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## **POST-DEPORTATION HUMAN RIGHTS PROJECT**

Boston College Law School, 885 Centre Street, Newton, MA 02459  
Tel 617.552.9261 Fax 617.552.9295 Email pdhrp@bc.edu  
www.bc.edu/postdeportation

### ***POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER***<sup>1</sup>

by Rachel E. Rosenbloom,<sup>2</sup> Daniel Kanstroom,<sup>3</sup> Maunica Sthanki,<sup>4</sup>  
Paul Whitworth<sup>5</sup> & Jessica Chicco<sup>6</sup>  
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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. **Motions to reopen are generally disfavored and – with few exceptions explained in this Practice Advisory – individuals seeking to reopen their immigration proceedings after having departed or having been removed from the United States face additional and significant hurdles. This Practice Advisory provides information on the legal issues surrounding post-departure motions to reopen. However, it will be up to the practitioner to decide whether a motion to reopen is warranted in a specific case.** Section II provides background information on motions to reopen and reconsider and on the regulatory “post-departure bar.” Section III discusses cases decided by the Board of Immigration Appeals and Courts of Appeals that may be relevant to those seeking reopening or re-

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<sup>1</sup> Copyright © 2010 Boston College, all rights reserved. The PDHRP gratefully acknowledges the input and assistance of Beth Werlin, Trina Realmuto, Kathleen Gillespie, Erzulie Coquillon, and Christine Rodriguez. 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.

<sup>2</sup> Assistant Professor, Northeastern University School of Law; Affiliated Faculty, Post-Deportation Human Rights Project, Center for Human Rights and International Justice at Boston College.

<sup>3</sup> Professor of Law and Director, Post-Deportation Human Rights Project, Center for Human Rights and International Justice at Boston College.

<sup>4</sup> Clinical Fellow, University of the District of Columbia, David A. Clarke School of Law.

<sup>5</sup> Class of 2008, Boston College Law School.

<sup>6</sup> Supervising Attorney, Post-Deportation Human Rights Project, Center for Human Rights and International Justice at Boston College; main author of the revisions to the November 2009 Practice Advisory.

consideration after departure or deportation. Section IV considers issues that may arise if a client is removed while a motion to reopen or reconsider is pending.

## II. BACKGROUND

### A. Reopening vs. Reconsideration

A motion to reopen is based on “facts or evidence not available at the time of the original decision.”<sup>7</sup> A motion to reopen must be supported by affidavits or other evidence,<sup>8</sup> 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.<sup>9</sup> Situations in which motions to reopen are appropriate include changed country conditions with regard to asylum claims; allegations of ineffective assistance of counsel; new eligibility for relief from removal; and vacatur of a conviction that formed the basis for the order of removal.<sup>10</sup>

In contrast, 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,”<sup>11</sup> including errors of law or fact in the previous order.<sup>12</sup>

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

A MTR must be filed with the adjudicatory body that last had jurisdiction over the case – either the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA).<sup>13</sup> Where the IJ last exercised jurisdiction, the motion must be filed with the IJ who entered the order.<sup>14</sup> If the BIA last exercised jurisdiction, the motion must be filed with the BIA.<sup>15</sup> Practitioners should verify where jurisdiction last was exercised in each case, as this will determine the forum where the motion is filed. Determining where jurisdiction last vested is not always as straightforward as it may seem (for example, jurisdiction does not vest with the BIA if it dismisses an appeal solely based on lack of jurisdiction),<sup>16</sup> so practitioners should pay close attention to the procedural history of the case in determining where to file a MTR.

The federal appeals courts have jurisdiction to review the BIA’s denial of a MTR, as well as the BIA’s affirmance of an IJ’s denial of such a motion, through a petition for review. 8 U.S.C. § 1252(a)(1), Immigration and Nationality Act (INA) § 242(a)(1). The federal circuit court with jurisdic-

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<sup>7</sup> *Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004).

<sup>8</sup> See INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B).

<sup>9</sup> See 8 C.F.R. § 1003.2(c)(1); *Kaur v. BIA*, 413 F.3d 232, 234 (2d Cir. 2005).

<sup>10</sup> See *Patel*, 378 F.3d at 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).

<sup>11</sup> *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002).

<sup>12</sup> 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).

<sup>13</sup> See 8 C.F.R. § 1003.23 (Immigration Court); 8 C.F.R. § 1003.2 (BIA). See also BIA Practice Manual, § 5.2(a)(iii), App. K-1, available at: <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf>.

<sup>14</sup> See 8 C.F.R. § 1003.23(b)(1)(ii).

<sup>15</sup> See 8 C.F.R. § 1003.2(a).

<sup>16</sup> See, e.g. *Matter of Mladineo*, 14 I&N Dec. 591, 592 (BIA 1974).

tion over the place where the IJ completed proceedings will have jurisdiction over a petition to review the BIA's action.<sup>17</sup>

In two recent decisions, the Supreme Court recognized the importance of the statutory right to motions to reopen and confirmed that courts of appeals have jurisdiction to review BIA decisions denying motions to reopen.<sup>18</sup>

## B. Statutory Authority and Overview/General Limitations on MTRs

Prior to 1996, MTRs were governed solely by regulation. As part of the Illegal Immigration and Immigrant Responsibility Reform Act of 1996 (“IIRIRA”),<sup>19</sup> 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) (INA §§ 240(c)(7) and (c)(6)).<sup>20</sup>

In its current form, the statute imposes time,<sup>21</sup> number,<sup>22</sup> and content<sup>23</sup> requirements on motions to reopen or reconsider, but does not generally distinguish between pre- and post-departure motions except with regard to motions to reopen filed by battered spouses and children under certain circumstances, which require physical presence at the time of filing.<sup>24</sup> Besides the statute, there are regulations governing motions to reopen and reconsider.<sup>25</sup>

In addition, 8 U.S.C. § 1229a(b)(5)(C), codified in 1990, provides that a person who is ordered removed *in absentia* may file a motion to reopen to rescind the order.<sup>26</sup>

## C. Time and Number Limits

Practitioners must always be mindful 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*.<sup>27</sup> The motion must be filed within 30 days of the date of entry of a final administrative order.<sup>28</sup>

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<sup>17</sup> See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

<sup>18</sup> See *Dada v. Mukasey*, 554 U.S. 1 (2008) (recognizing that MTRs are an “important safeguard” intended “to ensure a proper and lawful disposition” of immigration proceedings); *Kucana v. Holder*, 130 S. Ct. 827 (2010) (affirming federal court jurisdiction to review BIA denials of MTRs).

<sup>19</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>20</sup> 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)). Amendments to the INA renumbered these provisions without making any substantive changes. REAL ID Act of 2005, Pub. L. No. 109-13 § 101(d), 119 Stat. 231 (May 11, 2005).

<sup>21</sup> 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) (reopening).

<sup>22</sup> 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).

<sup>23</sup> 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).

<sup>24</sup> See INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).

<sup>25</sup> 8 C.F.R. §§ 1003.23, 1003.2.

<sup>26</sup> See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5061, § 545(a) (November 29, 1990).

The statute 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.<sup>29</sup> There are statutory exceptions to these time and numerical limitations if the petitioner is seeking asylum based on changed country conditions (motion may be filed any time);<sup>30</sup> is a battered spouse or child 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);<sup>31</sup> or was ordered removed *in absentia* (motion may be filed 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; or motion may be filed within 180 days if basis for reopening is exceptional circumstances).<sup>32</sup> In addition, most circuit courts have recognized that the filing deadlines are not jurisdictional and are thus subject to equitable tolling.<sup>33</sup>

#### **D. Sua Sponte Authority to Reconsider or Reopen “at any time”**

The regulations provide that the BIA and IJs have *sua sponte* authority to reopen or reconsider their own decisions “at any time,” without regard to the time and number limitations.<sup>34</sup> The BIA has stated, in general, that it will exercise *sua sponte* jurisdiction only in “exceptional circumstances.”<sup>35</sup> Exceptional circumstances include a change in law, if it is fundamental rather than incremental.<sup>36</sup> Additionally, the BIA has regularly exercised *sua sponte* authority to reopen proceedings where a conviction

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<sup>27</sup> See INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(6)(B). The Eleventh Circuit has held that 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. 2007).

<sup>28</sup> See INA § 240(c)(6)(A), (B), 8 U.S.C. § 1229a(c)(6)(A),(B).

<sup>29</sup> See INA § 240(c)(7)(A), (c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(A), (c)(7)(C)(i).

<sup>30</sup> See INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii).

<sup>31</sup> See INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).

<sup>32</sup> 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” is sufficient. In addition, there are no numerosity limits on motions to reopen to rescind an *in absentia* order. 8 C.F.R. 1003.23(b)(4)(iii)(D). 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>.

<sup>33</sup> See *Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000) (equitable tolling available where ineffective assistance of counsel caused delay if alien demonstrates due diligence); *Borges v. Gonzales*, 402 F.3d 398, 404-407 (3d Cir. 2005) (180 day period for reopening *in absentia* order can be equitably tolled for fraud); *Harchenko v. INS*, 379 F.3d 405, 409-410 (6th Cir. 2004) (time limitation is subject to equitable tolling); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) (test for equitable tolling of time limitation is “whether the claimant could reasonably have been expected to have filed earlier”); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1183-1185 (9th Cir. 2001) (equitable tolling applies where alien is unable to obtain vital information on existence of claim, not limited to ineffective assistance of counsel or fraud); *Riley v. INS*, 310 F.3d 1253, 1257-1258 (10th Cir. 2002) (time limitations subject to equitable tolling). But See, *Anin v. Reno*, 188 F.3d 1273, 1278-1279 (11th Cir. 1999) (time limitation is jurisdictional therefore not subject to equitable tolling). The Fifth Circuit has treated requests for equitable tolling as equivalent to requests for *sua sponte* reopening, and has held that it lacks jurisdiction to review the BIA’s denial of such motions. See e.g. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). Notwithstanding the Fifth Circuit’s position, the BIA may still review claims of equitable tolling. See, e.g. *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...”).

<sup>34</sup> 8 C.F.R. §§ 1003.2(a) (BIA), 1003.23(b)(1) (IJ).

<sup>35</sup> 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).

<sup>36</sup> See *Matter of Vasquez-Muniz*, 23 I&N Dec. 207, 208 (BIA 2002) (reconsidering *sua sponte* upon government motion 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).

that formed the basis of an order has subsequently been vacated.<sup>37</sup> However, the BIA has interpreted the “post-departure bar” – a regulatory limitation, discussed in detail below, rigidly. In its view, the regulations bar MTRs filed by individuals who have departed the U.S. and prohibit *sua sponte* reopening or reconsideration subsequent to departure from the United States.<sup>38</sup> The Second, Fifth, and Tenth Circuits have upheld this interpretation.<sup>39</sup> The Fourth Circuit has rejected it outright, and case law in the Third, Seventh, and Ninth Circuits calls it into serious question (see *infra*).

The Supreme Court has not yet addressed the post-departure bar, but it has confirmed federal court jurisdiction over motions to reopen as a general matter. However, in *Kucana v. Holder*, 130 S. Ct. 827 (2010), the Court expressly declined to decide whether federal courts may review a denial of a MTR requesting *sua sponte* reopening. 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.<sup>40</sup> 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.”<sup>41</sup> 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:

Where there is a consistent pattern of administrative decisions on a given issue, we would expect the BIA to conform to that pattern or explain its departure from it. Should the Board determine on remand that [the petitioner] is no longer “convicted” under the INA, we 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*,<sup>42</sup> or at least explain logically its unwillingness to do so.<sup>43</sup>

Because it may be more difficult or impossible to obtain federal court review of the denial of a motion for *sua sponte* reopening or reconsideration, attorneys should argue, whenever possible, that a

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<sup>37</sup> 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”).

<sup>38</sup> See *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 660 (BIA 2008).

<sup>39</sup> See *id.*; *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010), *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003); *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1159 (10th Cir. 2009).

<sup>40</sup> See, e.g., *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-1004 (8th Cir. 2008) (*en banc*); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Doh v. Gonzales*, 193 Fed. Appx. 245, 246 (4th Cir. 2006) (*per curiam*); *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-Gebbru 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 Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010), *rehearing and rehearing en banc denied* (opinion of the court and opinion concurring in part and concurring in judgment urged *en banc* review to reexamine whether there is jurisdiction to review denial of a motion to reopen in light of the Supreme Court’s decision in *Kucana*); *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).

<sup>41</sup> *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).

<sup>42</sup> In *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the BIA held that a conviction vacated due to procedural or substantive defects in the criminal proceedings is not a “conviction” for immigration purposes.

<sup>43</sup> *Cruz v. Att’y Gen. of U.S.*, 452 F.3d 240, 249 (3d Cir. 2006).

motion should be treated as timely filed and therefore within the statutory right to file a MTR. 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 under a previous statutory and/or regulatory scheme;<sup>44</sup>
- (3) An exception to the time limit applies; and/or
- (4) Equitable tolling applies.<sup>45</sup>

### E. 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.”<sup>46</sup> These regulations have been interpreted to apply both to persons who have been physically removed by the government, those who have “self-deported,”<sup>47</sup> 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.<sup>48</sup>

In addition, both regulations state that any departure, “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.”<sup>49</sup> This language is similar, though not identical, to that found in the regulation of withdrawals of BIA appeals. That regulation states that “[d]eparture from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal.”<sup>50</sup> These provisions are discussed in greater detail in Section IV. As discussed in Section III, the BIA has upheld the validity of the post-departure bar in a *sua sponte* case and stated that it does not have jurisdiction to consider a MTR filed on behalf of an individual who has departed the United States.<sup>51</sup> However, the BIA has recognized an exception to the bar for motions to rescind an *in absentia* order if the motion is premised on lack of notice.<sup>52</sup>

Federal circuit courts have varied in their conclusions and approaches to the applicability 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), and is therefore invalid.<sup>53</sup> The Sev-

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<sup>44</sup> See *supra* note 32.

<sup>45</sup> See *supra* note 33 for discussion on equitable tolling.

<sup>46</sup> 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

<sup>47</sup> 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 *infra* Section III, the Ninth Circuit rejected the BIA’s ruling that the post-departure bar applied to a person who had departed prior to the commencement of proceedings.

<sup>48</sup> See *Dada v. Mukasey*, 554 U.S. 1 (2008).

<sup>49</sup> 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

<sup>50</sup> 8 C.F.R. § 1003.4. See also *Rodriguez-Barajas*, No. 09-60351 (5th Cir. Filed Oct. 19, 2010).

<sup>51</sup> *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008).

<sup>52</sup> *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009).

<sup>53</sup> *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007).

enth Circuit has held that the regulations are not “jurisdictional,” and therefore do not preclude the BIA from considering a post-departure MTR.<sup>54</sup> The Court based its decision on the Supreme Court opinion in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009), holding that agencies cannot contract their own jurisdiction.

The Ninth Circuit has addressed the validity of the regulations in several cases with different rationales. In two cases, the Court interpreted the language of the regulation and found it could not be applied where the motion was filed after proceedings were completed.<sup>55</sup> The court also found the regulation inapplicable where the individual departed prior to the commencement of proceedings.<sup>56</sup> Furthermore, the Ninth Circuit has held that those who have been removed may seek reopening where a conviction that formed a “key part” of the removal proceeding is vacated.<sup>57</sup> Lastly, the Ninth Circuit has held that involuntary departure does not act to withdraw a pending motion to reopen.<sup>58</sup>

The First, Second, Fifth, and Tenth Circuits<sup>59</sup> have upheld the validity of the post-departure bar against some arguments, although some of these holdings may be vulnerable in light of the Supreme Court’s decision in *Union Pacific*. Further, the First, Second, and Fifth Circuits have not directly addressed the issue of whether the post-departure bar conflicts with the clear statutory language on MTRs. This was the basis on which the Fourth Circuit invalidated the regulation in *William v. Gonzales*, but it remains an open question in these circuits. The Fifth Circuit has held that the post-departure bar was valid as applied to *untimely* MTRs, but did not state whether it would hold differently with regards to a timely-filed, post-departure MTR.<sup>60</sup> The Tenth Circuit considered the statutory argument directly in the *sua sponte* context and held that there was no evidence to support a finding that Congress intended to repeal the post-departure bar when it codified the right to file a MTR.<sup>61</sup>

Several circuits have considered the validity of the regulation that states that departure acts to withdraw a pending MTR, or an appeal of a denied MTR. The Ninth Circuit has recently considered the issue in *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010). In the Fourth and Seventh circuits, where the departure bar regulation has been invalidated, this provision should no longer apply.<sup>62</sup> The Ninth and Sixth circuits have also held that, notwithstanding 8 C.F.R. § 1003.4 – which states that departure while an appeal is pending at the BIA shall constitute a withdrawal of the appeal – involuntary departure cannot act to withdraw a pending BIA appeal challenging the denial of a MTR.<sup>63</sup> The Fifth Circuit has issued a decision with a limited holding, stating that the BIA has jurisdiction over the appeal of an alien who departs “after the BIA has decided his appeal but while his habeas petition is pending,” despite 8 C.F.R. § 1003.4.<sup>64</sup> These cases are discussed in more detail in Section IV.

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<sup>54</sup> See *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010).

<sup>55</sup> See *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007); *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007).

<sup>56</sup> See *Singh v. Gonzales*, 412 F.3d 1117, 1121 (9th Cir. 2005).

<sup>57</sup> See *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006).

<sup>58</sup> See *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010).

<sup>59</sup> See *Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir. 2007); *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009).

<sup>60</sup> See *Ovalles*, 577 F.3d 288.

<sup>61</sup> See *Rosillo-Puga*, 580 F.3d 1147.

<sup>62</sup> See *William v. Gonzales*, 499 F.3d 329; *Marin-Rodriguez*, 612 F.3d 591.

<sup>63</sup> See *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835 (9th Cir. 2003); *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009).

<sup>64</sup> See *Rodriguez-Barajas*, No. 09-60351 (5th Cir. Filed Oct. 19, 2010).

## F. 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.<sup>65</sup> Thus, individuals who seek reopening in these circumstances should not encounter jurisdictional obstacles regardless of where the removal order was 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*.<sup>66</sup>

## 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 *sua sponte* motion to reopen for an individual who had departed the United States after the issuance of an order of removal. However, in *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009), the BIA stepped back from its reasoning in *Armendarez-Mendez* 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.

The respondent in *Armendarez-Mendez* filed a motion to reopen *sua sponte* with the BIA to seek § 212(c) relief. The BIA held that it did not have jurisdiction to consider respondent’s MTR and rejected the Ninth Circuit’s reasoning in *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007) that the bar did not apply to those who filed a MTR after being removed, as they were no longer “the subject of” removal proceedings. (See *infra* for additional explanation of *Lin*). 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.” The BIA was persuaded by the long history of the post-departure bar, and claimed that nothing in the legislative history of IIRIRA indicated that Congress intended to repeal the post-departure bar in 1996. In *dicta*, the BIA also disagreed with the Fourth Circuit’s analysis in *William v. Gonzales* which had found the regulation to be in conflict with the statute. The BIA also stated in *dicta* that the post-departure bar deprived the Board of jurisdiction to consider the motion *sua sponte*, citing a previous Fifth Circuit case *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003) (finding reasonable the BIA’s interpretation that the post-departure bar overrides its *sua sponte* authority).

In *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 if the motion was filed after the respondent’s departure from the United States. The BIA concluded that the regulatory language permits the reopening of an *in absentia* order “at any time” despite the post-departure bar, and held that “an alien ordered deported *in absentia* possesses a robust right to challenge the removal order on improper notice grounds.”<sup>67</sup> In a footnote, the BIA 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 than the post-departure bar regulation, and therefore the former overrides the latter with regard to *in absentia* MTRs.

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<sup>65</sup> *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009).

<sup>66</sup> See *Contreras-Rodriguez v. Att’y Gen.*, 462 F.3d 1314 (11th Cir. 2006).

<sup>67</sup> 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2).

The BIA’s prior reasoning in *Armendarez-Mendez* that “[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid,”<sup>68</sup> is in clear tension with *Bulnes-Nolasco*. It should also be noted that the regulatory language relied upon by the BIA in reaching its decision in *Bulnes-Nolasco* – “at any time” – is mirrored in the regulations giving the IJ and the BIA *sua sponte* authority to reopen. Nevertheless, several courts that have considered the post-departure bar in light of *sua sponte* authority have not found the *sua sponte* regulation to trump the post-departure bar.<sup>69</sup>

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

### **Fourth Circuit**

*(covers those ordered removed by IJ sitting in MD, NC, VA)*

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* sought to reopen with the BIA following the vacatur of the conviction that formed the basis of his removal. The BIA denied the motion, citing the post-departure bar in 8 C.F.R. § 1003.2(d). 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.”... 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.<sup>70</sup>

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.”<sup>71</sup> 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.<sup>72</sup> 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

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<sup>68</sup> *Armendarez-Mendez*, 24 I&N Dec. at 656. See discussion on this case *infra* in Part III(A).

<sup>69</sup> See *Zhang v. Holder*, 617 F.3d 650, 654 (2010); *Ovalles v. Holder*, 577 F.3d 288, 300 (5th Cir. 2009); *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156 (10th Cir. 2009).

<sup>70</sup> *William v. Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007).

<sup>71</sup> *Id.* at 333 (quoting *U.S. v. Johnson*, 529 U.S. 53, 58 (2000)).

<sup>72</sup> *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).

the regulation under the first step of the *Chevron* analysis,<sup>73</sup> and did not reach the petitioner’s argument that the regulation violated his right to due process under the Fifth Amendment.

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*.<sup>74</sup>

Because the *William* holding finds that the regulatory post-departure bar conflicts with the statute and is thus *ultra vires*, the BIA’s interpretation of the regulation in *Armendarez-Mendez* cannot override the *William* court’s interpretation of an unambiguous statute.<sup>75</sup> Moreover, the discussion of the *William* holding in *Armendarez-Mendez* is *dicta* and not binding on cases arising out of the Fourth Circuit. On remand, the BIA acknowledged that pursuant to the federal court’s decision it had jurisdiction over the MTR and that it had authority to grant untimely motions *sua sponte*.<sup>76</sup>

### **Seventh Circuit**

*(covers those ordered removed by IJ sitting in IL)*

The post-departure bar has been invalidated as a jurisdictional rule in the Seventh Circuit, though the court has left open the possibility that the BIA may be able to “recast its approach as one resting on a categorical exercise of discretion.”<sup>77</sup> In *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010), the Seventh Circuit held that the post-departure bar is invalid as a jurisdictional rule and cannot be interpreted to bar jurisdiction to consider post-departure MTRs. The BIA had granted the petitioner’s timely MTR, but withdrew its decision after being informed by the government that petitioner had been removed while his motion was pending. Resting on the Supreme Court’s decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009), which held that an administrative agency cannot contract its jurisdiction by regulation or decisions, the Seventh Circuit remanded to the BIA, holding that, “[a]s a rule about subject-matter jurisdiction, § 1003.2(d) is untenable.”<sup>78</sup>

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<sup>73</sup> *William*, 499 F.3d 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.*

<sup>74</sup> 8 U.S.C. § 1229a(c)(6)(A), INA § 240(c)(6)(A) provides that “[t]he Alien may file one motion to reconsider a decision that the alien is removable from the United States.”

<sup>75</sup> See *Nat’l Cable and Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

<sup>76</sup> The BIA also found that the vacatur of the conviction did not constitute “exceptional circumstances” to warrant *sua sponte* reopening in *William*’s case. *Tunbosun Olowale William*, A073 561 811, 2008 WL 5537807 (BIA Dec. 23, 2008). The BIA, however, routinely grants untimely MTRs in such circumstances where the alien is still in the U.S.

<sup>77</sup> *Marin-Rodriguez*, 612 F.3d at 595. In *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), however, the Supreme Court held that where an agency has been granted jurisdiction, it must exercise that discretion on a case by case basis. See also, *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957) (requiring that where discretion has been granted it be properly exercised, and reviewing a BIA decision for abuse of discretion and failure to exercise discretion).

<sup>78</sup> *Marin-Rodriguez*, 612 F.3d at 593.

## **Ninth Circuit**

(covers those ordered removed by IJ sitting in AZ, CA, NV, OR, WA)

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.

Reviewing a case involving the regulatory provision stating that departure effects the withdrawal of a MTR, the Ninth Circuit in *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010) invalidated that provision of the regulation, finding that the regulation conflicted with Congress’s clear intent in enacting IIRIRA of expediting removal while increasing the accuracy of removal determinations. Though the case concerned the withdrawal language of the departure bar (discussed in more detail in Section IV), and the departure in the case was involuntary, such reasoning renders the entire departure bar regulation invalid as in conflict with the statute.

### **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 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).<sup>79</sup> The petitioner in *Singh* filed an affirmative asylum application and later withdrew it and departed voluntarily. He was ordered removed in his absence and after re-entering sought to reopen proceedings. The Ninth Circuit reasoned that because Singh had 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 because the proceedings were completed when he was removed, and he was therefore not barred from filing a motion to reopen with the IJ. The court explained:

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.<sup>80</sup>

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).

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<sup>79</sup> It should be noted that the petitioner in *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, 1002 (9th Cir. 2007).

<sup>80</sup> *Lin*, 473 F.3d at 982.

Practitioners in the Ninth Circuit should note that in *Armendarez-Mendez* the BIA disagreed with the reasoning in *Lin* and *Reynoso-Cisneros* and stated that it declined to follow the Ninth Circuit's holdings in those cases even in cases arising in the Ninth Circuit.<sup>81</sup> Thus, cases raising these issues will likely not be decided favorably before the BIA and will require litigation before the Circuit Court.<sup>82</sup>

### **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 removal proceeding has been vacated. This argument is especially significant in light of the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), holding that the Sixth Amendment requires criminal defense attorneys to advise their noncitizen clients of the immigration consequences of their pleas, which may afford the possibility of vacating past criminal convictions. The majority opinion in *Padilla* reasoned that “deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants,”<sup>83</sup> and placed weight on the fact that deportation was a “virtually mandatory”<sup>84</sup> consequence of the guilty plea at issue in that case.

In *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006), the petitioner's conviction, one of two grounds of removal, was vacated following his removal. The Ninth Circuit, finding that the conviction was a “key part of his removal proceeding,” held that if the conviction was vacated on the merits, the petitioner was entitled to reopen the proceedings, since the vacatur rendered him eligible for relief from removal.<sup>85</sup>

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 vacate his conviction was pending at the time of his deportation. The BIA denied his motion to reopen, relying on the regulatory post-departure bar. The Ninth Circuit reversed, holding that in light of the vacatur of the conviction, the deportation was not “legally executed” and petitioner was entitled to a new hearing. *Wiedersperg* concerned a petitioner who waited seven years after his conviction was vacated to seek reopening. The court concluded that the vacatur established prima facie eligibility for relief and that it had been an abuse of discretion for the BIA to deny the motion “on the speculative grounds that he had ‘slept on his rights.’”<sup>86</sup>

Both *Estrada-Rosales* and *Wiedersperg* relied in turn on *Mendez v. Immigration and Naturalization Service*, 563 F.2d 956, 959 (9th Cir. 1977), in 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

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<sup>81</sup> 24 I&N Dec. at 653, citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>82</sup> In at least two unpublished decisions, the Ninth Circuit has found that its holding in *Lin* trumps the BIA's holding in *Armendarez-Mendez*. See *Kureghyan v. Holder*, 338 Fed. Appx. 622, 624 (9th Cir. 2009) (unpublished); *Chaiban v. Mukasey*, 299 Fed. Appx. 702 (9th Cir. 2008) (unpublished).

<sup>83</sup> 130 S. Ct. at 1480.

<sup>84</sup> *Id.* at 1478.

<sup>85</sup> *Cardoso-Tlaseca*, 460 F.3d at 1107.

<sup>86</sup> *Wiedersperg*, 896 F.2d at 1183.

executed. The court held that, for purposes of the post-departure bar to judicial review then contained in the statute,<sup>87</sup> “departure” meant “‘legally executed’ departure when effected by the government.”<sup>88</sup>

### C. Federal Circuit Courts That Have Upheld the Post-Departure Bar

#### First Circuit

(covers those ordered removed by IJ sitting in MA and Puerto Rico)

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, importantly, did not consider whether the regulation contradicts the statute and is thus *ultra vires*. The court only rejected the petitioner’s arguments that Congress necessarily repealed the post-departure bar in 1996 when it repealed the 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).<sup>89</sup>

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 in *Pena-Muriel* did not consider either of these issues – as well as additional arguments against the post-departure bar – they may be raised in future cases in the First Circuit.

The First Circuit applied the departure bar in *Shah v. Mukasey*, 533 F.3d 25 (1st Cir. 2008). In *Shah*, petitioner allegedly departed to Canada prior to the issuance of the NTA, was subsequently ordered removed *in absentia*, and sought to reopen proceedings six years later. The court found that he was barred from doing so because of the post-departure regulation, though it did not consider the validity of the regulation. The court also affirmed the BIA’s finding that Shah had failed to meet his burden of demonstrating he had not received notice.

*Shah* was decided prior to the BIA’s decision in *Bulnes-Nolasco*. Therefore, *Bulnes-Nolasco* should control post-departure motions to reopen by individuals seeking to reopen *in absentia* orders because they did not receive notice.

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<sup>87</sup> 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.”

<sup>88</sup> *Mendez*, 563 F.2d at 958.

<sup>89</sup> See *Pena-Muriel v. Gonzales*, 510 F.3d 350 (1st Cir. 2007) (denying petition for rehearing) (emphasis added).

## Second Circuit

(covers those ordered removed by IJ sitting in CT, NY, PA)

In *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010), the Second Circuit held that the departure bar does not conflict with the BIA's regulatory *sua sponte* authority under §1003.2(a). It also rejected the argument made by Zhang that the MTR should have been considered *nunc pro tunc* as of the day his request for a stay of removal had been denied, which would have rendered the departure bar inapplicable. The court did not, however, address whether the regulation conflicts with the statutory language, finding that the petitioner had abandoned the argument.

Zhang filed an untimely MTR requesting *sua sponte* reopening, following a denial of his asylum request and final order of removal. The BIA granted the motion and remanded to the IJ, but the IJ terminated proceedings because the petitioner had been removed. Zhang appealed to the BIA, and then to the Second Circuit.

The court undertook a review of the history of the post-departure bar. Though it noted that “the BIA’s construction is anything but airtight,” and that it is “linguistically awkward to consider the forcible removal of an alien as ‘constitut[ing] a withdrawal’ of any pending motions filed by the alien,” it reasoned that if the Attorney General has authority to vest *sua sponte* jurisdiction through regulation, then he or she would also have the authority to regulate that jurisdiction, including through a departure bar. Though the court recognized that the BIA’s application of the departure bar reached beyond *sua sponte* cases, it limited its reasoning to the validity of the post-departure bar in light of the BIA’s authority to reopen *sua sponte*. The court concluded that the BIA’s interpretation of the departure bar as jurisdictional was not plainly erroneous. However, it did so somewhat reluctantly, thus signaling that if it were not for the BIA’s clear precedent it might have held differently:

“Were we writing on a blank slate, we might reach a different conclusion than that of the BIA regarding the relationship between these portions of 8 CFR §1003.2. But, in light of *In re Armendarez-Mendez*, we are not presented with a blank slate....we cannot say that the Board’s construction is plainly erroneous.”

## Fifth Circuit

(covers those ordered removed by IJ sitting in LA, TX)

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 *sua sponte* MTR. The court held that because the motion was untimely and there is no statutory right to file an untimely MTR, petitioner could not rely on the argument that the regulation, 8 C.F.R. § 1003.2(d), was in conflict with the statute, 8 U.S.C. § 1229a(c)(7)(A). Thus, the court in *Ovalles* did not decide the specific issue of the validity of the post-departure bar, and left open whether a conflict may exist in the context of a timely filed MTR.

The respondent in *Ovalles* filed a *sua sponte* MTR, based on the Supreme Court case of *Lopez v. Gonzales*, 549 U.S. 47 (2006), which held that a single possession of drugs was not an aggravated felony. The BIA held that it lacked jurisdiction to consider the motion and the respondent appealed. The Fifth Circuit 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*, and treated it as a request to reopen *sua sponte*. The court followed its ruling in *Navarro-Miranda* (finding reasonable the BIA’s interpretation that the post-departure bar overrides its *sua sponte* authority), and

held that it does not have *sua sponte* authority to reopen. The court characterized the Fourth Circuit's ruling in *William* as applying only to timely-filed motions.

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, and that it is distinguishable from the *sua sponte* motion at issue in *Ovalles*. Furthermore, 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.

Following *Ovalles*, the Fifth Circuit decided a number of cases in which it applied *Ovalles*, holding that the BIA and IJs did not err in determining that they lacked jurisdiction to reopen post-departure motions *sua sponte*. In *Toora v. Holder*, 603 F.3d 282 (5<sup>th</sup> Cir. 2010), for example, the Court found that the IJ lacked jurisdiction in the case of an alien who departed after proceedings had commenced (i.e. after the NTA had been filed) but before the removal order had been entered.<sup>90</sup>

### **Sixth Circuit**

*(covers those ordered removed by IJ sitting in MI, OH, TN)*

In *Mansour v. Gonzales*, 470 F.3d 1194 (6<sup>th</sup> Cir. 2006), the Sixth Circuit, citing to the Fifth Circuit case of *Navarro-Miranda*, held that the BIA did not abuse its discretion in concluding that it lacked jurisdiction to grant the MTR where petitioner had departed the U.S., thereby executing his outstanding deportation order. The court did not address arguments regarding the validity of the departure bar.

The Sixth Circuit has found invalid the regulatory provision stating that an appeal to the BIA is withdrawn by departure, and held that involuntary departure cannot effect the withdrawal of a pending appeal of a MTR.<sup>91</sup> (See discussion in Section IV).

### **Tenth Circuit**

*(covers those ordered removed by IJ sitting in CO, UT)*

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

Respondent was ordered removed as an aggravated felon based on a state conviction of simple battery. Following his removal, the Seventh Circuit held that simple battery under the statute of conviction was not an aggravated felony.<sup>92</sup> Respondent filed a motion to reconsider *sua sponte* on this basis and the IJ denied his motion finding that the post-departure bar deprived the court of jurisdiction, and the BIA affirmed.

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 when it enacted the statutory language on

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<sup>90</sup> See also *Al-Mousa v. Holder*, 2010 U.S. App. LEXIS 5663 (5<sup>th</sup> Cir. 2010) (unpublished) (because the motion to reopen had been untimely, respondent could not rely on the statutory challenge, therefore argument on statutory conflict not reached); *Ramon-Sanchez v. Holder*, 359 Fed. Appx. 525 (5<sup>th</sup> Cir. 2010) (unpublished) (BIA did not err in determining that it lacked jurisdiction to reopen *sua sponte* where respondent had been removed).

<sup>91</sup> See *Madrigal v. Holder*, 572 F.3d 239, 245 (6<sup>th</sup> Cir. 2009).

<sup>92</sup> *Flores v. Ashcroft*, 350 F.3d 666 (7<sup>th</sup> Cir. 2003).

MTRs. In applying the first step of the *Chevron* analysis,<sup>93</sup> 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 *sua sponte* 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 has 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)<sup>94</sup> “all but compels invalidation” because “an alien cannot be forced by regulation to forfeit a motion guaranteed by statute.”<sup>95</sup> The Tenth Circuit denied a petition for *en banc* rehearing and the Supreme Court denied a petition for a writ of certiorari.

The Tenth Circuit has applied the reasoning in *Rosillo-Puga* to subsequent cases. In *Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009), the court declined to adopt the reasoning of *William*, and instead found no statutory conflict and upheld as reasonable the BIA’s interpretation that the regulation divested it and the IJ of jurisdiction (the MTR in this case was both number and time barred). Most recently, in *Estalita v. Holder*, 2010 U.S. App. LEXIS 11955 (10th Cir. 2010) (unpublished), petitioner filed a MTR while still in the U.S., and then departed pursuant to a grant of voluntary departure. Unaware of the departure, the BIA granted the motion, and then vacated its decision when it became aware of petitioner’s departure. Despite acknowledging that petitioner had been granted voluntary departure and had filed a timely motion, the Tenth Circuit found itself bound by precedent and upheld the post-departure bar, denying the petitioner’s arguments of statutory conflict and due process violations. A petition for a writ of certiorari has been filed in this case.

#### **IV. REMOVAL WHILE MTR OR APPEAL OF DENIAL OF MTR IS PENDING**

##### **A. Removal While a 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, the IJ or the BIA may deny the MTR as moot under the second clause of the post-departure bar which provides that “[a]ny departure from the United States, in-

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<sup>93</sup> See *supra* note 73, for discussion of the *Chevron* doctrine.

<sup>94</sup> In *Dada*, the Supreme Court analyzed the tension between voluntary departure – which generally allows 30 to 60 days for departure – and the 90 day motion to reopen period. Recognizing the statutory right to seek reopening, the Court held that individuals who wish to seek reopening must be permitted to withdraw their voluntary departure request prior to the expiration of the departure period.

<sup>95</sup> *Rosillo-Puga*, 580 F.3d at 1162 and 1169 (Lucero, J. dissenting).

cluding 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.”<sup>96</sup>

In a recent decision, *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010), the Ninth Circuit held that involuntary departure – removal by the government – does not act to withdraw a MTR. In applying the *Chevron* doctrine, the Court found that the intent of Congress was clear, and that “Congress anticipated that petitioners would be able to pursue relief after departing.” The Court concluded that “[i]t would completely eviscerate the statutory right to reopen...if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending.” Thus, MTRs cannot be deemed withdrawn by an involuntary departure in the Ninth Circuit. Because the Court based its decision on the first step of its *Chevron* analysis – finding the statute unambiguous and the regulation contrary to the statute – the reasoning should be applicable to post-departure MTRs generally.

The Fourth Circuit’s decision in *William* – invalidating the regulation as in conflict with the statute – should apply equally to departures during the pendency of a MTR, because the same question arises with regard to the conflict between the departure bar regulation and the broad statutory language granting a right to file one motion to reopen and one motion to reconsider. Likewise, one can argue that under *Cardoso-Tlaseca*,<sup>97</sup> a departure while a MTR is pending was not “legally executed” and that the post-departure bar therefore does not apply.

In considering the withdrawal clause in the context of MTRs to the BIA, the Seventh Circuit in *Marin-Rodriguez* stated that “it amounts to saying that, by putting an alien on a bus, the agency may ‘withdraw’ its adversary’s motion.”<sup>98</sup> The court went on to hold on broader grounds that the regulation was not valid as a jurisdictional rule, and this reasoning would extend to the withdrawal provision.

The Second Circuit also considered the effect of departure on pending MTRs in *Zhang*. Though it noted that “it is linguistically awkward to consider the forcible removal of an alien as ‘constitut[ing] a withdrawal’ of any pending motions,” and that the departure bar is not clearly jurisdictional in nature, it ultimately found that the BIA’s construction was not plainly erroneous.<sup>99</sup> The court limited its holding, however, to instances in which the petitioner is seeking *sua sponte* reopening of an untimely motion.

## **B. Removal While a BIA Appeal of an IJ Denial of a MTR is Pending**

When a person is physically removed or departs from the United States while an appeal of the IJ’s denial of a MTR is pending,<sup>100</sup> a further hurdle may be presented by 8 C.F.R. § 1003.4, which provides that:

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<sup>96</sup> 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

<sup>97</sup> 460 F.3d 1102, 1107 (9th Cir. 2006).

<sup>98</sup> *Marin-Rodriguez*, 612 F.3d at 593.

<sup>99</sup> *Zhang v. Holder*, 617 F.3d 650, 660 (2d Cir. 2010).

<sup>100</sup> 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...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.<sup>101</sup> The Sixth Circuit has similarly held that the doctrine of waiver and principles of “fundamental fairness” lead to the conclusion that involuntary departure (i.e. removal) does not act to withdraw a pending appeal, and that to allow the government to cut off the statutory right to an appeal through removal appeared to be a “perversion of the administrative process.”<sup>102</sup> Thus, attorneys may wish to argue that being subjected to removal does not constitute a “departure” for purposes of the withdrawal of an appeal.

The Fifth Circuit, in a narrow ruling, has held that § 1003.4 does not apply when the individual departs – voluntarily or not – after the BIA has decided the appeal and while a habeas petition is pending.<sup>103</sup>

## V. FILING POST-DEPARTURE MOTIONS

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.

Cases challenging the validity of the post-departure bar are currently pending in the Third, Sixth, Eighth, Ninth, and Tenth Circuits. For updates on these cases you can email PDHRP at [pdhrp@bc.edu](mailto:pdhrp@bc.edu).

The arguments against the post-departure bar will vary depending on the facts of the case and the applicable circuit law. 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, and the National Immigrant Project can offer assistance and amicus support in such cases. If you have a case that involves the post-departure bar, please contact Jessica Chicco at [pdhrp@bc.edu](mailto:pdhrp@bc.edu), Beth Werlin at [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org), or Trina Realmuto at [trina@nationalimmigrationproject.org](mailto:trina@nationalimmigrationproject.org).

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<sup>101</sup> See *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835, 838 (9th Cir. 2003).

<sup>102</sup> 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). The Second Circuit also noted that “[i]t is unclear whether this regulation applies where an alien does not voluntarily depart but instead is deported,” but did not decide the issue. *Ahmad v. Gonzales*, 204 Fed. Appx. 98 (2d Cir. 2006) (unpublished).

<sup>103</sup> See *Rodriguez-Barajas*, No. 09-60351 (5th Cir. filed Oct. 19, 2010) *Rodriguez-Barajas* voluntarily left the country after the BIA had dismissed his appeal and he had filed a habeas corpus petition with the federal court. The court found that because the BIA had issued a decision in the case, the regulation, which states that departure “subsequent to the taking of an appeal, but prior to a decision thereon” withdraws the appeal, did not apply.

## APPENDIX: Summary of Potential Challenges to the Post-Departure Bar

A number of potential arguments can be considered when challenging the post-departure regulation. Some of them are presented briefly here. This is by no means an exhaustive list. Not all of these arguments may be applicable to every case, and practitioners may have strong tactical or strategic reasons for choosing to include some but not all of the applicable arguments. More information on these and other potential challenges is provided throughout Section III.

- (1) *The BIA cannot contract its own jurisdiction through regulation or case law:* Pursuant to Supreme Court precedent, agencies cannot contract their own jurisdiction through regulation or case law. Therefore the post-departure bar cannot be treated as a jurisdictional limitation.<sup>104</sup>
- (2) *The regulation conflicts with the statute and is therefore ultra vires:*
  - Section 1229a(c)(7)(A) clearly states that an alien “may file one motion to reopen” (§ 1229a(c)(6)(A) contains the same language with regards to motions to reconsider). The statute goes on to spell out time and number limitations on such motions, but does not mention a requirement that the individual be inside the country.<sup>105</sup>
  - The statute authorizing motions to reopen makes physical presence a requirement for special motions by battered spouses, thus indicating that Congress knew how to include this requirement when it wished to do so (§ 1229a(c)(7)(C)(IV)(iv)).<sup>106</sup>
  - Congress implicitly repealed the post-departure bar on motions to reopen when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 and repealed 8 U.S.C. § 1105a(c) (barring post-departure judicial review).
- (3) *The IJ and BIA retain sua sponte jurisdiction despite the regulation:* The BIA has repeatedly held that the post-departure bar strips it of jurisdiction to consider MTRs even under the regulation giving the immigration courts and the BIA authority to reopen cases *sua sponte*.<sup>107</sup> However, the regulation granting *sua sponte* jurisdiction states that the IJ or BIA may reopen “at any time.” Furthermore, the post-departure bar purportedly restricts the alien’s right to file a MTR, whereas the *sua sponte* regulation authorizes the IJ and BIA to reopen or reconsider.<sup>108</sup> When discretion is granted to an agency it must be exercised on a case-by-case basis.<sup>109</sup>
- (4) *The departure bar applies only to an individual who “is the subject of” removal proceedings:* The language of the regulation uses the present tense. Therefore, individuals who departed after the conclusion of proceedings are no longer subject to removal proceedings and are not barred

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<sup>104</sup> See *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010), citing to *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).

<sup>105</sup> See *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); Cf. *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009).

<sup>106</sup> See *William*, 499 F.3d at 333 (4th Cir. 2007).

<sup>107</sup> See, e.g. *Zhang v. Holder*, 617 F.3d 650 (2nd Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *Rosillo-Puga v. Holder*, 580 F.3d 1147.

<sup>108</sup> *Rosillo-Puga*, 580 F.3d at 1170 (Lucero, J. dissenting).

<sup>109</sup> See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957).

from reopening.<sup>110</sup> This same reasoning can be used to argue that individuals who departed prior to the commencement of proceedings are also not “the subject of” removal proceedings and therefore not barred.<sup>111</sup>

- (5) *The regulation conflicts with the statutory 90 day removal period, and the 60 and 120 day voluntary departure periods:* IIRIRA established a statutory right to file MTRs, setting a 90 day time limitation. At the same time, it also set forth a requirement that individuals be removed within a period of 90 days following a final order of removal, and limited the voluntary departure period to 60 or 120 days. The statutory right to seek reopening would be meaningless if precluded by removal or departure pursuant to voluntary departure.<sup>112</sup>
- (6) *Departure is not a “transformative event” as opined in Armendarez-Mendez:* In *Armendarez-Mendez*, the BIA stated that individuals who have departed have “literally passed beyond our aid.”<sup>113</sup> However, the BIA clearly has jurisdiction in cases in which the alien is out of the country but prevails on a petition for review. Further, the BIA itself, in *Bulnes-Nolasco*, found it had jurisdiction to review a post departure MTR an *in absentia* order based on lack of notice.<sup>114</sup> Thus, the BIA’s reasoning appears to be flawed and inconsistent insofar as it purports to lack jurisdiction by virtue of the individual’s departure.
- (7) *Due process violation:* Particularly in the case of former legal permanent residents, the denial to consider the merits of a MTR violates an individual’s constitutionally-protected liberty interest in remaining in and/or returning to the U.S. without affording due process consistent with the Fifth Amendment. Due process requires an adjudication on the merits of the MTR.<sup>115</sup>
- (8) *Arbitrary and capricious application:* Agency action is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem.”<sup>116</sup> In the case of those seeking to reopen because the underlying removal order was not “legally executed,” the regulation as interpreted forecloses agency review of a removal order that was erroneous when issued or was subsequently rendered invalid by a change of law.

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<sup>110</sup> See *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007); Cf. *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008).

<sup>111</sup> See *Singh v. Gonzales*, 412 F.3d 1117, 1121 (9th Cir. 2005).

<sup>112</sup> See *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010). See also *Dada v. Mukasey*, 554 U.S. 1 (2010) (recognizing the conflict between voluntary departure and motion to reopen rules, and holding that aliens may withdraw a request for voluntary departure when seeking to reopen immigration proceedings).

<sup>113</sup> *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 656 (BIA 2008).

<sup>114</sup> *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009).

<sup>115</sup> See generally *Landon v. Plasencia*, 459 U.S. 21 (1982).

<sup>116</sup> *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).