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POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER[1]

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I. INTRODUCTION

This practice advisory provides guidance on filing motions to reopen or reconsider on behalf of clients who have been ordered deported, excluded, or removed and who have already departed the United States. Section II provides background on motions to reopen and reconsider and on the regulatory "post-departure bar." Section III discusses cases within the First, Fourth, Fifth, Ninth, Tenth and Eleventh Circuits and the Board of Immigration Appeals that may be relevant to deportees seeking reopening or reconsideration. Section IV considers issues that may arise if a client is removed while a motion to reopen or reconsider is pending. Section V provides practical tips on filing motions to reopen or reconsider.

 The PDHRP gratefully acknowledges the input and assistance of Beth Werlin, Trina Realmuto, Kathleen Gillespie and Erzulie Coquillon. This practice advisory does not constitute legal advice. Attorneys should perform their own research to ascertain whether the state of the law has changed since publication of this advisory.

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II. BACKGROUND

Reopening vs. Reconsideration

The term "MTR" is used in this practice advisory to refer both to motions to reconsider and motions to reopen.

A motion to reconsider is based on legal grounds alone. It asks that a decision be reexamined "in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier"[6] including errors of law or fact in the previous order.[7]

In contrast, a motion to reopen is based on "facts or evidence not available at the time of the original decision."[8] A motion to reopen must be supported by affidavits or other evidence,[9] and must establish that the evidence is material, was unavailable at the time of original hearing, and could not have been discovered or presented at the original hearing.[10] Situations in which motions to reopen are appropriate include changed country conditions with regard to asylum claims; allegations of ineffective assistance of counsel; newly eligible relief from removal; and vacatur of a conviction that formed the basis for the order.[11]

A MTR must be filed at the adjudicatory body that last had jurisdiction over the case – either the Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA").[12] Where jurisdiction lies with the IJ, the motion must be filed with the IJ who entered the order.[13] If jurisdiction lies with the BIA, the motion must be filed with the BIA.[14]

The federal appeals courts have jurisdiction to review the BIA's denial of an MTR, as well as the BIA's affirmance of an IJ's denial of such a motion, through a petition for review filed under 8 U.S.C. § 1252(a)(1). The place where the IJ completed proceedings determines which circuit will have jurisdiction over a petition to review the BIA's action.[15]

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[6] *In Re- Ramos*, 23 I. & N. Dec. 336, 338 (BIA 2002).
[7] *See* INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. §§ 1003.2(b)(1), 1003.23(b)(2) .
[8] *Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004).
[9] *See* INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B).
[10] *See* 8 C.F.R. § 1003.2(c)(1); *Kaur v. BIA*, 413 F.3d 232, 234 (2d Cir. 2005).
[11] *See Patel v. Ashcroft*, 378 F.3d 610, 612 (changed country conditions); *Siong v. INS*, 376 F.3d 1030, 1036-1039 (9th Cir. 2004) (ineffective assistance of counsel); *Iturribarria v. INS*, 321 F.3d 889, 894-97 (9th Cir. 2003) (ineffective assistance of counsel); *De Faria v. INS*, 13 F.3d 422 (1st Cir. 1993) (vacatur of conviction).
[12] *See* BIA Practice Manual, § 5.2(a)(iii), App. K-1, *available at* : http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf
[13] *See* 8 C.F.R. § 1003.23(b)(1)(ii).
[14] *See* 8 C.F.R. § 1003.2(a)
[15] *See* INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

What Does the Statute Say?

Prior to 1996, MTRs were governed solely by regulation. As part of the Illegal Immigration and Immigrant Responsibility Reform Act of 1996 ("IIRIRA"),[16] Congress codified the right to file MTRs. These provisions are now located at 8 U.S.C. §§ 1229a(c)(6) (motions to reconsider) and (c)(7) (motions to reopen).[17]

In its current form, the statute imposes time,[18] number, [19] and content[20] requirements on motions to reopen or reconsider, but does not distinguish between pre- and post-departure motions except with regard to the deadline for motions to reopen filed by battered spouses and children under certain circumstances.[21]

In addition, 8 U.S.C. § 1229a(b)(5)(C) provides that a person who is ordered removed *in absentia* may file a motion to reopen to rescind the order. Congress first codified this provision in 1990.[22]

Time and Number Limits

Practitioners must be mindful in *all* circuits of significant restrictions on MTRs (both pre- and post-departure) imposed by statute and regulation.

An individual who has been ordered removed is permitted to file only one motion to reconsider.[23] The motion must be filed within 30 days of the date of entry of a final administrative order.[24]

The Immigration and Nationality Act ("INA") also limits an individual ordered removed to filing one motion to reopen, within 90 days of the date of entry of a final administrative order.[25] However, the statute provides for exceptions to the time and number requirements in the following circumstances: those seeking asylum based on changed country conditions (motion

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[16] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[17] IIRIRA § 304 originally added these provisions at, respectively, 8 U.S.C. §§ 1229a(c)(5) and 1229a(c)(6). (INA §§ 240(c)(6), (c)(7)) Recent amendments to the INA moved these provisions to their current location without any substantive changes. REAL ID Act of 2005, Pub. L. No. 109-13 § 101(d), 119 Stat. 231 (May 11, 2005).

[18] *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(6)(B) (reconsideration); INA §§ 240(b)(5)(C)(ii), (c)(7)(C), 8 U.S.C. §§ 1229a(b)(5)(C)(ii), (c)(7)(C).

[19] *See* INA § 240(c)(6)(A), 8 U.S.C. § 1229a(c)(6)(A) (reconsideration); INA § 240(c)(7)(A), 8 U.S.C. § 1229a(c)(7)(A) (reopening).

[20] *See* INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C) (reconsideration); INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B) (reopening).

[21] *See* INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).

[22] *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5061, § 545(a) (November 29, 1990).

[23] *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(6)(B). The Eleventh Circuit recently held that the 8 C.F.R § 1003.2(b)(2) imposes a limit of one motion to reconsider *per decision*, rather than per case. *See Calle v. U.S. Att'y Gen.*, 504 F.3d 1324, 1328-1330 (11th Cir., Oct. 23, 2007).

[24] *See* INA § 240(c)(6)(A), (B), 8 U.S.C. § 1229a(c)(6)(A),(B).

[25] *See* INA § 240(c)(7)(A), (c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(A), (c)(7)(C)(i).

may be filed any time);[26] battered spouses and children seeking certain forms of relief under the Violence Against Women Act (motion may be filed within one year, or at any time under certain circumstances);[27] and those ordered removed *in absentia* (at any time if basis for reopening is lack of notice of the hearing, or confinement in federal or state custody and failure to appear was no fault of the person subject to the order; 180 days if basis for reopening is exceptional circumstances).[28] In addition, most circuits have recognized that the filing deadlines are subject to equitable tolling.[29]

Sua Sponte Authority to Reconsider or Reopen "at any time"

The regulations also provide that the BIA and IJs have *sua sponte* authority to reopen or reconsider their own decisions "at any time."[30] However, the BIA has interpreted the post-departure bar to prohibit *sua sponte* reopening or reconsideration subsequent to departure from the United States.[31] The Fifth and Tenth Circuits have upheld this interpretation.[32]

The BIA has stated that it will exercise *sua sponte* jurisdiction only in "exceptional circumstances."[33] Exceptional circumstances include a change in law, if it is fundamental rather than incremental.[34] Additionally, the BIA has regularly exercised *sua sponte* authority to reopen proceedings where a conviction that formed the basis of an order has subsequently been vacated.[35]

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[26] *See* INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii).
[27] *See* INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).
[28] *See Matter of Bulnes-Nolasco*, 25 I. & N. Dec. 57 (BIA 2009); *See* INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C). The 180 day time limit on motions to reopen *in absentia* orders for "exceptional circumstances" does not apply to pre-June 13, 1992 *in absentia* orders where "reasonable cause" can be shown. In addition, there are no numerosity limits on motions to reopen to rescind an *in absentia* order. *See generally*, Beth Werlin, "Rescinding an *In Absentia* Order of Removal," American Immigration Council, Legal Action Center Practice Advisory (Sept. 21, 2004), *available at* http://www.legalactioncenter.org/practice-advisories/rescinding-absentia-order-removal
[29] *See Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398, 404-407 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405, 409-410 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1183-1185 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253, 1257-1258 (10th Cir. 2002). *But See, Anin v. Reno*, 188 F.3d 1273, 1278-1279 (11th Cir. 1999).
[30] 8 C.F.R §§ 1003.2(a) (BIA) and 1003.23(b)(1) (IJ).
[31] *See Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646, 660 (BIA 2008).
[32] *See id.*;. *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003); *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1159 (10th Cir. 2009)
[33] *See Matter of J-J-*, 21 I. & N. Dec. 976, 984 (BIA 1997); *Matter of X-G-W-*, 22 I. & N. Dec. 71, 73 (BIA 1998).
[34] *See Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207, 208 (BIA 2002) (reconsidering *sua sponte* where the prior decision had held that a particular offense was not an aggravated felony, and a court of appeals subsequently held that it was); *Matter of X-G-W-*, 22 I. & N. Dec. 71, 74 (reopening *sua sponte* on the basis of legislative change).
[35] *See Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240, 246 n.3 (3d Cir. 2006) (citing ten unpublished BIA cases granting untimely motions to reopen based on vacated sentences, and noting that "the parties have not identified, and we have not found, a single case in which the Board has rejected a motion to reopen as untimely after concluding that an alien is no longer convicted for immigration purposes").

The regulations provide that "[t]he Board may at any time reopen or reconsider on its own any case in which it has rendered a decision."[36] Several circuits have held that because 8 C.F.R. § 1003.2 grants such broad discretion to the BIA to reopen or reconsider *sua sponte*, the courts lack jurisdiction to review such a decision.[37] However, the Eighth Circuit has reviewed such cases for abuse of discretion,[38] and the Seventh Circuit has limited non-reviewability to cases in which the BIA's decision not to exercise *sua sponte* jurisdiction is "indeed based on an exercise of uncabined discretion rather than on the application of a legal standard."[39] The Third Circuit has commented that even a decision regarding the exercise of *sua sponte* authority may not deviate, without explanation, from a settled practice of decision-making. [40]

Where there is a consistent pattern of administrative decisions on a given issue, the Third Circuit has stated that they expect the BIA to conform to that pattern or explain its departure from it. If the Board determines on remand that [the petitioner] is no longer "convicted" under the INA, the Third Circuit would expect it to reopen his proceedings despite the untimeliness of his motion, as it has routinely done in other cases where a conviction was vacated under *Pickering*, or at least explain logically its unwillingness to do so.[41]

What is the Post-Departure Bar?

Although the statutes codifying MTRs do not contain a bar to motions filed after a person departs, two federal regulations do: 8 C.F.R. § 1003.2 (MTRs filed with the BIA) and 8 C.F.R. § 1003.23 (MTRs filed with the IJ). Both regulations contain identical language prohibiting adjudication of post-departure motions, providing that MTRs "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States."[42] These regulations apply both to persons who have

[36] *See* 8 C.F.R. § 1003.2(a). It should be noted that the corresponding regulation regarding the IJ's *sua sponte* authority contains no such grant of discretion. *See* 8 C.F.R. § 1003.23(b)(1).

[37] *See, e.g.*, *Harchenko v. INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474 (3d Cir. 2003); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-1001 (10th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999); *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999). *But see Riley v. INS*, 310 F.3d 1253, 1257 (10th Cir. 2002)(finding abuse of discretion where BIA failed to consider whether case warranted equitable tolling of deadline for motion to reopen based on ineffective assistance of counsel).

[38] *See Recio-Prado v. Gonzales*, 456 F.3d 819, 821-22 (8th Cir. 2006); *Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1162 (8th Cir. 2005). Neither decision was *en banc*, however, and in a subsequent case, another panel of the Eighth Circuit cast doubt on the continuing viability of the *Recio-Prado* holding. The panel noted that other circuits have found such a decision to be unreviewable, and concluded: "Given [Eighth Circuit] precedent, we review the BIA's decision for abuse of discretion and leave resolution of the jurisdictional issue to the court en banc at the appropriate time." *Tamenut v. Gonzales*, 477 F.3d 580, 582 (8th Cir. 2007).

[39] *Cevilla v. Gonzales*, 446 F.3d 658, 660 (7th Cir. 2006) (holding that BIA decision not to exercise *sua sponte* authority to reopen was reviewable where BIA based its decision on its finding that person seeking reopening had not established eligibility for relief).

[40] *Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240, 249 (3d Cir. 2006).

[41] *Id.*

[42] *See* 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

been physically removed by the government, those who have "self-deported," [43] *i.e.*, left the country voluntarily while subject to an order of deportation, exclusion, or removal and those who have left the country after a grant of voluntary departure.[44]

As discussed in Section III, the BIA has upheld the post-departure bar and stated that it does not have jurisdiction to consider a MTR filed on behalf of an individual who has departed the United States pursuant to a final administrative order of removal.[45] However, the BIA has recognized an exception to the bar for motions to rescind an *in absentia* order if the motion is premised on a lack of notice.[46] Specifically, the BIA held that the post-departure bar does not prevent either the IJ or the BIA from considering a motion to reopen an *in absentia* order where the applicant can demonstrate failure to receive notice of a hearing.[47]

Federal circuit courts are split on the validity of the post-departure bar. The Fourth Circuit has held that the post-departure bar conflicts with the clear statutory language of the motion to reopen provision in INA § 240(c)(7),8 U.S.C. § 1229a(c)(7)) and is therefore invalid. Accordingly, persons residing outside of the United States whose cases were last within the jurisdiction of the Fourth Circuit can seek reopening or reconsideration.

The First, Fifth, and Tenth Circuits have upheld the validity of the post-departure bar against some arguments. The First Circuit, however, did not directly address the issue of whether the post-departure bar conflicts with the clear statutory language of the MTR provision of the INA. Thus, the regulation is still subject to challenge based on this argument in the First Circuit. The Fifth Circuit held that the post-departure bar could be applied to untimely MTRs, but left open the possibility of jurisdiction over a timely-filed, post- departure MTR. The Tenth Circuit considered the statutory argument directly and found that there was no evidence to support a finding that Congress intended to repeal to post-departure bar when it codified the right to file a MTR.

The Ninth Circuit has not directly addressed the question of the validity of the regulations, but it has all but eliminated the post-departure bar through its narrow interpretation of the regulatory language. However, as discussed below, the BIA has disagreed with this holding and has directed IJs, including those in the Ninth Circuit, not to follow Ninth Circuit precedent, in some situations.[48]

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[43] *See Stone v. INS*, 514 U.S. 386, 398 (1995) ("Deportation orders are self-executing orders, not dependent upon judicial enforcement."). However, in *Singh v. Gonzales*, 412 F.3d 1117, 1121 (9th Cir. 2005), discussed in Section III, the Ninth Circuit rejected the BIA's ruling that the post-departure bar applied to a person who departed prior to the commencement of proceedings.

[44] *See Dada v. Mukasey*, 128 S.Ct. 2307 (2008).

[45] *See Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA 2008).

[46] *See Matter of Bulnes-Nolasco*, 25 I. & N. Dec. 57 (BIA 2009).

[47] *Id., See also, Contreras-Rodriguez v. Attorney General*, 462 F.3d 1314 (11th Cir. 2006).

[48] *See Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646, 653 (BIA 2008).

Motions to Reopen *In Absentia* Proceedings Based on Lack of Notice

Both the statute and the regulations provide that motions to reopen *in absentia* proceedings based on lack of notice may be filed "at any time." The BIA recently held in *Matter of Bulnes-Nolasco* that this language trumps the regulatory post-departure bar,[49] and thus individuals who seek reopening in these circumstances should not encounter jurisdictional obstacles regardless of where the removal order issued. No circuit has held to the contrary, and in the Eleventh Circuit, those seeking reopening on grounds of lack of notice can rely on positive circuit precedent that predated the Board's decision in *Bulnes-Nolasco*.[50]

III. CASE LAW ON POST-DEPARTURE MOTIONS

A. Board of Immigration Appeals

The BIA recently considered two cases involving post-departure motions. In the first decision, *Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA 2008), the BIA found that it lacked jurisdiction to consider a motion to reopen for an individual who had departed the United States after the issuance of an administrative order of removal. However, in a subsequent decision, *Matter of Bulnes-Nolasco*, 25 I. & N. Dec. 57 (BIA 2009), the BIA clarified its ruling and held that an exception could be made in the case of a motion to reopen an *in absentia* order where the individual did not receive notice.

In ***Matter of Armendarez-Mendez*** the BIA held that the regulatory post-departure bar deprived it of jurisdiction to consider a MTR for someone who had left the country after an administrative removal order. The respondent in *Armendarez-Mendez* was removed in December 2000 because of a prior conviction of possessing cocaine with intent to distribute. At the time of his removal, respondent attempted to file for § 212(c) relief but the IJ and BIA held that he was not eligible.[51] In 2006, respondent filed a motion to reopen *sua sponte* with the BIA that was later denied.

In *Armendarez*, the BIA held that they did not have jurisdiction to consider respondent's motion to reopen and disagreed with the Ninth Circuit's analysis in *Lin v. Gonzales***,** 473 F.3d 979 (9th Cir. 2007). The BIA reasoned that the post-departure bar should be viewed in the context of the entire Immigration and Nationality Act and applying the bar only to individuals who are currently in removal proceedings contradicts the plain language meaning of a "motion to reopen." (See Section III for additional explanation of *Lin*) The BIA was persuaded by the history presence of the post-departure bar, noting that it had been in existence for more than half a century. The BIA claimed that nothing in the legislative history of IIRIRA indicated that Congress intended to repeal the post-departure bar and it would be improper to infer Congress's intention without further evidence. In *dicta*, the BIA also disagreed with the Fourth Circuit's analysis in

[49] *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009).
[50] *See Contreras-Rodriguez v. Att'y Gen.***,** 462 F.3d 1314 (11th Cir. 2006);
[51] Respondent was ordered removed prior to the Supreme Court's ruling in *INS v. St.Cyr*, 533 U.S. 289 (2001).

William v. Gonzales (discussed in detail below).[52] The BIA also stated in *dicta* that the post departure bar deprived the Board of jurisdiction to consider the motion *sua sponte*, citing *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003).

In ***Matter of Bulnes-Nolasco*** the BIA held that an IJ has jurisdiction to consider a motion to reopen an *in absentia* proceeding based on lack of notice even though the motion was filed after the respondent's departure from the United States.

The respondent in *Bulnes-Nolasco* was ordered removed *in absentia* while she was in Honduras. She filed a motion to reconsider with the IJ arguing that she was ordered removed *in absentia* while she was out of the country, and therefore did not depart the United States under an order of deportation. The IJ denied her motion and the respondent appealed to the BIA.

The BIA held that an *in absentia* removal order based on lack of notice constitutes an exception to the general post departure bar. The BIA concluded that the regulatory language permits the reopening of an *in absentia* order "at any time" and held that "an alien ordered deported *in absentia* possesses a robust right to challenge the removal order on improper notice grounds."[53] In a footnote, the BIA acknowledged the motion to reopen post-departure regulatory bar in 8 C.F.R. § 1003.23(b)(1), but stated that the regulation regarding the reopening of an *in absentia* order, 8 C.F.R. §1003.23(b)(4)(iii)(A)(2), is both more specific and more recent in time, and therefore it overrides the post-departure regulatory bar.

B. Federal Circuit Courts That Have Invalidated the Post-Departure Bar and/or Carved Out Exceptions

Fourth Circuit

In ***William v. Gonzales***, 499 F.3d 329 (4th Cir. 2007), the Fourth Circuit invalidated the post-departure bar contained in 8 C.F.R. § 1003.2(d) on the ground that it conflicts with the clear statutory language of 8 U.S.C. § 1229a(c)(7)(A).

The petitioner in *William* was removed on the basis of a criminal conviction. Following his removal, the conviction was vacated. William filed a motion to reopen with the BIA, which denied the motion, citing the post-departure bar in 8 C.F.R. § 1003.2(d).

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[52] In *William*, the court said that the post departure regulation conflicts with the motion to reopen statute. In *Armendarez,* the BIA acknowledges that the 4th Circuit's analysis in *William* was based on the plain language of the statute, which is step one of the Chevron analysis. 24 I. & N. at 653- 656. As a result, the BIA and IJs in the Fourth Circuit are bound to follow the *William* holding in cases arising out of the Fourth Circuit. *See, Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 385-388 (BIA 2007)(Acquiescing to the law of the circuit)

[53] 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2).

The Fourth Circuit granted William's petition for review, finding that the INA provides a right to file one motion to reopen, regardless of whether it is filed from inside or outside the country:

> **We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country.** This is so because, in providing that "an alien may file," the statute does not distinguish between those aliens abroad and those within the country – both fall within the class denominated by the words "an alien." Because the statute sweeps broadly in this reference to "an alien," it need be no more specific to encompass within its terms those aliens who are abroad. Thus, the Government's view that Congress was silent as to the ability of aliens outside the United States to file motions to reopen is foreclosed by the text of the statute. The statutory language does speak to the filing of motions to reopen by aliens outside the country; it does so because they are a subset of the group (i.e., "alien[s]") which it vests with the right to file these motions. Accordingly, the Government's view of § 1229a(c)(7)(A) simply does not comport with its text and cannot be accommodated absent a rewriting of its terms.[54]

In support of this conclusion, the court cited the well-established principle that "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."[55]

The court also pointed to the provision of the INA that grants a special extension of the filing deadline to a battered spouse or child who is "physically present in the United States" at the time of filing such a motion.[56] The court noted that this physical presence requirement would be meaningless if the underlying right to file MTRs did not include motions filed from both inside and outside the country.

Because the court found the statutory language to be clear, it invalidated the regulation under the first step of a *Chevron* analysis,[57] and did not reach the petitioner's argument that the regulation violated his right to due process under the Fifth Amendment.

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[54] *William v. Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007) (emphasis added).

[55] *Id*. at 333 (quoting *U.S. v. Johnson*, 529 U.S. 53, 58 (2000)).

[56] *Id*. The exception, which is codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV), was first enacted as part of the Victims or Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The "physical presence" element was added as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825, 119 Stat. 2960 (2006).

[57] *Id*. at 333. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court must first determine whether "Congress has directly spoken to the precise question" at issue by examining the plain meaning of the statute and, if necessary, employing traditional rules of statutory construction. *Id*. at 842. If the statutory language is clear, then the court "must give effect to the unambiguously expressed intent of Congress." *Id*. at 843. If the court is not able to discern the intent of Congress, a secondary inquiry is necessary to determine whether the agency interpretation is reasonable. *Id*.

The Fourth Circuit denied the government's petition in *William* for rehearing *en banc.*

Who is Covered by *William?*

The *William* decision covers those who have departed the United States. after being ordered deported, excluded, or removed by an IJ sitting within the territorial jurisdiction of the Fourth Circuit. The Immigration Courts that are located within the Fourth Circuit are in Maryland, North Carolina, and Virginia.

Although *William* concerns a motion to reopen filed with the BIA under 8 C.F.R. § 1003.2, the decision should also apply to motions filed with the IJ (which fall under 8 C.F.R. § 1003.23), because the relevant language in the two regulations is identical. The decision should also extend to motions to reconsider, as the statutory language regarding motions to reconsider is as broad as the language in the motion to reopen statute cited by the court in *William*.[58]

It is important to note that the *William* holding finds that the regulatory post-departure bar conflicts with the statute and is thus ultra vires. Therefore, the BIA's decision in *Armendarez-Mendez* cannot override the *William* court's interpretation of an unambiguous statute.[59] Moreover, the discussion of the *William* holding in *Armendarez-Mendez* is *dicta* and not binding on cases arising out of the Fourth Circuit.

Ninth Circuit

The Ninth Circuit has held that the post-departure bar does not apply in three specific circumstances: departure prior to commencement of proceedings, departure after proceedings have been completed and departure before or after a conviction that formed a "key part" of the proceeding has been vacated. These circumstances, taken together, cover the vast majority of deportees who may wish to seek reopening or reconsideration.

1) Departure prior to commencement of proceedings

In ***Singh v. Gonzales,*** 412 F.3d 1117, 1121 (9th Cir. 2005), the Ninth Circuit held that a person who has departed the United States before proceedings began is not the "subject of removal, deportation, or exclusion proceedings," and hence not subject to the post-departure bar contained in 8 C.F.R. § 1003.2(d),[60]

The petitioner in *Singh* entered the country in 1997, overstayed his non-immigrant visa, and filed an asylum application. Several months later, he withdrew the asylum application and departed the United States voluntarily. He was subsequently ordered removed *in absentia*. He

[58] INA § 240(6)(A) provides that "[t]he Alien may file one motion to reconsider a decision that the alien is removable from the United States."
[59] *See Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).
[60] It should be noted that Singh filed the motion to reopen with the IJ, and that the relevant post-departure bar was thus contained in 8 C.F.R. § 1003.23(b)(1) and not, as cited by the BIA and the Ninth Circuit, § 1003.2(d). However, as the Ninth Circuit has acknowledged elsewhere, "[t]he language of the two regulations is, in all material respects, identical." *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 at 1002 (9th Cir. 2007).

later re-entered the United States. on a non-immigrant visa, and moved to reopen proceedings. The Ninth Circuit reasoned that because Singh left the United States before removal proceedings had commenced against him, he was not the "subject of" removal proceedings when he departed, and therefore did not fall within the scope of the post-departure bar.

2) Departure after proceedings have been completed

In ***Lin v. Gonzales,*** 473 F.3d 979, 982 (9th Cir. 2007), the court held that the post-departure bar contained in 8 C.F.R. § 1003.23(b)(1) does not apply to someone whose removal order is executed prior to the person's filing a motion to reopen. Citing its decision in *Singh*, the court concluded that the petitioner was no longer "the subject of" removal proceedings and thus was not barred from filing a motion to reopen with the IJ. The court explained:

> Because petitioner's original removal proceedings were completed when he was removed to China, he did not remain the subject of removal proceedings after that time. While the regulation may have been intended to preclude aliens in petitioner's situation from filing motions to reopen their completed removal proceedings, the language of the regulation does not unambiguously support this result. Because ambiguity must be construed in favor of the petitioner, we decline to adopt the government's construction of the regulation and cannot affirm the denial of petitioner's motion to reopen on this ground.[61]

In ***Reynoso-Cisneros v. Gonzales,*** 491 F.3d 1001, 1002 (9th Cir. 2007), the court subsequently extended this holding to MTRs filed with the BIA under 8 C.F.R. § 1003.2(d).

Practitioners in the Ninth Circuit should note that the BIA in *Matter of Armendarez* disagrees with the reasoning in *Lin v. Gonzales* and *Reynoso-Cisneros v. Gonzales* and claims that *Armendarez* overrules the Ninth Circuit's holding.[62]

3) Departure before or after a conviction that formed a "key part" of the proceeding has been vacated

The Ninth Circuit has also held that those who have been deported, excluded, or removed may seek reopening of proceedings where a conviction that formed a "key part" of the proceeding has been vacated.

The most recent case in which it has reached this conclusion is ***Cardoso-Tlaseca v. Gonzales***, 460 F.3d 1102, 1107 (9th Cir. 2006). The petitioner's marijuana cultivation conviction, one of two grounds of removal, was vacated following his removal. The court, finding that the conviction was a "key part of his removal proceeding," held that if the conviction was vacated on the merits, and was thus no longer a basis for removal, then the petitioner was entitled to reopen the proceedings.

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[61] *Lin*, 473 F.3d at 982.

[62] 24 I. & N. Dec. at 653, *citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

In reaching this conclusion, the court relied on two prior cases, ***Estrada-Rosales v. Immigration and Naturalization Service,*** 645 F.2d 819, 821 (9th Cir. 1981) and ***Wiedersperg v. Immigration and Naturalization Service,*** 896 F.2d 1179, 1183 (9th Cir. 1990). In *Estrada-Rosales*, the petitioner's motion to set aside his conviction for procedural error was pending at the time of his deportation, and was decided a few months later. The BIA denied his motion to reopen, relying on the regulatory post-departure bar (which at that time was located at 8 C.F.R. § 3.2). The court held that in light of the vacatur of the conviction, the deportation was not legally executed and Estrada-Rosales was entitled to a new hearing.

Wiedersperg concerned a petitioner who waited seven years after his conviction was vacated to seek reopening of his deportation proceedings. The court reaffirmed its holding in *Estrada-Rosales*, concluding that:

Wiedersperg's successful overturning of his state conviction establishes a prima facie showing for relief. We hold that it was an abuse of discretion for the BIA to deny Wiedersperg a reopened hearing on the speculative grounds that he had 'slept on his rights' in such a way as to prevent his retrial.[63]

Both *Estrada-Rosales* and *Wiedersperg* relied in turn on ***Mendez v. Immigration and Naturalization Service,*** 563 F.2d 956, 959 (9th Cir. 1977), which the court concluded that because the petitioner's counsel had not been given notice of his client's deportation, the deportation was not legally executed. The court held that, for purposes of the post-departure bar to judicial review then contained in the statute,[64] "departure" meant "'legally executed' departure when effected by the government."[65]

Who is covered by *Singh, Lin,* and *Cardoso-Tlaseca*?

These decisions apply to individuals who were ordered deported, excluded, or removed by an Immigration Judge sitting within the Ninth Circuit. This includes the Immigration Courts in Arizona, California, Oregon, Washington, Hawaii, and Nevada.

[63] *Wiedersperg*, 896 F.2d at 1183.
[64] Former 8 U.S.C. § 1105a(c) (repealed 1996) provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order."
[65] *Mendez,* 563 F.2d at 958.

C. Federal Circuit Courts That Have Upheld the Post-Departure Bar With and Without Consideration of the Statutory Argument

First Circuit

The First Circuit upheld the validity of the regulatory post-departure bar in ***Pena-Muriel v. Gonzales,*** 489 F.3d 438, 443 (1st Cir. 2007), but did not consider whether the regulation contradicts the motion to reopen statute and is thus ultra vires. The court however, did reject the petitioner's argument that Congress repealed the post-departure bar in 1996 when it eliminated the statutory post-departure bar to judicial review contained in former 8 U.S.C. § 1105a, as well as his argument that the post-departure bar violates the constitutional right to procedural due process.

In denying a petition for rehearing, the court made clear that it did not rule on the argument that the regulation conflicts with the language of the motion to reopen statute:

> When this case was presented to the panel, petitioner presented only one statutory argument, asserting that Congress's deletion of 8 U.S.C. § 1105a(c) when passing IIRIRA removed the statutory foundation for the regulation barring motions to reopen from being filed outside of the United States, 8 C.F.R. § 1003.23(b)(1). We rejected this argument. **Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1) conflicts with 8 U.S.C. § 1229a(c)(7).** [66]

The conflict between the regulation and the statutory language is precisely the argument that the Fourth Circuit deemed persuasive in *William v. Gonzales*. Because the court did not consider it in *Pena-Muriel*, it may be raised in future cases in the First Circuit. It should also be noted that the court in *Pena-Muriel* did not consider the significance of regulatory language permitting *sua sponte* reopening or reconsideration "at any time."

Note that *Pena-Muriel* was decided prior to the BIA's decisions in *Bulnes-Nolasco* and *Armendarez*. Therefore, individuals who had an *in absentia* order and did not receive notice of their hearing can presently file a MTR even within the First Circuit.

Fifth Circuit

In ***Ovalles v. Holder,*** 577 F.3d 288, 300 (5th Cir. 2009), the Fifth Circuit held that the BIA does not have jurisdiction to consider an untimely filed motion to reopen. The court held that there is no conflict between the statute, 8 U.S.C. § 1229a(c)(7)(A), and the regulation, 8 C.F.R. § 1003.2(d), with regards to untimely filed motions to reopen. The court in *Ovalles* did not decide the specific issue of the validity of the post-departure bar. The court explained that it could not rule on this issue because the motion was not filed as per the requirements of 8 U.S.C.

[66] *See Pena-Muriel v. Gonzales*, 510 F.3d 350 (1st Cir. 2007) (denying petition for rehearing) (emphasis added).

§ 1229a(c)(7). The court left open whether a conflict may exist in the context of a timely filed motion to reopen.

The respondent in *Ovalles* was convicted of attempted possession of drugs in 2003 and was removed in 2004. In 2006, in *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court ruled that a single possession of drugs was not an aggravated felony, and Ovalles subsequently filed a motion to reopen *sua sponte* in July of 2007. The BIA held that it lacked jurisdiction to consider the motion and the respondent appealed to the Fifth Circuit.

The court in *Ovalles* focused on the untimeliness of respondent's motion, as it was filed years after his removal order became final and eight months after the Supreme Court's decision in *Lopez*. The court characterized the Fourth Circuit's ruling in *William* as applying only to timely-filed motions. In fact, however, the petitioner in *William* filed his motion five months after his removal order became final, and the issue of timeliness was not raised by either party within the *William* litigation. Thus it is not at all clear that *William* is distinguishable on this point. Any future litigation on this issue within the Fifth Circuit should make the argument that the Fourth Circuit's holding in *William* is a broad one that encompasses MTRs without regard to timeliness.

By interpreting *William* to apply only to the relatively narrow context of a timely-filed MTR, the *Ovalles* court avoided addressing the central issue in *William*: that the post departure regulation improperly conflicts with the statute. The court followed its ruling in *Navarro-Miranda* and held that it does not have *sua sponte* authority to reopen. The decision arguably leaves open the possibility that the regulation may improperly conflict with the statute with regard to a timely-filed MTR. Practitioners in the Fifth Circuit should try to demonstrate that their MTR was either timely filed or falls within an exception to the filing deadline.

***Who is covered by* Ovalles?**

This decision applies to individuals who were ordered deported, excluded, or removed by an Immigration Judge sitting within the Fifth Circuit. This includes the Immigration Courts in Louisiana, Mississippi, and Texas.

Tenth Circuit

In ***Rosillo-Puga v. Holder,*** 580 F.3d 1147, 1156 (10th Cir. 2009), the Tenth Circuit rejected the Fourth Circuit's reasoning in *William v. Gonzales*, and held that the regulatory post departure bar was a valid exercise of the Attorney General's rulemaking authority.

In 2003, the respondent in *Rosillo* was order removed on account of an Indiana state conviction of simple battery, which the IJ determined was an aggravated felony. A few months after the respondent was removed, the Seventh Circuit held that simple battery in Indiana was not

an aggravated felony.[67] In 2007, respondent filed a motion to reconsider *sua sponte* and the IJ denied his motion finding that the post-departure bar deprived the court of jurisdiction. The respondent appealed to the BIA and the BIA affirmed the IJ's decision.

The Tenth Circuit, in a split decision, cited the history of the post-departure bar and reasoned that Congress did not intend to repeal the bar without comment. In applying the first step of the Chevron analysis,[68] the court found that the statute, 8 U.S.C. § 1229a(c)(6)(A), was not clear and unambiguous. Applying the second step of the Chevron analysis, the court found that the post-departure bar was based on a permissible construction of the statute. Moreover, the court found that the construction of 8 C.F.R. § 1003.23(b)(1) is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority.

In a concurring opinion, Judge O'Brien explained that he would have preferred a narrower analysis following Ovalles, i.e. limiting the holding to whether untimely motions to reopen are subject to the post-departure bar.

In a strongly-worded dissent, Judge Lucero concluded that the court erred in its Chevron first-step analysis. Judge Lucero found that 8 U.S.C. § 1229a unambiguously grants every alien the right to one motion to reopen and one motion to reconsider regardless of whether the alien departed from the United States. He further concluded that "the language Congress chose is plain and unequivocal…[because] [it] draws no distinction between aliens who are in the country and aliens who have departed," and the Supreme Court's ruling in *Dada v. Mukasey*, 128 S.Ct. 2307, 2318 (2008) "all but compels invalidation" [69] because "an alien cannot be forced by regulation to forfeit a motion guaranteed by statute."[70]

A petition for *en banc* rehearing has been filed in this case.

Who is covered by Rosillo?

This decision applies to individuals who were ordered deported, excluded, or removed by an Immigration Judge sitting within the Tenth Circuit. This includes the Immigration Courts in Colorado and Utah.

Pending Cases

Cases challenging the validity of the post-departure bar are currently pending in the Second, Fifth, Ninth, and Eleventh Circuits. Email pdhrp@bc.edu for updates on these cases.

[67] *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003).
[68] See *supra* note 57, for discussion of the *Chevron* doctrine.
[69] *Rosillo-Puga*, 580 F.3d at 1162 (Lucero, J. dissenting).
[70] *Id.* at 1169.

IV. SPECIAL SITUATIONS

Removal While an MTR is Pending

With the exception of motions to an IJ seeking to reopen *in absentia* removal proceedings, the filing of a MTR does not automatically stay a removal order. Someone seeking reopening or reconsideration should simultaneously seek a discretionary stay of removal. If a person is physically removed from the United States while a MTR is pending, it is possible that an IJ or the BIA will deny the MTR as moot under the second clause of the post-departure bar, which provides that "[a]ny 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."[71]

Although this provision has not been the subject of litigation, the Fourth Circuit's decision in *William* arguably applies equally to departures during the pendency of a MTR, because the same question arises with regard to the conflict between the regulation and the broad statutory language. Likewise, it could be argued under *Cardoso-Tlaseca*[72] that such a departure was not "legally executed" and that the post-departure bar therefore does not apply.

It may be difficult to extend the Ninth Circuit's decisions in *Lin* and *Singh* to departures that occur following the filing of an MTR, because these decisions rely on specific regulatory language that does not appear in the second clause of the post-departure bar. In addition, as noted previously, the BIA has questioned the *Lin* reasoning of in *Matter of Armendarez-Mendez*. Thus, where a client ordered removed within the Ninth Circuit is physically removed from the United States. while an MTR is pending, and the case does not fall under *Cardoso-Tlaseca,* it may be necessary to argue that the clause is unconstitutional and/or in conflict with the language of the INA.

Removal While a BIA Appeal of an IJ Denial of a MTR is Pending

When a person is physically removed from the United States while an appeal of the IJ's denial of a MTR is pending,[73] a further hurdle may be presented by 8 C.F.R. § 1003.4, which provides that:

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[71] 8 C.F.R. §§ 1003.2(d); 1003.23(b)(1).

[72] *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006).

[73] 8 U.S.C. § 1229a(b)(5)(C) provides an automatic stay of removal while a motion to reopen and rescind an *in absentia* order is pending before the IJ, but does not provide an automatic stay pending appeal. In deportation cases, however, the stay remains in effect during the pendency of an appeal to the BIA. *See Matter of Rivera*, 21 I. & &N. Dec. 232, 234 (BIA 1996).

Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens . . ., subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.

The Ninth Circuit has held that this regulation applies only to those who voluntarily depart from the United States while an appeal is pending.[74] Thus, it may be argued that being subjected to removal does not constitute a voluntary departure.[75]

V. TIPS FOR FILING POST-DEPARTURE MOTIONS

TIP #1: Outside of the Fourth Circuit and, in certain circumstances, the Ninth Circuit, a post-departure MTR that is not based on lack of notice will require litigation at the Court of Appeals.

With the exception of motions to reopen *in absentia* proceedings based on lack of notice, the BIA has broadly applied the post-departure bar. The IJ and/or BIA may lack authority to find that the post-departure regulation is unlawful. Thus, clients not covered by the positive case law discussed in this advisory should be informed that a MTR has little chance of success unless it is litigated on a petition for review.

TIP # 2 : A post-departure MTR filed outside of the 30/90 day time limit should preserve the following arguments, where possible:

(1) The MTR was filed within 30/90 days of a triggering event (i.e., vacated conviction, change in circuit law, or recently obtained knowledge regarding availability of MTR); (2) the time limit does not apply; and/or (3) an exception to the time limit applies (i.e., time should be tolled for ineffective assistance of counsel, etc.).

TIP # 3 : Assistance is available from organizations that are challenging the validity of the regulations.

Both the American Immigration Council (formerly American Immigration Law Foundation (AILF)) and the Post-Deportation Human Rights Project (PDHRP) are involved in litigating this issue in various circuits. If you have a case that involves post-departure bar, please contact Maunica Sthanki at pdhrp@bc.edu or Beth Werlin at clearinghouse@immcouncil.org.

[74] *See Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835, 838 (9th Cir. 2003).

[75] *See Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (holding withdrawal provision of 8 C.F.R. § 1003.4 inapplicable where non-citizen was forcibly removed).

TIP #4: The validity of the post-departure regulation remains an open question in most circuits.

Most circuits have not considered the validity of the post-departure bar and therefore, it remains an open question in most of the country. The jurisdiction of timely MTRs remains an open question in the Fifth Circuit, and the strong dissent in the Tenth Circuit offers support to practitioners seeking to challenge the post-departure bar.

TIP #5: If the MTR is based on a vacated conviction or subsequent change in law, arguments regarding the validity of the initial removal order should be explored.

The post-departure bar may not apply if the basis of the MTR was a vacated conviction and therefore the original removal order was itself not legally executed. *See, Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006) While this legal argument has only been accepted in the Ninth Circuit, it is worth exploring in other circuits as well.

TIP #5: Arguments that the post-departure bar is unconstitutional or is in conflict with the language of the statute should be raised in the MTR filed with the IJ or BIA, and in any appeal to the BIA of an IJ's denial.

Although IJs and the BIA do not have the authority to rule that the post-departure bar is in conflict with the INA or is unconstitutional, any post-departure MTR should preserve these arguments for review by the Court of Appeals. However such issues do not have to be fully-developed at the administrative level.