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Departure Bar to Motions to Reopen and Reconsider:
Legal Overview and Related Issues[1]

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Introduction

This advisory discusses the so-called "departure bar" regulations. 8 C.F.R. §§ 1003.2(d), and 1003.23(b)(1). Relying on these regulations, the Board of Immigration Appeals (BIA or Board) and the Immigration Courts have refused to adjudicate motions filed by individuals who have departed the United States. This advisory addresses the legal background of the departure bar and the arguments adopted by circuit courts that have rejected or upheld the bar.

The advisory also addresses two issues related to the departure bar and litigation for those who have departed: (1) the departure bar regulation governing departure during the pendency of a BIA appeal, 8 C.F.R. § 1003.4, and (2) returning to the United States after a post departure motion (or appeal) is granted.[2]

Background

Dating back to 1952, the immigration regulations have included a "departure bar" – a provision that attempts to bar a person from pursuing a motion to reopen or a motion to reconsider after he or she has departed the United States. The current regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), bar motions before the Board of Immigration Appeals and the Immigration Courts, respectively. Specifically, the regulations provide:

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[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice provided by a lawyer familiar with a client's case. Counsel are advised to independently confirm whether the law in their circuit has changed since the date of this advisory.

[2] The Post-Deportation Human Rights Clinic at Boston College also has issued an advisory, *Post-Departure Motions to Reopen or Reconsider*, that provides background on the different types of motions and discusses in detail the BIA and circuit court case law on the departure bar.

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.2(d). *See also* 8 C.F.R. § 1003.23(b)(1).

From the outset, the BIA has understood the departure bar as a limitation on its jurisdiction. *See Matter of G- y B-*, 6 I&N Dec. 159 (BIA 1954). In a 2008 decision, the BIA upheld the departure bar regulation and reaffirmed its belief that it lacks jurisdiction over motions post departure. *See Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). The following year, the BIA stepped back from this position and concluded that immigration judges have jurisdiction to review certain motions filed by individuals outside the United States. *See Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009). Specifically, it held that the departure bar does not preclude an immigration judge from adjudicating a motion to reopen an in absentia order based on lack of notice. *See id.*; *see also Contreras-Rodriguez v. Gonzales*, 462 F.3d 1314 (11th Cir. 2006) (reaching same conclusion).

Importantly, when the BIA first adopted the departure bar, motions to reopen and reconsider were regulatory procedures. Not until 1996 did Congress codify the right to file a motion to reopen and a motion to reconsider. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, § 304 (Sept. 30, 1996); *see also Dada v. Mukasey*, 554 U.S. 1, 14 (2008) ("It must be noted, though, that the Act transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien").

Beginning in 2007, seven circuit courts have found that the departure bar is unlawful. In all seven cases, the courts considered the validity of the departure bar with respect to a *statutory* motion to reopen or reconsider, meaning a motion filed pursuant to the statutory right to file a motion to reopen or reconsider under INA §§ 240(c)(6) or (7). In contrast, as discussed below, some courts have considered and upheld the departure bar with respect to a sua sponte motion, i.e., a motion filed pursuant to the agency's regulatory authority to reopen or reconsider a case at any time. *See* 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(a).

Bases for Invalidating the Post Departure Regulation

Courts striking the departure bar regulation have concluded that the regulation either: (1) conflicts with the motion to reopen statute; or (2) constitutes an impermissible exercise of the agency's jurisdiction. In finding that the regulation conflicts with the motion statute, four courts have applied the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which generally governs challenges to

the validity of an agency regulation. *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, No. 10-9500, -- F.3d --, 2012 U.S. App. LEXIS 1964 (10th Cir. Jan. 30, 2012) (en banc). These courts have found that the departure bar regulation conflicts with the plain language of the motion statute, which contains no such bar, and that application of statutory construction rules reinforces this plain text reading. These courts also have relied on the Supreme Court's construction of the motion to reopen statute in *Dada v. Mukasey*, 554 U.S. 1 (2008), and reaffirmed in *Kucana v. Holder*, 130 S. Ct. 827 (2010). In *Dada*, the Supreme Court noted that in IIRIRA, Congress took the significant step of codifying the motion to reopen. *Dada*, 554 U.S. at 14. Further, the Supreme Court held that the government may not infringe on the "important safeguard" of a motion to reopen absent explicit limiting language in the statute. *Dada*, 554 U.S. at 18.

Three courts of appeals have taken a different approach, concluding that the Board's refusal to exercise its congressionally-delegated jurisdiction conflicts with the Supreme Court's decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009). *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010). These courts have reasoned that Congress delegated the authority to adjudicate *all* motions to immigration judges and the Board of Immigration Appeals and that, therefore, the agency cannot refuse to adjudicate a subset of motions (i.e. post departure motions) on jurisdictional grounds.

If you have a case in a circuit court that has not ruled on the validity of the departure bar, please contact the authors of this advisory at clearinghouse@immcouncil.org.

Sua Sponte Reopening or Reconsideration

As noted above, the cases finding the departure bar unlawful all arose in the context of motions to reopen or reconsider filed pursuant to the motion statutes, INA §§ 240(c)(6) and (7), and the courts relied upon these statutory provisions in their analyses. Many motions to reopen or reconsider, however, are filed out of time, and ask that the immigration judge or the BIA exercise sua sponte authority to reopen or reconsider a decision. *See* 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(a). Two circuit courts have found that the departure bar is lawful with respect to sua sponte motions. *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009).

The Ninth Circuit is the only court to indicate that the departure bar is not lawful based on reasoning that applies regardless whether the motion is filed pursuant to the motion statute or the sua sponte regulation. In *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), and *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007), the court interpreted the departure bar regulation as applicable only where a person filed the motion while still in proceedings (i.e., before he or she departed) and not when the motion is filed after the departure. However, subsequent to *Lin* and *Reynoso-Cisneros*, the Board issued *Matter*

of Armendarez, in which it rejected the Ninth Circuit's interpretation and said that it would decline to follow these decisions even in the Ninth Circuit. *Matter of Armendarez*, 24 I&N Dec. at 653 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). The Ninth Circuit has yet to revisit *Lin* and *Reynoso-Cisneros* following *Matter of Armendarez*.

Although most courts have not decided whether the departure bar is lawful with respect to sua sponte motions, given the adverse case law in the Second and Fifth Circuits and the uncertain future of *Lin* and *Reynoso-Cisneros*, individuals who are outside the 90 or 30 day filing windows, may want to consider whether the motion statute may nonetheless protect their motion. For example, there are several exceptions to the filing deadline including motions seeking to reopen and rescind an in absentia removal order, INA § 240(c)(7)(C)(iii), and motions seeking reopening to apply for asylum, INA § 240(c)(7)(C)(ii). Furthermore, most courts also recognize that the filing deadline is subject to equitable tolling. *See*, *e.g.*, *Harchenko v. INS*, 379 F.3d 405, 410 (6th Cir. 2004); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001). In this situation, individuals may wish to seek sua sponte reopening in the alternative, i.e. only if the immigration judge or BIA rejects the argument that the motion is statutory.

Inapplicability of the Departure Bar Where the Basis of the Underlying Conviction is Vacated

Prior to finding the departure bar unlawful, the Ninth Circuit held that the departure bar does not apply where the underlying removal order was not "legally executed." *See Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981). The court said that a removal order is not legally executed where a criminal court subsequently vacates a conviction that constituted a "key part" of the order. *See id.*; *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990).

Although no other courts have addressed this issue explicitly, several courts have considered a related issue: whether the pre-IIRIRA departure bar to *judicial review* (*see* former INA 106(c), repealed by IIRIRA § 306(b)) applied where the deportation was not "legally executed." Three courts indicated that § 106(c) did not apply in this context while three courts suggested otherwise. *See Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984); *Newton v. INS*, 622 F.2d 1193, 1195 (3d Cir. 1980) (citing *Mendez* with approval). *But see Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990) (rejecting *Mendez*); *Baez v. INS*, 41 F.3d 19, 23-24 (1st Cir. 1994) (same); *Roldan v. Racette*, 984 F.2d 85, 90 (10th Cir. 1993) (same); *Saadi v. INS*, 912 F.2d 428 (10th Cir. 1990).

Related Issues:

Departure Bar to BIA Appeals

In addition to the departure bar to motions to reopen or reconsider, the immigration regulations also attempt to bar individuals from pursuing an administrative appeal with

the BIA after departing the United States. By regulation, "departure from the United States . . . prior to the taking of an appeal from a decision in his or her case, shall constitute a waiver of his or her right to appeal." 8 C.F.R. § 1003.3(e). Further:

> Departure from the United States . . . subsequent to the taking of an appeal, but prior to a decision theron, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.

8 C.F.R. § 1003.4. The BIA interprets 8 C.F.R. § 1003.4 as jurisdictional. *See Matter of Armendarez,* 24 I&N Dec. at 652.

DHS generally cannot execute a removal order during the thirty day period to file a BIA appeal and during the pendency of the appeal. 8 C.F.R. § 1003.6(a). However, there are instances where DHS unlawfully deports a person during these time periods. In addition, DHS may deport a person (lawfully) while he or she is appealing an immigration judge's denial of a motion to reopen or reconsider. *See* 8 C.F.R. § 1003.6(b). In these situations, the Board generally applies the departure bar to conclude that it lacks jurisdiction over the appeal. The Sixth Circuit is the only circuit to consider the applicability of the bar where DHS deports a person, and has reversed the Board. *See Madrigal v. Holder,* 572 F.3d 239 (6th Cir. 2009). The court found that to allow the government to cut off the right to appeal by deporting a person would be a "perversion of the administrative process." *Id.* at 245.

Other courts have found the regulation lawful and applied it in other situations where the person was not physically deported by DHS. *See Long v. Gonzales*, 420 F.3d 516 (5th Cir. 2005) (applying departure bar where petitioner unwittingly left the United States when on a sightseeing trip); *Aguilera-Ruiz v. Ashcroft,* 348 F.3d 835 (9th Cir. 2003) (applying departure bar to "brief, casual, and innocent" departures); *but see Martinez-De Bojorquez v. Ashcroft,* 365 F.3d 800, 803 (9th Cir. 2004) (finding due process violation where person not given notice of the departure bar). However, no court has considered the Board's characterization of 8 C.F.R. §§ 1003.3(e) and 1003.4 as jurisdictional and assessed whether such characterization conflicts with the Supreme Court's decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).

Returning to the United States after the BIA or IJ Grants a Post Departure Motion

In circuits where the departure bar is invalid, individuals outside the United States who have prevailed on a post departure motion still may face legal and practical obstacles to pursuing their immigration cases. Until 2012, the government had no actual policy for returning successful litigants to the United States.[3] Even though the Office of Solicitor

[3] Complaint, *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y. May 12, 2011), at

General (OSG) indicated to the Supreme Court a policy existed, litigation has revealed that the OSG may have misled the Court.[4]

In August 2011, the Department of Homeland Security made public a 2008 Memorandum of Agreement (MOA) between U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection, which indicates that ICE is responsible for considering parole requests made by noncitizens "in removal proceedings or who have final removal orders . . . regardless of whether [he or she] is within or outside of the U.S."[5] However, parole generally is an inadequate vehicle for return for many reasons. Parole depends entirely on a favorable exercise of ICE discretion, i.e., it does not depend on a favorable court decision. In addition, among other reasons, parole also does not guarantee the person is returned to the status he or she held before removal and also does not protect against new inadmissibility charges.

In February 2012, ICE issued a memorandum purporting to contain its current "policy" for facilitating the return of persons who were deported during the pendency of a petition for review and who subsequently prevailed in litigation.[6] Although the memorandum indicates that "ICE will regard the returned alien as having reverted to the immigration status he or she held, if any, prior to the entry of the removal order," it also contains several loopholes, ambiguities and gaps in coverage.[7] Most notably, for purposes of this advisory, the policy does not apply to persons abroad who prevail on a motion to reopen or reconsider. Nevertheless, practitioners can argue that ICE similarly should engage in facilitating the return of successful motion litigants and, upon return, similarly should treat them as having their pre-deportation immigration status.

The lack of an adequate return policy in the petition for review context, the lack of any policy in the motions context and the problems associated with parole present significant challenges for attorneys. Moreover, without the assistance of counsel, successful post

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http://nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf.

[4] *See* February 7, 2012 Opinion and Order, *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y. May 12, 2011), at http://nationalimmigrationproject.org/legalresources/8-SJ-memo-order-final.pdf.

[5] Department of Homeland Security Memorandum of Agreement (Sept. 2008), located at http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf.

[6] U.S. Immigration and Customs Enforcement, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens* (Feb. 24, 2012), at http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf.

[7] *See* Washington Square Legal Services, Press Release, *Scrambling to Cover Up a Possible Lie to the Supreme Court in* Nken v. Holder, *ICE Issues a New Memo Describing Policy that It Claimed Existed Years Ago* (March 9, 2002), at http://nationalimmigrationproject.org/press_releases/2012_03_09_Press_Release_9am.pdf.

departure litigants stand little to no chance of returning to the United States. Practitioners facing these problems should contact the authors of this article by emailing trina@nationalimmigrationproject.org or clearinghouse@immcouncil.org to discuss return strategy.[8] (In addition, practitioners may wish to raise this concern in stay applications as a factor contributing to the irreparable harm a person will suffer if removed.[9])

[8] A related practice advisory on return strategy in general is available on the American Immigration Council's website at: http://www.legalactioncenter.org/sites/default/files/lac_pa_11607.pdf.

[9] For a further explanation of this issue, see the NYU Immigrant Rights Clinic summary, *Barriers to Return After Successfully Challenging a Removal Order from Outside the U.S.*" at http://nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_Summary.pdf.