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Post-Deportation Human Rights Project

Practice Advisory

Post-Departure Motions to Reopen and Reconsider[1]

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I. INTRODUCTION

Individuals seeking to reopen their immigration proceedings after departing or being removed from the United States face significant hurdles. This practice advisory provides information on the legal issues surrounding post-departure motions to reopen or reconsider. However, each practitioner must decide whether a motion is warranted in a specific case. Such a decision should be based on many factors, including the likelihood of success, costs, the availability of other legal remedies, etc.

Section II provides background information on motions to reopen and reconsider. Section III discusses the regulatory "post-departure bar." Section IV reviews cases decided by the Board of Immigration Appeals and Courts of Appeals that may be relevant to those seeking reopening or reconsideration after departure or deportation. Section V considers issues that may arise if a client is removed while a motion to reopen or reconsider is pending.

II. BACKGROUND

A. What is a motion to reopen?

A **motion to reopen** is an "important safeguard" intended "to ensure a proper and lawful disposition" of immigration proceedings.[3] Prior to 1996, motions to reopen were governed solely by regulation. As part of the Illegal Immigration and Immigrant Responsibility Reform Act of 1996 (IIRIRA), however, Congress codified the right to file motions to reopen. These provisions are now located at 8 USC § 1229a(c)(7), Immigration and Nationality Act (INA) § 240(c)(7). Regulations further explaining the procedures and requirements for filing a motion to reopen can be found at 8 CFR §§ 1003.2(c) (BIA), 1003.23(b)(1) (immigration court).

At its core, a motion to reopen is a request that the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA) reopen proceedings in which a final administrative order[4] has already been entered.[5] A

[3] *Dada v. Mukasey*, 554 U. S. 1, 18 (2008).

[4] *See* 8 CFR § 1241.1 (explaining that an order of removal made by the immigration judge at the conclusion of proceedings under INA § 240 becomes final: "(a) Upon dismissal of an appeal by the Board of Immigration Appeals; (b) Upon waiver of appeal by the respondent; (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time; (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal; (e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or
(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.")

[5] CLINIC has a wide variety of resources available to assist practitioners with motions to reopen. *See, e.g.,* Conchita Cruz, Katy Lewis, Michelle Mendez, Swapna Reddy, Dorothy Tegeler and Liz Willis, CLINIC and ASAP, *A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders* (July 2019), https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/2019-07-10-ASAP-CLINIC-Motion-to-Reopen-Guide.pdf; Michelle Mendez and Rebecca Scholtz, CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (2018), https://cliniclegal.org/resources/motions-reopen-daca-recipients-removal-order.

motion to reopen is based on factual grounds, and seeks a fresh determination based on newly discovered facts or a change in the applicant's circumstances since the time of the hearing.[6]

A motion to reopen must be supported by affidavits or other evidence,[7] and must establish that the evidence is material, was unavailable at the time of the original hearing, and could not have been discovered or presented at the original hearing.[8] Situations in which motions to reopen are appropriate include, but are not limited to, 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.[9]

B. How does a motion to reopen compare to a motion to reconsider?

A **motion to reconsider** seeks a new determination based on alleged errors of fact or law.[10] In contrast to a motion to reopen, there need not be any change in the applicant's circumstances or any factual changes in order to file a motion to reconsider. Instead, a motion to reconsider asks that an IJ or the BIA reexamine a decision "in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier,"[11] including errors of law or fact in the previous order.[12]

The statutory provisions governing motions to reconsider are located at 8 USC § 1229a(c)(6), INA § 240(c)(6). Regulations further explaining the procedures for filing a motion to reconsider can be found at 8 CFR §§ 1003.2(b), 1003.23(b)(1).

C. Where are motions to reopen and motions to reconsider filed?

Both motions to reopen and motions to reconsider must be filed with the agency adjudicator[13] that last had jurisdiction over the case – either the IJ or the BIA.[14] This rule, known as the last adjudicator rule, means that where the IJ last exercised jurisdiction, the motion must be filed with the IJ who entered the order.[15] If the BIA last exercised jurisdiction, the motion must be filed with the BIA.[16]

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[6] *See* INA § 240(c)(7)(B), 8 USC § 1229a(c)(7)(B); 8 CFR §§ 1003.2(c), 1003.23(b).
[7] *See* INA § 240(c)(7)(B), 8 USC § 1229a(c)(7)(B). Importantly, statements of counsel are not evidence, *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980), and thus it is critical to include affidavits and other documentary evidence.
[8] *See* 8 CFR § 1003.2(c)(1); *Kaur v. BIA*, 413 F.3d 232, 234 (2d Cir. 2005).
[9] *See, e.g., Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004) (per curium) (changed country conditions); *Siong v. INS*, 376 F.3d 1030, 1036-39 (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).
[10] *See* INA § 240(c)(6)(C), 8 USC § 1229a(c)(6)(C); 8 CFR § 1003.2(b)(1).
[11] *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002).
[12] *See* INA § 240(c)(6)(C), 8 USC § 1229a(c)(6)(C); 8 CFR §§ 1003.2(b)(1) (proceedings before the BIA), 1003.23(b)(2) (proceedings before the immigration court).
[13] Importantly, the last adjudicator rule still applies even if a petition for review has been filed with a federal circuit court. Should a practitioner seek to file a motion to reopen or reconsider at that stage, the motion should be filed with the last agency adjudicator that rendered a decision in the matter—likely the Board of Immigration Appeals.
[14] *See* 8 CFR § 1003.23 (Immigration Court); 8 CFR § 1003.2 (BIA). *See also* BIA Practice Manual, § 5.2(a), App. K-1, https://www.justice.gov/eoir/page/file/1189771/download.
[15] *See* 8 CFR § 1003.23(b)(1)(ii).
[16] *See* 8 CFR § 1003.2(a).

Practitioners must pay close attention to the procedural history of a case to determine where jurisdiction last vested. As a general matter, an adjudicator has exercised jurisdiction if it made a substantive decision on the matter. However, jurisdiction does not vest if the adjudicator dismissed the matter for lack of jurisdiction, such as when the BIA dismisses an appeal for failure to timely file.[17]

D. What are the procedural requirements for filing motions to reopen and motions to reconsider?

In its current form, the statute imposes time, number, and content requirements on motions to reopen or reconsider.[18] In addition to the statute, there are regulations governing motions to reopen and reconsider.[19]

1. Time and Number Limits

Motions to Reconsider: In general, an individual who has been ordered removed is permitted to file only one motion to reconsider.[20] The motion must be filed within 30 days of the date of entry of a final administrative order.[21]

Motions to Reopen: In general, an individual who has been ordered removed is permitted to file one motion to reopen within 90 days of the date of entry of a final administrative order.[22]

Statutory exceptions to these time and numerical limitations exist if the petitioner is seeking asylum or related relief based on changed country conditions;[23] is a battered spouse or child seeking certain forms of relief under the Violence Against Women Act;[24] or was ordered removed *in absentia*.[25] In addition, most circuit courts have recognized that the filing deadlines, and in some instances the numerical limitations, are not jurisdictional and are thus subject to equitable tolling.[26]

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[17] *See, e.g., Matter of Mladineo*, 14 I&N Dec. 591, 592 (BIA 1974).
[18] *See* INA § 240(c)(6)(A)-(C), 8 USC § 1229a(c)(6)(A)-(C) (reconsideration); INA §§ 240(c)(7)(A)-(C), 240(b)(5)(C), 8 USC §§ 1229a(c)(7)(A)-(C), 1229a(b)(5)(C) (reopening).
[19] 8 CFR §§ 1003.23 (immigration court), 1003.2 (BIA).
[20] *See* INA § 240(c)(6)(B), 8 USC § 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, 1328-30 (11th Cir. 2007).
[21] *See* INA § 240(c)(6)(A), (B), 8 USC § 1229a(c)(6)(A), (B).
[22] *See* INA § 240(c)(7)(A), (c)(7)(C)(i), 8 USC § 1229a(c)(7)(A), (c)(7)(C)(i).
[23] *See* INA § 240(c)(7)(C)(ii), 8 USC § 1229a(c)(7)(C)(ii).
[24] *See* INA § 240(c)(7)(C)(iv), 8 USC § 1229a(c)(7)(C)(iv).
[25] *See* INA § 240(b)(5)(C), 8 USC § 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 numerical limits on motions to reopen to rescind an *in absentia* order. 8 CFR 1003.23(b)(4)(iii)(D). *See generally*, Beth Werlin, American Immigration Council, *Practice Advisory: Rescinding an In Absentia Order of Removal*, (March 31, 2010), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf. For further guidance on assisting asylum seekers with *in absentia* orders of removal, *see* Conchita Cruz, Katy Lewis, Michelle Mendez, Swapna Reddy, Dorothy Tegeler and Liz Willis, CLINIC and ASAP, *A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders* (July 2019), https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/2019-07-10-ASAP-CLINIC-Motion-to-Reopen-Guide.pdf.
[26] *See Lugo-Resendez v. Lynch,* 831 F.3d 337 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. U.S. Att'y Gen*., 713 F.3d 1357, 1364 (11th Cir. 2013) (en banc) (per curiam) (90-day time limitation is a non-jurisdictional

2. *Sua sponte* Authority to Reopen or Reconsider "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.[27] The BIA has stated, in general, that it will exercise *sua sponte* jurisdiction only in "exceptional situations."[28] Exceptional situations include a change in law that represents a departure from established principles or a fundamental change, rather than merely an incremental change.[29] Additionally, the BIA has frequently exercised *sua sponte* authority to reopen proceedings where a conviction that formed the basis of a removal order has subsequently been vacated.[30]

E. Can the denial of a motion to reopen or motion to reconsider be appealed to a federal court?

The federal appeals courts have jurisdiction to review the BIA's denial of a motion to reopen or reconsider, as well as the BIA's affirmance of an IJ's denial of such a motion, through a petition for review.[31] The federal circuit court with jurisdiction over the place where the IJ completed proceedings will have jurisdiction over a petition to review the BIA's action.[32] In two key decisions, the Supreme Court has recognized the importance of the statutory right to motions to reopen and has confirmed that courts of appeals have jurisdiction to review BIA decisions denying these motions.[33]

The Supreme Court has confirmed federal court jurisdiction over motions to reopen, noting that motions to reopen are an "important safeguard."[34] However, in *Kucana v. Holder*, 130 S. Ct. 827, n. 18 (2010), the

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claim processing rule subject to equitable tolling); *Alzaarir v. Att'y Gen*., 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Neves v. Holder*, 613 F.3d 30 (1st Cir. 2010) (assuming, but not deciding, that time and number limitations are subject to equitable tolling); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Yuan Goa v. Mukasey*, 519 F.3d 376, 377 (7th Cir. 2008); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) (time limitation subject to equitable tolling); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005) (180 day time limitation to reopen *in absentia* order subject to equitable tolling); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004) (time limitation subject to equitable tolling); *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190-93 (9th Cir. 2001) (en banc); *Iavorski v. INS*, 232 F.3d 124, 129-33 (2d Cir. 2000) (Sotomayor, J.). *Iturribaria v. INS*, 321 F.3d 889 (9th Cir. 2003) (number limitation subject to equitable tolling).

[27] 8 CFR §§ 1003.2(a) (BIA), 1003.23(b)(1) (IJ).

[28] *See Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).

[29] *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 G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of X-G-W-*, 22 I&N Dec. 71, 74 (BIA 1998) (reopening sua sponte on the basis of legislative change).

[30] *See Cruz v. U.S. Att'y Gen.*, 452 F.3d 240, 246 n.3 (3d Cir. 2006) (citing ten unpublished BIA cases granting untimely motions to reopen based on vacated convictions, 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").

[31] INA § 242(a)(1), 8 USC § 1252(a)(1).

[32] INA § 242(b)(2), 8 USC § 1252(b)(2).

[33] *See Kucana v. Holder*, 558 U.S. 233 (2010) (affirming federal court jurisdiction to review BIA denials of motions to reopen); *Dada v. Mukasey,* 554 U.S. 1 (2008) (recognizing that motions to reopen are an "important safeguard" intended "to ensure a proper and lawful disposition" of immigration proceedings). Whether there is jurisdiction to review the denial of a sua sponte motion to reopen, however, has been the subject of contention. *See infra* note 33.

[34] *Kucana v. Holder*, 558 U.S. 233, 242 (2010); *Dada v. Mukasey*, 554 U.S. 1, 18 (2008).

Court expressly declined to decide whether federal courts may review a denial of a motion requesting *sua sponte* reopening. Most circuits have held that because 8 CFR § 1003.2 grants such broad discretion to the BIA to reopen or reconsider *sua sponte*, the courts lack jurisdiction to review such a decision.[35]

> **Practice Pointer** → It may be more difficult or impossible to obtain federal court review of the denial of a motion for *sua sponte* reopening or reconsideration. In addition (as detailed below) many circuits have invalidated the post-departure bar only in the context of "statutory" motions to reopen. Therefore, and whenever possible, attorneys should argue that a motion should be treated as falling within the statutory right to file a motion to reopen or reconsider. A post-departure motion that is otherwise numerically barred or is filed outside of the 30/90 day time limit should preserve the following arguments where applicable:
>
> (1) The motion to reopen or motion to reconsider 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 a motion to reopen or motion to reconsider);
> (2) The time or numerical limit does not apply under an applicable statutory and/or regulatory scheme;[36] and/or
> (3) Equitable tolling applies and renders the motion statutory.[37]

III. WHAT IS THE POST-DEPARTURE BAR?

The post-departure bar is a jurisdictional limitation that precludes the BIA and the immigration courts from considering motions filed by noncitizens who have been removed or deported from the United States. The post-departure bar is found in two federal regulations, but, significantly, does not appear in the statutes

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[35] *See*, *e.g.*, *Mejia-Hernandez v. Holder*, 633 F.3d 818 (9th Cir. 2011); *Ochoa v. Holder*, 604 F.3d 546 (8th Cir. 2010) (petition for rehearing en banc denied); *Mosere v. Muksey*, 552 F.3d 397 (4th Cir. 2009); *Lenis v. U.S. Att'y Gen.* 525 F.3d 1291 (11th Cir. 2008); *Tamenut v. Mukasey* 521 F.3d 1000 (8th Cir. 2008); *Ali v. Gonzales*, 448 F.3d 515 (2d Cir. 2006); *Harchenko v. INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003); *Belay-Gebru v. INS*, 327 F.3d 998 (10th Cir. 2003); *Calle-Vujiles v. Ashcroft* 320 F.3d 472 (3d Cir. 2003); *Luis v. INS*, 196 F.3d 36 (1st Cir. 1999). *But see Pllumi v. U.S. Att'y Gen.*, 642 F.3d 155 (3d Cir. 2011) (court may review denial "to the limited extent of recognizing when the BIA has relied on incorrect legal premise"); *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*); *Cevilla v. Gonzalez*, 446 F.3d 658 (7th Cir. 2006) (not reviewable when based on discretion, but reviewable when based on application of a legal standard); *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).

[36] *See* discussion *supra* Part I.D.1 (explaining statutory exceptions to the normal time and numerical limitations).

[37] *See supra* note 24 for discussion on equitable tolling.

codifying motions to reopen.[38] The two federal regulations—8 CFR § 1003.2(d) (motions filed with the BIA) and 8 CFR § 1003.23(b)(1) (motions filed with the IJ)—contain identical language prohibiting adjudication of post-departure motions, providing that motions to reopen "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." These regulations have been interpreted to apply to persons who have been physically removed by the government, those who have left the country voluntarily while subject to an order of removal, and those who have left the country after a grant of voluntary departure.[39]

In addition, both of these regulations include an automatic withdrawal provision and 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." This language is parallel to that found in the regulation regarding withdrawals of BIA appeals found at 8 CFR § 1003.4. Section 1003.4 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." Both of these withdrawal provisions are discussed briefly in Section V.

The BIA has upheld the validity of the post-departure bar as a jurisdictional bar, with the exception of motions to rescind an *in absentia* order based on lack of notice. Federal circuit courts have varied in their conclusions and approaches to the applicability of the post-departure bar. Relevant BIA and Circuit Court decisions are discussed in detail in Section IV.

IV. CASE LAW ON POST-DEPARTURE MOTIONS

A. Board of Immigration Appeals

The BIA has considered two major 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 been removed from the United States. 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 noncitizen 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 the noncitizen's motion because of the departure bar. In so holding, it rejected the Ninth Circuit's reasoning that the bar did not apply to those who filed a motion to reopen after being removed because, according to the Ninth Circuit, those noncitizens were no longer "the subject of" removal proceedings.[40] The BIA reasoned that the post-departure bar should be

[38] Congress codified the right to file motions to reopen as part of the Illegal Immigration and Immigrant Responsibility Reform Act of 1996 (IIRIRA). These provisions are now located at 8 USC § 1229a(c)(7), INA § 240(c)(7). Courts have held that this statutory right to file a motion to reopen cannot be infringed upon by the post-departure bar regulation. *See* discussion *infra* section IV.B.1.

[39] *See Dada v. Mukasey*, 554 U.S. 1, 6-7 (2008).

[40] *See Lin v. Gonzales,* 473 F.3d 979 (9th Cir. 2007).

viewed in the context of the entire INA, 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* (discussed below), which had found the regulation to be in conflict with the statute. The BIA also stated that the post-departure bar deprived the BIA of jurisdiction to consider the motion *sua sponte*, citing a previous Fifth Circuit case.[41]

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 noncitizen's departure from the United States. The BIA concluded that the regulation permitting motions to reopen *in absentia* orders "at any time" trumped the post-departure bar because "an alien ordered deported *in absentia* possesses a robust right to challenge the removal order on improper notice grounds."[42] In a footnote, the BIA further explained that the regulation regarding the reopening of an *in absentia* order, 8 CFR §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* motions to reopen based on lack of notice.[43]

The BIA's decision in *Bulnes-Nolasco* is in clear tension with the justification put forth by the BIA in *Armendarez-Mendez* that "[r]emoved aliens have, by virtue of their departure, literally passed beyond our aid."[44] Further, 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.

B. Circuit Court Precedent on the Post-Departure Bar

Federal circuit courts have generally treated statutory motions (defined as those motions filed within the 90-day or 30-day filing period or subject to statutory exception to that time period) quite differently than *sua sponte* motions (which are governed only by regulation). All circuit courts except for the Eighth Circuit have invalidated the departure bar in the context of statutory motions. The Eighth Circuit has not yet ruled on the issue.

In contrast, most circuit courts have not addressed the departure bar's applicability to *sua sponte* motions (which are deemed regulatory), thus leaving the BIA's decision in *Matter of Armendarez-Mendez* intact with regard to *sua sponte* motions. Those circuits that have addressed the applicability of the departure bar to *sua sponte* motions have found the departure bar to be valid in this context. This section explains the courts' reasoning in greater detail.

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[41] *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).
[42] 25 I&N Dec. at 59.
[43] *Id.* at n.3.
[44] 24 I&N Dec. at 656. *But see* discussion of *Matter of Diaz Garcia*, 25 I&N Dec. 794 (BIA 2012) *infra* Section IV.

1. Circuit Court Decisions Invalidating the Post-Departure Bar and/or Carving Out Exceptions

Ten circuits have thus far invalidated the post-departure bar regulation.[45] Three of them – the Second, Third, and Fifth circuits – have invalidated the regulation in the context of motions filed pursuant to the statute (i.e. timely, not numerically barred motions), but have upheld the regulation in the context of non-statutory, regulatory *sua sponte* motions. Most decisions invalidating the regulation have adopted one of two lines of reasoning:

(1) In the first line of cases, courts have engaged in a *Chevron* analysis[46] and concluded that the regulation is in conflict with the clear statutory language granting the right to file a motion to reopen and with Congress's intent. Where the courts have found that the regulatory post-departure bar conflicts with the statute and is thus *ultra vires*, the BIA's jurisdictional interpretation of the regulation in *Armendarez-Mendez* cannot override the court's interpretation of an unambiguous statute.[47] This approach has generally been adopted by the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

(2) In the second line of cases, courts have relied on the reasoning in the Supreme Court's decision *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), to hold that the regulation is an impermissible contraction of the agency's own jurisdiction. In *Union Pacific*, the Supreme Court held that the National Railroad Adjustment Board could not promulgate a regulation that contracted its own jurisdiction. Similarly, courts have found that because Congress delegated authority to the BIA to hear a motion to reopen, the BIA cannot curtail its own jurisdiction. This approach has been adopted by the Second, Sixth, and Seventh Circuits.

Both of these rationales for invalidating the post-departure bar are examined in more detail in the context of the cases in which these arguments were raised and discussed. Because some decisions do not fall neatly into either of these categories, and because additional arguments have been endorsed in reaching the conclusion that the post-departure bar is invalid, the decisions are summarized and discussed below by circuit.

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[45] The reasoning applied to motions filed with the BIA under 8 CFR § 1003.2 should also apply to motions filed with the IJ under 8 CFR § 1003.23 and vice versa, as the relevant language in the two regulations is identical. As the statutory language granting the right to file a motion to reconsider is parallel to the language for filing a motion to reopen, the reasoning of the decisions should also extend to motions to reconsider.

[46] Under the principles set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court engages in a two-step process. It 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, it moves on to step two of the analysis to determine whether the agency interpretation is reasonable. *Id*.

[47] *See Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 982-83 (2005).

- **First Circuit** *(covers those ordered removed by Immigration Courts in MA and Puerto Rico)*

In ***Perez-Santana v. Holder***, 731 F.3d 50 (1st Cir. 2013), the First Circuit struck down the departure bar finding it to be in direct conflict with the unambiguous language of the statute granting the right to file one timely motion to reopen. In this case, the noncitizen had filed a timely motion to reopen based on post-conviction relief obtained after his removal.

In a decision issued the same day, the court also considered the applicability of the departure bar in the context of a motion to reopen filed outside the 90-day limit. In that case, ***Bolieiro v. Holder***, 731 F.3d 32 (1st Cir. 2013), the noncitizen argued, in part, that principles of equitable tolling rendered her motion statutory, and that therefore the departure bar was in direct conflict with her statutory right to file the motion. Because the BIA had not decided the issue of the motion's timeliness and had instead applied the departure bar without distinction, the court did not address this claim, and instead granted the petition for review based on the same reasoning as that in *Perez-Santana*. In remanding the case to the BIA, however, it noted that, though the First Circuit has not explicitly adopted equitable tolling in the context of motions to reopen, the majority of other courts to have considered the issue had concluded that equitable tolling applies to motions to reopen.

- **Second Circuit** *(covers those ordered removed by Immigration Courts in CT and NY)*

The Second Circuit has invalidated the post-departure bar in the context of statutory motions to reopen. In ***Luna v. Holder***, 637 F.3d 85, 92 (2d Cir. 2011), the court considered two cases in which noncitizens argued that the jurisdictional 30-day deadline on petitions for review violated the Suspension Clause because it barred them from raising constitutional claims through a habeas petition or adequate substitute. The court concluded that there was no Suspension Clause violation because the statutory motion to reopen process provides an adequate and effective substitute for habeas. However, in order for the motion to reopen process to be an adequate substitute, the court reasoned, the BIA must retain jurisdiction over statutory motions even post-departure. In addition, the court specified that it included in the category of "statutory motions" those motions that are filed outside of the filing deadlines but that are equitably tolled.[48] The court adopted the reasoning of the Supreme Court's decision in *Union Pacific*, and held that the BIA's contraction of its jurisdiction over post-departure motions was impermissible because Congress alone controls the BIA's jurisdiction to hear motions to reopen filed under 8 USC § 1229a(c)(7).[49]

However, the Second Circuit has, rather reluctantly, upheld the post-departure bar in the context of *sua sponte* motions (see discussion below in Part C).

[48] *Luna*, 637 F.3d at 95.
[49] *Id.* at 100.

- Third Circuit *(covers those ordered removed by Immigration Courts in NJ and PA)*

In ***Prestol-Espinal v. Att'y Gen.***, 653 F.3d 213 (3d Cir. 2011), the noncitizen had filed a timely motion to reconsider following his removal. The Third Circuit conducted a *Chevron* analysis and invalidated the post-departure bar under step one of *Chevron* as in conflict with the statute and Congressional intent. The court enumerated the following reasons in reaching its conclusion:

(1) The plain text of the statute provides each noncitizen with the right to file a motion to reconsider;
(2) The Supreme Court has recognized the importance of this right;
(3) Congress chose to incorporate some limitations on motions but did not include a post-departure bar in the statute;
(4) The post-departure bar would allow the government to eviscerate the right to file a motion by removing the noncitizen within the filing window;
(5) Congress included geographic limitations on special motions to reopen for victims of violence but did not include such a limitation on all motions to reopen or reconsider; and
(6) Congress repealed the statutory post-departure bar on judicial review, in conformity with its intent to expedite removal while increasing accuracy, and these objectives would be undermined by the post-departure bar.

Only months after issuing this decision, however, the court upheld the validity of the post-departure bar in the context of an untimely *sua sponte* motions (see discussion below in Part C).

- Fourth Circuit *(covers those ordered removed by Immigration Courts in MD, NC, and VA)*

In ***William v. Gonzales***, 499 F.3d 329 (4th Cir. 2007), the Fourth Circuit was the first court to invalidate the post-departure bar on the ground that it conflicts with the clear statutory language of 8 USC § 1229a(c)(7)(A); INA § 240(c)(7)(A). The noncitizen in *William* sought to reopen with the BIA following the vacatur of the conviction that formed the basis of his removal. The BIA held that it lacked jurisdiction over the motion to reopen due to the post-departure bar in 8 CFR § 1003.2(d). The Fourth Circuit overturned, 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.[50]

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 . . .

[50] *William*, 499 F.3d at 332.

is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."[51] 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,[52] and noted that it would be meaningless if the underlying right to file motions to reopen 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 the *Chevron* analysis, and did not reach the argument that the regulation violated the noncitizen's right to due process under the Fifth Amendment.

- Fifth Circuit *(covers those ordered removed by Immigration Courts in LA and TX)*

In ***Garcia-Carias v. Holder***, 697 F.3d 257 (5th Cir. 2012), the Fifth Circuit invalidated the post-departure bar regulation in the context of motions to reopen, finding it to be in conflict with the statute. The court concluded that the statutory language granting a noncitizen the right to file a motion to reopen is clear and unambiguous and thus invalidated the regulation under step one of *Chevron*. In a companion case decided the same day, ***Lari v. Holder***, 697 F.3d 273 (5th Cir. 2012), the court applied the same analysis to invalidate the departure bar to motions to reconsider.

The court stopped short, however, of overturning its prior decision in *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009), which upheld the departure bar in the context of *sua sponte* motions (see discussion below in Part C).

- Sixth Circuit *(covers those ordered removed by Immigration Courts in MI, OH, KY, and TN)*

The Sixth Circuit has invalidated the post-departure bar, strongly wording its conclusion that the BIA's interpretation that it lacks jurisdiction to hear motions to reopen following removal has "no roots in any statutory source and misapprehends the authority delegated to the Board by Congress." ***Pruidze v. Holder***, 632 F.3d 234, 235 (2011). The court found the holding in *Union Pacific* applicable and concluded that "the agency may not disclaim jurisdiction to handle a motion to reopen that Congress empowered it to resolve."[53] The court was further convinced by the fact that the BIA itself undermined a jurisdictional approach by acknowledging jurisdiction over some post-departure motions to reopen in *Bulnes-Nolasco*, concluding that "[e]ven the Board does not buy everything it is trying to sell."[54] Furthermore, the court found that the BIA's jurisdictional interpretation of the regulation was contrary to the statute, as "Congress left no gap to fill when it empowered the agency to consider all motions to reopen filed by an alien," and therefore the BIA's reasoning failed under step one of the *Chevron* analysis.[55]

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[51] *Id*. at 333 (quoting *U.S. v. Johnson*, 529 U.S. 53, 58 (2000)).
[52] *Id*. The exception, which is codified at 8 USC § 1229a(c)(7)(C)(iv)(IV), was first enacted as part of the Victims of 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).
[53] *Pruidze*, 632 F.3d at 239.
[54] *Id.*
[55] *Id.* at 240.

In ***Gordillo v. Holder***, 640 F.3d 700 (6th Cir. 2011), the Sixth Circuit applied the reasoning of *Pruidze* and concluded the post-departure bar was invalid in the context of an untimely but equitably tolled motion to reopen.[56]

The Sixth Circuit has also found invalid the regulatory provision stating that an appeal to the BIA is withdrawn by departure, and held that an involuntary departure cannot effect the withdrawal of a pending appeal from the denial of a motion.[57] (See discussion on withdrawal in Section V).

- Seventh Circuit *(covers those ordered removed by Immigration Courts in IL)*

The Seventh Circuit invalidated the post-departure bar as a jurisdictional rule in ***Marin-Rodriguez v. Holder***, 612 F.3d 591 (7th Cir. 2010).[58] In that case, the BIA had granted the noncitizen's timely motion, but withdrew its decision after being informed by the government that the noncitizen had been removed while his motion was pending. Resting on the Supreme Court's decision in *Union Pacific*, 558 U.S. 67 (2009), the Seventh Circuit stated that "nothing in the statute undergirds a conclusion that the Board lacks 'jurisdiction'—which is to say, adjudicatory competence. . . to issue decisions that affect the legal rights of departed aliens."[59] The court remanded to the BIA, holding that, "[a]s a rule about subject-matter jurisdiction, § 1003.2(d) is untenable."[60]

- Ninth Circuit *(covers those ordered removed by Immigration Courts in the Northern Mariana Islands, HI, AZ, CA, NV, OR, and WA)*

The Ninth Circuit has issued a series of decisions invalidating the post-departure bar. ***Coyt v. Holder***, 593 F.3d 902 (9th Cir. 2010), held, pursuant to *Chevron*, that the regulation stating that a pending motion is withdrawn upon departure conflicts with Congress's clear intent in enacting IIRIRA—of expediting removal while increasing the accuracy of removal determinations—and is thereby invalid.

The Ninth Circuit extended this holding to instances in which the motion is filed following departure in ***Reyes-Torres v. Holder***, 645 F.3d 1073 (9th Cir. 2011). The court, referencing *Coyt*, found "no principled legal distinction" between the two cases, and again held that the post-departure bar was invalid as in conflict with the statutory language and the intent of Congress. In ***Toor v. Lynch***, 789 F.3d 1055 (9th Cir. 2015), the Ninth Circuit found the departure bar invalid regardless of whether the departure is voluntary or involuntary.

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[56] In an unpublished decision, *Lisboa v. Holder*, 436 F. App'x 545 (6th Cir. 2011), the Sixth Circuit relied on its analysis in *Pruidze* to conclude that the IJ had jurisdiction to consider a *sua sponte* post-departure motion to reopen.
[57] *See Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009).
[58] The court left open the possibility that the BIA may be able to "recast its approach as one resting on a categorical exercise of discretion." 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).
[59] *Marin-Rodriguez*, 612 F.3d at 594.
[60] *Id.* at 593.

Prior to the statutory conflict analysis, the Ninth Circuit had relied on another line of cases holding that the post-departure bar does not apply where the individual departs prior to the commencement of proceedings or following the completion of proceedings. The court noted that, on its face, the regulation bars post-departure motions by individuals who are "the subject of removal, deportation or exclusion proceedings," and reasoned that those who depart prior to the commencement or following completion of their proceedings are not "the subject of" removal proceedings at the time of their departure and hence not subject to the post-departure bar.[61] In *Armendarez-Mendez*, the BIA disagreed with this line of reasoning and stated that it declined to follow the holdings in those cases even in cases arising in the Ninth Circuit.[62]

Relying on a separate line of cases, the Ninth Circuit has also held that those who have been 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*, 559 U.S. 356 (2010), holding that the Sixth Amendment requires criminal defense attorneys to advise their noncitizen clients of the immigration consequences of their pleas, and that failure to do so may afford the noncitizen the possibility of vacating past criminal convictions.

In ***Cardoso-Tlaseca v. Gonzales***, 460 F.3d 1102, 1107 (9th Cir. 2006), the court held that where the conviction that was a "key part" of the removal proceedings had been vacated on the merits, the noncitizen was entitled to reopen the proceedings, since the vacatur rendered him eligible for relief from removal. 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) (holding that the deportation was not "legally executed" and the noncitizen was entitled to a new hearing where the conviction was vacated following deportation) and ***Wiedersperg v. INS,*** 896 F.2d 1179, 1183 (9th Cir. 1990) (holding that vacatur established prima facie eligibility for relief and that the BIA had abused its discretion in denying the motion alleging that noncitizen had "slept on his rights" when he filed the motion seven years after the vacatur). Both of these cases relied in turn on ***Mendez v. INS***, 563 F.2d 956, 958-59 (9th Cir. 1977), in which the court concluded that because the noncitizen'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,[63] "departure" meant "'legally executed' departure when effected by the government." In ***Toor v. Lynch***, 789 F.3d 1055 (9th Cir. 2015), however, the Ninth Circuit held that the post-departure bar is invalid irrespective of the manner in which the noncitizen departed.

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[61] *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (invalidating regulation for those who are removed prior to the filing of the motion); *Singh v. Gonzales*, 412 F.3d 1117, 1121 (9th Cir. 2005) (invalidating regulation for those who departed prior to commencement of proceedings). Though *Lin* concerned a motion filed before the IJ, the court subsequently extended its holding to motions filed with the BIA. *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007).

[62] 24 I&N Dec. at 653 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005)). However, 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 F. App'x 622, 624 (9th Cir. 2009) (unpublished); *Chaiban v. Mukasey*, 299 F. App'x 702 (9th Cir. 2008) (unpublished).

[63] Former 8 USC § 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."

- **Tenth Circuit** *(covers those ordered removed by Immigration Courts in NM,CO, and UT)*

In ***Contreras-Bocanegra v. Holder,*** 678 F.3d 811 (10th Cir. 2012) (en banc), the Tenth Circuit joined the majority of circuits in holding that the post-departure bar conflicts with the language of the statute and impermissibly interferes with Congress' clear intent that a noncitizen have the right to pursue a motion to reopen. The court therefore invalidated the regulation under step one of *Chevron*, finding it unnecessary to consider whether the regulation is an impermissible contraction of jurisdiction under *Union Pacific*, though it noted that "these inquiries may not be altogether separate."[64]

In this case, the Tenth Circuit explicitly overruled *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), in which it had reached step two of the *Chevron* analysis and concluded that the regulation was based on a permissible construction of the statute and its progeny.

Interestingly, in a later decision, the Tenth Circuit suggested that its ruling in *Contreras Bocanegra* is not limited to statutory motions to reopen, but instead may also apply to *sua sponte* reopening and reconsideration.[65]

- **Eleventh Circuit** *(covers those ordered removed by Immigration Courts in FL and GA)*

The Eleventh Circuit invalidated the post-departure bar in ***Lin v. U.S. Att'y Gen.***, 681 F.3d 1236 (11th Cir. 2012), finding that the regulation impermissibly conflicts with the statute granting the right to file one motion to reopen. The case concerned the regulatory provision deeming a motion withdrawn upon the noncitizen's departure or removal because the noncitizen had departed the United States after filing a motion to reopen seeking asylum based on changed country conditions.[66] Looking to the plain language of the statute, as well as the statutory scheme as a whole, the court invalidated the post-departure bar under step one of *Chevron*.

[64] *Contreras-Bocanegra*, 678 F.3d 811, 816 (10th Cir. 2012) (en banc).
[65] *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1271 (10th Cir. 2018) ("Our court has held that the post-departure bar is invalid because it is inconsistent with 8 U.S.C. § 1229a(c)(7) . . . But the Fifth Circuit has held that this rule extends only to motions to reopen or reconsider, not to sua sponte reopening or reconsideration.") (internal citations omitted).
[66] Motions to reopen based on changed country conditions are not subject to the time or number bars. *See* INA § 240(c)(7)(C)(ii), 8 USC § 1229a(c)(7)(C)(ii).

2. Circuit Court Decisions Upholding the Post-Departure Bar in the Context of *Sua Sponte* Motions[67]

- Second Circuit *(covers those ordered removed by Immigration Courts in CT and NY)*

Though the Court of Appeals for the Second Circuit invalidated the post-departure bar in the context of "statutory motions," meaning timely motions or those brought within the confines of the statute through equitable tolling, in *Luna v. Holder* (see discussion in Part B above), the court upheld the regulation in ***Zhang v. Holder***, 617 F.3d 650 (2d Cir. 2010), where the noncitizen had filed an untimely motion requesting *sua sponte* reopening following the denial of his asylum petition.[68]

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 noncitizen's argument that the motion 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 noncitizen had abandoned the argument.

Though noting 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," the court 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.[69] Thus, the court concluded that the BIA's interpretation of the departure bar as jurisdictional was not plainly erroneous. However, it signaled 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."[70]

- Third Circuit *(covers those ordered removed by Immigration Courts in NJ and PA)*

In ***Desai v. U.S. Att'y Gen.***, 695 F.3d 267 (3d Cir. 2012), the Third Circuit upheld the post-departure bar in the context of a *sua sponte* motion to reopen. The noncitizen had requested *sua sponte* reopening based on the vacatur of one of the two convictions which had formed the basis of his removal. The BIA denied the motion to reopen based on the post-departure bar but also stated that it would deny the motion on the merits.

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[67] Some courts have found that they lacked jurisdiction to even consider whether the BIA wrongly applied the departure bar in the sua sponte context. *See, e.g., Carrasco-Palos v. Sessions*, 695 F. App'x 992 (8th Cir. 2017) (per curiam) (stating that even if the noncitizen's initial removal order had not been reinstated, the court still would not have jurisdiction to review the BIA's denial of sua sponte reopening unless a "colorable constitutional claim" were raised).

[68] *See also Gaytan-Aragon v. Lynch*, 614 F. App'x 536 (2d. Cir. 2015) (recognizing that the departure bar applies to motions for sua sponte reopening filed with the BIA or an IJ).

[69] *Zhang*, 617 F.3d at 660.

[70] *Id.*

While acknowledging that it had invalidated the regulation in *Prestol-Espinal* (see discussion in Part B above), the court stated that it had "invalidated the post-departure bar only in those cases where it would nullify a statutory right, i.e., where a petitioner's motion to reopen falls within the statutory specifications."[71] Mirroring the reasoning of the Second Circuit in *Zhang*, the court concluded that "[b]ecause the BIA considers motions *sua sponte* pursuant to a grant of authority from the Attorney General, there is no statutory basis for a motion to reopen in the *sua sponte* context," and thus the concerns underlying its decision in *Prestol-Espinal* were absent.[72]

- **Fifth Circuit** *(covers those ordered removed by Immigration Courts in LA and 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* motion. The court held that because the motion was untimely and there is no statutory right to file an untimely motion, the noncitizen could not rely on the argument that the regulation was in conflict with the statute.

The noncitizen in *Ovalles* filed a *sua sponte* motion, arguing that a Supreme Court decision issued after his removal made clear that his single conviction for drug possession should not have been deemed an aggravated felony. The BIA held that it lacked jurisdiction to consider the motion. The Fifth Circuit focused on the untimeliness of the noncitizen's motion, as it was filed years after his removal order became final and eight months after the Supreme Court's decision on which it rested, and treated it as a request to reopen *sua sponte*.[73] The court followed its ruling in ***Navarro-Miranda v. Ashcroft***, 330 F.3d 672, 676 (5th Cir. 2003) (finding reasonable the BIA's interpretation that the post-departure bar overrides its *sua sponte* authority),[74] and held that the BIA lacked *sua sponte* authority to reopen. [75]

Importantly, the Fifth Circuit later clarified in *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016), that the deadline for filing a motion to reopen is subject to equitable tolling, and noted that if the BIA finds that equitable tolling should be applied, then the motion will be considered a statutory motion to which the post-departure bar cannot be applied. In so concluding, the Fifth Circuit distinguished its ruling in *Ovalles*, noting that the noncitizen in *Ovalles* had conceded that his motion to reopen was untimely, whereas *Lugo-Resendez*

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[71] *Desai*, 695 F.3d at 270.

[72] *Id.*

[73] Prior to *Mata v. Lynch,* 135 S.Ct. 2150 (2015), when individuals filed motions past the statutory deadline, and requested that the deadline be equitably tolled, the Fifth Circuit routinely treated these requests as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*, and held that it had no jurisdiction to review the BIA's refusal to exercise its *sua sponte* power to reopen cases because the BIA's *sua sponte* authority was purely discretionary. *Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). In *Mata*, the Supreme Court ruled that the Fifth Circuit may not decline to exercise jurisdiction over requests for equitable tolling by recharacterizing them as challenges to the BIA's *sua sponte* decisions. Furthermore, it rejected the false equivalence between a request for exercise of equitable tolling and exercise of *sua sponte* authority.

[74] In *Navarro*, the noncitizen had conceded that the post-departure regulation barred his motion, but argued that the BIA should exercise its *sua sponte* power to reopen anyway based on extraordinary circumstances, namely, a change in law. The BIA declined to exercise jurisdiction over the motion, holding that the post-departure bar trumped its *sua sponte* power to reopen.

[75] *Accord Salgado v. Sessions*, 715 F. App'x 375 (5th Cir. 2017); *see also Toora v. Holder*, 603 F.3d 282 (5th Cir. 2010) (upholding post-departure bar and finding that IJ lacked jurisdiction where the individual departed after proceedings had commenced but before the removal order had been entered).

had made no such concession and instead had argued that he was entitled to equitable tolling of the 90-day deadline. Finding that the BIA had abused its discretion in failing to consider whether the deadline should be equitably tolled, the court remanded to the BIA for such a determination. The court further admonished the BIA to "give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions."[76]

V. REMOVAL WHILE A MOTION OR APPEAL IS PENDING

A. Removal While a Motion is Pending

With the exception of motions to an IJ seeking to reopen *in absentia* removal proceedings, the filing of a motion to reopen or reconsider does not automatically stay a removal order.[77] Someone seeking reopening or reconsideration should simultaneously seek a discretionary stay of removal.[78] If a person is physically removed from the United States while a motion is pending, the IJ or the BIA may conclude they lack jurisdiction over the motion pursuant to 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."[79]

Any decision invalidating the BIA's jurisdictional interpretation of the post-departure bar should apply equally to the clauses of the regulations deeming a motion withdrawn upon departure or deportation. The same questions arise with regard to the conflict between the automatic withdrawal provision and the statutory language granting a right to file one motion to reopen and one motion to reconsider, and with regard to the agency's ability to restrict its own jurisdiction. Some of the decisions discussed above in Section IV also dealt directly with these withdrawal provisions, and case law supports the idea that any decision invalidating the BIA's jurisdictional interpretation of the post-departure bar should apply equally to the regulatory provisions deeming a motion withdrawn upon departure or deportation. *See, e.g., Lin v. U.S. Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012); *Coyt v. Holder*, 593 F3d 902 (9th Cir. 2010); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) (invalidating the regulation and stating that "it amounts to saying that, by putting an alien on a bus, the agency may 'withdraw' its adversary's motion"); *but see Zhang v. Holder*, 617 F.3d 650, 660 (2d Cir. 2010) (noting that "it is linguistically awkward to consider the forcible removal of an alien as 'constitut[ing] a withdrawal' of any pending motions," but ultimately finding that the BIA's interpretation that the departure bar limited its *sua sponte* authority was not plainly erroneous.").

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[76] *Lugo-Resendez v. Lynch*, 831 F.3d at 345; *but see Avila-Perez v. Lynch*, 672 F. App'x 402 (5th Cir. 2016) (reviewing the BIA's denial of a motion to reopen as untimely and holding that the BIA had not abused its discretion in failing to equitably toll the deadline because the noncitizen had not provided any explanation for his delay in consulting an attorney only years after changes in the law that impacted his removal case and thus had not proven due diligence).

[77] INA § 240(b)(5)(C); 8 USC § 1229a(b)(5)(C).

[78] CLINIC has resources on successfully filing stay requests. *See, e.g.,* Rachel Naggar, CLINIC, *Practice Advisory: Stays of Removal for DACA Recipients with Removal Orders* (March 9, 2018), https://cliniclegal.org/sites/default/files/Stay-PA_1.pdf.

[79] 8 CFR §§ 1003.2(d) (BIA), 1003.23(b)(1) (immigration court).

B. Removal While a BIA Appeal from the Denial of a Motion is Pending

Section 1003.4 presents a further hurdle when a person is physically removed or departs from the United States while an appeal of the IJ's denial of a motion is pending.[80] 8 CFR § 1003.4. That regulation provides that:

> 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.

Though a full analysis of the jurisprudence surrounding this provision is beyond the scope of this Practice Advisory, several decisions are worth noting. The Sixth Circuit has 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 appears to be a "perversion of the administrative process."[81] Other circuits have not gone so far. The Ninth Circuit has held that the removal must be lawful in order for it to constitute a withdrawal of the appeal under this regulation,[82] and the Tenth Circuit has stated that the noncitizen's intentions or motives do not make a difference, and instead "even inadvertent, unwanted, or accidental departures can lawfully trigger the regulation."[83] Thus, in some circuits, attorneys should consider arguing that being subjected to removal does not constitute a "departure" for purposes of the withdrawal of an appeal.

The BIA considered this regulation and held that an unlawful removal in violation of a stay of removal does not deprive it of jurisdiction to consider an appeal under 8 CFR § 1003.4. The BIA stated, in part: "fundamental fairness dictates that an unlawful act by the DHS should not serve to deprive us of jurisdiction."[84]

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[80] INA § 240(b)(5)(C), 8 USC § 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).

[81] *Madrigal v. Holder,* 572 F.3d 239, 245 (6th Cir. 2009) (holding withdrawal provision of 8 CFR § 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 F. App'x 98 (2d Cir. 2006) (unpublished).

[82] *Wiedersperg v. INS*, 896 F.2d 1179, 1181-82 (9th Cir. 1990) (citing *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977), for the proposition that the jurisdictional bar applies only where the "departure" was a "legally executed" one); *cf*. *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835, 838 (9th Cir. 2003) (noting that the automatic withdrawal provision applies to those who voluntarily depart from the United States while an appeal is pending); *United States v. Blaize*, 959 F.2d 850, 852 (9th Cir. 1992).

[83] *Montano-Vega v. Holder*, 721 F.3d 1175, 1180 (10th Cir. 2013) (Gorsuch, J.).

[84] *Matter of Diaz-Garcia*, 25 I&N Dec. 794 (BIA 2012).

VI. FILING POST-DEPARTURE MOTIONS

At this point, nearly all circuits have invalidated the post-departure bar in the context of statutory motions to reopen. In those circuits that already have binding precedent on this issue, it is important to include a statutory basis for the motion to reopen and to explain the post-departure bar's inapplicability to the motion.

In the Eighth Circuit, which has yet to rule on this issue, arguments that the post-departure bar is in conflict with the language of the statute, is an impermissible contraction of the IJ's or BIA's jurisdiction, and/or is unconstitutional should be raised in the motion filed with the IJ or BIA, and in any appeal to the BIA of an IJ's denial. Any post-departure motion to reopen or reconsider should preserve these arguments for review by the Court of Appeals.

The arguments against the post-departure bar will vary depending on the facts of the case and the applicable circuit law. CLINIC is involved in litigating issues related to the departure bar, and can offer assistance and amicus support in such cases. If you have a case that involves the post-departure bar, please contact Aimee Mayer-Salins at amayersalins@cliniclegal.org.

APPENDIX: Chart of Principal Cases by Circuit

	Cases Invalidating the Regulation	*Cases Upholding the Regulation*
1st Cir.	***Perez-Santana v. Holder***, 731 F.3d 50 (1st Cir. 2013); ***Bolieiro v. Holder***, 731 F.3d 32 (1st Cir. 2013): post-departure bar conflicts with the statutory right to file a motion.	
2d Cir.	***Luna v. Holder***, 637 F.3d 85 (2d Cir. 2011): BIA's interpretation of post-departure bar is an impermissible constriction of its jurisdiction, and post-departure motions must remain available in order for motions to reopen to provide an adequate and effective substitute for habeas.	***Zhang v. Holder***, 617 F.3d 650 (2d Cir. 2010): upholds validity of post-departure bar in the context of *sua sponte* motions.
3d Cir.	***Prestol Espinal v. Att'y Gen.***, 653 F.3d 213 (3d Cir. 2011): post-departure bar conflicts with the statutory right to file a motion.	***Desai v. Att'y Gen.***, 695 F.3d 267 (3d Cir. 2012): upholds validity of post-departure bar in the context of *sua sponte* motions.
4th Cir.	***William v. Gonzales***, 499 F.3d 329 (4th Cir. 2007): post-departure bar conflicts with the statutory right to file a motion.	
5th Cir.	***Garcia-Carias v. Holder***, 697 F.3d 257 (5th Cir. 2012): post-departure bar conflicts with the statutory right to file a motion to reopen, but upholds *Ovalles* in the context of *sua sponte* motions. ***Lari v. Holder***, 697 F.3d 273 (5th Cir. 2012): post-departure bar conflicts with the statutory right to file a motion to reconsider.	***Ovalles v. Holder***, 577 F.3d 288 (5th Cir. 2009): upholds validity of post-departure bar in the context of *sua sponte* motions.
6th Cir.	***Pruidze v. Holder***, 632 F.3d 234 (6th Cir. 2011): BIA's interpretation of post-departure bar is an impermissible constriction of its jurisdiction and the regulation is in conflict with the clear language of the statute.	
7th Cir.	***Marin-Rodriguez v. Holder***, 612 F.3d 591 (7th Cir. 2010): BIA's interpretation of post-departure bar is an impermissible constriction of its jurisdiction.	
8th Cir.[85]		
9th Cir.	***Coyt v. Holder***, 593 F.3d 902 (9th Cir. 2010); ***Reyes-Torres v. Holder***, 645 F.3d	

[85] In *Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011), the Eighth Circuit was presented with the question of the validity of the post-departure bar, but did not decide the issue. Instead, the court remanded the case for a determination of whether the motion was equitably tolled.

	1073 (9th Cir. 2011): post-departure bar conflicts with the statutory right to file a motion. *Toor v. Lynch*, 789 F.3d 1055 (9th Cir. 2015): post-departure bar conflicts with the statute granting the right to a motion to reopen regardless of whether an individual left voluntarily or involuntarily.	
10th Cir.	*Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012): post-departure bar conflicts with the statutory right to file a motion.	
11th Cir.	*Lin v. U.S. Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012): post-departure bar conflicts with the statutory right to file a motion. *Contreras-Rodriguez v. U.S. Att'y Gen.,* 462 F.3d 1314 (11th Cir. 2006): post-departure bar does not bar motions to reopen of *in absentia* orders based on lack of notice.	

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 375 affiliates in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC's BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP's primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeals, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice advisory on strategies and considerations in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client's release from immigration detention, amicus briefs on the "serious nonpolitical crime" bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution."

These resources and others are available on the DVP webpage.

BOSTON COLLEGE
CENTER FOR HUMAN RIGHTS
AND INTERNATIONAL JUSTICE
Post-Deportation Human Rights Project

The Center for Human Rights and International Justice at Boston College addresses the increasingly interdisciplinary needs of human rights work.

Through multidisciplinary training programs, applied research, and the interaction of scholars with practitioners, the Center aims to nurture a new generation of scholars and practitioners in the United States and abroad who draw upon the strengths of many disciplines, and the wisdom of rigorous ethical training in the attainment of human rights and international justice. The Center is built upon Boston College's deep religious and ethical tradition of service to others and its broad scholarly reach in graduate programs in Arts & Sciences and professional programs in Law, Business, Education, Social Work, and Nursing. The Center's research is conducted by its team of faculty, graduate students, and undergraduate research assistants, often in partnership with community organizations here and abroad, as part of the various projects of the Center.

Several current Center projects focus on Migrants and Human Rights. Among these, the Post-Deportation Human Rights Project is designed to address the harsh effects of current U.S. deportation policies. The Project aims to conceptualize an entirely new area of law, promoting the rights of deportees and their family members through research, policy analysis, human rights advocacy, and training programs. The ultimate aim of the Project is to advocate, in collaboration with affected families and communities, for fundamental changes that will introduce proportionality, compassion, and respect for family unity into U.S. immigration laws and bring these laws into compliance with international human rights standards.

Additional information and resources are available on the Center's website.