Filing Motions to Reopen in Removal Cases When Your Client Is Already Outside the U.S.

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Motions to Reopen or Reconsider DHS Decisions

•8 CFR §103.5 governs motions to reopen or reconsider DHS decisions, *e.g.*, reinstatement orders under INA §241(a)(5), administrative removal orders under INA §238(b), expedited removal orders under INA §235(b).

•8 CFR §103.5 does NOT contain a departure bar.

•DHS' denial of a motion to reopen or reconsider should be reviewable in the court of appeals via petition for review. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004)

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Departure Bar Regulation

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

- 8 CFR §1003.2(d). *See also* 8 CFR §1003.23(b)(1).

BIA has held that it lacks "jurisdiction" over post-departure motions.

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

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Motions to Reopen Following Departure Under An *In Absentia* Order

8 CFR §1241.7 – Self-Removal:

Any alien who has departed from the United States while an order of deportation or removal is outstanding shall be considered to have been deported, excluded and deported, or removed, except that an alien who departed before the expiration of the voluntary departure period granted in connection with an alternate order of deportation or removal shall not be considered to be so deported or removed.

BUT

8 CFR §1003.23(b)(4)(iii)(A)(2):

"[a]n order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed . . . **[a]t any time** if the alien demonstrates that he or she did not receive notice."

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Bulnes Recognizes the Right to Reopen After Departing Under An *In Absentia* Order

Matter of Bulnes, 25 I & N Dec. 57 (BIA 2009)

The Board held:

"An alien's departure from the United States while under an outstanding order of deportation or removal issued in absentia does not deprive the Immigration Judge of jurisdiction to entertain a motion to reopen to rescind the order if the motion is premised upon lack of notice."

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

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Statutory Motions

- The Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have found the departure bar unlawful with respect to statutory motions. *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, No. 10-9500, -- F.3d --, 2012 U.S. App. LEXIS 1964 (10th Cir. Jan. 30, 2012) (en banc); *Jian Le Lin v. United States AG*, No. 11-12506, -- F.3d --, 2012 U.S. App. LEXIS 10430 (11th Cir. May 23, 2012).
- The First, Fifth, and Eighth Circuits have *not* decided the issue.

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Statutory Motions (continued)

- The Third, Fourth, Ninth, Tenth, and Eleventh Circuits held that the regulation conflicts with the motion statutes, INA §§ 240(c)(6) and (7). These courts have analyzed the issue under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
- The Second, Sixth and Seventh Circuits have held that the BIA's interpretation of the regulation as jurisdictional conflicts with the Supreme Court's decision in *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).

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Sua Sponte Motions

BIA has authority to reopen or reconsider a decision "at any time." *See* 8 CFR §§1003.23(b)(1) and 1003.2(a).

- Not grounded in INA §§240(c)(6) and (7)
- Second and Fifth Circuits have found that the departure bar is lawful with respect to sua sponte motions. *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009).

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Vacated Conviction

- Departure bar should not apply if removal order was not "legally executed"
- Did the conviction constitute a "key part" of the removal order?

Favorable Ninth Circuit Decisions: *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981).

Other courts have not addressed this issue, but relevant/favorable law in Third and Sixth Circuits and relevant/unfavorable law in First, Fifth and Tenth Circuits.

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Motions Filed After Illegal Reentry

- Prior order + EWI = risk of criminal prosecution under INA § 276, 8 USC §1326 (risk is higher if person has a prior conviction)
- Prior order + EWI = risk of reinstatement under INA §241(a)(5) ("prior order . . . is not subject to *being reopened* or reviewed")
- Prior order + EWI = inadmissibility under INA §212(a)(C)(i)(II) (unless EWI'd before 4/1/1997)
- Factors: Is person already subject to reinstatement order or §1326 prosecution?
  Is potential motion timely?
  Has circuit ruled on post departure bar?
  Is person aware of the risk and willing to take it?

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Departure Bar to BIA Appeal

- Departure prior to taking an appeal = waiver of an appeal, 8 CFR §1003.3(e)
- Departure after taking an appeal = withdrawal of appeal, 8 CFR §1003.4
- The departure bar to BIA appeal does not apply where the "departure" occurs because DHS unlawfully removes a person. *Matter of Diaz-Garcia*, 25 I&N Dec. 794 (BIA 2012).

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Departure Bar to BIA Appeal (continued)

Sixth Circuit said bar does not apply where DHS deports a person. *See Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009).

Other courts have not addressed this issue, but:

- Fifth Circuit said bar applies even where departure is inadvertent, *Long v. Gonzales*, 420 F.3d 516 (5th Cir. 2005)
- Ninth Circuit said bar applies where departure is "brief, casual and innocent," *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835 (9th Cir. 2003)

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Petitions for Review of Motions to Reopen after *Kucana v. Holder*

8 USC §1252(a)(2)(B)
Creates a jurisdictional bar to review of certain discretionary decisions "under this subchapter"

This subchapter is Title 8, Chapter 12, Subchapter II of the USC Code, codified at 8 USC §§1151-1381.

8 CFR §1003.2(a)
Motion to reopen reg makes the decision to grant or deny a MTR "within the discretion of the [Board]."

Kucana v. Holder, 130 S.Ct. 827 (2010)
The AG can't shield its decisions on motions to reopen from judicial review by promulgating regulations that make those decisions "discretionary."

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What if your post departure motion is successful?

It should be *smooth sailing* after the motion is granted, right?

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WRONG!

- A **bottleneck** is a phenomenon where the performance or capacity of an entire system is limited by a single or limited number of components or resources.
- The **post departure bottleneck** is a phenomenon where the ability of a noncitizen abroad who prevails on a motion to return to the U.S. is limited by a single component, DHS, or a limited number of component agencies, ICE, CBP, DHS trial counsel, as well as OIL and DOS.

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Questions & Answers

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