that it will return Rashid to the United

> States for the proceedings that we now require, any dispute regarding this issue can be resolved by the BIA.

Rashid v. Mukasey, 531 F.3d 438, 448 (6th Cir. 2008).

The Board of Immigration Appeals also has acknowledged the government's ability to return a prevailing litigant from abroad, stating:

> Moreover, a removed alien whose removal order is vacated by a Federal court of appeals or the United States Supreme Court might also be permitted to lawfully reenter the United States and continue to pursue any remedy that falls within the scope of the Court's mandate.

Matter of Armendarez, 24 I&N Dec. 646, 656-57 n.8 (BIA 2008) (citing *Lopez v. Gonzales*, 127 S. Ct. 625, 692 n.2 (2006)).[16]

Despite these clear admissions that the government is able to return a prevailing litigant, AILF has heard reports of cases where the government said it is either unwilling or unable to return a prevailing litigant. For example, the government has argued: (1) a case is moot because the court has no authority to return a person even if the petitioner prevails; (2) a person need not be returned because a telephonic hearing is sufficient; (3) the court's order on a petition for review applies to the named respondent (usually the Attorney General) and the Board of Immigration Appeals, but the Board lacks the authority and ability to return someone; and, framed differently, (4) the court's order on a petition for review does not apply to the Department of Homeland Security, which is the only agency that can facilitate return.[17]

Thus, it seems the government's position is that it has the ability to return a prevailing litigation but will not do so in every case. If the prevailing litigant is pro se, it would seem much less likely that the government would affirmatively arrange for his or her return. As a result, the government effectively controls which litigants may return to the United States, even if they have all prevailed. The federal courts, therefore, must have the authority to order return to preserve the uniform application of law.

The authority to stay removal under INA § 242(b)(3)(C).

Section § 242(b)(3)(C) of the INA, as construed by the courts of appeals, authorizes courts to stay execution of a removal order. Arguably, if the court had jurisdiction to invoke its stay authority at the time of removal, it also has authority to invoke a stay nunc pro tunc.[18] Technically, a nunc pro tunc stay of removal should have the same effect as a return order.

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[16] The Board claims to lack the authority to return someone who has been removed. *Matter of Armendarez*, 24 I&N Dec. 646, 656-57 n.8 (BIA 2008).

[17] To protect the identity of the petitioner's in whose cases these arguments were made, some of whom are in ongoing proceedings, AILF has not provided case numbers for these cases.

[18] Courts have long possessed the equitable power to grant relief nunc pro tunc. *See, e.g.*, *Mitchell v. Overman*, 103 U.S. 62, 64-65 (1880) (holding that "[a] nunc pro tunc order should be

The argument might also be framed in terms of the court's power to reverse decisions it unquestionably has the authority to make. A court of appeals has the authority to grant or deny stay requests in the first instance. If the court previously denied a stay request in the petitioner's case, the court should have the authority to reverse that decision.

STEP 5 – Obtaining Payment by or Attorneys' Fees from the Government

Attorneys who are required to seek a court order to return their client, and who win such a court order, may seek attorneys' fees and costs for the work involved in litigating return. For further information, *see* AILF's Practice Advisory entitled "Requesting Attorney Fees Under the Equal Access to Justice Act," located at: http://www.ailf.org/lac/lac_pa_topics.shtml#section6.

Furthermore, attorneys may consider filing an action under The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in cases where:

(1) EITHER the government has refused to return the person despite having prevailed in federal court OR the person has been removed in violation of an administrative or federal court stay order; AND

(2) the person has suffered mental, emotional, physical harm as a result of removal.

As these cases involve knowledge of state tort and constitutional law, AILF suggests that attorneys considering bringing these actions consult with local counsel who is familiar with such claims.

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granted or refused, as justice may require in view of the circumstances of the particular case"); *Iavorski v. INS*, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (the "far-reaching equitable remedy of granting relief *nunc pro tunc* in certain exceptional cases has long been available under immigration law"). *See also Batanic v. INS*, 12 F.3d 662, 667-68 (7th Cir. 1993) (affording petitioner the right to apply for asylum nunc pro tunc); *Matter of Rapacon*, 14 I&N Dec. 375, 378 (BIA 1973) (application for permission to reapply for admission to the United States after deportation is granted nunc pro tunc). *Accord Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 11167 (9th Cir. 2005) (if petitioner is eligible to show that he was unlawfully removed from the country he "will be entitled to the relief available at the time of his original hearing").

SAMPLE LETTER TO OPPOSING COUNSEL

Name and Address of Opposing Counsel

Re: _____ v. _____
_____ Circuit Case Number _____

Dear _____,

As you know, the Court granted the petition for review in the above-referenced case. Specifically, the Court vacated the decision of the BIA / ICE and _____. Mr./Mrs./Ms. X is currently in _____, _____. In light of the Court's decision, we would like to arrange Mr./Mrs./Ms. X return to the United States as soon as possible.

Land border: Mr./Mrs./Ms. X has informed me that he/she is able to present himself/herself to the ___ Port of Entry on any date after _____. Please inform the Port Director of his/her situation and let us know the name/s of the person to whom Mr./Mrs./Ms. X should report upon arrival.

Airport: Mr./Mrs./Ms. X has informed me that he/she is able to present himself/herself at the U.S. Embassy/ USCIS Overseas Office in _____, ____ on any date after _____. We have reviewed ____(Embassy/consulate or DHS Overseas Office) procedures for issuing a border transportation letter (*see* www. _____) and request that DHS issues such a letter on Mr./Mrs./Ms. X's behalf so that he may board a return flight to the United States. Please inform the Port Director at _____ Airport of Mr./Mrs./Ms. ____'s situation and let us know the name/s of the person to whom Mr./Mrs./Ms. X should report upon arrival.

Please confirm that DHS will arrange and cover the transportation costs associated with Mr./Mrs./Ms. X's return, including the cost of his/her bus/airplane ticket from ___, ___ to ___, _____.

Finally, please advise whether DHS intends to detain Mr./Mrs./Ms. X's upon his/her return and, if so, how much money Mr./Mrs/Ms. X's family can expect to post for bond.

I am hopeful we can work together to effectuate Mr./Mrs./Ms. X's return without the need for further litigation. If I do not hear back from you by _____, I will presume your client is unwilling to facilitate my client's return.

Sincerely,

Name
Attorney for _____

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

[1] Copyright (c) 2009, 2010 American Immigration Council. Click here for information on reprinting this practice advisory. The information in this advisory is accurate and authoritative as of the date of the advisory. Readers are cautioned to check for changes to the rules and other 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.

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.

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[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 (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 log-in, 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/.

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[8] Brochure describing CM/ECF and PACER, *available at* http://www.pacer.gov/documents/pacer_brochure.pdf

[9] The CM/ECF website proves 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&A[1]

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

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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. *Ngarurih 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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

REQUESTING ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Trina Realmuto and Stacy Tolchin[2]

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:

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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 specialize 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 house 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).

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[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]

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[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.

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[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

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[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).

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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).

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[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.Il. 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]

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[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 law[22]; the foreseeable length and complexity of the

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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-

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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/cpiai.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:

$$\$125 \times \frac{\text{(current CPI-U)}}{\text{(March 1996 CPI-U)}}.$$

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).

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[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]

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[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. *Floroiu 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.

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[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 routine 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).

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

USCIS ADJUSTMENT OF STATUS OF "ARRIVING ALIENS" WITH AN UNEXECUTED FINAL ORDER OF REMOVAL

By Mary Kenney

Practice Advisory[1]
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.ailf.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,

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[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.ailf.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

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[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.

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[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.

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[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.

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"ARRIVING ALIENS" AND ADJUSTMENT OF STATUS: WHAT IS THE IMPACT OF THE GOVERNMENT'S INTERIM RULE OF MAY 12, 2006?

By Mary Kenney

Practice Advisory[1]
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 BIAs Denial of a Motion to Reopen, Remand or Continue a Case." *See* http://www.ailf.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?

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[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.ailf.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:

- 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.

- 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

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[5] AILF and AILA submitted comments strongly opposing the suggested future changes to the regulations. *See* http://www.ailf.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.

- 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

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[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]

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[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:

- the individual properly filed an adjustment application with USCIS while in the U.S.;
- the individual departed from and returned to the U.S. pursuant to a grant of advance parole to pursue the previously filed adjustment application;
- the application for adjustment of status was denied by USCIS; and
- 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.

- **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.

- **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

- **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.

- **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.

LEGAL ACTION CENTER

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PRACTICE ADVISORY[1]

"Finality" of Removal Orders for Judicial Review Purposes

By Trina Realmuto[2]
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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.

I. Statutory Provisions and Regulations Addressing Finality

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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.

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[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 included 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 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 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 <u>not</u> 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

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[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).

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[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.

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY

ARREST, DETENTION AND BOND PROCEDURES FOR NON-CITIZENS *WITHOUT* CRIMINAL CONVICTIONS[1]

Updated July 2008[2]

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

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[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

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[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

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[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

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[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. Loiselle,* 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?

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[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 more[42]

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]

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[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 Pisciotta 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.)

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[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 ADVISORY[1]
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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

INTRODUCTION TO HABEAS CORPUS[1]

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 --

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[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 2005[5] 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

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[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.

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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.

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[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]

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[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] *Kholyavskiy 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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

REINSTATEMENT OF REMOVAL

by Trina Realmuto[2]

April 23, 2008

A person who has been removed and unlawfully reenters the United States may be subject to reinstatement of removal under § 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5). This practice advisory provides an overview of the reinstatement statute and implementing regulations, including how the reinstatement process is currently being carried out by the Department of Homeland Security (DHS). The advisory addresses who is subject to reinstatement, where to obtain federal court review of reinstatement orders and what arguments are available to challenge the legality of reinstatement orders in federal court, including challenges to the underlying removal order. It also addresses the Supreme Court's decision in *Fernandez-Vargas v. Gonzales*, 547 U.S. 30, 126 S. Ct. 2422 (2006) regarding the retroactive application of the reinstatement provision. Finally, the advisory includes a list of circuit court cases that have addressed the reinstatement provision.

The first inquiry, before a client's reinstatement case is litigated in federal court, is whether the client would be eligible for relief from removal but for the reinstatement order. In cases where the client is not or not likely to be eligible for ultimate relief, the client may be better advised not to pursue litigation.

Court decisions addressing INA § 241(a)(5) may change the existing law or create new law. Counsel are advised to independently confirm whether the law in their circuit has changed since the date of this advisory.

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I. BACKGROUND

What is reinstatement of removal?

Reinstatement of removal is the term for removal pursuant to INA § 241(a)(5) as amended by IIRIRA[3] § 305(a). The regulations implementing the statute are located at 8 C.F.R. § 241.8. Section 241(a)(5) took effect on April 1, 1997. The provision states:

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

Who is subject to reinstatement of removal?

Noncitizens who return to the United States illegally after having been removed under a prior order of deportation, exclusion, or removal are subject to removal under § 241(a)(5) unless they meet a statutory or judicial exemption.

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

Congress has enacted legislation that specifically exempts the following individuals from being subject to reinstatement of removal:

- Individuals applying for adjustment of status under INA § 245A (the legalization program) who are covered by certain class action lawsuits.[5]
- Nicaraguans and Cuban applicants for adjustment under § 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).[6]
- Salvadoran, Guatemalan, and Eastern European applicants under NACARA § 203.[7]

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[3] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-575 (1996).

[4] Some online versions incorrectly use the word "chapter" rather than "Act."

[5] *See* Legal Immigration Family Equity Act (LIFE Act), § 1104(g), Pub. L. No. 106-555, 114 Stat. 2763 (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).

[6] LIFE § 1505(a)(1) codified in NACARA § 202(a)(2), 8 C.F.R. § 241.8(d).

[7] LIFE § 1505(c).

- Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).[8]

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

Litigation has resulted in some court-created exemptions to § 241(a)(5). That is, some courts have said that certain people are not subject having their prior orders reinstated. As of the date of this advisory, these should include individuals whose reinstatement orders were issued in the:

- First, Seventh, and Eleventh Circuits, who applied for discretionary relief before April 1, 1997;[9]
- Tenth Circuit, who took affirmative steps to legalize their immigration status prior to April 1, 1997.[10]
- Ninth Circuit, who filed an application for adjustment of status and application for permission to reapply for admission to the United States after deportation or removal (aka I-212 waiver) prior to the reinstatement determination.[11]

After issuance of a reinstatement order, can a person apply for any "relief" from removal?

A final reinstatement order triggers § 241(a)(5)'s bar to relief. However, DHS previously has taken the position that withholding of removal is not a form of relief because it is mandatory, not discretionary. Thus, if a person expresses a fear of return during the reinstatement process, the regulations provide for an interview with an asylum officer. If an asylum officer determines that the person has a "reasonable fear of persecution or torture," he or she may apply for withholding before an immigration

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[8] LIFE § 1505(b)(1) codified in HRIFA §902(a)(2), 8 C.F.R. § 241.8(d).

[9] *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004). Although these decisions pre-dated the Supreme Court's decision in *Fernandez-Vargas*, AILF believes that the *Fernandez-Vargas* decision should not impact the continuing validity of these decisions. See discussion in retroactivity section below.

[10] *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-90 (10th Cir. 2007) (finding that it would be fundamentally unfair to apply the reinstatement provision to an individual who had applied for lawful residence status prior to April 1, 1997).

[11] These people are entitled to adjudication of the I-212 waiver application. If the waiver application is approved, they are not subject to reinstatement. If the waiver application is denied, they are subject to the reinstatement provision. *See Duran Gonzales v. DHS*, 508 F.3d 1227, 1242 n.14 (2007) (effectively overruling *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) but not as to its holding that a successful I-212 waiver application would "avoid" the reinstatement provision) (rehearing pending). For more detailed and current information on the *Duran Gonzales* class action law suit, please see AILF's website at: http://www.ailf.org/lac/lac_lit.shtml.

judge. 8 C.F.R. § 241.8(a)(e); 8 C.F.R. § 208.31. The person arguably also might be eligible to apply for asylum. *See* the discussion of *Fernandez-Vargas* in the retroactivity section below.

What is the process for assessing whether a client is subject to INA § 241(a)(5)?

First, determine whether the client has a prior deportation, exclusion or removal order. To verify whether a prior order exists, attorneys may (1) call the Executive Office for Immigration Review (800 898-7180); (2) file a Freedom of Information Act Request with the DHS/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. If the client has not departed since the prior order was issued, he or she cannot be subject to reinstatement because § 241(a)(5) requires an illegal reentry "after having been removed or having departed voluntarily, under an order of removal." However, in this situation, DHS could attempt to execute the outstanding order.

Third, determine whether the client returned to the United States illegally. In general, a person enters legally when he or she is admitted following inspection and authorization by an immigration officer. However, whether an entry is legal or not can involve complex entry and admission issues.

Individuals who meet all three statutory conditions and who do not fall under a statutory or judicial exemption are subject to reinstatement under INA § 241(a)(5).

What happens when a person's removal order is reinstated?

Once a person is identified as subject to § 241(a)(5), a DHS officer completes the top portion of the Form I-871, titled "Notice of Intent to Reinstate." This notice contains the factual allegations against the individual, including alienage, the date of the prior order, and the date of illegally reentry. The notice states that there is no right to a hearing before an immigration judge, but the individual can make an oral or written statement to an immigration officer. The notice contains a space for the individual to sign to acknowledge receipt of the notice and to indicate whether they wish to make a statement to contest the determination. The regulations provide "[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." 8 C.F.R. § 241.8(a)(3).

In cases where there is an identity dispute over whether the individual was in fact previously subject to a prior order, DHS is supposed to compare the individual's fingerprints with those in its file before DHS issues the order. In the absence of such fingerprints, the regulations provide that DHS cannot remove the individual. 8 C.F.R. § 241.8(a)(2).

A DHS officer issues a reinstatement order by completing the bottom portion of Form I-871, labeled "Decision, Order and Officer's Certification." The Decision, Order and Officer's Certification box on Form I-871 is the actual reinstatement order. The date it is completed is the date the reinstatement order is administratively final and the judicial review clock begins to run.[12] Often the DHS officer will sign the top and bottom portions of the form on the same day. Thus, reinstatement orders may be issued and even executed within a period of hours.

II. FEDERAL COURT JURISDICTION OVER REINSTATEMENT ORDERS AND TRANSFER UNDER 28 U.S.C. § 1631

Can reinstatement orders be appealed and, if so, to which court?

Yes. Every circuit court to address jurisdiction over reinstatement orders has concluded that judicial review is available in the court of appeals having jurisdiction over the place the reinstatement order was issued.[13] Notably, a person can file a petition for review challenging a reinstatement order even after it has been executed and the person has been physically removed.

A petition for review must be filed within 30 days of the date of the reinstatement order. INA § 242(b)(1). If the petitioner has not yet been removed, a motion for a stay of removal may be filed simultaneously with a petition for review.

The 30-day deadline for filing a petition for review is jurisdictional, meaning that the court of appeals will not be able to exercise jurisdiction over an untimely petition for review. The bottom box on Form I-871, entitled Decision, Order and Officer's Certification, when signed by the DHS officer, is the final order. The date on this document begins the 30-day clock for filing a petition for review.[14]

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[12] *See, generally, Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 (1st Cir. 2004).

[13] *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Delgado v. Mukasey*, _ F.3d _, 2008 U.S. App. LEXIS 2655, *3 (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); *Bejjani v. INS*, 271 F.3d 670, 674 (6th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas*, 126 S. Ct. at 2427 & n.5; *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002) *overruled on other grounds, Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006); *Castro-Cortez et al v. INS*, 239 F.3d 1037, 1043-44 (9th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas*, 126 S. Ct. at 2427 & n.5; *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).

[14] Courts have not addressed the question of when the appeal period begins where the date of the reinstatement order is different from the date of service.

In addition, courts have not yet addressed if or how the finality of the reinstatement order is affected by referral to an asylum officer for a reasonable fear

If a person would otherwise be statutorily barred from filing a petition or review of a removal order, does the statutory bar also apply to reinstatement orders?

Courts that are statutorily barred under INA § 242(a)(2)(C) from considering petitions for review filed by persons with certain criminal convictions may nonetheless review a reinstatement order if the petition for review raises a question of law or constitutional issue. *See* INA § 242(a)(2)(D). *See, e.g. Debeato v. AG*, 505 F.3d 231, 234 (3d Cir. 2007); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 (5th Cir. 2006).

What if federal court review of the reinstatement order was sought in the wrong court?

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 may be invoked to obtain court of appeals' review of claims raised in an improperly filed district court action or claims raised in a petition for review filed with the wrong court of appeals. A court of appeals can transfer an improperly-filed district court action to itself. In addition, one court of appeals can transfer a petition for review to another court of appeals. Transfer can be requested by a party or invoked *sua sponte* by a court.

In general, 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.

In the reinstatement context, several courts have invoked the transfer statute.[15] Courts have invoked the statute based on justifiable reliance on a statute or court decision,[16] to

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interview or by referral to an immigration judge for a withholding application. Therefore, out of an abundance of caution, one might presume that the judicial review clock begins ticking on the date the reinstatement order is issued notwithstanding referral to an asylum officer or immigration judge. Arguably, filing a petition for review of the reinstatement order in this situation should not impact the agency's jurisdiction or willingness to consider and decide the withholding application.

[15] Although the REAL ID Act eliminated district court jurisdiction to review removal orders through habeas corpus actions as of the date of enactment, May 11, 2005, the elimination of this habeas review does not impact the district court's authority to transfer improperly filed habeas actions to the court of appeals where the requirements of § 1631 are met. Indeed, § 1631 provides that such transfer is appropriate to cure a court's "want of jurisdiction."

[16] *See Castro-Cortez v. INS*, 239 F.3d 1037, 1046-1047 (9th Cir. 2001) (decided prior to the REAL ID Act's elimination of habeas jurisdiction over final removal orders) *abrogated on other grounds by Fernandez-Vargas,* 126 S. Ct. at 2427 & n.5 (transferring habeas petition where "petitioners had good reason to believe that direct review [of

preserve review that would otherwise be time barred for failure to file a timely petition for review,[17] or to prevent undue delay.[18]

III. FEDERAL COURT CHALLENGES TO THE PRIOR REMOVAL ORDER (UNDERLYING THE REINSTATEMENT ORDER)

Do the federal courts have jurisdiction to consider a challenge to a prior order even though § 241(a)(5) says the prior order "is not subject to being . . . reviewed"?

AILF believes there must be some opportunity to challenge the legality of a prior order before DHS can use the order as the basis for a reinstatement order. To date, the Fifth, Third and Tenth Circuits courts have found jurisdiction to review the prior order in certain circumstances. *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006); *Debeato v. AG*, 505 F.3d 231, 234-35 (3d Cir. 2007); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007). The Ninth Circuit has held that it cannot review the prior order. *Martinez-Merino v. Keisler*, 504 F.3d 1068, 1071 (9th Cir. 2007) (rehearing pending).

What is the statutory basis for the federal courts to review the prior order?

INA § 242(a)(2)(D) provides for review of legal and constitutional questions notwithstanding INA §§ 242(a)(2)(B)&(C) "or any other provision [of the INA (other than INA § 242)] which limits or eliminates judicial review. The reinstatement provision, INA § 241(a)(5), provides that "the prior order of removal…is not subject to being…reviewed…." Because § 241(a)(5) is a provision "which limits or eliminates judicial review" within the meaning of INA § 242(a)(2)(D), it follows that courts may review legal and constitutional challenges to prior removal orders.

Post-REAL ID, what have the circuit courts held regarding review of prior orders?

The Fifth, Third and Tenth Circuits have adopted the construction of INA § 242(a)(2)(D) set forth above. The Fifth Circuit ultimately dismissed the petition for review, however, because the petitioner had a meaningful opportunity to seek judicial review of the underlying order in the prior removal proceeding but did not do so. *Ramirez-Molina*, 436 F.3d at 515. The Third Circuit reviewed the prior order but upheld its validity under a "gross miscarriage of justice" standard. *Debeato*, 505 F.3d at 237. The Tenth Circuit

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reinstatement order] was not available and that a habeas corpus petition was their only avenue to secure judicial review").

[17] *See, e.g., Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003) (transferring habeas action because, without transfer "the petitioner will have lost his opportunity to present the merits of the claim due to a statute of limitations bar").

[18] *See e.g., Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir. 2003) (noting district court transfer of habeas action seeking review of a reinstatement order), at 16 (retransferring case to the district court for further proceedings); *Cruz v. Ridge*, 383 F.3d 62, 65 (2d Cir. 2004) (discussing jurisdiction to review transfer order in reinstatement case).

held that, while § 242(a)(2)(D) provides a basis for reviewing underlying orders, it does not trump INA § 242(e)'s limitations on review of expedited removal orders. Thus, the court held that it could not review the underlying expedited order at issue in that case. *Lorenzo*, 508 F.3d at 1282-84.

Although the Eighth Circuit also has addressed the issue of collateral review, the decision pre-dated the REAL ID Act's enactment of INA § 242(a)(2)(D) and thus did not address it. *Ochoa-Carrillo v. Gonzales*, 446 F.3d 781 (8th Cir. 2006). In this case, the petitioner claimed she was not the person named in the prior expedited removal order being reinstated. She argued that the district court had habeas corpus jurisdiction to review her claim pursuant to INA § 242(e)(2) (authorizing limited habeas corpus review of expedited removal orders). The court disagreed, finding that habeas corpus review under INA § 242(e)(2) is not available in a reinstatement proceeding because review of the underlying order is barred.

The Ninth Circuit has held that it lacks jurisdiction to review any challenge to a prior order. *Martinez-Merino*, 504 F.3d at 1071. In so holding, the *Martinez-Merino* court said it was bound by the en banc decision in *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007). However, the *Morales-Izquierdo* court did not address § 242(a)(2)(D). Petitioner, supported by AILF and other amici curaie working on this issue, sought rehearing on this basis. The *Martinez-Merino* court ordered the government to respond and a decision as to whether the case will be reheard is pending as of the date of this advisory.

Prior to the enactment of the REAL ID Act, would the federal courts review prior orders in reinstatement cases?

Although pre-REAL ID case law is helpful to understanding the historical development of collateral review, practitioners should <u>not</u> rely on these cases in formulating jurisdictional arguments. The REAL ID Act's enactment of § 242(a)(2)(D) radically altered the relevant legal arguments in this area.

Prior to the REAL ID Act, and with little or no analysis, several courts stated that they could not review prior removal orders.[19] Only the Fourth and Ninth Circuits addressed whether the bar also precluded habeas review when an individual alleged a colorable constitutional claim that he was denied judicial review in the first proceeding.[20] Both

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[19] *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, 327-328 (8th Cir. 2003); *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173 (9th Cir. 2001); *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061 (10th Cir. 2004).

[20] *Smith v. Ashcroft*, 295 F.3d 425, 428-29 (4th Cir. 2002); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963-64 (9th Cir. 2004).

courts held that such individuals may obtain habeas review of the prior order.[21] Applying the rationale of *INS v. St. Cyr*, 533 U.S. 289 (2001), these courts reasoned that it would raise a serious constitutional question if *all* review of the prior order were barred. Thus, these circuits interpreted § 241(a)(5)'s bar to review to preclude only direct review in the courts of appeals, not habeas corpus review.[22]

IV. ADMINISTRATIVE CHALLENGES TO PRIOR ORDERS

Can the agency reopen or reconsider a prior order if my client is potentially or presently subject to a reinstatement order?

If a person is potentially or presently subject to reinstatement, practitioners should not automatically rule out the possibility of an administrative challenge to the prior order even though the statute says the prior order "is not subject to being reopened or reviewed…."

Why should I bother asking the agency to reconsider or reopen the prior order when the reinstatement statute bars review or reopening of the prior order?

The law on collateral review is still developing. The courts may hold that a prior order cannot be reopened or collaterally reviewed *in a reinstatement case*. However, such a holding would not necessarily bar reopening or review in a *direct* challenge to the prior order.

Indeed, the First Circuit has suggested that an administrative motion is an appropriate avenue to remedy errors in the reinstatement process. *Ponta-Garca v. Ashcroft*, 386 F.3d 341 (1st Cir. 2004). In *Ponta-Garca*, the court dismissed an untimely petition for review of a reinstatement order. Notably, however, the petitioner had filed a motion to reconsider or reopen the reinstatement decision with the local DHS Field Office Director. Although the court rejected petitioner's contention that the motion tolled the petition for review deadline, the court stated, "[s]hould the eventual disposition of that motion not be in the petitioner's favor, he may, of course, file a separate petition for review with respect thereto." *Ponta-Garca*, 386 F.3d at 343, n.1. The court encouraged the government "to reexamine the case with care." *Id.* at 343.

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[21] *But cf. Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001) (finding review of prior order precluded where petitioner voluntarily waived appeal in the first proceeding).

[22] *See also Sifuentes–Barraza v. Garcia*, 252 F. Supp. 2d 354, 360 (W.D.Tx. 2003) (also applying the rationale of *St. Cyr* to permit habeas review of prior order). *And see Chacon-Corral v. Weber*, 259 F. Supp. 2d 1151 (D. Col. 2003) (applying the rationale of *U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987) to permit habeas review of prior order). *Accord Avila-Macias v. Ashcroft*, 328 F.3d 108, 115 (3d Cir. 2003) (whether the district court has jurisdiction over collateral challenge can be "can be raised and decided" in district court via habeas).

In addition, the Ninth Circuit has suggested that motion to reopen might be available where the prior order was issued in absentia. *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 496 n.13 (9th Cir. 2007) (en banc).

Where can I find the regulations governing motions to reopen or reconsider if ICE issued the underlying order?

The regulations at 8 C.F.R. § 103.5 govern motions to reopen or reconsider decisions made by DHS officers. The applicable regulations include the following:

"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)(2).

"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)(3).

Motions to reopen or reconsider must be filed within 30 days of the decision or proceeding. 8 C.F.R. § 103.5(a)(1)(i). 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." *Id.*

The INA contains some restrictions on direct *federal* court review of expedited removal orders. *See* INA § 242(e). Arguably, these restrictions do not apply to requests for administrative review.

How do I ask for reopening or reconsideration if the BIA issued the underlying order?

If the BIA issued the underlying order, the respondent may file a motion to reopen or motion to reconsider, as appropriate, in accordance with the governing regulations. It is advisable to inform the BIA that DHS has reinstated the order as DHS will likely point this out in its response. If the challenge to the underlying order is based in whole or in part on an ineffective assistance of counsel claim, the respondent must comply with the procedural requirements of the BIA's decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

What if the client already has been deported based on the reinstatement order?

The regulations governing motions to reopen and reconsider before the Service do not contain a jurisdictional bar to review of motions filed by people outside the United States. Accordingly, the motions should not be denied for this reason. If DHS nevertheless were to take this position, a circuit court could reverse it on petition for review.

The regulations governing motions to reopen and reconsider before immigration judges and the BIA purport to bar review if the person has departed the United States. *See* 8 C.F.R. § 1003.23(b)(1) (immigration court); 8 C.F.R. § 1003.2(d) (BIA). To date, at least one court has struck down this post-departure regulatory bar because it conflicts with the motion to reopen statute. See *William v. Gonzales,* 499 F.3d 329 (4th Cir. 2007)**.**[23] Other circuit courts are considering this argument. Some courts also have held that these regulations do not apply in certain cases, for example, where the motion to reopen is filed after departure,[24] where the motion seeks reopening of an in absentia order,[25] where basis of the order has been nullified,[26] and/or where the order was unlawfully executed.[27] The BIA also has conducted collateral review of a prior order notwithstanding a person's departure.[28]

What if the BIA or DHS denies the motion to reopen or motion to reconsider?

The courts of appeals should have jurisdiction to consider a petition for review of a BIA or DHS denial of a motion to reopen or motion to reconsider. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004) (suggesting availability of such review).

Is there a way to "challenge" the prior order through consular processing?

Maybe. Individuals who are applying for visas from abroad and who have viable claims that their prior order or reinstatement order is unlawful can try to convince a consular officer that they are not subject to INA §§ 212(a)(9)(A) or (C), and, thus do not need a waiver of their previous removal order/s. One could argue that a person is not inadmissible based on an unlawful order and/or an I-212 waiver should not be required for unlawful orders.

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[23] AILF appeared as amicus curiae in this case and is interested in working with attorneys litigating this issue in other circuits. Please bring cases to the attention of AILF by emailing the AILF's Litigation Clearinghouse at clearinghouse@ailf.org.

[24] *Zi-Xing Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007); *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007).

[25] *Contreras-Rodriguez v. US AG,* 462 F.3d 1314 (11th Cir. 2006). *See also, Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 496 n.13 (9th Cir. 2007) (en banc) (suggesting possibility).

[26] *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179, 1181 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981).

[27] *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977).

[28] *Matter of Malone,* 11 I&N Dec. 780 (BIA 1966); *Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967); *Matter of Roman,* 19 I&N Dec. 855, 856-57 (BIA 1988).

V. "RETROACTIVE" APPLICATION OF INA § 241(a)(5)

Did "reinstatement" exist prior to § 241(a)(5)'s April 1, 1997 effective date?

Yes, but the *only* individuals subject to reinstatement under former INA § 242(f) (1995) were those who had been previously deported (not excluded) on grounds relating to certain criminal convictions, failing to register or falsification of documents, or security or terrorist related grounds and subsequently re-entered the country illegally.

How does reinstatement under former INA § 242(f) compare with reinstatement under current INA § 241(a)(5)?

Under pre-IIRIRA reinstatement procedures, legacy INS was required to issue 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 immigration judge would determine deportability and adjudicate any application for relief. The regulations further provided that reinstatement proceedings were to be conducted in general accordance with the rules governing deportation hearings before immigration judges. *Id.*

The current reinstatement provision substantively differs from its predecessor provision. The new provision expands the scope of individuals subject to reinstatement proceedings and broadens the consequences of issuance of a reinstatement order by providing that the prior order is not subject to "being reopened or reviewed" and the individual is "not eligible and many not apply for any relief under the INA."

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

In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S. Ct. 2422 (2006), the Supreme 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 not take any affirmative steps to legalize their unlawful status in the United States 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 application for adjustment of status and request to waive his prior deportation order until March 2001 (after April 1, 1997).

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

The Court's decision rested on the retroactivity analysis from *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). First, the Court noted that Congress did not expressly prescribe whether the statute could be applied retroactively. 126 S. Ct. at 2428. The Court then concluded that application of traditional statutory construction rules failed to indicate whether Congress intended the provision to apply retroactively or prospectively. 126 S. Ct. at 2428-29. Next, the Court moved on to consider whether application of § 241(a)(5) would produce a retroactive effect. A statute has a retroactive effect only when it applies to conduct completed prior to the change in law.

The Court concluded that "Fernandez-Vargas has no retroactivity claim based on a new disability consequent to a completed act …." 126 S. Ct. at 2432. The Court reasoned that, in reinstatement cases, "it is the conduct of remaining in the country after entry that is the predicate action" triggering § 241(a)(5)'s application, not the person's illegal reentry. 126 S. Ct. at 2432. The Court stated that § 241(a)(5) does not penalize illegal reentry but, rather, establishes a process to "stop an indefinitely continuing [immigration] violation." Therefore, because the petitioner continued his illegal presence after new § 241(a)(5) took effect, his conduct was not completed prior to the change in law.

The Court also noted that the petitioner had six months following § 241(a)(5)'s enactment in which he could have left the United States before the statute took effect. 126 S. Ct. at 2432.

Can persons who took an affirmative step/s to legalize their status prior to April 1, 1997 claim that INA § 241(a)(5) should not apply retroactively to them?

Yes. Importantly, the *Fernandez-Vargas* Court expressly declined to decide whether the provision can be applied retroactively to someone who took affirmative steps to legalize their status, 126 S. Ct. at 2432-33, for example, by filing an adjustment of status application, an immigrant visa petition or labor certification application, asylum application, or by seeking temporary protective status (TPS). Indeed, there are several places in the decision where the Court expressly noted that the petitioner's situation is different from a petitioner who took some action to legalize their status before the change in law.[29]

Before the *Fernandez-Vargas* decision, the First, Seventh and Eleventh Circuits held that § 241(a)(5) does not apply retroactively a person who applied for adjustment of status prior to April 1, 1997. *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004).[30] AILF believes these decisions are still good law. *See also Valdez-*

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[29] *Fernandez-Vargas*, 126 S. Ct. at 2425 (limiting holding to the "continuing violator of the INA now before us."); 2427 n.5 (noting that whether a noncitizen's marriage or application for adjustment of status before April 1, 1997 renders § 241(a)(5) impermissibly retroactive as applied are "facts not in play here"); 2432 n.10 (noting that petitioner's retroactivity claim was not based on a claim that § 241(a)(5) cancelled vested rights because he "never availed himself" of cancellation, adjustment or voluntary departure and did not take an "action that enhanced their significance to him in particular"); 2433 & n. 12 (declining to express an opinion on whether § 241(a)(5) would have retroactive effect had the petitioner married a U.S. citizen and applied for adjustment of status before the change in law); 2434 (concluding "that § 241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas....."). Emphasis added.

[30] *Compare Velasquez-Gabriel v. Crocetti*, 263 F.3d. 102, 110 (4th Cir. 2001) (reasoning that § 241(a)(5) did not have an impermissible effect because the petitioner did not file an adjustment application before April 1, 1997).

Sanchez v. Gonzales, 485 F.3d 1084, 1089-90 (10th Cir. 2007) (discussing ongoing validity of these cases).

Two circuits have addressed retroactivity claims post-*Fernandez-Vargas*. The Tenth Circuit has held that § 241(a)(5) cannot be applied retroactively to an individuals who had applied for lawful residency prior to April 1, 1997. *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007). The Fifth Circuit has held that § 241(a)(5) can apply retroactively to someone who married a U.S. citizen and filed an I-130 visa petition but did not file an adjustment application before April 1, 1997. *Silva Rosa v. Gonzales*, 490 F.3d 403 (5th Cir. 2007).[31]

How does *Fernandez-Vargas* impact potential asylum applicants?

Footnote 4 of the *Fernandez-Vargas* decision states: "Notwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to § 241(a)(5) may seek withholding of removal" under INA § 241(b)(3)(A) or 8 C.F.R. § 241.8(e) and 208.31 (2006). Interestingly, the parenthetical following the Court's citation of 8 C.F.R. § 208.31, the regulation regarding the "reasonable fear" process, states: "raising the possibility of asylum to aliens whose removal order has been reinstated under INA § 241(a)(5)." Since the Supreme Court has indicated that asylum remains available, individuals subject to reinstatement who have potential asylum claims may pursue these claims and cite footnote 4 for the authority to do so.

Does *Fernandez-Vargas* overturn any circuit court case law?

Yes, the decision overturns *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001) and *Castro-Cortez v. INS*, 239 F.3d 1037(9th Cir. 2001). These courts had held that § 241(a)(5) cannot apply retroactively to pre-April 1, 1997 reentrants.

The *Fernandez-Vargas* decision also may have overturned *Dinnall v. Gonzales*, 421 F.3d 247 (3d Cir. 2005) (holding that § 241(a)(5) cannot apply retroactively if persons was eligible for voluntary departure before April 1, 1997). The Court suggests a petitioner must take "some action" towards legalizing status to prevail on a retroactivity claim. *Fernandez-Vargas*, 126 S. Ct. at 2433 n.10.

Are there any defenses available to people in removal proceedings who are subject to reinstatement pursuant to *Fernandez-Vargas* and DHS now moves to terminate proceedings in order to reinstate?

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[31] Prior to *Fernandez-Vargas*, the courts were divided on whether the filing of immigrant visa petition prior to April 1, 1997 was sufficient to invoke retroactivity concerns. *Compare Lopez-Flores v. DHS*, 376 F.3d 793 (8th Cir. 2004) (holding that § 241(a)(5) cannot be applied retroactively where person filed an I-140 petition before April 1, 1997) *with Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005) (holding that the filing of an I-130 petition before April 1, 1997 is not sufficient to render § 241(a)(5) impermissibly retroactive).

Possibly. Once removal proceedings have commenced in immigration court, only the immigration judge has the authority to terminate proceedings. *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998); 8 C.F.R. § 1239.2(c). A motion to terminate made "must be adjudicated on the record and pursuant to the regulations as would any other motion;" it is "not just and automatic grant...but an informed adjudication by the Immigration Judge...based on an evaluation of the factors underlying the Service's motion." 22 I&N Dec. 281 at 284. Thus, an immigration judge can refuse to terminate proceedings to permit DHS to issue a reinstatement order if the judge believes that reinstatement is not lawful or if reinstatement would have an impermissible retroactive effect.

In addition, an immigration judge could refuse to terminate proceedings if he or she concludes that DHS waived its opportunity to pursue reinstatement against the person. Arguably, at the time DHS issued the Notice to Appear, it was aware the petitioner was subject to reinstatement but nonetheless choose to initiate removal proceedings, rather than reinstatement proceedings. By choosing to initiate removal proceedings, the government waived its opportunity to subject the person to reinstatement under INA § 241(a)(5).

This waiver argument applies equally to immigration cases within the jurisdiction of the Sixth and Ninth Circuits where the circuit courts in *Bejjani* and *Castro-Cortez*, respectively, had previously held that § 241(a)(5) did not apply retroactively to a pre-IIRIRA reentrant. By deciding not to petition the Supreme Court for certiorari in those cases, arguably, the government acquiesced to the holdings in those decisions.

VI. DUE PROCESS CONSIDERATIONS

What are the due process concerns in the reinstatement process?

The due process concerns 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 evidence;
Lack of a meaningful opportunity to cross-examine evidence;
Inability to develop an adequate administrative record;
Right to counsel issues, including lack of access to counsel during the reinstatement process and lack of notice to existing counsel in violation of 8 C.F.R. § 292.5; and
Lack of notice of the right to seek federal court review.

How have the circuit courts ruled on due process claims?

To date, no court has found that the current reinstatement process violates due process.

Some courts have expressed concern regarding the due process issues surrounding the reinstatement process.[32] Nonetheless, courts have upheld the reinstatement procedures.[33] In many cases, however, the petitioner was unable to show 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 might be able to establish prejudice.

One court held that the reinstatement procedures, including fingerprinting procedures, did not violate petitioner's due process rights where petitioner argued that she was not the person named in the prior removal order. *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 845-48 (8th Cir. 2006). *But see Rafaelano v. Wilson*, 471 F.3d 1091 (9th Cir. 2006) (transferring case to BIA to resolve factual dispute regarding the existence of the prior order).

Notably, consistent with the canon of constitutional avoidance, if a petitioner raises a non-constitutional claim along with a due process challenge to a reinstatement order, presumptively courts will rule on the non-constitutional claim before reaching the due process issue.

VII. OTHER POTENTIAL ARGUMENTS AND ISSUES

Can someone who is eligible for adjustment of status under INA § 245(i) argue that INA § 245(i) trumps the bar to relief in INA § 241(a)(5)?

Unless it already has been rejected by the relevant circuit court, this argument may be available. Unfortunately, however, many circuits have rejected this argument. *See Delgado v. Mukasey*, __ F.3d __, 2008 U.S. App. LEXIS 2655, Case No. 06-5035-ag (2d Cir. Feb. 7, 2008) (rejecting argument and discussing similar decisions of the First, Sixth, Seventh, Tenth, and Eleventh Circuits).

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[32] *See, e.g., Castro-Cortez v. INS*, 239 F.3d 1037, 1047-50 (9th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas* , 126 S. Ct. 2422, 2427 & n.5 (2006); *United States v. Charleswell*, 456 F.3d 347 (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).

[33] *See, e.g. Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007) (en banc), *Warner v. Ashcroft*, 381 F.3d 534, 539 (6th Cir. 2004); *Lattab v. Ashcroft*, 384 F.3d 8, 20-21 (1st Cir. 2004); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 302 (5th Cir. 2002); *Gomez-Chavez v. INS*, 308 F.3d 796, 802 (7th Cir. 2002); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 327-328 (8th Cir. 2003); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162-63 (10th Cir. 2003); *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842 (8th Cir. 2006).

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 pursuant to a legal admission.

A few courts have addressed such claims. *See, e.g.*, *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 845-48 (8th Cir. 2006) (rejecting challenge to the existence of a prior order against petitioner); *Rafaelano v. Wilson*, 471 F.3d 1091 (9th Cir. 2006) (transferring case to BIA to resolve factual dispute regarding whether person was previously departed under a removal order or pursuant to a grant of voluntary departure). *Accord Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001) (transferring case to district court to resolve genuine issue of fact regarding citizenship claim made by person subject to reinstatement order).

What is the status of the *Morales-Izquierdo* case?

Although the Ninth Circuit previously held that only immigration judges can issue reinstatement orders, an en banc panel of the court reversed this conclusion. *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007). Thus, DHS officers within the Ninth Circuit can issue reinstatement orders. The en banc panel further rejected petitioner's due process arguments and refused to consider his collateral attack on the prior order. *But see* discussion of *Martinez-Merino* in the collateral review section above.

Can a person with an approved I-212 waiver application avoid reinstatement?

In all circuits that have decided this issue, with the exception of the Ninth Circuit, an approved I-212 waiver application generally will not protect a person from issuance of a reinstatement order.

In the Ninth Circuit, pursuant to *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), persons who file an I-212 waiver application prior to a reinstatement determination are entitled to adjudication of the I-212 waiver application. If the waiver application is approved, they are not subject to reinstatement. If the waiver application is denied, they <u>are</u> subject to the reinstatement provision. *See Duran Gonzales v. DHS*, 508 F.3d 1227, 1242 n.14 (2007) (effectively overruling *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) but not as to its holding that a successful I-212 waiver application would "avoid" the reinstatement provision) (rehearing pending). For more detailed and current information on the *Duran Gonzales* class action law suit, please see AILF's website at: http://www.ailf.org/lac/lac_lit.shtml.

Does a person who qualifies for VAWA adjustment, U Visa, or T Visa have any additional arguments to avoid reinstatement?

Persons who qualify for adjustment of status under the Violence Against Women Act and trafficking victims who qualify for a visas as defined by INA § 101(a)(15)(T) or (U) may

have additional arguments that they should be allowed to apply for such relief notwithstanding the bar to relief in INA § 241(a)(5). As Congress enacted waivers to exempt these individuals from virtually all inadmissibility grounds, including INA § 212(a)(9)(C)(i), there is an equitable argument that the bar to relief in INA § 241(a)(5) should be similarly construed. In addition, Congress has stated its desire that I-212 waiver applications should be granted in these cases. See *Violence Against Women and Department of Justice Reauthorization Act of 2005*, § 813(b), Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

What avenues are available to individuals who are otherwise eligible for an immigrant or nonimmigrant visa but for having previously been subject to a reinstatement order?

People applying for a visa abroad must establish that they are admissible. A person who was deported based on a reinstatement order may be inadmissible under INA § 212(a)(9)(C)(i)(II).

Importantly, the Department of State has interpreted INA § 212(a)(9)(C)(i)(II) as *only* applying to reentries after April 1, 1997.[34] Therefore, if the person's reinstatement order was based on a pre-April 1, 1997 reentry, he or she is not inadmissible under INA § 212(a)(9)(C)(i)(II). However, the person may still be inadmissible under INA § 212(a)(9)(A) for having been previously removed, but could apply for a waiver under INA § 212(a)(9)(A)(ii). *See also* 8 C.F.R. §§ 212.2(b)(nonimmigrant visas) and 212.2(d) (immigrant visas).

If the person's reinstatement order was based on a post-1997 reentry, he or she is inadmissible under INA § 212(a)(9)(C)(i)(II) and generally cannot apply for a waiver of inadmissibility 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) (holding that a person who enters the United States without inspection after removal is not eligible for a waiver of inadmissibility unless 10 years have elapsed since the date of last departure from the United States). Whether a person must wait the 10 years to apply for such waiver is the subject of litigation in *Duran Gonzales*, the Ninth Circuit-wide class action, referenced in the question above.

Individuals who are applying for visas abroad and who have viable claims that their prior order or reinstatement order is unlawful also can try to convince a consular officer that they are not subject to INA §§ 212(a)(9)(A) or (C), and, thus they do not need a waiver of their previous removal order/s. The argument is that the person should not be subjected to inadmissibility based on an unlawful order and/or an I-212 waiver should not be required where the order was unlawful.

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[34] *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, dated June 17, 1997 (adopting same interpretation).

ADDENDUM OF
PUBLISHED APPELLATE COURT REINSTATEMENT DECISIONS

Supreme Court

Fernandez-Vargas v. Gonzales, 547 U.S. 30, 126 S. Ct. 2422 (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, __ F.3d __, 2008 U.S. App. LEXIS 2655, Case No. 06-5035-ag (2d Cir. Feb. 7, 2008)

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)

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, 295 (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)

Sixth Circuit

Bejjani v. INS, 271 F.3d 670 (6th Cir. 2001) *abrogated by Fernandez-Vargas Gonzales*, 126 S. Ct. 2422, 2427 & n.5 (2006)
Warner v. Ashcroft, 381 F.3d 534 (6th Cir. 2004)

Seventh Circuit

Gomez-Chavez v. INS, 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)

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)

Ninth Circuit

Castro-Cortez et al. v. INS, 239 F.3d 1037 (9th Cir. 2001) *abrogated by Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2427 & 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)
Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), *effectively overruled in part by Duran Gonzales v. DHS*, 508 F.3d 1227 (2007)
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)
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. Keisler, 504 F.3d 1068 (9th Cir. 2007)

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)

Eleventh Circuit

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

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

§ 212(h) Eligibility: Case Law and Potential Arguments

By the Legal Action Center[2]

Updated February 19, 2008

This practice advisory addresses the basic statutory requirements for eligibility for INA § 212(h) waivers, 8 U.S.C. § 1182(h). It also addresses the availability of § 212(h) waivers in removal proceedings depending on whether the person is a lawful permanent resident (LPR) and/or whether the person is charged with a ground of inadmissibility or deportability.

The practice advisory also addresses when it is or arguably might be possible for an individual to file a "stand-alone" § 212(h) waiver, that is, a § 212(h) waiver that need not be filed in conjunction with an application to adjust status. A stand-alone § 212(h) waiver generally can be used as an independent form of relief from removal by LPRs who are charged with inadmissibility. It also arguably may be used by LPRs who are charged with deportability but have departed the country and returned since committing a deportable offense. This practice advisory discusses arguments supporting the availability of stand-alone § 212(h) waivers to arriving aliens and to non-LPRs charged with inadmissibility. It also discusses arguments for stand-alone waivers for LPRs charged with deportability who have not departed since committing the deportable offense.

Finally, the advisory discusses the regulation imposing a heightened hardship standard in cases involving violent or dangerous crimes. However, this advisory does not address the procedures for applying for a § 212(h) waiver nor does it address the standards for evaluating the hardship requirement.

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The information in this advisory is accurate as of the date of the advisory. Readers are cautioned to check for new cases and legal developments. This practice advisory is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

I. STATUTORY OVERVIEW OF § 212(h).

Q1: What grounds of inadmissibility does § 212(h) waive?

A § 212(h) waiver, if granted, waives the following criminal grounds of inadmissibility:

- crimes involving moral turpitude. INA § 212(a)(2)(A)(i)(I).
- a single offense of simple possession of 30 grams or less of marijuana. INA §§ 212(a)(1)(A)(i)(II) & 212(h).
- multiple criminal convictions where aggregate sentence was 5 years or more. INA § 212(a)(2)(B).
- prostitution and commercial vice activities. INA § 212(a)(2)(D).
- serious criminal offenses involving a grant of immunity. INA § 212(a)(2)(E).

Q2. Who can receive a § 212(h) waiver?

A § 212(h) waiver is available to certain "immigrants" (including specifically VAWA self petitioners) who meet the statutory eligibility requirements and for whom the agency decides to exercise favorable discretion.[3]

Q3: What are the statutory requirements for a § 212(h) waiver?

First, the person must fit into *one* of the following categories (*see* INA § 212(h)(1)):

A. An immigrant charged with prostitution under subparagraphs (i) or (ii) of INA § 212(a)(2)(D), where:
   a. subparagraph (i) or (ii) is the sole basis of inadmissibility;
   b. admission would not be contrary to national welfare, safety, or security; and
   c. the person has been rehabilitated.

B. An immigrant charged with any other criminal ground of inadmissibility that is subject to the waiver, where:

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[3] This practice advisory uses the term "immigrant" consistent with its use in § 212(h) and throughout the INA. *See* 8 U.S.C. § 1101(a)(15) (defining the term "immigrant" generally as referring to aliens other than those who fall within specified classes of "nonimmigrant aliens"). Thus, "immigrant" includes both those seeking to immigrate and those who already are LPRs. When the reference is to the LPR category only, the practice advisory will so designate.

a. the criminal activities (necessitating the waiver) occurred more than 15 years before the date of the application for a visa, admission or adjustment of status; and
b. admission would not be contrary to national welfare, safety, or security; and
c. the person has been rehabilitated.

C. An immigrant who:
a. is the spouse, parent, or son or daughter of a U.S. citizen or LPR; and
b. establishes that extreme hardship would befall the qualifying relative if admission were denied.

D. VAWA self-petitioners under INA §§ 204(a)(1)(A)(iii) or (iv) or 204(a)(1)(B)(ii) or (iii) (no additional statutory requirements).

Second, the person cannot have been convicted of having committed, attempted or conspired to commit, or have admitted acts that constitute murder or criminal acts involving torture. *See* INA § 212(h).

Third, "the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status." *See* INA § 212(h)(2).

Finally, in the case of a person previously granted LPR status, additional restrictions apply. In addition to the three requirements above, a § 212(h) waiver can only be granted to a person previously admitted to the U.S. as an LPR where the LPR:
a. has lawfully resided[4] in the United States for not less than 7 years before removal proceedings were initiated;[5] and
b. has not been convicted of an aggravated felony since becoming an LPR.[6]

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[4] In an unpublished decision, the BIA has held that the statute does not require 7 years of continuous residence as an LPR but instead only requires 7 years of continuous residence in any lawful status. *In re Afek*, No. A45-662-418, 2006 WL 3088766 (BIA Aug. 4, 2006). The BIA went on to hold that a person resides "lawfully" for purposes of § 212(h) if he or she was not subject to being removed as a matter of law during the prescribed period. *Id.*

[5] Notably, unlike cancellation of removal under INA § 240A, the commission of a criminal offense does not cut off the 7 years required for a § 212(h) waiver. Thus, an LPR who is not eligible for cancellation on this basis, or not eligible for § 212(c) relief (if offense is post-1996), still could be eligible to apply for a § 212(h) waiver.

[6] Several courts have considered whether the aggravated felony bar and/or seven year residency requirement violates equal protection insofar as these requirements do not apply to non-LPRs applying for § 212(h). *Compare* category C, above, *with*

Q4: In what circumstances can a person apply for a § 212(h) waiver?

Persons in the U.S. seeking § 212(h) waivers generally either will apply for the waiver in conjunction with an application to adjust status or as a stand-alone application in removal proceedings. 8 C.F.R. §§ 1212.7(a)(1)(ii)-(iv), 1240(a)(a)(ii). However, a person filing a stand-alone application in removal will also need a basis to avoid removal. Thus, stand-alone § 212(h) waivers are often filed by LPRs returning from a trip abroad, in which case pre-existing LPR status is maintained. Alternatively, stand-alone § 212(h) waivers may be filed by immigrant visa holders, in which case, the waiver must be granted *nunc pro tunc* which would concurrently render the visa valid.[7]

An LPR returning from a trip abroad arguably also could apply affirmatively for a § 212(h) waiver to U.S. Customs and Border Patrol. Such an affirmative application would be particularly useful if the person has not yet accrued 7 years of lawful residence in the United States, because otherwise the issuance of the Notice To Appear would cut off the continued accrual of physical presence.

Persons outside the U.S. can apply for a § 212(h) waiver in conjunction with an application for an immigrant visa at a U.S. consulate. 8 C.F.R. § 212.7(a)(1)(i).

II. SITUATIONS INVOLVING INADMISSIBLITY CHARGES

Q5: My client committed a waivable § 212(h) offense after becoming a lawful permanent resident. She then departed from the U.S., and was charged as an

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requirements for people previously granted LPR status. To date, courts have rejected these claims. *See Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 507-08 (5th Cir. 2007); *Taniguchi v. Schultz,* 303 F.3d 950, 957-58 (9th Cir. 2002); *Latu v. Ashcroft,* 375 F.3d 1012, 1020-21 (10th Cir. 2004); *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 638-40 (3d Cir. 2002); *Jankowski-Burczyk v. INS,* 291 F.3d 172, 178-81 (2d Cir. 2002); *Lukowski v. INS*, 279 F.3d 644, 647-48 (8th Cir. 2002); *Moore v. Ashcroft*, 251 F.3d 919, 925-26 (11th Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934, 947-48 (7th Cir. 2001); *Umanzor-Lazo v. INS*, 1999 U.S. App. LEXIS 8514 (4th Cir. 1999) (unpublished decision upholding statute in summary fashion). *See also In re Michel*, 21 I&N Dec. 1101, 1104 (BIA 1998) (affirming distinction on statutory basis).

[7] A § 212(h) waiver can be granted *nunc pro tunc* to cure a ground of inadmissibility existing at the time the person applied for the visa or admission. *See Matter of P--*, 7 I&N Dec. 713, 714 (BIA 1958) (§ 212(h)'s predecessor waiver may be granted *nunc pro tunc* to returning LPR charged with inadmissibility); *Matter of Millard*, 11 I&N Dec. 175, 178 (BIA 1965) (§ 212(h) waiver granted *nunc pro tunc* to immigrant visa holder charged with inadmissibility); *Matter of Sanchez*, 17 I&N Dec. 218, 222 (BIA 1980) (§ 212(h) waiver may be granted *nunc pro tunc* to returning LPR in deportation proceedings); *Matter of Parodi*, 17 I&N Dec. 608, 611 (BIA 1980) (§ 212(h) waiver available to LPR in deportation proceedings in conjunction with adjustment of status application).

arriving alien upon return from abroad. Is she eligible for a stand-alone § 212(h) waiver?

Yes. The Board of Immigration Appeals has held that a returning LPR seeking to overcome a ground of inadmissibility is not required to apply for adjustment of status in connection with a § 212(h) waiver. *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).

Section 101(a)(13) of the INA was enacted by IIRIRA and defines the terms "admission" and "admitted." Generally, under this definition, an LPR will not be regarded as "seeking admission" upon a return to the U.S., and thus will be allowed entry as an LPR. *See* INA § 101(a)(13). However, there are important exceptions to this in the statutory definition. Under subsection (C)(v) of INA § 101(a)(13), a lawful permanent resident returning from abroad may be regarded as seeking admission (and, thus, be classified as an arriving alien[8]) if, among other things, he or she has committed an offense identified in INA § 212(a)(2). *See* Q7 for exceptions to INA § 101(a)(13)(C)(v). LPRs regarded as seeking admission upon return to the U.S. will be placed in removal proceedings.

If the lawful permanent resident is seeking to overcome a ground of inadmissibility covered by a § 212(h) waiver (see Q1) and meets (or arguably meets) the statutory eligibility criteria for such a waiver (see Q3), he or she can apply for a § 212(h) waiver. Even if she is eligible for adjustment, an LPR in this situation will not have to apply for adjustment, but instead can apply solely for a stand-alone § 212(h) waiver.

In *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007), the BIA held that a returning lawful permanent resident who is placed in removal proceedings and charged as an arriving alien need not apply for adjustment of status in conjunction with the § 212(h) waiver. Rather, the grant of a § 212(h) waiver, the BIA reasoned, eliminates the basis of inadmissibility and leaves LPR status intact. The BIA further noted that the regulation requiring persons "in the United States" to file § 212(h) waiver applications concurrently with adjustment applications did not apply to the respondent, a returning LPR charged as an arriving alien. *Matter of Abosi*, 24 I&N Dec. at 205-06 discussing 8 C.F.R. § 1245.1(f).

Matter of Abosi involved an LPR who was cited for a possession of a small amount of marijuana, who then departed the United States and was placed in removal proceedings and charged as an arriving alien upon his return due to the drug offense. Important to the BIA's conclusion was that LPR status is not lost until entry of a final administrative removal order.

Q6: My client is an immigrant visa holder (but not an LPR) who has been placed in proceedings as an arriving alien; is he eligible for a stand-alone § 212(h) waiver?

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[8] An "arriving alien" generally is defined by regulation as an applicant for admission coming or seeking to come into the United States at a port-of-entry. 8 C.F.R. §§ 1.1(q) and 1001.1(q).

At least one group of non-LPR immigrants may be able to file stand-alone § 212(h) waivers in this situation. In *Matter of Millard,* 11 I&N Dec. 175 (BIA 1965), the respondent failed to disclose that she had engaged in prostitution outside the United States on her applications for a nonimmigrant border crossing card and on her subsequent immigrant visa application. Upon entry, she was placed in exclusion proceedings and charged with inadmissibility for misrepresentation, a crime involving moral turpitude (perjury) and prostitution. The BIA held that the granting of a stand-alone § 212(h) waiver application effectively eliminated her inadmissibility at the time of entry and concurrently rendered the immigrant visa valid. Consequently, she both defeated removal proceedings and was eligible for admission.

Thus, under *Matter of Millard*, an immigrant visa holder who is placed in removal proceedings and charged with inadmissibility as an arriving alien solely for a criminal offense that is waivable under § 212(h) should be permitted to file a stand-alone § 212(h) waiver. The criminal offense could have been committed outside the United States (as in *Matter of Millard*). Arguably, the criminal offense also could have been committed inside the United States (if the person was previously present) provided it was committed prior to the issuance of the immigrant visa by the U.S. Embassy or consulate abroad. The person would need to request *nunc pro tunc* adjudication (thereby restoring the validity of the immigrant visa). Once the validity of the visa was restored, the grounds for removal would be eliminated and the individual would be eligible for admission without additional relief, such as adjustment of status.[9]

Q7: My client is a lawful permanent resident who committed and pled guilty to an offense identified in INA § 212(a)(2) before April 1, 1997, who departed the U.S. and who does not want to be charged as an arriving alien. What argument is available?

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[9] This argument in support of stand-alone § 212(h) waivers for immigrant visa holders charged as arriving aliens and placed in removal proceedings is bolstered by the 2006 interim regulations on jurisdiction over adjustment applications of paroled arriving aliens in removal proceedings. *See* 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1). Under these interim regulations, which are currently effective, *only* USCIS has jurisdiction to adjudicate an adjustment application of an "arriving alien" in removal proceedings. Thus, if the § 212(h) application was filed in conjunction with the adjustment application before an IJ, the IJ would not have jurisdiction to hear the adjustment application and would pretermit it on this basis. It might be possible for the IJ to adjudicate the I-212(h) waiver first, and then pretermit the adjustment application for USCIS to adjudicate the adjustment application, but this would be very cumbersome and there is no guarantee IJs would be willing to cooperate. On the other hand, if the two applications were filed together with USCIS, USCIS would be in the position of deciding whether to waive inadmissibility – the very issue that was initially before the IJ in the removal proceedings. Thus, a stand-alone § 212(h) waiver is not only consistent with *Matter of Millard,* but also resolves the procedural dilemma created by the interim "arriving alien" adjustment regulations.

There is an argument, accepted by two circuit courts, that the definition of "admission" adopted by IIRIRA cannot be applied retroactively to LPRs who pled guilty prior to April 1, 1997.

IIRIRA enacted a new definition of "admission" and "admitted." INA § 101(a)(13). Under this definition, a returning LPR will be considered an applicant for admission in six specific situations. *See* § 101(a)(13)(C)(i)-(vi). Relevant here, the LPR will be considered an applicant for admission if he or she committed an offense identified in INA § 212(a)(2), unless since such offense, he or she has been granted relief under § 212(h) or cancellation. INA § 101(a)(13)(v). If the returning LPR is considered an applicant for admission under this definition, he or she will be charged as an arriving alien with a ground of inadmissibility.[10]

In some cases, it may be more beneficial for a returning LPR to be charged with a deportability ground under INA § 237(a)(2) rather than as an "arriving alien" with an inadmissibility ground under INA § 212(a). For example:

- Arriving aliens charged under INA § 212 bear the burden of proving admissibility. The government, however, bears the burden of proving deportability by clear and convincing evidence if the person is charged with deportability under § 237.

- A single crime of moral turpitude committed at any time may trigger inadmissibility whereas it must have been committed within 5 years of lawful admission for it to trigger deportability. *Compare* INA § 212(a)(2)(A)(i)(I) *with* INA § 237(a)(2)(A)(i)(I).

The Fourth and Ninth Circuits have held that LPRs who pled guilty prior to April 1, 1997 and who subsequently depart and return to the United States are not subject to current INA § 101(a)(13) and, thus, cannot be charged as arriving aliens. *See Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004); *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007). The courts reasoned that the retroactive application of INA § 101(a)(13)'s definition of admission (as enacted by IIRIRA) would have an impermissible retroactive effect because it effectively prohibits an LPR from traveling abroad.

III. SITUATIONS INVOLVING DEPORTABILITY CHARGES

Q8: My client is charged with deportability, is eligible to adjust status (or re-adjust status if client is an LPR) but needs a § 212(h) waiver. Could she apply for a § 212(h) waiver in this situation?

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[10] In unpublished decisions, the BIA has held that the government has the burden of proving that the returning LPR falls within one of the exceptions in § 101(a)(13(C) and should be categorized as an applicant for admission. *See, e.g., In re Picon Alvarado,* A90-316-913, 2004 WL 1405870 (BIA Mar. 12, 2004).

Yes, the BIA has held that persons charged with deportability may apply for a § 212(h) waiver in conjunction with an application for adjustment of status. *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968); *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980); *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The BIA reasoned in these decisions that, in order to qualify for adjustment of status, an applicant must be admissible under INA § 245(a). Moreover, it noted that an adjustment applicant has been held to be assimilated to the same position as a non-citizen presenting at the border and seeking entry as an LPR. Based upon this reasoning, the BIA concluded that an individual charged with deportability could apply for a § 212(h) waiver of inadmissibility in conjunction with an adjustment application.

Q9: Can a person charged with deportability apply for a stand-alone § 212(h) waiver?

Possibly. A person charged with a ground of deportability arguably is eligible for a stand-alone § 212(h) waiver where the deportable offense is also an inadmissible offense to which the § 212(h) waiver applies; *and* where the person has departed and reentered the U.S. after committing the deportable offense.

A person charged with a ground of deportability may be eligible for a § 212(h) waiver but not eligible for adjustment of status or another form of relief. For example, the person may have a U.S. citizen child (and thus a qualifying relative for the § 212(h) waiver) but the child is not old enough to file an immigrant visa petition. Arguably, if a stand-alone § 212(h) waiver were available in this situation, the waiver could be granted *nunc pro tunc* to restore the person's previous status. *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980) (§ 212(h) waiver may be granted *nunc pro tunc* to returning LPR in deportation proceedings). This would provide relief from removal for a person whose prior status was lawful. However, if the person's previous status was not lawful or had expired, then even a *nunc pro tunc* grant of a stand-alone § 212(h) waiver would not prevent a removal order.[11]

The BIA's decision in *Matter of Sanchez, supra,* establishes that stand-alone § 212(h) waivers are available to cure deportability grounds where the person: (1) committed a deportable offense which is also an inadmissible offense to which the § 212(h) waiver applies; *and* (2) departed and reentered the United States after committing the deportable offense. In *Matter of Sanchez*, the respondent was found deportable for having committed a crime involving moral turpitude within five years of entry. Relying on prior

[11] Generally, where the law is settled with respect to eligibility for a stand-alone § 212(h) waiver, it is not necessary for an individual to be *ineligible* for adjustment to consider filing a stand-alone waiver. Where the law is settled, filing a stand-alone § 212(h) waiver application is much simpler than filing a § 212(h) waiver application with an accompanying adjustment application. However, if the law is not settled, practitioners may want to file (and argue eligibility for) a stand-alone § 212(h) waiver application only in situations in which the person is ineligible for adjustment.

BIA precedent in the § 212(c) context, the BIA held that the § 212(h) waiver may be granted *nunc pro tunc* to cure a ground of deportability "when, at the time of the alien's last entry, he was inadmissible because of the same facts which form the basis of his deportability." *Matter of Sanchez*, 17 I&N Dec. at 221 (quoting *Matter of Tanori*, 15 I&N Dec. 566 (BIA 1976)).

The BIA has stated that where the person has not departed the United States since commission of the deportable offense (which is also an inadmissible offense), the person cannot obtain *nunc pro tunc* relief. In this situation, the BIA has considered § 212(h) waiver applications in conjunction with adjustment applications only. *Matter of Parodi*, 17 I&N Dec. 608, 611 (BIA 1980). This position has lead to equal protection challenges to the availability of stand-alone § 212(h) waivers based solely on departure from the U.S. See Q10, *infra.*

Notably, with two exceptions,[12] the regulation at 8 C.F.R. § 1245.1(f) provides that a concurrently filed adjustment of status application is the "sole method" of requesting the Attorney General's exercise of discretion for a § 212(h) waiver if the person is "in the United States." However, this regulatory language existed at the time of the BIA's decision in *Matter of Sanchez* and did not alter the outcome of the decision. Thus, immigration judges should continue to follow *Matter of Sanchez*.

Q10: Does the BIA's interpretation permitting stand-alone § 212(h) waivers for returning LPRs charged with inadmissibility but denying them to LPRs who have not left the country and, thus, are charged with deportability, violate equal protection?

Arguably, yes, however, circuit courts have reached opposite conclusions on this issue. The Eleventh Circuit has held that the BIA's distinction between LPRs based on whether they have departed and returned to the United States after becoming deportable is "arbitrary" and thus, its application to the petitioner violated equal protection. *Yeung v. INS*, 76 F.3d 337, 340-41 (11th Cir. 1995). The court concluded that the BIA's decisions (*Matter of Sanchez* and the decision below in *Yeung*) created two classifications of non-citizens "identical in every respect" but for their departure and held that deportable aliens are equally deserving of consideration for § 212(h) waivers. *Id.* [Notably, the BIA had not yet issued its decision in *Matter of Abosi* permitting returning LPRs to apply for a stand-alone § 212(h) waiver at the time of the Eleventh Circuit's decision in *Yeung.* Thus, the court relied on *Matter of Sanchez* for the proposition that a returning LPR is eligible for a stand-alone § 212(h) waiver].[13]

More recently, however, the Fifth and Seventh Circuits upheld the distinction between LPRs who departed the country and, thus, are charged with inadmissibility and those who

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[12] According to the regulation, the two exceptions are provided in 8 C.F.R. §§ 1235 and 1249.

[13] As it is the law of the circuit, DHS and immigration judges within the Eleventh Circuit are bound by the *Yeung* decision. Please let AILF know if the decision is not being followed by emailing us at clearinghouse@ailf.org.

had not departed and, thus, are charged with deportability. *Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2007); *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007). The Seventh Circuit in *Klementanovsky* posited reasons why Congress may have contemplated a statutory distinction between these two groups and criticized the *Yeung* decision for not having considered such reasons (notably, that the *Yeung* Court focused exclusively on the BIA-created distinction, and not any congressionally-created distinction). *Klementanovsky*, 501 F.3d at 793-94. The Fifth Circuit in *Malagon de Fuentes*, in a summary fashion, also concluded that the distinction survived rational basis review. *Malagon de Fuentes*, 462 F.3d at 504.

Both courts also purport to have distinguished their holdings from the § 212(c) context, in which the Second Circuit in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) found that permitting LPRs in exclusion proceedings to apply for § 212(c) relief while denying LPRs in deportation proceedings from similarly applying violated equal protection. *Malagon de Fuentes*, 462 F.3d at 504-05; *Klementanovsky*, 501 F.3d at 793-94.

IV. CHART

The following charts summarized the availability of § 212(h) waivers by charges lodged and immigration status (assuming statutory eligibility).

Persons Charged with Inadmissibility

	Stand-alone § 212(h) Waiver Available?	**Waiver Necessary In Conjunction with AOS?**
LPRs	Yes, per *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).	Not necessary if stand-alone § 212(h) waiver is granted. If person cannot avoid arriving alien classification and if paroled, person still has right to adjust status before USCIS.[14]

[14] *See generally*, 8 C.F.R. § 1245.2(a)(1)(ii). For more detailed information regarding arriving aliens and adjustment of status, see the following AILF practice advisories: "Arriving Aliens" and Adjustment of Status: What is the Impact of the Government's Interim Rule of May 12, 2006? (Updated October 3, 2006); 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 (April 16, 2007); USCIS Adjustment of Status of "Arriving Aliens" with an Unexecuted Final Order of Removal (Amended March 14, 2007). *See also* AILF's issue page on this topic, located at http://www.ailf.org/lac/clearinghouse_102306.shtml.

Arriving aliens and non-LPRs	Yes, per *Matter of Millard*, 11 I&N Dec. 175 (BIA 1965), but need *nunc pro tunc* grant and, as a practical matter, other means to immigrate to avoid removal (*e.g.* immigrant visa holder).	Not necessary if stand-alone § 212(h) waiver is granted. If person cannot avoid arriving alien classification and if paroled, person still has right to adjust status before USCIS.[15]

Persons Charged with Deportability

	Stand-alone § 212(h) Waiver Available?	**Waiver Available in Conjunction with AOS?**
LPRs who have departed and returned since committing deportable offense	Yes, if meet conditions set forth in *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980).	Yes**,** per *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968) and *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980).
LPRs who have not departed the U.S. since committing deportable offense	Yes, if in the Eleventh Circuit per *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995). No, if in the Fifth or Seventh Circuits per *Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2007); *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007). Potential equal protection argument available to persons in the First, Second, Third, Fourth, Sixth, Eighth, Ninth and Tenth Circuits.	Yes, per *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968) and *Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980).
Non-LPRs	No, must be adjustment eligible.	Yes, per *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992); *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998).

V. VIOLENT OR DANGEROUS CRIMES

[15] *See* footnote 14 above.

Q11: My client has been charged with what is arguably a violent or dangerous crime. Must they show "extreme hardship" or "exceptional and unusual hardship" to a qualifying relative to warrant a favorable exercise of discretion?

Short answer: Whether a crime is violent or dangerous is beyond the scope of this advisory. However, practitioners should first consider whether there is a basis for challenging this classification. Unless the courts rule otherwise, a person charged with a violent or dangerous crime must show either exceptional circumstances or exceptional and unusual hardship to a qualifying relative.

Explanation**:** In enacting § 212(h), Congress authorized the Attorney General to exercise broad discretion in deciding whether to grant a waiver:

> (2) the Attorney General, in his discretion, and *pursuant to such terms, conditions and procedures as he may by regulations prescribe*, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

INA § 212(h)(2). In turn, legacy INS promulgated the following regulation:

> (d) Criminal grounds of inadmissibility involving violent or dangerous crimes. The Attorney General, *in general*, will *not favorably exercise discretion under section 212(h)(2) of the Act* (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act *in cases involving violent or dangerous crimes, except in extraordinary circumstances*, such as those involving national security or foreign policy considerations, or *cases in which an alien clearly demonstrates* that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in *exceptional and extremely unusual hardship*. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

8 C.F.R. § 212.7(d) (emphasis added). In *Mejia v. Gonzales*, 499 F.3d 991, 995-97 (9th Cir. 2007), the Ninth Circuit upheld the heightened "exceptional and unusual hardship" standard as a permissible construction of the Attorney General's statutorily-authorized authority to promulgate regulations governing the exercise of its discretion. The court also held that the regulation could be applied retroactively to a person who was convicted before the regulation was enacted. *Id.* at 997-98.

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AMERICAN IMMIGRATION COUNCIL

IMMIGRATION LAWSUITS AND THE APA: THE BASICS OF A DISTRICT COURT ACTION

By Mary Kenney

Practice Advisory[1]
May 9, 2007

Table of Contents

1. Introduction
   - What is the Administrative Procedure Act (APA)?
   - What types of immigration-related claims can be brought under the APA?
2. Forum/Venue
   - Where is an APA suit filed?
3. Statute of limitations
   - When can an APA suit be filed?
4. Jurisdiction
   - What is the jurisdictional basis for an APA suit?
   - Because an APA action is against the federal government, does the APA include a waiver of sovereign immunity?
   - Are there other jurisdictional grounds that can or must be included in an APA complaint?
5. Cause of Action
   - What does it mean for the APA to provide a cause of action?
   - What "agency action" is reviewable under the APA?
6. Limitations on Judicial Review under the APA
   - No judicial review where another statute specifically precludes review
   - No review of agency action committed to agency discretion by law
   - Exhaustion of administrative remedies
   - Final agency action
7. Parties to an APA suit
   - Who has standing to bring an APA suit?

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- Who can be named as a defendant?

8. Standard of Review
   - What is the scope and standard of review in an APA suit?
9. Discovery
   - Can discovery be carried out against the government agency in an APA suit?
10. Attorney's Fees
   - Is it possible to get attorney's fees in an APA case?

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.

The cases cited in this practice advisory are examples only and do not constitute an exhaustive search of relevant caselaw in all jurisdictions. Moreover, the information in this practice advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

- **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 the United States in federal district court for unlawful action (including the unlawful failure to act) by federal agencies or agency officials or employees. 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 with 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.[2] The following are just a few examples of successful APA challenges:

- USCIS denial of an adjustment of status reversed where the agency erred in finding the plaintiff ineligible for adjustment, *Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005);
- INS denial of a religious worker visa petition reversed where it was based upon the improper application of a regulation, *Camphill Soltane v. USDOJ,* 381 F.3d 143 (3d Cir. 2004);
- Preliminary injunction granted where there was a reasonable question whether EOIR's directives to immigration judges violated the APA, *Baharona-Gomez v. EOIR*, 167 F.3d 1228 (9th Cir. 1999);
- USCIS denial of specific consent to pursue special immigrant juvenile status (SIJS) in state court reversed, *Young Zheng v. Pogash,* 416 F. Supp. 2d 550 (S.D. Tex. 2006);
- USCIS denial of an H-1B visa reversed 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);
- Motion to dismiss denied where court found that plaintiffs adequately stated an APA claim against USCIS and the FBI over delays in processing adjustment and naturalization applications, *Kaplan v. Chertoff,* No. 06-5304, 2007 U.S. Dist. LEXIS 22935, *71-72 (E.D. Pa. Mar. 29, 2007).

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 the courts' websites.

[2] The Immigration and Nationality Act (INA) specifies that a petition for review in a federal court of appeals is the "sole and exclusive means for judicial review" of an order of removal. 8 USC § 1252(a)(5); *see also* 8 USC § 1252(b)(9). Consequently, an APA action is not possible in the removal context.

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).[3] All courts that have considered the question of what statute of limitations 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.

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[3] 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.

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., Figgens 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).[4]

- **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*,

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[4] In *Figgens*, the plaintiffs erroneously relied on 8 USC § 1329 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 based on some other ground in suits *against* the United States. *See Sabhari v. Reno*, 197 F.3d 938, 942 (8th Cir. 1999).

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).[5]

- **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 are raising a claim directly under the Constitution, you will want to include that as a basis for jurisdiction. Similarly, if you are raising a claim directly under an immigration statute, you will want to include that statute as a basis for jurisdiction. *See e.g., Ngwanyia v. Ashcroft*, 302 F.Supp. 2d 1076. 1084 n. 14 (D. Minn. 2004) (complaint alleged that USCIS's failure to provide employment authorization to asylees violated the APA, the due process clause of the constitution, and 8 USC § 1158(c)(1)(B), although court ultimately held only that USCIS practice violated the APA). If you have a claim for mandamus, you will want to include the federal mandamus statute, 28 USC § 1361.[6]

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 relief 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

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[5] 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. *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).

[6] For more on mandamus actions, *see* "Mandamus Actions: Avoiding Dismissal and Proving the Case" (August 6, 2009), http://www.legalactioncenter.org/sites/default/files/lac_pa_081505.pdf.

action. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) (stating that 5 USC § 704[7] 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); *Md. Dep't of Human Res. v. Dep't of Health and Human Servs.*, 763 F.2d 1441, 1445 n.5 (D.C.Cir. 1985) (describing the APA as a "generic" cause of action for persons aggrieved by agency action).

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**

[7] 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."

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 §§ 1182(h) and (i)(2) (precluding judicial review of certain discretionary waivers); § 1252(a)(2)(B) (precluding review of certain discretionary decisions in the non-removal context); § 1252(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. For example, one court specifically found that 8 USC § 1252(a)(2)(B) does not bar an APA action challenging a denial of an adjustment application on non-discretionary grounds, even though such action would be barred if the adjustment application had been denied on a discretionary basis. *See, e.g.*, *Pinho v. Gonzales*, 432 F.3d 193, 204 (3d Cir. 2005) ("Determination of eligibility for adjustment – unlike the granting of adjustment itself – is a purely legal question and does not implicate agency discretion").[8]

- **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, 190-91 (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

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[8] For more on the INA bar to review of discretionary decisions, *see* "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.

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.[9] *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., Luis v. INS,* 196 F.3d 36, 40 (1st Cir. 1999) (*citing Heckler v. Chaney,* 470 U.S. 821, 831 (1985)); *Harchenko v. INS,* 379 F.3d 405, 410-411 (6th Cir. 2004).[10] 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 held that the APA does not apply to the discretionary waiver of a foreign residency requirement under 8 USC § 1182(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).

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

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[9] The court considered the question of discretion under both the APA standard and 8 USC § 1252(a)(2)(B), the statutory bar to review of discretionary immigration decisions, finding that the two standards were "partly duplicative." *Pinho*, 432 F.3d at 200 n.9; *see also Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d 683 (9th Cir. 2003) (discussing both APA and INA restrictions on review of discretionary decisions); *Shah v. Chertoff,* No. 3:05-CV-1608-BH (K) ECF, 2006 U.S. Dist. LEXIS 73754 (N.D. Tex. 2006) (same). Note, however, that the scope of the two limits on judicial review differs due to different statutory language and context.

[10] While *Luis* and *Harchenko* and several cases cited below are removal cases, and thus were not brought under the APA, the same reasoning would apply to an APA case.

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.); *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 a full discussion of each of these requirements, see the Legal Action Center's (LAC) 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 recent immigration cases brought under the APA, with the courts concluding in each 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); *Duran Gonzales v. DHS*, No. C06-1411P, 2006 U.S. Dist. LEXIS 82502, *8-9 (W.D. WA. Nov. 13, 2006) (APA challenge to DHS's willful refusal to follow Ninth Circuit law); *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.C.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 Temporary Protected Status (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 a plaintiff not only to have an injury but also to demonstrate standing under the APA by showing that "the interests sought to be protected by the [plaintiff are] arguably within the 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 those 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. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *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"). This rule is particularly applicable in challenges to a decision or agency action in an individual case. Based upon this general rule, the government will frequently object to any discovery being carried out in any action brought under the APA.

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 is not 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 U.S.C. § 2412(d) & 5 U.S.C. § 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, "Requsting 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.

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FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER REAL ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW

Practice Advisory[1]

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 Act[2] 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.

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[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.ailf.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 or 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?

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[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.ailf.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.

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[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):

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[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-Taverez 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-Khaliel 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 Taverez 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).

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
February 28, 2006

EMPLOYMENT AUTHORIZATION AND ASYLUM: STRATEGIES TO AVOID STOPPING THE ASYLUM CLOCK

By the Legal Action Center

I. INTRODUCTION

Applicants for asylum in the United States are not immediately or automatically granted employment authorization. Before receiving an employment authorization document (EAD),[2] an asylum applicant must wait for a final grant of asylum or for an application to remain pending for 180 days according to the "asylum clock." The asylum clock tracks how many days are credited towards the time an asylum application has been pending, not counting any delay caused by the asylum applicant.

A general lack of transparency plagues the administration of the asylum clock. Immigration judges (IJs) and asylum officers (AOs) often fail to inform the noncitizen of the determination to stop the clock. Asylum applicants who are unaware that the IJ has stopped the clock may discover this fact weeks or sometimes months later when the DHS denies their application for employment authorization. Despite repeated requests by the American Immigration Lawyers Association (AILA) for IJs to make this determination on the record, the

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[2] "Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, an applicant for asylum who is not an aggravated felon shall be eligible pursuant to §§ 274a.12(c)(8) and 274a.13(a)" to submit an application for EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). Sections 274a.12(c)(8) and 1274a.12(c)(8) include pending applications for asylum and withholding of removal. Applicants for deferral of removal under the Convention against Torture pursuant to 8 C.F.R. § 208.17 or 8 C.F.R. § 1208.17 are eligible to apply for an EAD once they receive a grant of deferral. 8 C.F.R. § 274a.12(c)(18); 8 C.F.R. § 1274a.12(c)(18); 8 C.F.R. § 241.5(c) (permitting the DHS, in its discretion, to grant work authorization to people with a final order of removal who are released on an order of supervision).

Executive Office for Immigration Review (EOIR) continues to maintain that it will not require IJs to make formal findings on the record when the clock is stopped.[3]

This practice advisory explains how the asylum clock works in theory and in practice. The advisory focuses on both EOIR's interpretations and implementation of the asylum EAD clock. It also explains where the Legal Action Center (LAC) disagrees with EOIR's interpretations and implementation.

A. EOIR Interpretation Problems

Interpretation problems occur when the IJ or AO follows EOIR policy, but where the LAC believes the policy is contrary to the regulations. This usually happens when EOIR improperly determines that the applicant for asylum caused the delay. *See infra* Section V, EOIR Interpretations of the Asylum EAD Clock and LAC's Analysis. Another problem involves restarting the asylum clock. The regulations require that the IJ restart an asylum clock when a delay no longer exists, but in practice, the asylum clock is often improperly permanently stopped. For example, EOIR's interpretation implies that once there is a denial of asylum, the EAD clock is permanently stopped. However, the only time the asylum EAD clock is permanently stopped is when the applicant does not show exceptional circumstances for failing to attend an interview at the asylum office or the hearing at immigration court. 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4).

B. EOIR Implementation Problems

Implementation problems occur when the IJ stops the clock contrary to EOIR policy. A common problem occurs when testimony at the asylum hearing could not be completed in the allotted time.[4] EOIR policy states that adjourning because the case could not be completed in the time allotted should not stop the clock.[5] However, IJs are improperly stopping the clock, finding that the respondent is the cause for the delay. In response, in liaison meetings with AILA, EOIR has conceded that the clock should not be stopped when testimony does not fit within an allotted time "unless the reason why the hearing was protracted was due to the alien's actions."[6]

This practice advisory suggests arguments attorneys representing asylum applicants before an AO or respondents in immigration court proceedings can use to: 1) prevent the AO or IJ from stopping the clock or 2) convince the IJ or AO to restart a stopped clock. EOIR has suggested that arguments about the asylum EAD clock should be made at the hearing, and if the

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[3] *See* Appendix, EOIR/AILA Liaison Agenda Question 2, March 7, 2002; EOIR/AILA Liaison Agenda Question 4, March 16, 2005.

[4] *See* Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

[5] Under the current adjournment codes, continuing the hearing in this circumstance should be a code 13, which would not stop the clock. *See* EOIR Operating Policies and Procedures Memorandum (OPPM) OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

[6] *See* Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

issue arises after the hearing, the respondent should file a written motion with the IJ.[7] *See infra* Section VIII, Actions an Attorney Could Take to Restart the Asylum EAD Clock or Prevent it From Stopping.

II. THE TWO ASYLUM CLOCKS

- Asylum Adjudication clock: The asylum adjudication clock measures the number of days an asylum application has been pending adjudication: "[I]n the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed." INA § 208(d)(5)(A)(iii).

- Asylum EAD clock: The asylum EAD clock also measures the number of days after submission of an asylum application that must elapse before the applicant may be provided an EAD. "An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum." INA § 208(d)(2).

Different events may stop either the asylum adjudications clock or both the asylum adjudications clock and asylum EAD clock.[8] This advisory focuses on the asylum EAD clock.

III. HOW DID THE ASYLUM EAD CLOCK DEVELOP?

- Prior to 1994, applicants could file for asylum and an EAD concurrently, and asylum officers could authorize employment for up to one year. The Immigration and Naturalization Service (INS) could renew the EAD and even if an asylum application was denied, the district director could grant further employment authorization. 8 C.F.R. § 208.7 (1991).

- In 1994, the government amended the regulations to require asylum applicants to wait 150 days after submitting a completed asylum application before applying for an EAD. The INS then had 30 days to adjudicate the EAD application. 59 Fed. Reg. 62,289-90 (Dec. 5, 1994) *codified at* 8 C.F.R. § 208.7 (1994).

- In 1996, Congress amended the INA by adding the 180-day waiting period for EAD purposes and implemented the 180-day period to adjudicate asylum applications. *See* Sec. 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (amending INA § 208).

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[7] *Id*.

[8] EOIR outlines its interpretation of how different events stop either the asylum EAD clock or the asylum adjudications clock. *See* OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes, *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

IV. HOW DOES THE ASYLUM EAD CLOCK AFFECT WORK AUTHORIZATION?

- The clock starts on the date that the applicant submits a complete asylum application in accordance with 8 C.F.R. §§ 208.3 and 208.4. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).

- Once the asylum EAD clock reaches 150 days, the asylum applicant may apply for an EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).

- An asylum officer may grant, deny, refer or dismiss an asylum application. 8 C.F.R. § 208.14(b) & (c); 8 C.F.R. § 1208.14(b) & (c). Only a *denial* of an asylum application makes the applicant ineligible for an EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).[9] A *referral* to the immigration court by an asylum officer is not a denial. 8 C.F.R. § 208.14(c); 8 C.F.R. § 1208.14(c). Therefore, while a denial will stop the clock, a referral to the immigration court will not. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).[10]

- After the applicant has filed an application for an EAD, the U.S. Citizenship and Immigration Services (CIS) has 30 days from the date of the filing to grant or deny the EAD application. CIS cannot grant the application before the asylum clock has reached 180 days after the initial filing of the asylum application. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).

- The regulations state that "(a)n applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization." 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). In addition, the regulations say that if an asylum application is denied while an application for employment authorization is pending with the CIS, the employment authorization application will be denied. *Id*. However, respondents who have received an EAD and later appeal a denial of asylum may continue to renew their EAD throughout administrative and judicial review.[11] If the IJ grants asylum and the

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[9] An asylum officer may deny asylum to a person who "is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status" or who was "paroled into the United States and the parole has not expired or been terminated." 8 C.F.R. § 208.14(c)(2) and (3); 8 C.F.R. § 1208.14(c)(2) and (3).

[10] If charging documents may not be issued, an asylum officer shall dismiss an application instead of referring the case to immigration court. 8 C.F.R. § 208.14(c)(1), 8 C.F.R. § 1208.14(c)(1). With no pending asylum application, the asylum clock does not apply.

[11] If the respondent received the EAD while the application was pending at the asylum office and the AO denies (not refers) the application, the EAD will be valid until the expiration of the EAD or 60 days after the AO denial, whichever is later. 8 C.F.R. § 208.7(b)(1); 8 C.F.R. § 1208.7(b)(1). If the application is denied by the IJ or BIA, the EAD terminates when the EAD expires. 8 C.F.R. § 208.7(b)(2); 8 C.F.R. § 1208.7(b)(2).

DHS appeals, the respondent may be granted an EAD pursuant to 8 C.F.R. § 274a.12(c)(8)(ii). The EAD is renewable during the appeals process, including judicial review. 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b). When all appeals and judicial review have been exhausted, if the asylum application has been denied, work authorization terminates on the expiration date of the EAD. 8 C.F.R. § 208.7(b)(2); 8 C.F.R. § 1208.7(b)(2).

- The asylum clock does not apply to a person who filed an asylum application prior to January 4, 1995, or whose asylum application has been recommended for approval.[12] 8 C.F.R. § 208.7(a)(1) & (3); 8 C.F.R. § 1208.7(a)(1) & (3).

V. HOW IS THE ASYLUM EAD CLOCK STOPPED?

- A delay in the adjudication "caused" by the asylum applicant will stop the clock only during the time the delay exists: "Any delay requested or caused by the applicant shall not be counted as part of these time periods." 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2).

- The regulations provide only a limited number of examples of what constitutes an applicant caused delay. By regulation, "delays caused by failure without good cause to follow the requirements for fingerprint processing" stop the clock. *Id*. The time between the issuance of a request for evidence and the receipt of a response to that request also is excluded. *Id.* Additionally, the period during which the applicant fails to appear to receive the decision of the asylum officer will not be counted towards the 180 days. 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d). The asylum clock restarts when the applicant "does appear to receive and acknowledge receipt of the decision or until the applicant appears before an immigration judge in response to the issuance of a charging document under § 208.14(c) [or § 1208.14(c)]." 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d).

- The clock permanently stops if an asylum applicant fails to appear for an interview with an asylum officer or for a hearing before an IJ unless the applicant demonstrates that the failure to appear was due to exceptional circumstances. 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4).

- EOIR's adjournment codes reflect the agency's interpretation of what stops the clock.[13] The chart of codes lists whether an adjournment is "alien-related" or "DHS-related" or "IJ-related" or "Operational." An "alien-related" adjournment stops both the asylum EAD clock and the asylum adjudications clock.[14]

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[12] If the applicant receives a letter of recommendation for asylum from the asylum office, but has not received the approval notice, the applicant may apply for an EAD under 8 C.F.R. § 274a.12(c)(8)(ii).

[13] *See* OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes, *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

[14] *Id. at* Adjournment Codes Appendix.

- IJs enter the adjournment code on a worksheet that is not part of the administrative record. The information on the worksheet is then recorded in the court's computer system.

VI. EOIR INTERPRETATIONS OF THE ASYLUM EAD CLOCK AND THE LAC'S ANALYSIS

This section explains EOIR's interpretations of what constitutes a "delay caused or requested by the applicant" and when the delay ends. 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2). This section also includes the LAC's analysis to the government's interpretations. To resolve asylum EAD clock problems, a respondent may file a motion with the court. *See infra* Section VIII, Actions an Attorney Could Take to Restart the Asylum EAD Clock or Prevent it From Stopping.

A. Respondent's Rejection of the "Next Available" Hearing Date

Many attorneys and unrepresented respondents, without realizing the consequences, reject the earliest available hearing date offered by the IJ. IJs stop the clock when respondents decline to take the next "open date" on the court's calendar, reasoning that the rejection of the proposed hearing date is an "alien caused delay."[15]

Even if an attorney accepts the date offered by the IJ, a clerk may later call the attorney and offer a hearing date in the very near future. If the attorney rejects this new date, EOIR takes the position that this refusal stops the clock.

When AILA suggested that rejecting the first available hearing date should not always be a delay caused by the respondent, EOIR stated: "We do not agree with your contention that attorney conflicts should not constitute 'alien caused delays.' An attorney acts on behalf of the alien. Any delays caused by an attorney conflict should be considered 'alien caused delays.'"[16]

EOIR has insisted that IJs must have flexibility to schedule asylum hearings in order to adjudicate cases within the 180 days mandated by the statute. In response to AILA's suggestion that there be a mandatory time period before a hearing date, EOIR stated: "[a] requirement to offer a hearing date no sooner than 30 days after the master calendar hearing is unrealistic for an expedited system."[17]

LAC's Analysis

Apart from the question whether an attorney's time conflict constitutes a delay caused by the applicant, the LAC believes that if counsel does not accept a hearing date that would be

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[15] *See* Appendix, AILA-EOIR Liaison Agenda Question 11, March 30, 2000. However, accepting another hearing date within 24 hours of the hearing date that the IJ first offered will not stop the clock. *See* Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000, page 9.

[16] *See* Appendix, AILA-EOIR Liaison Agenda Question 11, March 30, 2000.

[17] *Id*.

within 14 days of an initial Master Calendar (MC) hearing, the resulting delay *should* not be charged to the respondent.[18] EOIR policy states that the respondent should only be charged with the delay when the rejected date is "not less than 14 days from the date of the Master Calendar."[19] EOIR written policy also states that a merits hearing should not be scheduled within 14 days of the MC unless failing to schedule the hearing in this time period would prevent adjudication of the asylum application within 180 days.[20] Therefore, an applicant may argue that scheduling a MC to an individual hearing does not stop the clock. Additionally, EOIR policy advises the IJs to be aware of due process concerns.[21]

Even if the court stops the clock because the applicant refuses the next available hearing date, the clock should be restarted at the next hearing, because the delay would no longer exist. 8 C.F.R. § 1208.7(a)(2).

B. Filing a Defensive Asylum Application

The asylum clock applies to defensive asylum applications, that is, applications filed with the immigration court in the first instance as a defense to removal. The EAD provisions contained in 8 C.F.R. § 1208.7(a)(1) refer to the filing procedures for asylum applications in 8 C.F.R. § 1208.4(b)(3) & (4), which include filing a complete asylum application with the immigration court or Board of Immigration Appeals (BIA).[22] Although the Department of Homeland Security (DHS) allows for submission of the affirmative asylum application by mail, EOIR policy only permits a respondent to file a defensive application for asylum at a hearing.[23]

Under this EOIR policy, respondents may not file the asylum application during the time between two master calendar hearings or between a master calendar and an individual hearing. Respondents must wait for the next scheduled hearing to file their applications.

LAC's Analysis

Because the asylum EAD clock does not start until the respondent files a completed application, this policy unnecessarily prolongs the time until the clock will start. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). The LAC believes this policy is subject to challenge.

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[18] Instead, this should be coded as an adjournment from a master calendar to an individual calendar, current code 17, which would not stop the clock. *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

[19] *See* Revised OPPM No. 00-01, Asylum Request Processing, Revised August 4, 2000, page 9 *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

[20] *Id.* at Page 8.

[21] *See* Revised OPPM No. 00-01, Asylum Request Processing, August 4, 2000, page 4 *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

[22] An asylum application filed with the BIA would only involve a motion to remand or a motion to reopen.

[23] *See* Revised OPPM No. 00-01, Asylum Request Processing, August 4, 2000, page 15 *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

C. Disputes about Timely Production of Biometrics

Before adjudication of an asylum application, DHS must complete a biometrics check.[24] 8 C.F.R. § 1003.47(a). Section 208(d)(5)(A)(i) of the INA prohibits an AO or IJ from granting asylum until DHS completes a background check. Failure to comply with the fingerprinting requirements without good cause may lead to dismissal of the application. 8 C.F.R. § 208.10; 8 C.F.R. § 1208.10. For work authorization purposes, the regulations provide that a "delay requested or caused by the applicant" may include "delays caused by failure without good cause to follow the requirements for fingerprint processing." 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2). EOIR takes the position that if the IJ adjourns a case "to allow alien time to complete the required paperwork for a biometrics check or an overseas investigation," the clock stops.[25] EOIR justified this position by citing the supplementary information to its January 2005 Background and Security Investigations Interim Rule.[26] This rule assigns the responsibility for providing biometrics or other biographical information to the respondent. EOIR has said that once the person has satisfied the biometrics requirements, the clock may be restarted. The respondent may notify the court that he or she did provide the requisite biometrics information and file a motion to restart the clock. *See infra* Section VIII.

LAC's Analysis

The LAC believes that allowing time for a respondent to comply with the biometrics requirement is not a delay caused or requested by the respondent. 8 C.F.R. § 1208.7(a)(2). In fact, the regulations support an interpretation that the respondent should not be charged with the delay unless and until he or she is notified of the obligation to provide biometrics information and fails to comply in a timely manner. By regulation, DHS is required to provide the respondent with notice of the biometrics requirements and instructions for the procedures. 8 C.F.R. § 1003.47(d).[27] The applicant must comply with the biometrics requirements "before or as soon as practicable after the filing of the application for relief in the immigration

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[24] As of January 2005, biometrics included "digital fingerprints, photographs and, signature, and in the future may include other digital technology that can assist in determining an individual's identity and conducting background investigations." *See* 70 Fed. Reg. 4743, n.2 (Jan. 31, 2005).

[25] A delay by the respondent relating to biometrics data currently is code 36. If the IJ adjourns a case to allow DHS time to complete the biometrics check, it is code 37 and the respondent will not be charged with the delay. *See* OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes, *available at*: http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-07.pdf.

[26] *See* Appendix, AILA-EOIR Liaison Agenda Question 2, October 17, 2005 (EOIR explained that in the supplement to the background check regulation, a respondent seeking relief is responsible for taking the initiative to provide biometrics or other biographical information in a timely manner). *See* 70 Fed Reg. 4743, 4745 (Jan. 31, 2005).

[27] Once a person files or indicates an intention to file an application for relief, DHS "shall notify the respondent of the need to provide biometrics and other biographical information and shall provide a biometrics notice and instructions to the respondent for such procedures." 8 C.F.R. § 1003.47(d).

proceedings." *Id*. Also, 8 C.F.R. § 1208.7(a)(2) states that the clock stops during "delays caused by failure without good cause to follow the requirements for fingerprint processing." Therefore, under the regulations, the time it takes to comply with the biometrics information does not result in a respondent-created delay. Rather, the respondent should be charged with the delay only if he or she does not comply in a timely manner.

If DHS seeks a continuance due to a pending background check, the delay should be charged to DHS and the EAD clock should continue to run.[28] If the respondent joins in the request for a continuance, the delay will be charged to the respondent and the clock will stop.[29] If the respondent opposes or takes no position on the request for a continuance, the DHS should be charged with the delay.

D. Request for Evidence

A request for evidence may be issued if "the evidence submitted either does not fully establish eligibility" or "raises underlying questions regarding eligibility" for asylum. 8 C.F.R. § 103.2(b)(8). The regulations state that the period of time the clock runs "shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request." 8 C.F.R. § 208.7(a)(2). In practice, this means that a request for evidence is an action that will cause the clock to stop.

LAC's Analysis

As soon as the applicant submits the requested evidence, the delay no longer exists and the AO or IJ should restart the clock immediately. 8 C.F.R. § 208.7(a)(2).

E. Delays for Additional Evidence or Amending Asylum Application

The clock starts when a completed application is filed. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).[30] A complete asylum application must: 1) have all the boxes checked, 2) be signed, and 3) include additional supporting evidence as required on the application instructions.[31] 8 C.F.R. § 208.3(c)(3); 8 C.F.R. § 1208.3(c)(3). If the application has not been returned to the applicant within 30 days, it is deemed complete. 8 C.F.R. § 208.3(c)(3); 8 C.F.R. § 1208.3(c)(3). An asylum officer or IJ may permit an applicant to amend or supplement the application, and the clock will stop for any period of delay caused by such a request. 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c).

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[28] Currently code 37. *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

[29] Currently code 45. *Id*.

[30] This includes defensive asylum applications. *See* 8 C.F.R. § 1208.7(a)(1) and 8 C.F.R. § 1208.4(b)(3) & (4).

[31] The current version of the asylum application is dated 7/3/03. However, DHS still accepts the 10/18/01 version. Therefore, submitting the 10/18/01 version should not stop the clock.

In removal proceedings, after the respondent files an asylum application, the IJ may continue the case for a second MC hearing to receive evidence or an updated affidavit instead of scheduling an individual hearing. In this scenario, EOIR policy is to stop the clock even though the respondent did not request the second MC.[32] EOIR has stated that in such a situation, the respondent has caused the delay "by not submitting all the documents required at the time the original asylum application was filed or at the first master calendar hearing."[33] EOIR stated that "[i]t is the alien who is asking for a benefit here–that of amending or updating his or her application. Consequently, it is an alien caused delay."[34]

LAC's Analysis

The LAC believes that if a respondent submits additional information to the immigration court in advance of a hearing and does not cause a delay, the clock should not stop. If the respondent requests additional time to submit supplemental materials, the clock should stop only during the delay and should restart as soon as the delay no longer exists. 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c).

F. Contesting the Charges, Filing for Other Forms of Relief

EOIR policy states that the clock stops if a respondent contests the charges of removability contained in the Notice to Appear.[35]

LAC's Analysis

The LAC believes this interpretation may be subject to challenge based on arguments about DHS's burden of proof. *See* INA § 240(c), 8 C.F.R § 1240.8. Even if the EAD clock does stop, it should stop only until the IJ makes a determination on the allegations and the charges, then the clock should restart. 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2).

Additionally, EOIR policy states that the clock is stopped when a respondent files for other forms of relief.[36] However, 8 C.F.R. § 208.7(a)(2) stops the asylum EAD clock only for any delay in the adjudication of the asylum application caused or requested by the respondent. Filing for another form of relief, on its own, does not delay the adjudication of the asylum application, as the asylum application may be adjudicated before the IJ addresses any other relief requested.

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[32] *See* Appendix 2, EOIR/AILA Liaison Agenda Question 8, March 27, 2003.
[33] *Id*.
[34] *Id*.
[35] Currently code 51, *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.
[36] Currently code 6, *Id*.

G. Reopening a Case

An EOIR policy memorandum gives IJs three "options" for setting the asylum clock after the IJ has granted a motion to reopen:

1) Restart the clock after granting the motion to reopen.

EOIR suggests IJs choose the first option of not restarting the clock when reopening is based on a document that "was previously unavailable." EOIR notes that the IJ can restart the clock at the first master calendar.

2) "Roll back" the clock and restart it from the date the IJ issued the final order, as if the clock never stopped from the denial of asylum to the granting of the motion to reopen.

EOIR states that IJs should use this second option when the respondent did not cause the delay. An example of this is a motion to reopen an *in absentia* order where the respondent did not receive notice of the hearing.

3) Restart the clock from the date the motion to reopen is granted.[37]

EOIR suggests IJs use the third option of restarting the clock when the motion was granted when proceedings are reopened based on changed country conditions.

LAC's Analysis

In response to the first option, the LAC believes that if the document previously was unavailable to the respondent, the respondent has not caused the delay. Furthermore, EOIR's position is undermined by the fact that once the BIA or IJ reopens a case after the IJ denied asylum, there is no longer an order denying the asylum application. *See Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005) (the grant of a motion to reopen vacates the previous voluntary departure order and therefore INA § 240B(d) does not continue to operate); *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). Therefore, the IJ should treat the asylum EAD clock as never having stopped by restarting the clock from the date the final order was given. That is, the IJ should "credit" all the time that elapsed since the original order denying asylum because a valid order denying asylum no longer exists.

[37] *See* Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000, pages 6-7, *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

The LAC agrees with EOIR's interpretation of the second option, but disagrees that the scope is so narrow. The LAC believes this interpretation is applicable to more scenarios than EOIR's example of the *in absentia* context.

Regarding the third option, the LAC believes that while the adjudications asylum clock should not be reset, the IJ should credit all the time since the original order denying asylum on the asylum EAD clock, based on same arguments discussed above to counter the first option.

H. Remands from the BIA

EOIR takes the position that if the BIA remands a case to the IJ, the remand does not restart the clock.[38] In support of this position, EOIR cites INA § 208(d)(5)(A)(iii), which states:

> In the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.

INA § 208(d)(5)(A)(iii).

LAC's Analysis

The LAC does not believe this statutory provision provides support for EOIR's position on remanded cases. First, section 208(d)(5)(A)(iii) of the INA describes the timeline for adjudication of the asylum application, not work authorization. Work authorization is addressed separately in the statute. Section 208(d)(2) of the INA prohibits an asylum applicant from receiving work authorization within 180 days of filing the application. Although both sections of the statute have 180 day requirements, this does not link the two asylum clocks together. Additionally, EOIR policy treats the two clocks as separate by stating that different actions can stop just the asylum adjudications clock or both the asylum EAD clock and the asylum adjudications clock.[39]

Further, once on remand, a case is no longer on appeal and there is no final order. Reversal of a denied asylum application means that no denial exists and the person is put in the status he or she was in before the order denying asylum was issued. *Cf. Matter of Lok*, 18 I&N Dec. 101 (BIA 1981); (reversal of deportation order nullifies the order and restores the alien's lawful permanent resident status); *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987) (same); *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1996) (court reversal of a BIA order of deportation nullifies the order); *Katsis v. INS*, 997 F.2d 1067 (3d Cir. 1993) (same). Although the EAD clock stops upon the denial of an asylum application, 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1), with no order denying asylum in effect, there is no bar to applying for work authorization. In such a situation, the clock should not be *restarted*, but rather should be treated as never having stopped.

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[38] *See* Appendix 2, AILA-EOIR Liaison Agenda Question 1, October 17, 2005.

[39] *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

The time should be recalculated from the date of the first order denying asylum. The IJ should "credit" all the time that elapsed since the original order denying asylum.

VII. WHAT HAS EOIR SAID ABOUT RESOLVING ASYLUM EAD CLOCK DISPUTES?

- Currently, EOIR has identified two tracks for a respondent to pursue to restart a stopped clock. A respondent or attorney may (1) contact the court administrator, and/or (2) file a motion with the immigration court.[40] EOIR says that "[w]hen a case is pending before the immigration courts, court administrators and immigration judges should review inquiries about the accuracy of the asylum clock and address errors without undue delay."[41]

- EOIR has suggested that arguments about the asylum EAD clock should be made at the hearing, and if the issue arises after the hearing, the respondent should file a written motion with the IJ.[42] EOIR said that the Office of the Chief Immigration Judge has no authority to overrule an IJ's decision.

- EOIR also has suggested that a respondent who thinks the clock has been improperly stopped due to a data entry error contact the court administrator by mail. [43] If the court administrator fails to timely respond or provides an unsatisfactory response, EOIR suggests contacting the assistant chief immigration judge at EOIR headquarters.[44] If a case is pending at the BIA, EOIR's Office of General Counsel may be contacted.[45]

VIII. ACTIONS AN ATTORNEY COULD TAKE TO RESTART THE ASYLUM EAD CLOCK OR PREVENT IT FROM STOPPING

- Once the clock reaches 150 days, immediately file the I-765, the EAD application. CIS then has 30 days to adjudicate the application. If the EAD is approved while the application is pending before the asylum office, the EAD may be renewed even if the case is later referred to the Immigration Court and while it is appealed to the BIA. 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b).

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[40] Contact information for the court administrator for each court is available at: http://www.usdoj.gov/eoir/sibpages/ICadr.htm.

[41] *See* Appendix, AILA-EOIR Liaison Agenda Question 3, October 17, 2005.

[42] *See* Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

[43] *See* Appendix, EOIR/AILA Liaison Agenda Question 3, March 16, 2005.

[44] *See* Appendix, AILA-EOIR Liaison Agenda Question 3, October 17, 2005. A list of the Assistant Chief Immigration Judges and their respective territory is *available at* http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm.

[45] *See* Appendix, EOIR/AILA Liaison Agenda Question 3, March 16, 2005;AILA-EOIR Liaison Agenda Question 3, October 17, 2005.

- Be aware of the code. How an adjournment is coded likely will determine whether the clock is stopped. If there are a variety of possibilities as to how to code the adjournment, assert that the clock is stopped based on an event that will not charge the respondent with delay. During the hearing, ask the IJ to indicate on the record the code used for continuing the case. It may be helpful to bring the list of codes to the hearing.[46]

- Where a respondent failed to attend an asylum interview or a hearing at the immigration court due to exceptional circumstances, the clock should not stop. If the case is before the IJ, the respondent may file a motion citing 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4) and demonstrate exceptional circumstances.

- Comply with the biometrics requirements. Promptly complete the biometrics requirements and submit proof to the court showing compliance. Even if there was a respondent caused delay (see discussion of biometrics above), as soon as the respondent has met the biometrics requirements, he or she may notify the IJ and request that the clock be restarted. EOIR says a respondent "may file a motion to inform the immigration judge that he or she has provided the requisite biometrics."[47] EOIR says this will "allow an immigration judge to attribute the future delay to DHS in advance of the next hearing."[48] In addition, or in the alternative, EOIR has said that the respondent may send a letter to the court administrator.[49]

- Monitor the status of the clock. Many people discover that the clock has been stopped after attempting to file for an EAD. Respondents may check the status of the clock at any time by calling EOIR's Automated Status Query System at 1-800-898-7180. According to EOIR, the 800-number is updated within the next day whenever there is a change to the clock.[50]

- Make a record: file a motion to restart the clock and argue your case. The clock stopping guidelines are confusing to IJs, court staff, attorneys, respondents, and the DHS. The case law, statutes and regulations are sparse; however, there are strong arguments based on the regulations, as this Practice Advisory illustrates. Cite the applicable regulations and argue why there is no applicant caused delay or why the applicant caused delay no longer exists. Review the different actions that EOIR believes stop the clock to assert a code that properly reflects the cause of the delay.

- This motion, like any other motion, must be adjudicated. Since motions fall under the case completion goals for EOIR, the adjudication should be timely. Also, filing a

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[46] *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.
[47] *See* Appendix, AILA-EOIR Liaison Agenda Question 2, October 17, 2005.
[48] *Id.*
[49] *See* Appendix, EOIR/AILA Liaison Agenda Question 8, March 27, 2003.
[50] *See* Appendix, AILA-EOIR Liaison Agenda Question 4, March 16, 2005.

motion and making an argument will ensure the issue is in the administrative record for possible review by the BIA and/or federal court.

- Appeal clock-related issues to the BIA. The BIA has not yet ruled on whether it will consider EAD clock issues on interlocutory or direct appeal. It could be argued that stopping the clock is a legal determination and an application of the regulations, so the BIA would be able to entertain such an appeal under 8 C.F.R. § 1003.1(b)(9) (relating to IJ decisions regarding asylum). The BIA has noted that the IJ has the authority to determine who caused a delay in processing an asylum case. *Matter of Hernandez*, 21 I&N Dec. 224, 228, n.2 (BIA 1996).

If you have questions or comments regarding this advisory, or current clients adversely affected by the asylum clock, contact Emily Creighton at ecreighton@immcouncil.org.

Appendix
Selected AILA-EOIR Liaison Notes on the Asylum Clock[51]

March 30, 2000, AILA-EOIR Liaison Meeting

11. *As you know, when an asylum case is proceeding before an immigration judge, the IJ stops the clock for purposes of employment authorization if the alien requests a continuance. Could EOIR issue instructions to IJs regarding the interpretation of this requirement? At present, some IJs stop the clock whenever alien's counsel is "unavailable" for the next "open date" on the court's calendar. Often the next "open date" is so soon that it is not realistic or just to expect that the alien or his or her advocate could be prepared to present the hearing on merits. We suggest the IJ offer a date that is no sooner than 30 days after the Master Calendar hearing.*

Also, if the attorney is "unavailable" because of a conflict with another EOIR hearing or interviews with the INS, this should not be considered an as alien-requested continuance.

Some IJs say that they are required to offer the soonest available date. Is there an instruction from EOIR to this effect? If so, could we obtain a copy of it?

RESPONSE

OPPM 97-6: Definitions and Use of Adjournment and Call-up Codes covers the use of adjournment codes in Immigration Court, as attached (for a list of OPPM's available on the agency's website, click *here*). There are no instructions which require an Immigration Judge to offer the earliest available date. One adjournment code which is considered an "alien-caused delay" is a rejection of the original hearing date. Immigration Judges must be given the flexibility to schedule asylum cases. Under section 208(d)(5)(A)(iii) of the Immigration and Nationality Act, in the absence of exceptional circumstances, final administrative adjudication of an asylum application shall be completed within 180 days after the application is filed. This statutory requirement may be an important consideration in scheduling asylum cases. Any policies cannot detract from the ability to meet this important statutory goal. A requirement to offer a hearing date no sooner than 30 days after the master calendar hearing is unrealistic for an expedited system.

We do not agree with your contention that attorney conflicts should not constitute "alien caused delays." An attorney acts on behalf of the alien. Any delays caused by an attorney conflict should be considered "alien caused delays."

[51] Complete AILA-EOIR Liaison Agenda Questions a*vailable at* http://www.usdoj.gov/eoir/statspub.htm.

March 7, 2002, AILA-EOIR Liaison Meeting

2. *Will EOIR request that Immigration Judges make formal findings on the record when the "clock" is stopped during the pendency of an asylum application through no fault of the alien? When there is no indication as to why the clock has stopped, who should we deal with at EOIR?*

RESPONSE

All continuances must be accurately assigned to the appropriate requesting party. The clock is tolled (stopped) for any alien caused delay. The clock remains stopped for the total number of days during which the delay continues. Immigration Judges must continue to give due consideration to requests from all parties for adequate time to prepare and to present their cases at the individual hearing. For further guidance on this issue, please see the Office of the Chief Immigration Judge's Operating Policy and Procedures Memorandum at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

EOIR will not require Immigration Judges to make formal findings on the record when the "clock" is stopped. However, if a party wishes to know whether his or her action will stop the clock, the party should inquire at the time of the action. If there is a question regarding the clock, please contact the Court Administrator. If the issue cannot be resolved at that level, then you may contact Loreto Geisse, Counsel to the Chief Immigration Judge, at: (703) 305-1247.

March 27, 2003, AILA-EOIR Liaison Meeting

8. *At the March 2002 EOIR liaison meeting, AILA inquired whether IJs would be required to state on the record the code for the "asylum clock" and to whom the continuance is attributable. There remain additional problems with the clock and the rights of asylum seekers to obtain an employment authorization document (EAD) which the OCIJ Operating Policy and Procedures Memoranda (OPPM) do not address.*

--There are times when an asylum hearing is not completed because the length of the testimony does not fit within the allotted time, even where the alien has requested a longer time slot. The clock remains stopped even when this is not the alien's fault.

--There are times when an IJ will continue the case for a second Master Calendar Hearing (MCH) after the filing of the I-589 to receive "evidence" or an updated affidavit at the second MCH when those items could be filed at a date prior to the Individual Hearing (IH). The clock remains stopped even though the alien did not request the second MCH.

(a) Will OCIJ issue further instructions on the clock to deal with these and other circumstances that keep arising?

RESPONSE

The OCIJ is constantly examining its policies and directives to the field in order to address issues that arise. This includes policies regarding the issue of asylum clocks. In the first example, the clock should not be stopped unless the reason why the hearing was protracted was due to the alien's actions. In the second example, the clock should be stopped, as the alien is causing the delay by not submitting all the documents required at the time the original asylum application was filed or at the first master calendar hearing. It is the alien who is asking for a benefit here–that of amending or updating his or her application. Consequently, it is an alien caused delay.

(b) What recourse do aliens have if they believe the clock has been improperly stopped? If the recourse is to file a motion to restart the clock, and it is denied, will OCIJ review that decision of the IJ?

RESPONSE

While cases are pending before the Immigration Court, an alien can contact the Court Administrator, by mail, if they believe that their asylum clock has been improperly stopped due to a data input error (e.g., the legal technician has entered into the system an incorrect code). If it cannot be corrected in a timely manner, please contact OCIJ headquarters. For concerns regarding the IJ's determination to whom the delay will be attributed, the parties should make their arguments at the hearing. If the issue arises after the hearing, please file a written motion with the Judge. Please note, however, that the OCIJ has no authority to overrule an IJ's decision.

(c) In its March 2002 response, EOIR advised AILA to contact the court administrator with regard to clock problems. Do you really want court administrators to deal with these matters on a case by case basis and, if not satisfied, to contact OCIJ?

RESPONSE

Yes.

March 16, 2005, AILA-EOIR Liaison Meeting

3. Members continue to have problems with the setting and resetting of the asylum clock for applicants in proceedings. On a case that is remanded or reopened, under what circumstances should the clock be restarted or reset where an asylum application has already been tendered and the clock "stopped" by some intervening event?

RESPONSE

If a motion to reopen is granted, and the decision on the asylum application was a grant, deny, or other, the ANSIR system displays the following three clock options: (1) restart the clock from the IJ completion date, (2) restart the clock from the motion to reopen completion date, (3)

do not restart the clock. For specific details, see the Office of the Chief Immigration Judge's Operating Policy and Procedures Memorandum (OPPM) 00-01, "Asylum Request Processing," available at http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf. Based on the immigration judge's selection, the clock will then be recalculated or will continue to be stopped. With respect to remands, OCIJ is currently reviewing clock issues and the ANSIR system and will provide further guidance at a later date.

If a practitioner disagrees with the clock setting, the first step is to try to resolve the concern locally with either the court administrator or the immigration judge and thereafter with the Assistant Chief Immigration Judge having jurisdiction over the particular court. However, if at any point the result is unsatisfactory and the case is on appeal to the Board, the request should instead be directed in writing to the Office of General Counsel. See http://www.usdoj.gov/eoir/sibpages/ICadr.htm for contact information, a list of the Immigration Courts, and the link to the list of areas of responsibility and jurisdiction of the Assistant Chief Immigration Judges.

4. Members continue to report confusion by the bar and Respondents as to whether and when the clock has been stopped and on what basis, only finding out weeks or months later when an application for an EAD is denied due to a stopped clock. Will EOIR reconsider requiring Immigration Judges to inform Respondents when their actions have resulted in stopping the clock for asylum purposes? ***[A similar question was asked in the March 7, 2002 Agenda Questions (#2). See http://www.usdoj.gov/eoir/statspub/eoiraila0203.htm . Asylum clock questions were also raised in the March 27, 2003 (#8) and March 30, 2000 (#11) Agenda Questions.]***

RESPONSE

EOIR will not require immigration judges to make formal findings on the record when the "clock" is stopped. However, if a party wishes to know whether his or her action will stop the clock, the party should inquire at the time of the action. For further guidance on which actions will stop the clock, see the Office of the Chief Immigration Judge's OPPM 03-03, titled "Definitions and Use of Adjournment, Call-up and Case Identification Codes," available at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

Moreover, the status of the clock can be checked at any time by calling EOIR's Automated Status Query System at 1-800-898-7180. Whenever there is a change to the clock, the 800-number is updated within the next day.

October 17, 2005, AILA-EOIR Liaison Meeting

1. At the last liaison meeting held on March 16, 2005, OCIJ stated that it was reviewing the clock stopping provisions as they relate to asylum cases that are remanded or reopened and would provide guidance at a later date. Has this issue been resolved and if so, how? If OCIJ has not yet addressed the issue, when does it anticipate resolving this issue?

RESPONSE:

Since the March 16, 2005, liaison meeting, the Office of the Chief Immigration Judge (OCIJ) has reviewed the issue of the clock and remands. When the Board of Immigration Appeals (Board) remands an asylum case to an immigration judge, the immigration judge does not restart or reset the asylum clock. OCIJ has considered the propriety of restarting or resetting the asylum clock and concluded that the clock would not restart upon remand. In reaching that conclusion, OCIJ relied on section 208(d)(5)(A)(iii) of the Immigration and Nationality Act. That section provides that in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed. When an immigration judge enters an order, the immigration judge stops the clock. Thus, if the immigration judge denied an asylum application on day 160, the clock would remain on day 160 while the case was on appeal and during any further proceedings.

2. At the AILA Annual Conference in Salt Lake City, EOIR commented that the new biometrics regulation would result in stopping the clock in expedited asylum cases between an initial master calendar and the next. Given the time in receipting in applications before the court and obtaining biometrics appointments, such a policy could result in a delay of three to four months. Please comment on the exact policy and mechanism that EOIR anticipates an asylum seeker in proceedings to follow in order to comply with the biometrics requirements, and their impact on the clock.

RESPONSE:

When adjourning a hearing and scheduling the next, immigration judges consider the reason for the delay and properly attribute the delay to the respondent or the Department of Homeland Security. As explained in the supplement to the background check regulation, **a respondent seeking relief is responsible for taking the initiative to provide biometrics or other biographical information in a timely manner.** *See* 70 Fed Reg. 4743, 4745 (Jan. 31, 2005). Therefore, when an immigration judge adjourns a case to allow the respondent time to complete the necessary paperwork or other requirements for the background investigations and security checks, the delay is attributed to the alien. Conversely, if DHS needs time to complete the background investigations and security checks, the delay is properly attributed to the government.

Because the Executive Office for Immigration Review (EOIR) has no role in the provision of biometrics or the processing of background checks, an immigration judge does not know whether a respondent has complied with the regulation. Therefore, an immigration judge generally learns that a respondent has complied during the next scheduled hearing. However, a respondent may file a motion to inform the immigration judge that he or she has provided the requisite biometrics. A motion reflecting the alien's compliance with the regulation would allow an immigration judge to attribute the future delay to DHS in advance of the next hearing.

3. Despite the recent instruction regarding procedures for restarting or correcting the asylum clock, many members report that the issues are not being resolved even when following

the steps noted in prior liaison minutes. Court administrators and immigration judges alike are telling respondents that they have no power over the issue and inquiries to both OCIJ and the Board remain unanswered after up to two months. Will EOIR review its procedures or revise its liaison instructions for resolving such cases?

RESPONSE:

EOIR agrees that asylum clock questions generally should not require two months for review. Any specific information that AILA can provide about cases illustrating delay may assist EOIR in identifying the source of any delay. In the event a court administrator or immigration judge has declined to respond to an asylum clock inquiry, if AILA provides the A number, OCIJ is willing to look into the matter. Please contact the Assistant Chief Immigration Judge (ACIJ) with control over the relevant geographic location. A list of the ACIJ's and their respective territory is available at http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm.

When a case is pending before the immigration courts, court administrators and immigration judges should review inquiries about the accuracy of the asylum clock and address errors without undue delay. OCIJ recently reminded court administrators and immigration judges about the importance of addressing asylum clock issues. In particular, court administrators were reminded that they had the responsibility for reviewing and addressing such inquiries in consultation with the immigration judges.

When a case is pending at the Board, asylum clock questions should be directed to the attention of the Office of General Counsel (OGC), who works with OCIJ to respond appropriately to the clock inquiry. Practitioners interested in additional information about the asylum clock and asylum clock inquiries may consult question 3 of the AILA-EOIR liaison agenda questions dated March 16, 2005, available at http://www.usdoj.gov/eoir/statspub/eoiraila031605.pdf.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

JUDICIAL REVIEW PROVISIONS OF THE REAL ID ACT

Practice Advisory[1]

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.

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[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 Remedying 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

BIA "AFFIRMANCE WITHOUT OPINION":
WHAT FEDERAL COURT CHALLENGES REMAIN?

Practice Advisory[1]

By Mary Kenney
April 27, 2005

The Board of Immigration Appeals (BIA) implemented its current "affirmance without opinion" (AWO) regulations more than two years ago. *See* 67 Fed. Reg. 54878 (Aug. 26, 2002). Since then, it has issued AWO decisions in thousands of cases. Many of these cases were appealed to federal court and as a result, all federal courts of appeals have ruled on the validity of the AWO decision-making practice. It is now well-settled that certain challenges to AWO decision-making are not viable. For example, courts have universally rejected a general due process attack on the AWO procedure. Despite this, there have been successful challenges to the *application* of the AWO procedure in certain circumstances. This practice advisory discusses the types of AWO challenges that have failed and those that remain available.

This practice advisory supplements and updates several earlier practice advisories AILF issued on AWO.[2] While information in each of these earlier practice advisories continues to be useful, you must remember that the case law has continued to evolve. Consequently, the information and suggestions contained in the earlier practice advisories

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[2] *See* "How to Challenge an Affirmance Without Opinion by a BIA Member," http://www.ailf.org/lac/lac_pa_100102.asp (Sept. 27, 2002); Challenging a BIA Summary Affirmance in Federal Court: How to Distinguish Albathani v. INS and Gonzalez-Oropeza v. U.S. Attorney General," http://www.ailf.org/lac/lac_pa_postalbathani_032503.pdf (Mar. 25, 2003); "Update on Affirmance Without Opinion Litigation," http://www.ailf.org/lac/lac_pa_120403.asp (Sept. 23, 2003); and "Update on BIA Affirmance Without Opinion Litigation," http://www.ailf.org/lac/lac_pa_120903.asp (Dec. 9, 2003).

must be read in conjunction with this current practice advisory and any cases that are subsequently issued. The information in this advisory is accurate as of the date of this practice advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

What challenges to the AWO procedure are no longer viable?

Courts agree that the AWO procedure in and of itself does not violate due process or basic rules of administrative law. The courts of appeals are in agreement that a general due process challenge to the AWO procedure is not viable. The majority of these courts also have rejected the argument that the AWO procedure on its face violates basic rules of administrative law by interfering with the federal court's ability to review the agency decision. Several courts also have rejected the claim that the AWO regulations violate the Immigration and Nationality Statute (INA). For relevant cases in each circuit, *see* Column 1 of the attached chart.

What challenges to the AWO procedure remain?

In most circuits, there remain several ways to successfully challenge the application of the AWO procedure in specific types of cases. Keep in mind, however, that a challenge to the use of the AWO procedure in a particular case generally will not be successful *unless* there are substantive errors in the merits of the case that you are also challenging. The following highlights arguments against the use of the AWO procedure that have been successful.

1. As a threshold matter, a number of courts have held that they have jurisdiction to review a Board member's determination to issue an AWO decision.

In cases throughout the country that challenge the use of the AWO procedure, the government has consistently taken the position that federal courts lack jurisdiction to consider whether the Board has complied with its own AWO regulations. Federal court review of a case is not permitted under the Administrative Procedures Act (APA) where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Relying on this section, the government claims that the decision whether to issue an AWO decision is within the "unfettered" discretion of the agency and thus argues that the courts lack jurisdiction under the APA.

The First, Third and Ninth Circuit Courts of Appeals have squarely rejected the government's arguments. These courts all have found that the decision whether to issue an AWO decision is not subject to unfettered discretion, but instead that Board members are bound by non-discretionary regulatory criteria. Consequently, these courts have held that they have jurisdiction to review the application of the AWO procedure to a particular case. *See Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003);

Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004); and *Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004), *pet. for reh'g en banc pending*.[3]

Several other courts have considered the question of whether the Board member followed the regulations in applying the AWO procedure to a case, without directly addressing the jurisdictional question. *See, e.g., Denko v. Ashcroft*, 351 F.3d 717 (6th Cir. 2003) (assuming without deciding that jurisdiction exists and finding that the procedure was properly applied in the case); *Garcia v. Attorney General*, 329 F. 3d 1217 (11th Cir. 2003) (finding that the case satisfied the AWO requirements without specifically examining its own jurisdiction over this issue).

In contrast, the Eighth and Tenth Circuit Courts of Appeals have accepted the government's arguments and held that they are without jurisdiction to consider a challenge to the application of the AWO procedure to a case. *See Ngure v. Att'y Gen.*, 367 F.3d 975 (8th Cir. 2004)[4]; *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004).

Note, however, that even in cases where the courts found jurisdiction to review the application of the AWO procedure, the court may not necessarily exercise this review. This is discussed in more detail in Section 3.

See Column 2 of the attached chart for identification of the lead cases in each circuit on this issue.

2. A challenge to the AWO procedure may exist where the Board's summary affirmance makes it impossible for a reviewing court to determine if it has jurisdiction.

Several courts have ruled that in certain circumstances, a summary affirmance by the Board is impermissible because it makes it impossible for a court to determine if it has jurisdiction over a petition for review. When this happens, the courts are willing

[3] Jurisdiction may be precluded on some other basis, however. *See, e.g., Falcon-Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003) (finding review of the use of the AWO procedure prohibited where it would involve review of a discretionary decision over which court's jurisdiction barred by INA § 242).

[4] The 8th Circuit has left open the possibility that an exception to this rule might apply in a case in which an IJ decision is based upon both grounds that are judicially reviewable and grounds that are not subject to review (*see* section 2 of this advisory), and where an intervening legal development may have affected the IJ decision. To date, the court has done nothing more than recognize the possibility of this exception. *See, e.g., Sui v. Ashcroft*, 395 F.3d 863 (8th Cir. 2005) (recognizing this as possible exception but finding no intervening legal developments related to the case).

to remand the case with instructions that the Board must explain its reasons for affirming the IJ decision.

This situation arises when the IJ issues a decision that is based upon alternate holdings, at least one of which is reviewable by the court and one of which is not reviewable. For example, the INA generally prohibits judicial review of a decision denying asylum because the application was not timely filed. *See* 8 U.S.C. § 1158(a)(3). In some cases an IJ will deny an asylum application because it was not timely filed, but also hold in the alternative that the individual is ineligible for asylum on the merits. Because the AWO procedure prohibits a Board member from explaining the reasons for an affirmance, the court in such a case will not be able to tell on what ground the Board member affirmed the IJ decision. If the Board member agreed with the IJ that the application was not timely filed, the court would have no jurisdiction. If the Board member affirmed the decision only on the merits, however, then the court would have jurisdiction to review the case. Because of the jurisdictional "conundrum" that this creates, several courts have held that use of the AWO procedure in this situation is impermissible. *See e.g.*, *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003); *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004); *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004).

Both the Board and the Department of Justice (DOJ) apparently now recognize that the AWO procedure should not be used if it will result in this type of jurisdictional conundrum, and that a remand is appropriate in any case in which a federal court faces this dilemma. In a brief to the Supreme Court, the DOJ attorneys informed the Court that:

> We have been informed by the Executive Office of Immigration Review … that … the Board has altered its practices and determined that in cases where the IJ's decision rests on both reviewable and nonreviewable grounds for denying relief from removal, AWO procedures should not be utilized. Furthermore, [the DOJ] … has adopted a policy of consenting to remands in such cases, including those that were decided under the AWO procedures prior to the policy change and that raise the jurisdictional conundrum.

See Kebede v. Gonzales, No. 04-280 (Supreme Court), Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 20.[5] In making this representation, DOJ specifically cited to *Haoud*, *Zhu*, and *Lanza* as cases in which the jurisdictional conundrum was present.

[5] The Supreme Court has since denied certiorari in this case. *See Kebede v. Gonzales*, 161 L.Ed. 2d 523 (Mar. 28 2005).

In light of the government's representation, attorneys handling "jurisdictional conundrum" cases that are in federal court can ask the government to join in a motion to remand, and can move for a remand even without the government's cooperation. Even if the case is not in federal court, attorneys whose clients received AWO decisions may consider filing a motion to reconsider with the Board. Although the Board's regulations preclude motions to reconsider based solely on the argument that the Board member should not have issued an AWO decision, arguably, this regulation is inapplicable to jurisdictional conundrum cases; alternatively, the regulation conflicts with the circuit court cases remanding where the Board's AWO decision prevented the court from determining its own jurisdiction. *See Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003); *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004); *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004).

This strategy can be successful even in those circuits that have indicated generally a lack of jurisdiction to review an AWO decision. For example, the 8th Circuit has held that it generally does not have jurisdiction to review the use of the AWO procedure. *See Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004); *Sui v. Ashcroft*, 395 F.3d 863 (8th Cir. 2005). Despite this, it has remanded a case presenting this issue on petitioner's motion with instructions that the Board review the case and indicate the grounds upon which it affirms the IJ's decision. *See Malonga v. Ashcroft*, No. 04-2059 (8th Cir.) (docket entry of April 15, 2005).

See Column 3 of the attached chart for identification of the lead cases in each circuit on this issue.

3. Even where jurisdiction is not an issue, two courts have held that the application of the AWO procedure to a particular case was in error.

As noted in section 1, some courts have found that they have jurisdiction to review the Board's application of the AWO procedure. The fact that jurisdiction exists, however, does not mean that a court will always exercise this review. For example, courts have indicated that in many cases it is unnecessary to review the Board's use of the AWO procedure because the court can resolve the case on the merits by reviewing the IJ's decision. *See, e.g., El Moraghy v. Ashcroft*, 331 F.3d 195, 206 (1st Cir. 2003) (review of decision to issue an AWO decision unnecessary where case is already being remanded on the merits); *Olowo v. Ashcroft*, 368 F.3d 692 (7th Cir. 2004) (indicating that it makes no practical difference whether AWO properly applied when court can review the IJ decision on the merits); *Falcon-Carriche v. Ashcroft*, 350 F.3d 845, 853 n.7 (9th Cir. 2003) (in most cases, review of the IJ decision on the merits and the decision to use the AWO procedure "collapses into one analysis').

Cases that present the jurisdictional conundrum discussed in section 2 are the clearest example of when federal court review should be exercised. There are other situations in which it is appropriate for a court to remand a case for improper use of the AWO procedure, even though no jurisdictional questions are involved. The Third and the Ninth Circuit Courts of Appeals both have done exactly this. In these cases, the

courts found that the regulatory requirements for an AWO decision were not satisfied.[6] Moreover, because both cases raised "novel" issues for which there was no squarely controlling precedent, the courts remanded the cases to the Board to allow it the opportunity to first rule on the issue. *Smriko v. Ashcroft,* 387 F.3d 279 (3d Cir. 2004); and *Chen v. Ashcroft*, 378 F.3d 1081, 1087 (9th Cir. 2004), *pet. for reh'g en banc pending*.

See Column 4 of the attached chart for identification of the lead cases in each circuit.

[6] For a discussion of the regulatory requirements for an AWO decision, *see* "How to Challenge an Affirmance Without Opinion by a BIA Member," http://www.ailf.org/lac/lac_pa_100102.asp (Sept. 27, 2002)

The following chart identifies the primary cases in each circuit on each of the issues identified in the practice advisory. This chart is current as of April 27, 2005. The case law on this issue continues to evolve, so be sure to research for any new cases in your circuit after this date.

Circuit Court	**Column 1** Does AWO violate due process or administrative law?	**Column 2** Does court have jurisdiction to review Board's decision to issue an AWO decision?	**Column 3** Judicial review where court's own jurisdiction in question?	**Column 4** Will court actually review Board's application of AWO regulations?[7]
1st	No -- *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003)	Yes – *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003); *cf. El Moraghy v. Ashcroft*, 331 F.3d 195, 206 (1st Cir. 2003) (review of decision to issue an AWO decision unnecessary where case is already being remanded on the merits)	Yes -- *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003)	Probably – *see Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003) (questioning use of AWO procedure where new evidence before the BIA)
2d	No -- *Zhang v. U.S. DOJ*, 362 F.3d 155 (2d Cir. 2004)	Possibly – *see Shi v. BIA*, 2004 U.S. App. LEXIS 13631 (2d Cir. 2004) (unpublished) (finding that the use of the AWO procedure was not an abuse of discretion)	No case	Possibly – *see Shi v. BIA*, 2004 U.S. App. LEXIS 13631 (2d Cir. 2004) (unpublished) (finding that the use of the AWO procedure was not an abuse of discretion)
3d	*No -- Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc) (also rejecting claim that AWO inconsistent	Yes – *Smriko v. Ashcroft*, 387 F. 3d 279 (3d Cir. 2004) (finding that a court can review whether the agency properly applied non-	No case	Yes – *Smriko v. Ashcroft*, 387 F. 3d 279 (3d Cir. 2004) (finding that BIA misapplied AWO procedure in violation of the regulations); *see*

[7] For a discussion of the difference between columns 2 and 4, see sections 1 and 3 above.

	with the INA)	discretionary AWO factors from the regulations)		*also Berishaj v. Ashcroft*, 378 F.3d 314 (3d Cir. 2004) (criticizing use of AWO); *Fang v. Ashcroft*, 2004 U.S. App. LEXIS 22699 (3d Cir. 2004) (unpublished) (remanding because use of AWO procedure was an abuse of discretion)
4th	*No -- Belbruno v. Ashcroft*, 362 F.3d 272 (4th Cir. 2004) (also rejecting claim that AWO inconsistent with the INA)	No case	No case	No case
5th	*No -- Soadjede v. Ashcroft*, 324 F.3d 830 (5th Cir. 2003)	Possibly – *see Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004) (reviewing AWO decision where its use prevented court from determining its own jurisdiction)	Yes – *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004) (remanding case where court could not tell if case was denied on an issue over which it had jurisdiction)	No case
6th	*No -- Denko v. INS*, 351 F.3d 717 (6th Cir. 2003)	Possibly – *see Denko v. INS*, 351 F.3d 717 (6th Cir. 2003) (declining to decide the issue but labeling government's argument "doubtful")	No case	No case
7th	*No -- Georgis v. Ashcroft*, 328	No decision; *but see Olowo v.*	No case	Possibly, at least in limited

	F.3d 962 (7th Cir. 2003)	*Ashcroft*, 368 F.3d 692 (7th Cir. 2004) (declining to decide the issue but indicating that it makes no practical difference whether AWO properly applied when court can review the IJ decision on the merits)		circumstances – *see Ciorba v. Ashcroft*, 323 F.3d 539 (7th Cir. 2003) (finding no error in Board having employed the AWO procedure); *but see Georgis v. Ashcroft*, 328 F.3d 962 (7th Cir. 2003) (indicating that in many cases it will not make a practical difference whether AWO properly applied when court can review the IJ decision on the merits).
8th	*No -- Loulou v. Ashcroft*, 354 F.3d 706 (8th Cir. 2003), *amended by* 2004 U.S. App. LEXIS 8347 (8th Cir. April 28, 2004)[8]	No – *see Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004); *Lau May Sui v. Ashcroft*, 395 F.3d 863 (8th Cir. 2005)	Generally no, with the possible exception of cases in which there is both a reviewable and non-reviewable issue and a new development in the law that may have undermined the IJ's reasoning. *Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004); *see also Somakoko v. Gonzales*, 399 F.3d 882 (8th Cir. 2005), *pet for*	No – *see Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004); *Lau May Sui v. Ashcroft*, 395 F.3d 863 (8th Cir. 2005)

[8] The Eighth Circuit also has rejected an argument that the AWO procedure violates the separation of powers doctrine, finding that this argument is essentially a due process argument foreclosed by *Loulou*. *See Reyes Vasquez v. Ashcroft*, 395 F.3d 903, 906 (8th Cir. 2005).

			reh'g pending	
9th	*No -- Falcon-Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003)	Yes – *see Falcon-Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003); *Chen v. Ashcroft*, 378 F.3d 1081 (9th Cir. 2004)	Yes – *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004); *but see Kasnecovic v. Gonzales*, 400 F.3d 812 (9th Cir. 2005) (distinguishing *Lanza*)	Yes – *see Chen v. Ashcroft*, 378 F.3d 1081 (9th Cir. 2004) (finding that the Board violated the AWO regulations because the case did not satisfy the regulatory criteria)
10th	*No -- Yuk v. Ashcroft*, 355 F.3d 1222 (10th Cir. 2004)	No – *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004)	No case – *but see Sviridov v. Ashcroft*, 358 F.3d 722 (10th Cir. 2004) (distinguishing Haoud because here the IJ did not rule on alternate reviewable and non-reviewable grounds)	No – *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004); *but cf. Batalova v. Ashcroft*, 355 F.3d 1246 (10th Cir. 2004) (reviewing Board's decision to issue a brief order under 8 CFR § 3.1(e)(5))
11th	*No -- Mendoza v. U.S. Att'y Gen.*, 327 F.3d 1283 (11th Cir. 2003)	Possibly – while the court has not explicitly ruled on this issue it has considered whether a particular case satisfies the AWO regulations. *See Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003) (finding that the case satisfied the AWO requirements); *Gonzalez-Oropeza v. Ashcroft*, 321 F.3d 1331 (11th Cir. 2003) (same)	No case	Possibly – while the court has not explicitly ruled on this issue it has considered whether a particular case satisfies the AWO regulations. *See Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003) (finding that the case satisfied the AWO requirements); *Gonzalez-Oropeza v. Ashcroft*, 321 F.3d 1331 (11th Cir. 2003) (same)

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court

By Trina Realmuto[2]
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 review[4] 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 remedying the failure to timely file a petition for review. Finally, the advisory provides an overview of the federal statue, 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. S*heviakov 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.

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[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 that 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 appeals[10] 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

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[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.

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[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.

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[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 Eight 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. Ashcorft*, 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*

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[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]

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[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 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

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[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 jurisdiction[18] or justifiable reliance on a statute or court decision.[19] Other courts have ordered transfer to preserve review that

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[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 review[20] 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]

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[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).

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
April 6, 2005

EOIR Background and Security Check Regulations – Effective April 1, 2005 Q and A

Introduction

On Friday, April 1, 2005, the Executive Office for Immigration Review's (EOIR) Background and Security Check regulations went into effect at the immigration courts and the Board of Immigration Appeals (Board or BIA). EOIR published the regulations as an interim rule on January 31, 2005. *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743 (January 31, 2005). Comments to the rule are due on May 2, 2005.[2] The rule is codified at 8 C.F.R. §§ 1003.1, 1003.19, 1003.47, 1208.4, 1208.10 and 1208.14.

The interim rule bars immigration judges and the BIA from granting most forms of relief until the Department of Homeland Security (DHS) has informed them that background and security checks have been completed. Under the rule, IJs will grant continuances and the Board will remand or "hold" the appeals until the checks are complete. The rule also says that respondents applying for relief are responsible for submitting biometric and biographical data; if applicants fail to submit this data, their applications may be deemed abandoned.

The following Q and A provides basic information about the requirements under the interim rule and highlights the major changes to the current procedures. At this time, it is not clear how this rule will be implemented. It appears that applicants for relief will have to send copies of their applications to a USCIS service center, along with the application fees; the service center then will mail the applicant a receipt notice and instructions to appear for a biometrics appointment. The Office of the Chief Immigration Judge issued

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[2] For more information about submitting comments, see Infonet, AILA Doc. No. 05033167.

an Interim Operating Policies and Procedures Memorandum (OPPM), 05-03 (Mar. 28, 2005) (http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-03.pdf), which gave guidance to IJs regarding the notice requirements and scheduling of remanded cases.

Q: Which forms of relief are covered by the rule?

A: This rule covers the following applications for relief from removal: asylum, adjustment of status, conditional permanent resident status, waivers under 209(c), 212 or 237, cancellation of removal, withholding of removal, and registry.

Although the rule does not preclude IJs from making decisions without completed background checks, the rule indicates that IJs, when scheduling bond redetermination hearings, should take into account the time needed for DHS to conduct a preliminary security check. The rule also permits – but does not require – IJs to grant "one or more" continuances for DHS to conduct security checks prior to the bond hearing.

Q: What are applicants' responsibilities under the rule?

A: Applicants for relief must provide biometrics and other biographical data.[3] DHS is responsible for obtaining this information from applicants who are detained.

At the hearing where the respondent first indicates that he or she intends to apply for relief, DHS and the IJ will provide the applicant with notice of the obligations under this rule and instructions for submitting the necessary information. On March 31, 2005, DHS began distributing an instructions form. The form is posted on Infonet (AILA Doc. No. 05040472). The form states:

> For Asylum, Withholding of Removal and CAT Applications:
> Asylum applicants must send copies of the first three pages of the I-589, the E-28, and the instructions to the USCIS Nebraska Service Center. The Nebraska Service Center will mail a receipt notice and a separate Application Support Center (ASC) notice providing the applicant with instructions to appear for a biometrics appointment.
>
> For Other Applications (including adjustment of status, cancellation of removal, and suspension of deportation):
> Applicants for other forms of relief from removal must send a copy of the application, the application fee, the biometrics fee, a copy of the E-28 and a copy of the instructions to the USCIS Texas Service Center.

[3] Biometrics currently include fingerprints, photographs, and signatures, but in the future, may include other digital technology. Other biographical data includes information such as name, address, date and place of birth, marital status, current immigration status, and employment authorization.

The instructions form does not specify procedures for respondents applying for waivers of inadmissibility and it leaves many questions unanswered. It also results in a major change in the way that fees and applications have been submitted.

Presumably, the procedures set forth in this instruction from will apply uniformly nationwide. However, applicants should comply with the specific instructions that are provided at the hearing.

Q: What are the consequences of failing to provide biometrics and biographical data?

A: The interim rule says that failure to provide biometrics and other biographical data in conformity with the rule and the instructions provided by DHS and the IJ constitutes abandonment of the application. The IJ may enter an order dismissing the application for relief unless the applicant demonstrates that failure to provide the data was the result of good cause.

Q: Does the interim rule say which security checks DHS must complete?

A: No. The interim rule does not specify which background and security checks DHS must conduct. EOIR takes the position that "it remains the province of DHS to determine what identity, law enforcement, and security investigations and indices checks are required (this may vary over time and from case to cases) and when those investigations and indices are complete." 70 Fed. Reg. at 4747.

Q: What happens if the applicant submits the necessary data, but the check is not complete on the day of the merits hearing?

A: The interim rule says that DHS shall endeavor to complete the security checks "as promptly as possible" and that "DHS shall attempt to give reasonable notice to the immigration judge" if the security check will not be complete on the date of the merits hearing. Nonetheless, if a security check is not complete on the day of the hearing, the IJ has two options:

(1) Continue the case, or
(2) Proceed with the hearing

The IJ, however, cannot grant the application for relief. According to OPPM 05-03, IJs also may not make a conditional grant of relief. The IJ may dictate and record a draft oral decision outside of the presence of the parties; the IJ cannot inform the parties that he or she is drafting a decision. The draft decision may be played to the parties and issued at a hearing after the security checks are complete.

Q: What happens to cases at the BIA?

A: The BIA may not grant or affirm a grant of relief from removal if the security checks are incomplete, if they are not current, or if new information has been uncovered. If the security checks are not complete or are not current, the BIA has two options:

(1) Remand the case to the IJ for completion of the checks, or
(2) Place the case on hold until the checks are complete

The supplemental information to the rule says that the BIA will remand most pending cases because the records do not indicate whether the security check was completed. EOIR anticipates that in the future, the BIA will establish internal procedures that will make "holding" cases the more efficient option. In these cases, the BIA must inform the parties that the cases are being placed on hold; DHS then must report to the BIA when the security checks are complete.

Q: What happens if a case is remanded to the IJ pursuant to this rule?

A: According to OPPM 05-03, the Board's order should contain instructions that the case is being remanded *solely* for DHS to complete the background check. The OPPM advises IJs that they should not readjudicate cases remanded for security checks. The immigration courts will schedule remanded cases for master hearings. If the security checks uncover no new information, the IJ will enter an order consistent with the Board's decision. The IJ will only schedule a merits hearing as needed if new information is uncovered by the security checks.

Q: What notice is provided to applicants that are granted relief?

A: The IJ and BIA decisions granting relief must advise applicants granted relief that they need to contact DHS for further proof of their status. DHS must inform EOIR of locations and followup procedures for applicants granted relief. DHS just issued a standard form; this form is posted on Infonet. See AILA Doc. No. 05040473.

Q: How does this rule affect *Santillan v. Ashcroft* and *Padilla v. Ridge* – the lawsuits challenging the government's refusal to issue evidence of LPR status?

A: There are two pending class action lawsuits that challenge the government's refusal to issue evidence of LPR status even after EOIR has granted adjustment of status. These cases are *Santillan v. Ashcroft*, No. 04-2686 (N.D. Cal.) (certified national class), and *Padilla v. Ridge*, No. M-03-126 (S.D. Tex.) (certified district class). After the interim rule was published, the defendants in these lawsuits filed motions to dismiss. The courts have not issued final decisions on the motions. For more information about these lawsuits, see Infonet AILA Doc. No. 04102262 and http://www.txlawyerscommittee.org/news/releases/SantillanClassCertification.htm.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
October 19, 2004

ST. CYR REGULATIONS AND STRATEGIES FOR APPLICANTS WHO ARE BARRED FROM SECTION 212(c) RELIEF UNDER THE REGULATIONS

By Beth Werlin[2]

This practice advisory is the fifth in a series of advisories following up on the Supreme Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001). The information 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.

I. INTRODUCTION AND SUMMARY

The Department of Justice (DOJ) published its final rule on procedures for applying for section 212(c) relief pursuant to the Supreme Court's decision *INS v. St. Cyr*, 533 U.S. 289 (2001). The final rule adopts without substantial changes the proposed rule.[3] The regulations are effective on October 28, 2004. This practice advisory describes who can apply for section 212(c) relief under the regulations and discusses strategies and arguments to assist individuals who are barred under the regulations.

The regulations allow only persons who *pled guilty or nolo contendere before April 1, 1997* to apply for relief. Under the regulations, persons who were convicted after a trial are not eligible. The eligibility requirements and bars to section 212(c) relief, *as they existed at the time of the plea agreement*, will apply. In a change from the proposed rule, the final regulations say that applicants who entered pleas prior to November 20, 1990 are not subject to the bar for five year sentences for an aggravated felony.

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[2] Beth Werlin is a staff attorney at the Legal Action Center. We gratefully acknowledge the contributions of Nancy Morawetz, Manuel Vargas, and Trina Realmuto.

[3] *See* Department of Justice, Executive Office for Immigration Review; Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57826 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240). This rule was proposed initially in August 2002. *See* 67 Fed. Reg. 52627-52633 (proposed Aug. 13, 2002).

Special motions to reopen to apply for section 212(c) relief must be filed by **April 26, 2005.** This deadline applies only to motions to reopen and does not affect eligibility to apply for relief in any new or pending cases. Under the regulations, individuals who were deported or departed the United States and/or who illegally returned are not eligible to apply for section 212(c) relief.

Additional categories of people may be eligible to apply for relief, but they are not covered by the new regulations. For example, in the Third Circuit, applicants who were *convicted after* a trial are eligible to apply for section 212(c) relief. Furthermore, some circuits have not addressed this issue, and there are untested arguments even in those courts that have decided the issue adversely.

II. WHO CAN APPLY FOR SECTION 212(C) RELIEF UNDER THE REGULATIONS?

The regulations allow lawful permanent residents (LPRs) and former LPRs to apply for section 212(c) relief. The applicant must show that he or she meets the following criteria:

- The applicant is an LPR or was an LPR until he or she received a final order of deportation or removal.

- The applicant pled guilty or nolo contendere to an offense rendering him or her deportable or removable pursuant to a plea agreement made before April 1, 1997.[4] The triggering date for section 212(c) eligibility is the date on which the plea was agreed to by the parties.

- The applicant had seven consecutive years of lawful unrelinquished domicile in the United States prior to the date of the final administrative order of deportation or removal or, if the person does not have a final order, by the time that he or she applies for 212(c) relief.

- The applicant was otherwise eligible to apply for section 212(c) relief *at the time the plea was made*. The applicant must be removable or deportable on a ground that has a corresponding counterpart in INA § 212. (But see Section IV of the practice advisory for further discussion.)

III. WHICH VERSION OF SECTION 212(C) APPLIES?

[4] The new regulations do not provide any relief for individuals who were convicted after a trial. However, 8 C.F.R. § 1212.13(g) – part of the "*Soriano* rule," 66 Fed. Reg. 6436 (Jan. 22, 2001) – continues to apply. This provision allows a person who was placed in deportation proceedings prior to April 24, 1996 to apply for 212(c) relief, regardless of whether the conviction was by plea or trial. However, the deadline to file a motion to reopen was June 23, 2001. 8 C.F.R. § 1003.44(f) 2004) (amended by 69 Fed. Reg. at 57833). DOJ will apply the *Soriano* rule to any pending *Soriano* motions.

Under the regulations, different versions of section 212(c) apply. To determine which version applies, DOJ will look to the date that the applicant pled guilty.

- **Pleas/Nolo Contendere Before November 29, 1990 (the date of enactment of the 1990 amendment to the INA)**

  Section 212(c) as it existed prior to the 1990 amendment will apply. Thus, applicants are eligible for 212(c) relief even if they served a sentence of five years or more for the aggravated felony conviction(s). ***This is a change from the proposed rule***. In making this change, DOJ acquiesced in the Ninth Circuit's decision in *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003). *See* 69 Fed. Reg. at 57830. In *Toia*, the court held that a 1990 amendment to the INA barring the availability of section 212(c) relief for aggravated felons who served a sentence of at least five years does not apply retroactively to individuals who entered into plea agreements before the date of enactment, November 29, 1990.

- **Pleas/Nolo Contendere On or After November 29, 1990 and Before April 24, 1996 (the date of enactment for the Antiterrorism and Effective Death Penalty Act (AEDPA))**

  Section 212(c) as it existed prior to AEDPA will apply. Thus, the applicant must have served a term of less than five years imprisonment if the conviction is an aggravated felony.

  Some respondents who, before *St. Cyr* was issued, were erroneously deprived of the opportunity to apply for section 212(c) relief now have served more than five years in prison. However, not all of these people had served five years at the time that they were denied relief by the immigration judge. Several district courts have held that they are eligible to apply for section 212(c) relief now. *See, e.g., De Cardenas v. Reno*, 278 F. Supp. 2d 284 (D. Conn. 2003); *Hartman v. Elwood*, 255 F. Supp. 2d 510 (E.D.P.A. 2003); *see also Velez-Lotero v. Achim*, 312 F. Supp. 2d 1097 (E.D. Ill. 2004) (petitioner eligible because he had not served five years at the time he entered into a plea agreement in criminal court).

  Not all courts have looked to the date of the immigration judge's decision to determine if the applicant served five years. The First Circuit has said that the relevant date is when the BIA issues its decision. *Gomes v. Ashcroft*, 311 F.3d 43 (1st Cir. 2002) (denying relief where petitioner served more than five years when the BIA dismissed appeal). Likewise, the Second Circuit has indicated that the time in prison continues to accrue until the BIA issues a decision, *Brown v. Ashcroft*, 360 F.3d 346, 354 (2d Cir. 2004). However, in *Brown*, the section 212(c) applicant had served more than five years even prior to the immigration judge's decision – other cases may be distinguishable based on this fact.

- **Pleas/Nolo Contender After April 24, 1996 but before April 1, 1997 (the effective date of IIRIRA)**

Section 212(c) as it was modified by AEDPA will apply. Thus, the following individuals are *not* eligible: LPRs convicted of an aggravated felony, controlled substance offenses, certain firearms offenses, espionage or treason, or two or more crime involving moral turpitude committed within five years after entry and for which the sentence is one year or longer.

IV. DEPORTABILITY CHARGES MUST HAVE INADMISSIBILITY "COUNTERPART"

The final rule added a provision specifying that where the respondent is charged under INA § 237 or former INA § 241, the removability or deportability charge must have a "statutory counterpart" in INA § 212 (grounds of inadmissibility). *See* 8 C.F.R. § 1212.3(f)(5); 69 Fed. Reg. at 57831-32 (citing *Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979), *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988), *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991)). This provision is consistent with a long line of precedents holding, generally, that section 212(c) is available in deportation proceedings only where the deportability ground has a comparable excludability ground.[5]

Because "aggravated felony" is a ground of deportability (INA § 237(a)(2)(A)(iii)), but not a ground of inadmissibility, respondents charged with aggravated felonies should be aware that the government *may* contend that they are not eligible for section 212(c) relief. Respondents with aggravated felony convictions, however, are eligible for relief, as evidenced by the Supreme Court's decision in *St. Cyr*.[6] Likewise, the BIA has found that respondents with aggravated felonies may apply for section 212(c) relief. *See Matter of Meza*, 20 I&N Dec. 257 (BIA 1991). In *Matter of Meza*, the Board looked to the specific category of aggravated felony at issue – illicit trafficking in a controlled substance – and found that the conviction also could form the basis for excludability under former INA § 212(a)(23) (1988) (trafficking offenses). Thus, because there was a comparable excludability ground, the respondent was eligible to apply for section 212(c) relief.

Furthermore, in *Matter of Meza*, the Board noted that the 1990 amendment to section 212(c) specifically bars noncitizens who had served more than five years for an aggravated felony; this amendment implies that relief is available to respondents

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[5] *See, e.g., Matter of Jimenez*, 21 I&N Dec. 567 (BIA 1996); *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991), *aff'd* 983 F.2d 231 (5th Cir. 1993); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991); *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). The courts of appeals have upheld these decisions. *See, e.g., Rodriguez-Padron v. INS*, 13 F.3d 1455 (11th Cir. 1994); *Rodriguez v. INS*, 9 F.3d 408 (5th Cir. 1993); *Campos v. INS*, 961 F.2d 309 (1st Cir. 1992); *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988).

[6] Mr. St. Cyr was convicted of a drug trafficking crime, an aggravated felony, and charged as removable under INA § 237(a)(2)(A)(iii). *St. Cyr v. INS*, 229 F.3d 406, 408 (2d Cir. 2000).

convicted of aggravated felonies. In fact, the concurrence in *Matter of Meza* rested solely on this basis. *Matter of Meza*, 20 I&N Dec. 257, 260-61 (BIA 1991) (Heilman, Board Member, concurring). The concurring BIA member reasoned that because there is no ground of excludability based on conviction of an aggravated felony, the fact that Congress amended section 212(c) to bar relief to certain persons convicted of aggravated felonies must mean that 212(c) applies to deportable offenses. The concurrence also concluded that the BIA's previous cases requiring a comparable ground of deportability are no longer relevant:

> It appears that this amendment renders irrelevant the holdings in such cases as *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984), and *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979), *aff'd*, 624 F.2d 191 (9th Cir. 1980), as far as aggravated felonies are concerned. … Congress has now given a statutory basis for an application for section 212(c) relief in deportation proceedings, where previously this relief had only been available through administrative and judicial interpretation.

In subsequent cases, the BIA has indicated that *Matter of Meza* is limited to the issue of section 212(c) eligibility in the case of a conviction of a drug trafficking aggravated felony. *See Matter of Esposito*, 21 I&N Dec. at 9-10; *Matter of Montenegro*, 20 I&N Dec. 603, 606 (BIA 1992). *Matter of Meza*, however, need not be read so narrowly. At a minimum, respondents convicted of aggravated felonies can argue that the specific category of aggravated felony, *see* INA § 101(a)(43), has a comparable ground of inadmissibility. It also is noteworthy that the most recent cases on the issue of "comparable grounds" have dealt with non-aggravated felony grounds of deportability.[7] The argument presented in the concurrence of *Matter of Meza* lends additional support to respondents removable based on a an aggravated felony conviction.

V. SPECIAL MOTION TO SEEK 212(C) RELIEF

Under the new regulations, former LPRs who are subject to an administratively final order of deportation, exclusion or removal may file a "special motion to seek section 212(c)." 8 C.F.R. § 1003.44. The deadline for filing the motion is April 26, 2005. This deadline applies only to motions to reopen and does not affect eligibility to apply for relief in any new or pending cases. Noncitizens placed in removal proceedings at a future date will be able to apply for section 212(c) relief if they are eligible under these regulations; they will not need to file a special motion.

A. Procedures (8 C.F.R. § 1003.44(e) - (j))

[7] The most recent cases found that section 212(c) relief was not available to respondents charged under former sections 241(a)(3)(B)(iii) (document fraud conviction), 241(a)(2)(C) (firearms conviction) and 241(a)(2) (entered without inspection) of the INA. *Matter of Jimenez*, 21 I&N Dec. 567 (BIA 1996); *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991)

Venue: The motion should be filed with the immigration judge or the Board of Immigration Appeals (Board or BIA), whichever last held jurisdiction. Typically, this means that the motion should be filed with whichever body last made a decision on the case.

Fee: There is no filing fee for the motion, but the applicant must pay the section 212(c) application fee if the motion is granted (assuming it has not been paid previously).

Contents and Format: The motion must be accompanied by the Form I-191 application (on the web at http://uscis.gov/graphics/formsfee/forms/files/i-191.pdf) and supporting documents. The motion must contain the notation, "special motion to seek section 212(c) relief."

DHS Response: DHS has 45 days form the date of filing to respond to the motion.

Reopened Proceedings: If the motion is granted, the case is reopened solely for the purpose of applying for section 212(c) relief, unless a motion to reopen on other grounds is granted. If the Board has jurisdiction and grants the motion, it will remand the case to the immigration judge for adjudication of the section 212(c) application.

Number Limitations: This motion has no effect on the number limitations on motions to reopen.

B. Rules when a motion to reopen already was filed with the immigration judge or Board (8 C.F.R. § 1003.44(g))

If there is a pending motion unrelated to section 212(c) relief: The applicant must file a separate special motion, and note that there currently is another motion pending.

If there is a pending motion for section 212(c) relief based on *St. Cyr*: The applicant is not required to file a separate motion, but may supplement the previous motion.

If there is a pending motion for section 212(c) relief based on the prior regulations (*Soriano* rule): The applicant is not required to file a separate motion. The immigration judge or Board will apply the *Soriano* rule and the new regulation.

If a motion filed under the *Soriano* rule was denied: The applicant may file a new special motion for section 212(c) relief, but he or she must meet the eligibility requirements under this regulation.

If a motion filed under *St. Cyr* was denied: The immigration judge or Board will not grant a motion where the applicant already has filed a motion to reopen under *St. Cyr*, and it was denied (unless the motion was denied as untimely or over the motion to reopen number limit).

C. Other Bars to Special Motions for section 212(c) Relief

- Previously Denied Relief – A person who was previously denied section 212(c) relief on discretionary grounds will not be allowed to reopen his or her case. 8 C.F.R. § 1003.44(d).

- Deported or Departed – The immigration judge or Board will not grant a motion filed by a person who has departed the United States, is currently outside the United States, who illegally returned to the United States, or who has not been admitted or paroled. 8 C.F.R. § 1003.44(k).

VI. STRATEGIES FOR APPLICANTS WHO ARE BARRED FROM APPLYING FOR RELIEF UNDER THE REGULATION

The regulations exclude many LPRs or former LPRs who may be otherwise eligible to apply for section 212(c) relief, including: 1) those who were convicted after trial (as opposed to plea agreement), and 2) those who were deported or removed from the United States prior to the Supreme Court's decision in *St. Cyr* (June 25, 2001). Despite their ineligibility under the regulations, these LPRs may have claims for section 212(c) relief based on constitutional and/or statutory retroactivity grounds.

A. LPRs Who Were Convicted After Trial

Although 25% of the comments received by DOJ in response to the proposed *St. Cyr* rule recommended that individuals who were convicted as result of a *trial* be allowed to apply for relief, DOJ declined to adopt this recommendation. It noted that the "issue has been heavily litigated in the federal courts," and erroneously said that "every circuit that has addressed the question has held that an alien who is convicted after trial is not eligible for 212(c) relief…." 69 Fed. Reg. at 57828. The Third Circuit, however, held that people who were convicted by a trial prior to IIRIRA's enactment date, April 1, 1997, may apply for section 212(c) relief. *See Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004). Thus, LPRs and former LPRs in the Third Circuit who were convicted after trial may ask the BIA or the immigration court to reopen their proceedings to apply for section 212(c) relief notwithstanding the new regulations.[8] Petitioners in circuits where the issue has not been decided should ask the courts to follow the Third Circuit, and petitioners in other circuits with adverse decisions may request rehearing en banc in light of *Ponnapula*.

Another favorable circuit court decision to note is *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004). In this case, the Second Circuit indicated that some LPRs with pre-AEDPA trial convictions may be eligible for section 212(c) relief. The Second Circuit dissent in *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004), offers additional arguments for LPRs with trial convictions. Moreover, the Sixth Circuit has decided in favor of a petitioner

[8] The Board is bound to follow a circuit court's precedent in cases arising in that circuit. *See, e.g., Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002); *Matter of Cazares*, 21 I&N Dec. 188, 192 (BIA 1997); *Matter of K-S-*, 20 I&N Dec. 715, 717-18 (BIA 1993); *Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989).

who was convicted of two crimes of moral turpitude, the first of which was a trial conviction and the second of which was a plea agreement. *See Thaqi v. Jenifer*, 377 F.3d 500 (6th Cir. 2004). *Ponnapula*, *Restrepo*, *Thom*, and *Thaqi* are discussed in more detail below and may be consulted if litigating this issue in the courts.

The following is a representative list of the circuit court cases to address whether LPRs with trial convictions are eligible for section 212(c) relief. The case law is still developing. Also, not all of these cases address all arguments in support of allowing LPRs with trial convictions to apply for section 212(c) relief, and so there may be untested arguments in each circuit.

First Circuit	*Dias v. INS*, 311 F.3d 456 (1st Cir. 2002)
Second Circuit	*Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003); *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004); *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004)
Third Circuit	*Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004)
Fourth Circuit	*Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002)
Sixth Circuit	*Thaqi v. Jenifer*, 377 F.3d 500 (6th Cir. 2004)
Seventh Circuit	*Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004)
Ninth Circuit	*Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002)
Eleventh Circuit	*Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002)

Retroactivity Analysis

When litigating whether an LPR with a trial conviction is eligible for section 212(c) relief, the primary issue is whether the repeal of section 212(c) can be applied retroactively. In *St. Cyr*, the Supreme Court analyzed this issue under the two-step retroactivity test of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and its progeny.

The first step of the *Landgraf* retroactivity test requires a court to determine "whether Congress had directed with the requisite clarity that the law be applied retrospectively." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (quoting *Martin v. Hadix*, 527 U.S. 343, 352 (1999)). If Congress has clearly expressed its intent for the law to be applied retroactively, then the inquiry is at an end. However, if Congress did not clearly indicate whether the law is to be applied retroactively, then the second step of the *Landgraf* test requires the court to examine whether the retroactive application of the law in question "produces an impermissible retroactive effect" on those who are affected by the change in the law. In general, "[a] statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'" *St. Cyr*, 533 U.S. at 321 *quoting Landgraf*, 511 U.S. at 269.

The first step of the *Landgraf* analysis already has been answered in favor of the LPRs. *St. Cyr* said that Congress did not clearly express its intent to retroactively apply the repeal of section 212(c) relief to pre-AEDPA convictions.

Moving on to the second step of the analysis, LPRs who were convicted after trial need to show that applying the repeal of section 212(c) would produce an impermissibly retroactive effect. In making this showing, the "relevant past event" for purposes of the retroactivity analysis must be identified. The following events have been proposed:

1. the criminal conduct[9]

2. the agreement to plead guilty (*see* DOJ final rule)

3. the decision to go to trial (*see Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004))

4. the conviction (*see Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (Underhill, J., dissenting))

5. the decision to forego the affirmative filing of a section 212(c) application based on the expectation that they would be permitted to file a stronger application later (*see Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004))

The Third Circuit's Decision in *Ponnapula*

In *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004), the Third Circuit considered the case of an individual who, before the effective date of IIRIRA, turned down a plea agreement and who then sustained a trial conviction. The court held that he had a reasonable reliance interest in the availability of section 212(c) relief, regardless of whether such reliance was only one consideration of many in the decision to go to trial. The court said,

> if it was reasonable in *St. Cyr* for an alien to rely on the attenuated availability of § 212(c) relief in accepting a plea agreement, we see no reason why it would be unreasonable for the same alien to likewise rely in declining a plea agreement. The reasonable reliance question turns on the nature of the statutory right and the availability of some choice affecting that right, not on the particular choice actually made.

[9] If the criminal conduct is the "relevant past event" then the date of the actual conviction or plea agreement, as well as the type of conviction (plea vs. trial), is irrelevant. The Oregon district court recently focused on the date of the criminal conduct for purposes of the retroactivity analysis. *See Garcia-Plascencia v Ashcroft*, No. 04-1067 (D. Or. Sept. 28, 2004) (posted at http://www.lexisnexis.com/practiceareas/immigration/pdfs/web624.pdf); *see also Thom v. Ashcroft*, 369 F.3d 158, 168-69 & n. 17 (2d Cir. 2004) (Underhill, J., dissenting); *Restrepo v. McElroy*, 369 F.3d 627, 643 (2d Cir. 2004) (Calabresi, J., concurring); *Chambers v. Reno*, 307 F.3d 282, 293-298 (4th Cir. 2002) (Goodwin, J., dissenting); *but see Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (citing *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)); *Domond v. INS*, 244 F.3d 85-86 (2d Cir. 2001).

The Third Circuit's decision discussed and criticized other courts' retroactivity analysis. First, according to the Third Circuit, the other circuit courts "erected too high a barrier to triggering the presumption against retroactivity." "Because the Supreme Court has repeatedly couched its holdings in this area in terms of a liberal presumption--albeit one that arises only conditionally, on a finding of retroactive effect--we read *Landgraf* and its progeny to hold that the presumption against retroactivity is easily triggered, though not automatic." The *Ponnapula* court further concluded that the other circuit courts failed to apply the presumption against retroactivity, but rather treated "*Landgraf* as establishing a presumption in favor of retroactive application."

Second, the other circuits erred by requiring petitioners who sustained trial convictions to show actual reliance on the availability of section 212(c) relief, the court's opinion continued. The court held that "[t]he Supreme Court has never required actual reliance or evidence thereof in the Landgraf line of cases, and has in fact assiduously eschewed an actual reliance requirement." The court said: (1) in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court found that the statute could not be applied retroactively "without once referring to the defendant's conduct or the defendant's actual expectations"; (2) in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Supreme Court found that the statute could not be applied retroactively "without reference to Hughes Aircraft's conduct or expectations"; (3) in *Martin v. Hadix*, 527 U.S. 343 (1999), the Supreme Court found that the statute could be applied retroactively, however, the Court's "discussion focus[ed] not on the bona fides of the attorneys' claimed actual reliance, but instead on whether reliance was (or would have been) reasonable"; and (4) in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court found that the statute could not be applied retroactively and the Court's retroactivity analysis "avoided an 'actual reliance' formulation in favor of a 'reasonable reliance' formulation…."

Third, the *Ponnapula* court found that the other circuits erroneously have required petitioners to prove that their past conduct evidenced their intention to preserve section 212(c) relief by going to trial. The court noted it was "unable to locate [this evidentiary burden] in the *Landgraf* line." Furthermore, the court concluded that "[t]he Landgraf line also establishes that a change in law can be found impermissibly retroactive without establishing that some (or all) members of the group affected by the change in law relied on the prior state of the law."

Nonetheless, acknowledging the "constricted and questionable (but nonetheless prevailing) view" taken by other circuits on this issue, the court then proceeded to demonstrate that the retroactive application of IIRIRA's repeal of section 212(c) to petitioner would have an impermissibly retroactive effect notwithstanding those decisions. The court distinguished petitioner Ponnapula's situation from the situation of the petitioners in those decisions. This part of the decision may help petitioners distinguish their cases from adverse precedents in other circuits.

The Second Circuit's Decisions in *Restrepo* and *Thom*

In *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), the Second Circuit held that AEDPA § 440(d) may have an impermissibly retroactive effect if applied to LPRs who sustained pre-AEDPA aggravated felony convictions following a jury trial. Significantly, the petitioner in *Restrepo* claimed that he decided to forego his opportunity to affirmatively file a section 212(c) application before AEDPA based on "the considered and reasonable expectation that he would be permitted to file a stronger application for § 212(c) relief at a later time."

The court of appeals remanded the case to the district court to decide in the first instance whether the petitioner would have to make an individualized showing that he did not apply affirmatively for section 212(c) based on this expectation, or whether such reliance may be presumed in all such cases under a categorical approach.[10] Although the court remanded on this important issue, it noted that the Supreme Court did not require an individualized showing in *St.* Cyr. The court said "the [*St. Cyr*] Court never suggested that all parties who claim that a statute has a retroactive effect must show the disruption of a *quid pro quo* exchange. And it would be out of keeping with the reasoning of St. Cyr II to read such a *quid pro quo* requirement into that opinion." Judge Calabresi's concurrence expressed his preference for the categorical approach.

The court also said that its holding was consistent with its prior decision in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003). In *Rankine*, the court had declined to extend *St. Cyr* to LPRs who were convicted after trial. The *Restrepo* court noted that

> *Rankine* resolved the narrower question of whether an alien detrimentally relied on the continuing availability of 212(c) relief in deciding to go to trial rather than accepting a plea. Petitioner, by contrast, raises a separate and distinct reliance claim that *Rankine* did not have occasion to address since it arose outside of the plea bargaining context.

Just two months after the Second Circuit decided *Restrepo*, it issued another decision in a case involving a pre-AEDPA trial conviction, *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004). In *Thom*, the court held that *Rankine* governed and that the petitioner was ineligible for section 212(c) relief. The court distinguished *Thom* from *Restrepo* on the ground that the petitioner in *Restrepo* claimed that he relied on the fact that he would later have an opportunity to file a stronger application for relief. The *Thom* court said, "[b]ecause Petitioner does not claim any other basis for such a reliance or expectation, see, e.g., *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), we hold that IIRIRA and the AEDPA may be applied retroactively to him."

Given the court's decision in *Thom*, petitioners in the Second Circuit may want to raise the *Restrepo* argument: the repeal of section 212(c) has an impermissibly retroactive effect on LPRs with pre-AEDPA trial convictions because they gave up their opportunity to affirmatively file an application for relief. Petitioners may also argue that the "categorical approach" should apply. Under the categorical approach, petitioners would not have to make an individualized showing that they relied on the expectation that they

[10] The briefing at the district court is scheduled to be completed Fall 2004.

would apply for relief at a later time. In addition, petitioners who have evidence that they relied on the expectation of applying for relief may present that argument.

The Sixth Circuit's Decision in *Thaqi*

In *Thaqi v. Jenifer*, 377 F.3d 500 (6th Cir. 2004), the petitioner had two convictions involving moral turpitude: the first in 1994 by jury trial and the second in 1995 by guilty plea. The Sixth Circuit Court of Appeals found that he was eligible for section 212(c) relief because applying the repeal of section 212(c) to the petitioner would have an impermissibly retroactive effect. The court said, "the crime that rendered him ineligible for § 212(c) relief was also the result of a guilty plea -- it was his second conviction, in which he pleaded guilty to larceny, that made him guilty of two unconnected crimes of moral turpitude." Thus, the court reasoned that the petitioner, like the petitioner in *St. Cyr*, might have contested the larceny charge had he known that later legislation would deprive him of eligibility for section 212(c) relief.

Importantly, the court noted that *St. Cyr* does not require that a petitioner demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissibly retroactive effect. All that *St. Cyr* requires is that "petitioner is among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for § 212(c) relief." The court also distinguished decisions in the First, Second, Fourth and Ninth Circuits holding that there was no impermissibly retroactive effect where the petitioners had been convicted by a trial. The court found that those decisions were not applicable to petitioner's case because "[a]lthough [petitioner's] first conviction resulted from a jury trial, his second, the one which would render him ineligible for § 212(c) relief under AEDPA, resulted from a guilty plea."

B. LPRs who Departed the United States

The final rule bars former LPRs who were eligible for section 212(c) relief but were deported or removed from the United States from filing special 212(c) motions. 8 C.F.R. § 1003.44(k). This bar applies to the following groups: those who have departed the United States; those who were deported or removed but have illegally returned to the United States;[11] and those who have not been admitted or paroled.

DOJ justifies this bar by noting that existing regulations, *see* 8 C.F.R. § 1003.2(d), "treat an executed deportation or removal order as administratively complete, thereby eliminating any possibility of challenging a proceeding that resulted in the departure of an alien." 69 Fed. Reg. at 57827. Furthermore, DOJ asserts that "aliens who have been deported had a sufficient opportunity to challenge the denial of their applications for 212(c) relief in administrative and judicial proceedings." *Id.* at 57827-28.

Although not all individuals who have been deported had a "sufficient opportunity" to challenge the denial of relief, past efforts to challenge the denial of motions to reopen for people who have departed the United States have been unsuccessful. *See Robledo-Gonzalez v. Ashcroft*, 342 F.3d 667 (7th Cir. 2003); *Patel v. U.S. Atty. Gen.*, 334 F.3d

[11] Significantly, these individuals may be subject to summary removal if DHS reinstates their prior orders under INA § 241(a)(5). See AILF's web page (www.ailf.org) for the most recent practice advisory on reinstatement of removal.

1259 (11th Cir. 2003); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003). Nonetheless, most circuit courts have not addressed whether DOJ can bar motions filed from people who have left the United States. Further, even the courts that have upheld this bar have not addressed all of the arguments or challenges that may be presented. Attorneys with strong cases for relief, particularly where the petitioner did not have a "sufficient opportunity" to challenge the denial of relief may contact AILF's Legal Action Center to discuss further options.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

UPDATED PRACTICE ADVISORY[1]

SPECIAL IMMIGRANT RELIGIOUS WORKERS: HOW TO DEMONSTRATE THAT AN IMMIGRANT SEEKS EMPLOYMENT IN A "RELIGIOUS OCCUPATION."

By Mary Kenney and Deborah Morgan[2]
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.

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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.ailf.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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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/repealdenial.htm; http://uscis.gov/graphics/howdoi/aau.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 chose 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

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[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 cases 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

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[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); s*ee 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: **T**he 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).

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

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.

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[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 courts[6] "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.

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[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.ailf.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.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

Practice Advisory[1]

Objecting to Video Merits Hearings

By Traci Hong and Mary Kenney[2]

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.

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[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.

[2] Traci Hong is a former staff attorney at the Legal Action Center. Mary Kenney is a senior attorney at the Legal Action Center.

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 ore 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.

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either waived the issue or failed to exhaust available administrative remedies. *See, e.g.*, 8 USC § 1252(d)(1) (requiring exhaustion of administrative remedies).

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
July 17, 2003

EXPORT LICENSING REQUIREMENTS FOR FOREIGN NATIONALS

By F. Amanda DeBusk and Daniel M. Fisher-Owens, Miller & Chevalier Chartered, Washington, D.C.

I. INTRODUCTION.

In today's heightened security environment, the U.S. government is increasing its scrutiny of foreign nationals working for U.S. companies. Of particular concern are the "deemed export" regulations. They provide that giving controlled technology to a foreign national located in the United States is deemed equivalent to exporting that controlled technology to a foreign country. Immigration lawyers should ask whether the immigrant will have access to controlled technology. If that question is not asked, the visa is likely to be delayed and even worse, companies could be found in violation of the "deemed export" regulations administered through the Commerce Department and State Department.

In preparing visa applications, immigration counsel should be cognizant of the level of controlled technology to which a foreign national will have access, and to coordinate with the company's compliance personnel to determine whether an export license is required. Export license applications, if required, should be initiated as early as possible in the hiring and visa issuance process in order to avoid costly delays.

The main sectors where foreign national employees can require access to controlled technology are the defense and high technology industries, although industries

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as diverse as civilian aerospace, petrochemicals, specialty steel production, nuclear power, and consulting also can be affected by export licensing requirements.

A web of export controls governs exports to foreign nationals. Most technology used in the development, production, or use of commercial items is controlled under the Commerce Department's Export Administration Regulations ("EAR"), which control exports and reexports of a broad range of technical information, for both national security and foreign policy reasons. The State Department's International Traffic in Arms Regulations ("ITAR") control exports of technology and services that relate to military items. For companies in the defense industry that are regulated by the Defense Security Service, employment of foreign nationals without appropriate safeguards in place can jeopardize a company's security clearances.

This article focuses on the deemed export rule under the Commerce Department's EAR, which govern exports of non-military technology. While there are some significant differences between the EAR and ITAR, the deemed export concept, as noted above, is increasingly important under both regimes and the basic concepts are the same under both regimes. In addition, domestic transfers of technology to foreign nationals raise issues under U.S. sanctions and anti-terrorism regulations as well as traditional export controls.

II. THE "DEEMED EXPORT" REGULATIONS ARE BROAD.

A deemed export occurs when a company releases information that falls within the definition of technology to a foreign national, including one of its employees, in the United States. Once such information is released to a foreign national, it is deemed to have been exported to that person's country of nationality. Under both the EAR and the ITAR, the deemed export rule applies to technology (and, in some cases, software) transfers to a foreign national, if the technology (or software) to which the foreign national is exposed relates to the development, production, disposal, or use of items controlled under either the EAR or the ITAR.

Under the EAR, the deemed export rule is derived from the definition of "export," which includes "[a]ny release of technology or source code subject to the EAR to a foreign national" in the United States. *See* 15 C.F.R. § 734.2(b)(2)(ii). This so-called "deemed export" rule presumes that any technology released to a foreign national in the United States ultimately will be exported to that national's home country. The same export controls that apply to a physical export of the technology to that country, therefore, apply to a release of the technology in the United States

A release of technology is defined under the EAR as including:

(1) Visual inspection of U.S.-origin technology by a foreign national;
(2) Oral exchange of information in the United States or abroad; or
(3) Application to situations abroad of personal knowledge or technical experience acquired in the United States. *See* 15 C.F.R. § 734.2(b)(3).

A release of technology is defined under the ITAR as "[d]isclosing (including oral or visual disclosure)" ITAR-controlled technical data to a foreign national in the United States. *See* 22 C.F.R. § 120.17(4).

Both the EAR and ITAR focus on the fact that a transfer of technology can occur with the mere inspection or discussion of technology. Accordingly, immigration counsel should ask whether a foreign national employee could be exposed to controlled technology, including internal company research material, staff meetings, telephone calls, e-mail and other modes of communication. If so, a license may be required.

For dual-use items, deemed export licenses are processed by the Commerce Department's Bureau of Industry and Security ("BIS"), the Bureau primarily responsible for enforcing the EAR. A company must submit a deemed export license application on a standardized form, which must be accompanied by a letter of explanation detailing the type of technology to which the foreign national will have access. Additional information regarding the background of the foreign national also must be submitted to BIS, including a current resume. Additional requirements for technology license applications are found at 15 C.F.R. § 748, Supp. 2. BIS has issued guidance for deemed export license applications, including information about standard licensing conditions that are generally attached to export licenses. *See* www.bis.doc.gov/DeemedExports/foreignationals.pdf.

III. CERTAIN FOREIGN NATIONALS, DUAL NATIONALS AND EMBARGOED COUNTRY NATIONALS MAY NEED LICENSES.

The export license requirement reaches foreign nationals who are not lawful permanent residents (or in a protected class), dual nationals, and embargoed country nationals.

A. Foreign Nationals with a Foreign Permanent Resident Status and Dual Nationals Are Subject to the Deemed Export Rules.

For purposes of the EAR deemed export rule, a foreign national is any person who is not a U.S. citizen, lawful permanent resident, political asylee, refugee, or another member of a limited class of "protected individuals." *See* 15 C.F.R. § 734.2(b)(2)(ii)(citing 8 U.S.C. § 1324b(a)(3)). Workers employed in the United States under employment-based visas generally are considered foreign nationals for purposes of the deemed export rule. The holders of "H" visas are the largest class of individuals that may need export licenses.

The EAR does not directly address the question of how to treat dual nationals or persons holding the equivalent of permanent residency in a country other than their country of citizenship. For deemed export purposes, the Commerce Department has issued an informal interpretation indicating that it considers the last permanent resident

status or citizenship obtained by such an individual as his or her nationality. *See* http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html. For example, if a citizen of India were to have subsequently obtained permanent resident status in the United Kingdom, she would be considered a United Kingdom national for purposes of the deemed export rule.

B. Embargoed Country Nationals Generally Need Licenses.

Nationals of countries subject to U.S. embargoes or subject to anti-terrorist controls pose additional issues from the perspective of deemed export controls, as the release of virtually any EAR-controlled technology to them will likely require an export license. Additional compliance issues may arise with respect to economic sanctions regulations maintained by the Treasury Department's Office of Foreign Assets Controls ("OFAC") against Cuba, Iran, Libya, or Sudan. A broad range of controls, including those prohibiting exports of any U.S.-origin technology, generally applies to such countries, as well as, in some cases, their nationals. [2] Immigration counsel should consult with compliance professionals when a company contemplates employing a national from one of the embargoed countries, as licensing policy may disfavor the granting of a license, or there may be a statutory provision that prohibits granting a license for the technology in question.

IV. IMMIGRATION COUNSEL SHOULD ASK ABOUT SERVER ACCESS.

The lion's share of controlled technology is stored in some electronic form, and computer networks provide numerous opportunities for deemed exports to occur.

A. Inquire Whether the Foreign National Has Unrestricted Server Access.

Both technical personnel and information technology support personnel may require licenses if they have unrestricted access to controlled data.

Immigration counsel should ask whether the company has password protection for individual documents, protected databases, and other computer security. Companies employing foreign nationals that have significant amounts of controlled technical data stored on their computer systems are at risk unless they segregate controlled technology within the server network. A company using best practices may require a compliance person to be responsible for granting access to restricted servers.

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[2] While deemed exports to embargoed country nationals are not specifically prohibited in the economic sanctions regulations maintained by the Treasury Department's Office of Foreign Assets Control ("OFAC"), at least one interpretation in OFAC's Iranian Transactions Regulations characterizes the release of technology to a foreign national as an export. *See* 31 C.F.R. § 560.418.

B. Ask Whether Foreign National Computer Support Personnel Have "Master" Access.

A deemed export compliance issue that has become increasingly important is the granting of "master" access to information technology ("IT") support staff over computer systems containing controlled technical data. Master access is granted to IT personnel to enable them to maintain and troubleshoot computer systems, implement access controls, and conduct backup and recovery operations. Even though IT personnel may not be technically trained in the relevant substantive field, the EAR recognizes no such distinctions when it comes to controlled technology.

Simply having access to the entire system creates the possibility that IT personnel could visually inspect controlled technical data — enough for a deemed export to occur. Master access by IT personnel also can present significant risks when IT support is outsourced. Some IT support providers have operations overseas, and U.S. companies may have no control — or even any idea — of the nationality of computer support personnel who might gain access to the system through remote proxy or on-site support visits. Companies that have controlled technical data stored on their computer systems should be sure that any grant of master access to its own or outsourced computer support personnel complies with its policies and procedures on deemed exports.

V. ALLOW ABOUT THREE MONTHS FOR OBTAINING A "DEEMED EXPORT" LICENSE.

In determining whether a license is required, it is important to focus on whether the technology is controlled due to its listing on the EAR's Commerce Control List or the ITAR's Munitions List. Release of ITAR-controlled technology requires a license to virtually all foreign nationals, with very limited exceptions. For EAR-controlled technology, the combination of the level of technology involved and the foreign national's home country will determine whether a license is required. The release of highly sensitive technology, such as nuclear and missile technology, is tightly controlled and virtually all foreign nationals will require a license. The release of less sensitive EAR-controlled technology, however, often does not require a license for many foreign nationals, such as nationals of the European Union, Australia, Japan and other close U.S. allies.

If a license is required, the company will need to submit a license application to either the Commerce Department or the State Department to obtain authorization to release the controlled technology to the foreign national in question.

A. Commerce Department Licenses Can Take 90 Days or Longer.

The Commerce Department attempts to process license applications within 60 days, but deemed export license applications often take longer. It is not unusual for processing to take 90 days or longer, particularly applications involving foreign nationals

from embargoed countries or countries of proliferation concern such as China, India, Pakistan, and Israel.[3]

B. State Department Licenses Typically Take At Least 60 Days.

For military items controlled by the State Department, licensing in the employment context generally is handled through a Technical Assistance Agreement ("TAA"). A TAA is an agreement between the company releasing the controlled technical data and the foreign national setting forth the parameters of the technical data to be disclosed and imposing limits on its use and re-transfer. TAAs are subject to very specific regulatory requirements and must contain certain clauses mandated by the ITAR. The State Department's Directorate of Defense Trade Controls ("DDTC") must approve the TAA prior to any transfer of controlled technical data. Subsequent amendments to the scope of technology involved also must be pre-authorized by DDTC. Requirements for TAAs can be found at 22 C.F.R. § 124. It is customary to include a current resume, as well as basic biographical information about the individual involved in the TAA. Gaps in employment history commonly lead to further inquiry by DDTC. Licensing times are generally 60 days or more for TAAs.

VI. ENFORCEMENT IS INCREASING.

Given the broad government concern about terrorists entering the United States, various government agencies are looking at foreign nationals and, consequently, deemed exports. BIS has made increased enforcement of the deemed export rule a priority for 2003. *See* Bureau of Industry and Security, Annual Report Fiscal Year 2002, at p. 14.[4] Anecdotal reports have surfaced in the export community that indicate that BIS has begun to monitor applications for "H" visas more closely. BIS has conducted sporadic

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[3] The deemed export license application processing for nationals from embargoed countries (Cuba, Iran, Libya, Sudan) is significantly slower than 90 days. Processing for North Korea and Syria, which are considered terrorist-supporting countries but not subject to full embargoes, also is extremely slow. To put the timeframes into perspective, application processing times have recently taken almost a year in some Cuba cases.

[4] In response to a request from Congress, the General Accounting Office ("GAO") recently conducted a review of BIS enforcement of the deemed export rule. The report was generally critical of the Commerce Department's enforcement efforts, citing a lack of post-license audits, as well as a large disparity between the number of H-1 visa holders working in potentially sensitive industries and the number of export licenses requested from and granted by the Commerce Department. *See* United States General Accounting Office, Export Controls: Department of Commerce Controls over Transfers of Technology to Foreign Nationals Need Improvement, GAO-02-972 (Sept. 6, 2002).

spot checks of foreign nationals granted "H" visas who have accepted employment in sensitive industries, including interviews with their employers.

At the end of 2001, Customs launched Operation Shield America designed to prevent international terrorist organizations from obtaining sensitive U.S. technology, weapons, and other equipment that could help them carry out attacks. As a result of Operation Shield America, Customs has stepped up its Export Enforcement Program and its focus on deemed exports. Companies are receiving visits from Customs officials inquiring about foreign nationals and there is increased emphasis on deemed exports.

Finally, the FBI also has become interested in deemed export issues because of the terrorism angle. It provides leadership through the Joint Terrorism Task Forces that are composed of various federal, state and local agencies (including the U.S. Office of Export Enforcement in the Commerce Department and various offices in the Department of Homeland Security) in order to provide a comprehensive response to terrorism. As part of its investigative activities, FBI agents have visited large, mainstream companies to inquire about particular foreign nationals, the projects on which these individuals have been working, and whether the foreign nationals are licensed.

VII. AVOID EMPLOYMENT DISCRIMINATION.

Compliance with export controls must not lead to non-compliance with applicable federal, state, and local employment discrimination laws. It is important for immigration counsel to work with human resources to be certain that eligibility to receive deemed exports of EAR-controlled technology is listed among the conditions of employment for key technical and IT job listings. It also must be made clear on all forms that any information collected regarding an employment applicant's nationality or citizenship is solely for export control compliance purposes, and will not be used to unfairly discriminate in the hiring process.

VIII. CONCLUSION.

Immigration lawyers should advise their clients of the increased scrutiny that the U.S. government is giving foreign nationals in the United States. Checking for compliance with the deemed export regulations at the front end of the visa application process will save time and money in the long run.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
September 17, 2002
Amended January 10, 2003

PRACTICING BEFORE THE BIA UNDER THE NEW "PROCEDURAL REFORMS" RULE

By Beth Werlin, AILF

On August 26, 2002, the final Board of Immigration Appeals (BIA or Board) restructuring rule was published in the Federal Register. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 FR 54878 (August 26, 2002). **This rule went into effect on September 25, 2002.** The most significant change to the BIA's procedures is that under the new rule, most cases are decided by a single member of the BIA, as opposed to three-member panels. In addition, the length of time that cases are pending at the BIA likely will be reduced.

This practice advisory highlights some of the changes that the final rule implements. For cases pending on August 26, 2002, the rule allows you to file an optional supplemental brief or statement explaining why three-member review is appropriate. The rule does not preclude referral to a three-member panel even if the parties do not request three-member panel review. The rule states that the supplements may be filed until September 25, 2002 or the expiration of any briefing schedule set by the Board, whichever is later.

Case Management System

A. Summary Dismissals

After the Notice of Appeal (NOA) is filed, the case is assigned to a single Board member. The regulations allow this Board member to summarily dismiss the appeal, even prior to the preparation of the transcript, if the appeal falls within one of the categories for dismissal in 8 C.F.R. § 3.1(d)(2)(i).

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The rule retains all of the summary dismissal grounds under the current regulations[2] and adds a new category of cases that may be summarily dismissed: frivolous appeals. Under this new ground, a Board member may dismiss a case where "the appeal is filed for an improper purpose, such as to cause unnecessary delay" or where "the appeal lacks an arguable basis in fact or in law." 8 C.F.R. § 3.1(d)(2)(i)(D). The Board member may not summarily dismiss the case if the appeal "is supported by a good faith argument for extension, modification, or reversal of existing law." *Id.*

In the proposed rule, summary dismissal was mandatory. However, the final rule deleted the mandatory language and authorized the Board member to exercise his or her discretion in summarily dismissing a case under 8 C.F.R. § 3.1(d)(2)(i). The new rule says, however, the filing of an appeal that is summarily dismissed may constitute frivolous behavior warranting disciplinary actions. 8 C.F.R. § 3.1(d)(2)(iii).

- ***Practice Tip***: If you believe that a BIA member may dismiss your case under the frivolous appeal ground, 8 C.F.R § 3.1(d)(2)(i)(D), you may explain why your case should not be summarily dismissed in both the NOA and the brief.

  For example, this situation may arise where there is adverse precedent on point, but you intend to argue for modification or reversal of the existing law. You may want to state this in the NOA and brief. Since the regulations allow single members to summarily dismiss a case prior to preparing the transcript and setting a briefing schedule, it is important to state why your appeal is not frivolous in the NOA as well as the brief.

B. Adjudication on the Merits

Under the new regulations, the majority of cases are decided by a single member rather than three-member panels. Three-member panels are reserved for six categories of cases, which are described below. All cases are assigned to a single BIA member initially. After reviewing the record, the member has three options: affirm the underlying decision without opinion, issue a brief order, or refer the case for three-member review. In addition, the Board member may summarily dismiss the case at any time.

1. Affirmance Without Opinion (AWO)

An AWO is a three-sentence decision by a single Board member that affirms, without explanation, the results of the decision reached below. Before affirming the decision without opinion, the Board member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(e)(4)(i). Specifically, the case must satisfy

[2]These grounds include: failure to specify reasons for appeal in Notice of Appeal; appeal concerns only a finding of fact or legal conclusion conceded by the appealing party; appeal is from an order granting the relief the appellant requested; no brief is filed after indicating on the Notice of Appeal that a brief would be filed; BIA lacks jurisdiction; appeal is untimely or waived; and appeal fails to meet essential statutory or regulation requirements or is excluded by statute or regulation. *See* 8 C.F.R. § 3.1(d)(2)(i).

both of the requirements listed in sections (a) and (b) below, *and* one of the two alternate requirements listed in section (c):

a. the result reached below must be correct; *and*

b. any errors in the decision below must be harmless or nonmaterial; *and* either

c. (i) the issues on appeal must be squarely controlled by existing Board or federal court precedent *and* cannot involve the application of precedent to a novel fact situation; *or*

(ii) the factual and legal issues raised on appeal must be "not so substantial that the case warrants the issuance of a written opinion in the case."

The regulations are clear that an AWO is an affirmance of the results of the underlying decision but not necessarily an affirmance of the reasons for the decision. The AWO decision issued by the Board member must contain *only* the following three sentences: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4)."

- ***Practice Tip***: Even before the BIA's new rule was issued, the Board had accelerated its use of the AWO procedure under former 8 C.F.R. § 3.1(a)(7). Thousands of these decisions already have been issued in all types of cases, including asylum appeals. Because Board members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing *every* appeal to ensure that it meets all of the requirements for an AWO decision.

  If your client already has received an AWO decision, you may want to challenge the AWO in a petition for review or petition for habeas corpus. AILF has prepared a practice advisory discussing arguments that challenge a BIA member's use of the AWO procedure to deny an appeal. *See* AILF's Practice advisory entitled, "How to Challenge an Affirmance Without Opinion By A BIA Member" (http://www.ailf.org/lac/2002/082602.pdf) (August 26, 2002).

2. Brief Order

If the single BIA member does not conclude that the appeal is appropriate for an AWO decision and that the case should not be referred for three-member panel review, he or she may issue a brief order. 8 C.F.R. § 3.1(e)(5); *see also* 67 FR at 54886-87. A single member has authority to do the following with a brief order:

- *affirm* the underlying decision

- *modify* the underlying decision

- *remand* the case for further factfinding

- *reverse* the case, but only "if such a reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation." *Id.*

In the preamble to this rule, DOJ provided examples of how Board members will use brief orders. *See* 67 FR at 54866. Brief orders will be used to provide additional explanation where the Board member believes that the underlying decision was correct, but that the immigration judge's explanation was insufficient. *Id.* Brief orders also will be used where an intervening precedent needs to be addressed, but where it would not change the outcome of the case. *Id.* In some situations, the brief order will state, "the immigration judge's opinion is affirmed for the reasons set forth therein and as set forth in this opinion." *Id.* The BIA member may issue a brief order to remand the record for specific fact finding where new evidence is presented on appeal. 67 FR at 54866.

3. Three-Member Panel Decisions

The Board member who initially reviews the case may assign the case to a three-member panel only if the case presents one of the following circumstances:

(1) The need to settle inconsistencies among the rulings of different immigration judges.

(2) The need to establish a precedent construing the meaning of laws, regulations or procedures.

(3) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents.

(4) The need to resolve a case or controversy of major national import.

(5) The need to review a clearly erroneous factual determination by an immigration judge.

(6) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 3.1(e)(5) (where a single member can reverse if an intervening precedent, law, or regulation requires reversal).

8 C.F.R. § 3.1(e)(6).

The EOIR-26 (NOA form) (revised September 2002) states that the appellant may specify the reasons why the appeal warrants review by a three-member panel. *See also* 67 FR at 54897.

- ***Practice Tip***: In most cases, your client will want three-member panel review, particularly since single BIA members can reverse the underlying IJ decision only under narrow circumstances (when reversal is required by intervening law). You should argue why three-member panel review is appropriate in both your NOA and brief.

  If your case was pending on August 26, 2002 (the date on which DOJ published this rule), you may file a **supplemental brief or statement** explaining why your case is appropriate for three-member review. 8 C.F.R. § 3.3(f). The rule states that the supplements may be filed until **September 25, 2002 or the expiration of any briefing schedule** set by the Board, whichever is later. The preamble to the new rule says that this supplement is "entirely optional" and that the BIA "in its discretion, will determine how these briefs will be considered and what procedures will be used in determining whether to apply a single-member or three-member panel review." 67 FR at 54898. The rule does not preclude referral to a three-member panel even if the parties do not request three-member panel review.

  If your client's case was filed after August 26, 2002, you do not need a supplement, but you may explain why three-member panel review is needed in the brief.

Motions to Reopen and Motions to Reconsider

The BIA refers motions to reopen and motions to reconsider to a single Board member for review. 8 C.F.R § 3.2(i). Unless the Board member determines that the motion should be assigned to a three-member panel under the standards in 8 C.F.R. § 3.1(e)(6), the motion is adjudicated by a single member. *Id.*

- ***Practice Tip***: If you want your client's motion to be adjudicated by a three-member panel, be sure to explain why three-member panel adjudication is appropriate in the motion and any memorandum of law in support of the motion. Like appeals that were pending on August 26, 2002, motions pending on that date may be supplemented with a brief or statement explaining why your motion is appropriate for three-member adjudication. 8 C.F.R. § 3.3(f). Again, this optional supplement is due on September 25, 2002 or the expiration of the briefing schedule, whichever is later.

Briefing Schedules

The briefing schedule for the main brief is set after the transcript is available. 8 C.F.R § 3.3(c)(1). For cases where the respondent is detained, both parties are provided 21 days to file simultaneous briefs. *Id.* For non-detained cases, the appellant is provided 21 days to file a brief; the appellee has 21 days from the date that the appellant's brief was due to

file a brief. *Id.* This is a change from the proposed rule, which included simultaneous briefing in both detained and non-detained cases.

The rule retains the authority for the BIA, upon written motion, to extend the period for filing a brief for up to 90 days for good cause shown. 8 C.F.R. § 3.3(c)(1).

Standards of Review

The BIA applies the "clearly erroneous" standard to review all factual determination by the immigration judges, including findings as to credibility of testimony. 8 C.F.R. § 3.1(d)(3); *see Matter of S-H-*, 23 I&N Dec. 462, 464 (BIA 2002). However, the BIA has retained the "de novo" standard of review for: (1) all questions of law, discretion, and judgment and all other issues in appeals from decision of immigration judges, and (2) all questions arising in appeals from decisions issued by Service officers. *Id.*

The new "clearly erroneous" standard of review for Immigration Judges' factual determinations applies only to appeals filed on or after the effective date of the new rule (September 25, 2002). 8 C.F.R. § 3.3(f).

New Evidence

The new rule precludes the BIA from considering new evidence on appeal. 8 C.F.R. § 3.1(d)(3)(iv). Either party may file a motion for remand if additional factfinding is necessary.

- ***Practice Tip***: If it becomes necessary to file a motion for remand after the briefs were filed, be sure to file the motion as soon as possible. Otherwise, the case may be decided before you file your brief and then you will have to file a motion to reopen, rather than a motion for remand. As discussed below, this new rule sets timeframes for the adjudication of appeals. Most likely, cases no longer will be pending at the BIA for several months or years. Most cases are decided within 90 days of the completion of the record.

Timeframes for Adjudications

The new rule sets timeframes for the adjudications of all appeals. In cases where a single Board member is making the decision, he or she must adjudicate cases within 90 days of the completion of the record. 8 C.F.R. § 3.1(e)(8). Cases that are assigned to a three-member panel must be decided within 180 days. *Id.* The chair of the BIA may extend these deadlines up to 60 days. *Id.*

In addition, the BIA intends to reduce the amount of time it takes to transcribe the proceedings. 67 FR at 54895. The BIA hopes to implement a 60-day timeframe for preparing the transcript. *Id.* IJs have only 14 days to review the transcript and approve

the decision. 8 C.F.R. § 3.5(a). Together, these new timeframes likely will reduce the amount time between the filing of the NOA and the decision.

Reduction of the Board Membership

The BIA will be reduced from 23 members to 11 members. 8 C.F.R. § 3.1(a)(1). Currently, only 17 of the 23 positions are filled. This reduction of the membership will occur 180 days from the effective date of the regulations (September 25, 2002). *Id.* After the reduction, the BIA will operate with two three-member panels and five members acting individually. *See* 67 FR at 54893.

Application of New Rule to Pending Cases

The new rule went into effect on September 25, 2002. 8 C.F.R. § 3.3(f). The rule applies to all cases pending at the BIA on that date except that the new standard of review for IJs' factual findings (clearly erroneous) applies only to cases filed on and after September 25, 2002. *Id.* Because the new rule applies to pending cases, you may want to file the supplemental brief or statement explaining why three-member panel review is appropriate in you case prior to or with your brief. However, the rule does not preclude referral to a three-member panel even if the parties do not request three-member panel review.

LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

HOW TO CHALLENGE AN AFFIRMANCE WITHOUT OPINION BY A BIA MEMBER

By Mary Kenney
September 27, 2002

The original version of this practice advisory was issued on August 26, 2002. This practice advisory has been updated to reflect the changes to the BIA's regulations, which went into effect on September 25, 2002.

This practice advisory discusses arguments that challenge a Board of Immigration Appeals (Board or BIA) Member's use of the "affirmance without opinion" (AWO) procedure to deny an appeal. 8 C.F.R. § 3.1(e)(4) authorizes a single Board Member to summarily affirm the result of a decision by an immigration judge, without providing any reasons for the affirmance without opinion.

The Department of Justice has just issued new final regulations restructuring the entire appeal process before the Board. *See* Board of Immigration Appeals; Procedural Rules to Improve Case Management; Final Rule, 67 Fed. Reg. 54878 (August 26, 2002). These regulations went into effect on September 25, 2002. The new regulations retain the AWO procedure from the previous regulations (see former 8 C.F.R. § 3.1(a)(7)), but make several changes to the prior procedure. The arguments in this practice advisory may be used to challenge an AWO decision under both the current and former regulations. The citations used throughout the practice advisory refer to the current regulations, unless otherwise noted.

The information in this advisory is accurate and authoritative, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Additionally, the cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits. You should research the case law in your own circuit to insure that there is no conflicting precedent and to find additional support.

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What is an affirmance without opinion (AWO)?

An AWO is a three-sentence decision by a single Board Member that affirms, without explanation, the results of the decision reached by the IJ in a case. An AWO decision is a decision on the merits of the appeal. Because it is a decision on the merits of the appeal, an AWO is different from a summary *dismissal* of an appeal under current 8 C.F.R. § 3.1(d)(2). When a case is summarily dismissed, the Board never makes a decision on the merits.

For the AWO procedure to be used, the regulations require the Board Member to first review the merits of the case to ensure that the result reached by the IJ was correct. The Board Member must also make sure that the case satisfies several other criteria, discussed below, before using the summary AWO procedure. If a case does not satisfy *all* of the required criteria, then the single Board Member has the authority to issue a brief order affirming, modifying, or remanding the case. 8 C.F.R. § 3.1(e)(5). Unlike AWO decisions, these brief orders will contain at least some explanation for the decision. In very limited circumstances, the case will be reassigned to a three-Member panel of the Board. *Id.*; 8 C.F.R. § 3.1(e)(6). Three-Member panels of the Board will truly become the exception, rather than the predominant method for deciding cases.

The regulations are clear that an AWO is an affirmance of the results of the IJ's decision but not necessarily an affirmance of the IJ's reasons for his or her decision. Despite the fact that the Board Member may disagree with the IJ's reasons for the decision, the Board Member is prohibited by the regulation from explaining his or her own reasons. Instead, the AWO decision issued by the Board Member must contain *only* the following three sentences: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4)."

Even before the new regulations were issued, the Board had accelerated its use of the AWO procedure under former 8 C.F.R. § 3.1(a)(7). Thousands of these decisions have already been issued in all types of cases, including asylum appeals. AILF's informal study of last summer's decisions indicates that half of the decisions issued by the Board were AWO decisions; this means that there may have been over 100 AWO decisions on any given day. Under the new regulations, an even larger number of AWO decisions is likely, because the AWO process – which was discretionary – is now mandatory for all cases that satisfy the criteria.

Because Board Members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing *every* appeal to ensure that it meets all of the requirements for an AWO decision.[2] For this reason, it is important for

[2] For example, in *Farjardo v.INS*, 2002 U.S. Lexis 16045 (9th Cir. Aug. 9, 2002), the court reversed and remanded an AWO decision after finding that the underlying decision by the IJ was based upon two "clear"—and prejudicial – errors of law. AWO should never have been used in that case, since one of the requirements is that any errors by the IJ be harmless ones.

attorneys to monitor the decisions in their own cases and to challenge AWO decisions when it appears that an appeal did not satisfy the requirements for an AWO.

In what forum can you challenge the use of AWO?

A. **BIA Appeal**: The safest course of action is always a preventive one. Thus, in all appeals filed with the Board you should include an argument that the AWO procedure cannot be applied to the appeal because the case does not satisfy the criteria for the use of this procedure. By demonstrating why the case is not appropriate for summary affirmance under the regulations, you may be able to prevent the Board from using this shortcut to dispose of your client's appeal. *See also* AILF's practice advisory entitled "How to Prevent the BIA Summary Dismissal of Your Appeal" (www.ailf.org/lac/2002/032202c.htm) (March 19, 2002).

   It is important to include the argument with the Notice of Appeal itself, rather than saving it to include in the brief. For cases in which the Notice of Appeal is already filed, you can either supplement the Notice of Appeal or include these arguments in you brief.

   In addition, you may also want to submit an argument that the case is appropriate for three-Member panel review under the new regulation at 8 C.F.R. § 3.1(e)(6). Three-Member panel review is limited to cases that meet certain specific criteria. *See* 8 C.F.R. § 3.1(e)(6). If you wish to have a three-Member panel of the Board decide a case, you should explain in the Notice of Appeal (and again in the brief if you file one) why the case satisfies the criteria for such review.

B. **Motion for Reconsideration**: Note: a motion for reconsideration is *not* required prior to filing a federal court appeal of an adverse BIA decision. Additionally, the filing of a motion to reconsider *does not stay the deadline for filing a Petition for Review in the Court of Appeals.* A Petition for Review *must* be filed within 30 days of the date of the BIA's decision – including AWO decisions – whether or not you have also filed a motion to reconsider. For procedures for filing a Petition for Review, *see* AILF's Practice Advisory entitled "How to File a Petition For Review" (www.ailf.org/lac/2002/061002a.pdf) (June 2002).

   The regulations on motions for reconsideration prohibit a motion that is based "*solely* on the argument that the case should not have been affirmed without

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Similarly, in the precedent case *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA 2002), a single Board Member originally – and erroneously – used the AWO procedure to affirm the IJ's determination that a felony DWI under Massachusetts's law was an aggravated felony. On reconsideration, the Board, *en banc*, used this case to overrule its earlier precedent on DWI convictions. A precedent-setting case by definition cannot satisfy the criteria for AWO and the single Member clearly erred in using this procedure initially. Unfortunately, most erroneous AWO decisions will not be overturned on reconsideration.

opinion." 8 C.F.R. § 3.2(b)(3) (emphasis added). Thus, you cannot file a motion for reconsideration to challenge the use of AWO unless there are other issues you want the Board to reconsider. For example, if you claim that the crime your client was convicted of is not an aggravated felony, you can seek reconsideration on this issue as an error of law. Additionally, you could also challenge the use of the AWO procedures by arguing, for example, that your client's conviction is factually distinguishable from all existing precedent and therefore does not satisfy the criteria for AWO.

All motions for reconsideration must comply with the regulations, including the time (30 days) and number (usually one) limitations on such motions. *See* 8 C.F.R. § 3.2. Moreover, any motion for reconsideration of a decision issued by a single Board Member will be referred to the screening panel for a disposition by a single Board Member unless the standards for assigning the motion to a three-Member panel are satisfied. 8 C.F.R. § 3.2(i); *see* 8 C.F.R. § 3.1(e)(6).

C. **Petition for Review to the Court of Appeals or Habeas Corpus Petition:** These arguments also can be used in a Petition for Review of an AWO decision or, where there is no jurisdiction for a Petition for Review in the Court of Appeals, in a habeas corpus petition in federal district court. For procedures on filing a Petition for Review, *see* AILF's Practice Advisory entitled "How to File a Petition For Review" (www.ailf.org/lac/2002/061002a.pdf) (June 2002) . **All Petitions for Review must be filed within 30-days of the date of the BIA's AWO decision. This 30-day deadline is jurisdictional, which means that if you miss the deadline, you cannot file it later**. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

The argument that the AWO procedures were misapplied in your client's case will have most force when you have reasons to object to the decision of the IJ on the merits. If a court were to find that a single Member issuing a brief explanation of the affirmance or a three-Member panel would have reached the same decision on the merits, it might also find that the use of the AWO procedure was harmless error.

What arguments can you make as to why the AWO procedure should not have been used in the case?

A. An AWO is never appropriate when there are new arguments or evidence.

A Board Member should never use the AWO process when new arguments are raised for the first time in the appeal to the Board, or when new evidence is submitted with the appeal. When it issued the initial AWO regulations in 1999, the Department of Justice (DOJ) justified the legality of the AWO process based upon the premise that the IJ already reviewed all issues and evidence in the case. *See* Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 56137(1999). The DOJ reasoned that because the IJ would have already discussed the

issues and evidence, it is permissible for a Board Member to summarily affirm without further explanation. When an argument or evidence is presented for the first time to the Board, the IJ obviously could not have already discussed it. Thus, anytime a case raises new arguments/evidence in the appeal to the Board, the following argument against the AWO procedure can be made:

1. First, an agency is required to explain the reasons behind a decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1946) (calling the requirement a "fundamental rule of administrative law"); *see also Guentchev v. INS*, 77 F.3d 1036, 1038 (7th Cir. 1996) (a statement of reasons for a decision is a "norm of administrative law"). Federal courts have routinely required the Board to provide an explanation for a decision that is sufficient to allow the court to carry out a review. *See, e.g., Panrit v. INS*, 19 F.3d 544, 546 (10th Cir. 1994) *quoting Turri v. INS*, 997 F.2d 1306, 1310 (10th Cir. 1993) (noting that Board has an obligation to "articulate a reasoned basis for its decision"); *Mousa v. INS*, 223 F.3d 423, 430 (7th Cir. 2000) (Board must consider all claims and "give careful, individualized, rational explanations for its decisions"); *Guentchev v. INS*, 77 F.3d at 1038 (citation omitted) (Board "must announce its decision in terms sufficient to enable a court to determine it heard and thought and not merely reacted"); *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002) (Board must provide a 'comprehensible reason for its decisions sufficient for [the court] to conduct [its] review and to be assured that the petitioner's case received individualized attention"); *Vargas v. INS*, 938 F.2d 358, 363 (2nd Cir. 1991) (citations omitted) ("Board's decision stands or falls on its express findings and reasoning"); *Tukhowinich v. INS*, 64 F.3d 460, 464 (9th Cir. 1995) (citations omitted) (setting aside a Board decision which failed to support its conclusion with a reasoned explanation based on legitimate concerns).

2. The three-sentence AWO decision does not contain any reasons or explanation as to why the decision was reached. In the Federal Register announcement of the current AWO regulation, the DOJ acknowledged that appellants in removal proceedings have a "right to a reasoned administrative decision." Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 56137(1999). The DOJ's entire justification for why the AWO procedure does not violate the requirement for a "reasons statement" is that reasons for the decision are provided in the IJ's decision.

3. When an issue is raised for the first time in the appeal before the Board, the IJ will not already have considered or addressed it. If the Board were allowed to summarily affirm the IJ decision in this situation, there would not be any explanation of the agency's decision on the particular issue. For this reason, courts have implied that a summary affirmance would not be appropriate where new issues are raised before the Board. *See Maashio v. INS*, 45 F.3d 1235, 1238 (8th Cir. 1995) (upholding BIA's summary adoption of the reasoning of the IJ because no new issues were raised on appeal); *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994) (upholding BIA's summary adoption of the reasoning of

the IJ by distinguishing cases in which BIA was the first forum to rule on the issues).

4. Additional support for this argument can be found in decisions in which courts have required the Board to respond to all arguments that are made to it. *See, e.g., De La Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th cir. 1994) (due process requires that a decision-maker actually consider the evidence and arguments that a party presents); *Hengan v. INS*, 79 F.3d 60, 64 (7th Cir. 1996) (agencies must respond to arguments made to them); *see also Lwin v. INS*, 144 F.3d 505 (7th Cir. 1989) (Board erroneously failed to consider claim of social group for asylum).

5. Similarly, courts have ruled that the Board is required to respond to new evidence that is submitted to it.[3] *See, e.g., Panrit v. INS*, 19 F.3d 544, 545 (10th Cir. 1994) (even under a limited abuse of discretion standard, court can review to ensure that BIA "actually considered all of the evidence cited by the petitioner"); *Cortes-Castillo v. INS*, 997 F.2d 1199, 1203 (7th Cir. 1993) (adoption of IJ decision insufficient when new evidence required a re-examination of the equities and an explanation from the Board). Even when the Board rejects the submission of new evidence, it must explain its reasons for doing so. *Ubau-Morenco v. INS*, 67 F.3d 750 (9th Cir. 1995).

B. AWO can be used only if the case satisfies *all* of the criteria in the regulation.

1. Before affirming an IJ's decision without opinion, the Board Member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(e)(4)(i). Specifically, the case must satisfy *both* of the requirements listed in sections (a) and (b) below, *and* one of the two alternate requirements listed in section (c):

a. the result reached by the IJ must be correct; *and*

b. any errors in the decision below must be harmless or nonmaterial; *and* either

c. (i) the issues on appeal must be squarely controlled by existing Board or federal court precedent *and* cannot involve the application of precedent to a novel fact situation; *or*

[3] **NOTE: under the new regulations, the board is prohibited from considering any new evidence. 8 C.F.R. § 3.1(d)(3)(iv).** Instead, the regulations provide that a party asserting that the Board cannot resolve a case without further factfinding must submit a motion to the Board requesting a remand to the IJ for the consideration of the new evidence. *Id.*

(ii) the factual and legal issues raised on appeal must be "not so substantial that the case warrants the issuance of a written opinion in the case."[4]

2. As an initial matter, the Board Member cannot use the AWO process if the result ordered by the IJ below was not correct. To argue that the decision below was not correct – and that AWO is therefore inappropriate in the case – you essentially will need to argue the merits of the case.

3. Additionally, the Board Member cannot use the AWO process – even if he or she believes the result of the decision below is correct – *unless* the errors committed by the IJ were either harmless or nonmaterial ones. The regulation does not define what a "nonmaterial" error is or how such an error would differ from a harmless one.

The standard for harmless error varies somewhat in different federal circuits. You will need to determine what the standard is in your own circuit in order to make this argument. Examples of cases that discuss the harmless error issue include: *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002) (finding prejudice where IJ failed to adequately explain procedures and develop the record); *Podio v. INS*, 153 F.3d 506 (7th Cir. 1998) (finding IJ's refusal to allow witnesses to testify was prejudicial); *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); *Colemenar v. INS*, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was "so clearly denied a full and fair hearing").

Moreover, several errors – each of which alone might be harmless – can have a combined effect that is prejudicial. *See, e.g.*, *Vargas-Garcia v. INS*, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

4. The Board Member also cannot issue an AWO decision unless one of two alternatives is established. 8 C.F.R. § 3.1(e)(4)(i)(A) and (B). The first of these actually contains two sub-tests, *both* of which must be satisfied. 8 C.F.R. § 3.1(e)(4)(i)(A). First, the case must be *"squarely"* controlled by Board or federal court precedent. (Emphasis added) A case is not squarely controlled by precedent if there are differences in the factual or legal issues that require some extension of the precedent – even a minor one. For instance the respondent's case in *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA 2002), was not squarely controlled by the Board's earlier DWI decisions because the

[4] The new regulation changes the "so insubstantial" test to a "not so substantial" test. *Compare* 8 C.F.R. § 3.1(e)(4)(i)(B) *with* former 8 C.F.R. § 3.1(a)(7)(ii)(B).

Massachusetts' law involved in *Ramos* differed from the state law involved in the Board's earlier cases.[5] *See supra* footnote 1.

The second prong of this test allows the use of AWO only if the case does not involve the application of precedent to a novel fact situation. Thus, even in cases in which the legal issues are similar to those found in Board or federal court precedent, AWO cannot be used if there are factual distinctions that make your client's case "novel." In the preliminary comments to the initial AWO regulation, DOJ indicated its intent that cases *not* involving a "novel" fact situation are limited to certain situations in which "legally significant facts [ ] fall into recognizable patterns." 64 FR at 56140. It then cited the *Soriano* cases as examples of cases involving legally significant facts that fall into certain recognizable patterns. In these cases, because § 212(c) relief was no longer available to aliens in certain appeals pending before the Board, the factual differences in their cases were legally insignificant. The majority of cases will not be so clear-cut, however, and thus there will be room to argue that even minor variations in facts are "novel."

5. The alternative test to that described in section 4 above, requires that all factual and legal questions be "not so substantial" that the case warrants a written decision. 8 C.F.R. § 3.1(e)(4)(i)(B). Because this test is an alternative one, a Board Member could use the AWO procedure if he or she determined that the issues met the "not so substantial" test even if the case did not satisfy the requirements in section 4, above. Thus, a Board Member might determine that the requirements of section 4 were not satisfied because there was no precedent on point and/or the facts were novel ones. Despite this, the Board Member could still use the AWO process if he or she determined that the factual and legal issues were "not so substantial" that a written decision was needed.

The regulation provides no guidance about what would make a factual or legal issue "not so substantial" that a written decision is not warranted. However, to satisfy this alternative, the regulation requires that *both* the factual *and* the legal issues be "not so substantial." Thus, its is important to argue the strength of both your factual and your legal issues, for if you convince the Board or the court that either one does not meet the substantiality test you will have demonstrated that the case does not satisfy this criteria.

[5] In fact, the Board initially reopened the case because it determined that its earlier precedent was not controlling for this reason. *Ramos*, 23 I. & N. Dec. 336 (BIA 2002). Subsequently, it reopened the case a second time, and overruled the earlier precedent. *Id.*