LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court

By Trina Realmuto[2]
April 20, 2005

I. Introduction

A petition for review of a final removal, exclusion, deportation order must be filed not later than thirty days after the date the Board of Immigration Appeals (BIA) issues the order.[3] The deadline for filing a petition for review[4] is usually held to be "mandatory and jurisdictional" and "not subject to equitable tolling."[5] In general, courts will dismiss untimely petitions for review for lack of jurisdiction.

This practice advisory first addresses narrow situations in which a court might excuse a late-filed petition for review. The advisory then discusses other potential administrative and federal court options for remedying the failure to timely file a petition for review. Finally, the advisory provides an overview of the federal statue, 28 U.S.C. § 1631, that

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[2] Trina Realmuto works with the Legal Action Center as a consultant. She can be contacted at trina.realmuto@gmail.com.

[3] *See* INA § 242(b)(1) (removal orders); IIRIRA § 309(c)(4)(C) (deportation and exclusion orders). Final orders after immigration court proceedings are generally issued by the BIA unless the person waived appeal or the order was issued *in absentia*. Final orders also may be issued by U.S. Immigration and Customs Enforcement under certain INA provisions, e.g., INA § 241(a)(5) (reinstatement) (except in the Ninth Circuit, *see Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) and 238(b) (administrative removal of aggravated felons). For ease of reference, this advisory refers to the BIA.

[4] For information regarding when and how to file a petition for review, *see* AILF's Practice Advisory "How to File a Petition for Review" (April 2005), located at http://www.ailf.org/lac/lac_pa_041105.pdf.

[5] *Stone v. INS*, 514 U.S. 386, 405 (1995). *See also* Federal Rule of Appellate Procedure (FRAP) 26(b) (court may not extend the time to file a petition for review unless specifically authorized by law).

authorizes courts to transfer a case to cure a lack of jurisdiction when an action is filed in the wrong federal court.

Practitioners may be more likely to obtain some relief for a client, notwithstanding a missed 30-day deadline, if they vigorously pursue both available administrative and federal court remedies.

This advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. The information in this document is current as of the date of issuance. However, as future court decisions may change the existing law or create new law on these issues, counsel are advised to independently confirm whether the law in their circuit has changed since the date of this advisory.

II. Counting the 30 Day Deadline

A petition for review must be received by the court of appeals clerk's office on or before the 30th day after the date of the final order and not merely mailed by that date. If the 30th day falls on a Saturday, Sunday, or legal holiday, the petition is due the following business day. *See* Federal Rule of Appellate Procedure (FRAP) 26(a)(3) (Computing Time).

In counting the 30 days for a detained *pro se* petitioner, the petition must be "deposited in the institution's internal mailing system on or before the last day for filing." FRAP 25(a)(2)(C). *See, for example, Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001) and *Arango-Aradondo v. INS*, 13 F.3d 610, 612 (9th Cir. 1994), *citing Houston v. Lack*, 487 U.S. 266, 270 (1988).

Where a petition for review arrived at the court's post office box on the 30th day but the court clerk did not physically receive it and stamp it as "filed" until the 31st day, it nevertheless was considered "received" and timely filed. S*heviakov v. INS*, 237 F.3d 1144 (9th Cir. 2001). Because the petitioner had complied with the local rule instructing litigants to use the post office box address and had evidence that the petition arrived at the post office address on the 30th day, the court reasoned that it could not fault the petitioner for the clerk's office's inability to timely stamp it as "filed." *Id.* at 1148.

III. "Exceptions" to the Petition for Review Deadline

As discussed in more detail below, courts have excused the failure to file a timely petition for review in two situations:

> where the BIA fails to comply with the applicable regulations regarding mailing the decision to petitioner or petitioner's counsel (in which case, the court may find that 30-day filing deadline did not begin until the petitioner or counsel received actual notice); and

where the court or the BIA provides misleading information regarding appellate review (in which case, the reviewing court may deem the petition for review constructively filed within the 30-day period).[6]

The rationale for these two "exceptions" was that petitioners should not be penalized for errors by the BIA or the courts.

A. BIA Fails to Properly Mail the Decision to Petitioner or Counsel

The applicable regulations provide that the Board must serve its decision on the alien or party affected. 8 C.F.R. § 1003.1(f). In addition, if the individual is represented by counsel, the decision must be mailed to the attorney of record. 8 C.F.R. § 292.5(a). Attorneys representing individuals before the BIA are required to file notices of appearance containing their correct address. 8 C.F.R. § 1003.38(g). Attorneys, as well as *pro se* respondents, are obligated to notify the BIA of address changes. 8 C.F.R. § 1003.38(e). Notifying the immigration service of an address change does not fulfill the obligation to notify the BIA.[7]

If the Board failed to comply with service regulations by, for example, not properly serving its decision on the last known address of petitioner or counsel, or by mailing it to an incorrect or incomplete address,[8] or failing to mail it at all, some courts have held that the 30-day deadline for filing a petition for review did not begin until the petitioner or counsel received actual notice of the BIA's decision.

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[6] Some courts have recognized the existence of exceptions to the petition for review deadline but found that the petitioner did not qualify for the exception. *Singh v. Immigration & Naturalization Serv.*, 315 F.3d 1186 (9th Cir. 2003) (noting exceptions). *See also Gaur v. Ashcroft*, 2003 U.S. App. LEXIS 6861 (3d Cir. 2003) (unpublished) (expressing agreement with exceptions recognized in *Singh*); *Nahatchevska v. Ashcroft*, 317 F.3d 1226 (10th Cir. 2003) (noting that "unique circumstances" may excuse untimely petition for review) (citations omitted).

[7] For example, in *Lee v. INS*, 685 F.2d 343, 344 (9th Cir. 1982) (per curiam), petitioners' counsel changed his address while the appeal was pending before the BIA and notified the INS of the address change but failed to notify the BIA. The Board subsequently mailed its decision to the address of record for counsel. The Ninth Circuit held that the BIA satisfied its service obligation and dismissed petitioners' untimely filed petition for review, stating "[p]etitioners' attorney should have undertaken the minimal effort necessary to notify the BIA, a tribunal separate from and independent of the INS, petitioners' adversary in this case, of his correct address." *Id.*

[8] Where the BIA mailed the briefing schedule to an address that was missing the name of the counsel's company, the First Circuit held that the that BIA erred by failing to send the briefing schedule to the counsel's proper address. Thus, the court reversed the BIA's denial of a motion to reconsider based on non-receipt of the briefing schedule. *Hossain v. Ashcroft*, 381 F.3d 29 (1st Cir. 2004).

Where the petitioner claimed he "was never advised of the Board's decision, or provided a copy of the Board's decision," the record did not document when the BIA mailed its decision to the petitioner and the government could not establish when the BIA's decision was mailed, the Fifth Circuit declined to dismiss the petition for review as untimely. *Ouedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989).

In another illustrative example, the petitioner's attorney properly notified the BIA of his change of address. Nevertheless, the BIA mailed its decision to counsel's former address. After the BIA learned of its error, it mailed a second copy of the decision to counsel's correct address. In this situation, the Second and Ninth Circuits held that service was not properly effectuated until the decision was mailed to petitioner or counsel at the address recorded with the BIA. *Zaluski v. INS*, 37 F.3d 72, 73 (2d Cir. 1994); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258-59 (9th Cir. 1996).[9]

If the petition for review is not filed within 30 days of actual notice of the BIA's decision, it seems less likely that a court would be willing to recognize equitable tolling.

B. Court or the BIA Provides Misleading Information Regarding Appellate Review

If the immigration court or BIA provides wrong information about the petition for review deadline, a court could deem a late-filed petition for review constructively filed within the 30-day filing period.

Where an Immigration Judge mistakenly believed that he could grant petitioner an extension of the appeal period, the Ninth Circuit found that the BIA improperly dismissed the petitioner's appeal as untimely. *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1355 (9th Cir. 1980). The court examined Supreme Court cases extending the time for federal court appeals[10] and concluded that "[i]n each case, the appellant was misled by the words or conduct of the trial court into believing that the time for appeal was extended beyond that prescribed by the applicable rules." *Id.* "In such unique circumstances, where there has been official misleading as to the time within which to file a notice of appeal, the late notice may be deemed to have been constructively filed within the jurisdictional time limits," the court held. Although *Hernandez-Rivera* involved an exception to the deadline for timely filing a *notice to appeal* to the BIA, the Ninth Circuit later cited to the decision as a situation in which a late *petition for review* "arguably filed after expiration of the

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[9] *See also Radkov v. Ashcroft,* 375 F.3d 96, 99 (1st Cir. 2004) (citing *Martinez-Serrano* and *Ouedraogo* with approval). *But see Nowak v. INS*, 94 F.3d 390, 391-92 (7th Cir. 1996) (finding *Ouedraogo and Zaluski* inconsistent with the Supreme Court's decision in *Stone v. INS* which held that petition for review deadline begins when the Board issues its decision).

[10] *See e.g. Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964).

time limitation may nevertheless confer jurisdiction on a court of appeals." *Singh v. Immigration & Naturalization Serv.*, 315 F.3d 1186, 1188 (9th Cir. 2003). [11]

Non-immigration cases permitting the extension of deadlines for appeals, motions, or briefs where there has been actual, though not necessarily intentional, misleading by a court may further support an argument that a late-filed petition for review has been constructively timely filed. *See, for example, Clark v. CFTC*, 126 F.3d 424, 426 (2d Cir. 1997) (excusing late filed petition for review in commodities case, citing *Hernandez-Rivera* with approval).

Where governing case law effectively misled a petitioner to file suit in district court, rather than filing a petition for review in the court of appeal, one court of appeals permitted direct review in the context of reviewing the district court's decision on appeal. *Singh v. Reno*, 183 F.3d 504 (7th Cir. 1999). In a "highly unusual" case, the Seventh Circuit found that a petitioner was entitled to seek direct review *even though he did not file a petition for review at all*. The court reviewed the dismissal of a habeas petition filed by a criminal alien. Relying on its prior decision in *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), the court affirmed the district court's dismissal for lack of subject-matter jurisdiction. Under the case law at the time, the Seventh Circuit believed it could review the claims of criminal aliens if they presented substantial constitutional issues. The petitioner had presented substantial due process claims warranting direct review.

Significantly, the court excused the petitioner's failure to file a petition for review because the jurisdiction issue was not settled at the time he filed his habeas corpus petition. The petitioner could not have known that he should have filed a petition for review, the court said, because the governing case law at the time suggested that habeas review was the proper procedural route. *Singh*, 182 F.3d at 508, 511. The court reasoned that "[s]ince Singh could not have known that he was headed for the wrong court, we think it unfair that he be prejudiced for failing to seek review in this Court within the statutory 30-day deadline." *Singh*, 182 F.3d at 511.

After the Seventh Circuit issued its decision in *LaGuerre*, the Supreme Court held that the proper forum for federal court review of a BIA decision issued to individuals found removable based on certain criminal grounds is in district court via habeas corpus. *INS v. St. Cyr*, 533 U.S. 289 (2001). Thus, based on *St. Cyr*, the petitioner in *Singh* was actually correct to have filed a habeas corpus petition rather than a petition for review.

The important aspect of the *Singh* decision, however, is that the court excused the 30 day deadline to avoid prejudicing the petitioner. The court found that then-governing case law effectively misled the petitioner to file in the wrong court.

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[11] Examples of cases where courts have accepted untimely notices of appeal to the BIA based on affirmative misleading include: *Vlaicu v. INS*, 998 F.2d 758, 760 (9th Cir. 1993) (per curiam); *Atiqullah v. INS*, 39 F.3d 896, 898 (8th Cir. 1994); and *Naderpour v. INS*, 52 F.3d 731, 733 (8th Cir. 1995).

It seems unlikely that courts would be willing to exercise direct review in cases that do not present as highly unusual fact pattern as the one presented in *Singh*.

IV. Other Administrative and Federal Court Review Remedies

A. Administrative Remedies

1. *Types of Administrative Motions*

i. Motions to Reopen

A motion to reopen may be filed within ninety days of the final order provided no prior motion to reopen has been filed. *See* INA § 240(c)(6); 8 C.F.R. § 1003.2(c). A motion to reopen must be based on new or previously unavailable evidence such as the ineffective assistance rendered by prior counsel in failing to timely file a petition for review.

ii. Motions to Rescind and Reissue

If filing a motion to reopen is not possible due to the time or number limits on such motions, counsel could consider filing a motion to rescind and reissue. Such a motion requests that the BIA rescind its prior decision (for which the review deadline has expired) and re-issue the *identical* decision to allow petitioner to seek judicial review.

Pursuant to 8 C.F.R. § 1003.1(d)(ii), the BIA is authorized to "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." The BIA's authority to rescind and reissue a prior decision is further supported by the Seventh Circuit's decision in *Firmansjah v. Ashcroft*, 347 F.3d 635 (7th Cir. 2003). In *Firmansjah*, the BIA affirmed a removal order but the respondent did not receive notice of it until after the 30-day delay deadline for filing a petition for review had expired. *Id.* at 626. The petitioner requested that the Board "reissue" this order, which it did. *Id.* The petitioner then filed a petition for review within 30 days of the reissued order. The court held that the 30-day petition for review deadline starts anew when the BIA "reissues" its decision, stating "nothing prevents the Board from entering a new removal order, which is subject to a fresh petition for review." *Id.* at 627. *See also Dearinger v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000) (ordering government to reenter the BIA's order denying appeal and restart thirty-day period for filing the petition for review in the court of appeals) (also discussed below).

In addition, the Board has discretionary equitable powers to serve the interests of justice. *See e.g., Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (stating that as long as the Board has jurisdiction, its "discretionary powers are not limited, restricted, or qualified."); *Matter of X-G-W-*, 22 I.&N. Dec. 71 (BIA 1998) (exercising *sua sponte* authority to reopen proceedings to pursue certain asylum claims based on coerced population control policies to "serve the interest of justice"). Rescission of a prior decision and reissuance with a new effective date arguably serves the interests of justice if it remedies an error by

the BIA or prior counsel which caused petitioner to miss the deadline for filing a petition for review.

2. *Possible Basis for an Administrative Motion*

i. Ineffective Assistance of Counsel

A motion to reopen or motion to reissue and rescind based on ineffective assistance of counsel is more convincing if it is filed by new counsel, rather than by existing counsel at the time the deadline for filing a petition for review expired. The motion must fully comply with the procedural requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff'd* 857 F.2d 10 (1st Cir. 1988) and demonstrate that the petitioner has been prejudiced by the deprivation of the opportunity to seek federal court review. For further information on ineffective assistance of counsel claims, *see* AILF's Practice Advisory, "Protecting Your Client When Prior Counsel Was Ineffective" (April 2002), located at: www.ailf.org/lac/lac_pa_050202c.pdf.

ii. Improper Service of the BIA's Decision

A motion to reopen or motion to rescind and reissue based on the BIA's failure to properly serve its decision on the petitioner or petitioner's counsel may allege that the BIA violated due process and the applicable service regulations.

The failure to provide proper notice of a BIA decision due to defective service infringes on an individual's due process right to notice and his/her statutory and constitutional right to federal court review. Defective service also violates the applicable regulations, which require that the Board serve its decision on petitioner or counsel at the correct and complete address. 8 C.F.R. §§ 292.5(a) and 1003.1(f).[12]

B. Federal Court Remedies

1. *Review of Timely Filed Motions to Reopen/ Reconsider*

If a petition for review of a Board decision is not timely filed but a motion to reopen/reconsider is filed, the petitioner may eventually have court of appeals review over some of the original issues in a petition for review of the BIA's denial of the motion to reopen/reconsider.

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[12] As discussed above, improper service of the BIA's decision is one of two implied exceptions to the rules requiring timely filing of petitions for review. Even if litigating this argument in the court of appeals, it is prudent to also file a motion with the BIA. The BIA has an incentive to correct its administrative errors. Moreover, if the BIA corrects its service error (by reissuing the decision or reopening the case), the correction likely would moot the petition for review that is pending at the court of appeals.

For example, in *De Jimenez v. Ashcroft*, 370 F.3d 783 (8th Cir. 2004), the Board denied the petitioner's appeal but the petitioner did not file a petition for review of the Board's decision. Rather, the petitioner filed a motion to reopen, which the Board subsequently denied. The petitioner again did not file a petition for review. Rather, the petitioner filed a motion to reconsider the BIA's denial of the motion to reopen, which the Board also denied. The petitioner then filed a timely petition for review. The Eight Circuit accepted jurisdiction over the petition for review of the motion to reconsider denial. The court held the BIA's decisions denying the petitioner's appeal and her motion to reopen were "not *res judicata* with respect to issues raised by the motion to reconsider." *Id.* at 789. The court further noted that "although we are not directly reviewing the BIA's order denying petitioner's motion to reopen, our review of the denial of the motion to reconsider may require us to consider the validity of that order."

Where the issues in the original BIA order differ from the issues in the motion to reopen, however, some courts have refused to review the BIA's original order. For example, the BIA affirms the denial of cancellation on the merits and petitioner does not file a timely petition for review. Instead, petitioner files a motion to reopen based on ineffective assistance of prior counsel. The BIA then denies the motion to reopen based on a deficiency in the ineffective assistance of counsel claim. Petitioner then timely files a petition for review of the BIA's denial of the motion to reopen. The court of appeals will not likely reach the cancellation claim when reviewing the motion to reopen denial since the merits of the issues (cancellation eligibility v. a defective ineffective assistance of counsel claim) do not overlap. *See, e.g. Infanzon v. Ashcorft*, 386 F.3d 1359, 1361 (10th Cir. 2004) (where petitioner did not file a petition for review of original BIA order denying asylum and withholding of removal, court lacked jurisdiction to review the order in context of its review of the BIA's subsequent denial of motion to review based on ineffective assistance of counsel).

2. *Habeas Review*

At least one circuit court has held explicitly that ineffective assistance of counsel does *not* excuse the failure to file a timely petition for review.[13] However, as described below, where petitioner alleges ineffective assistance of counsel caused them to miss the deadline, some courts have held that habeas corpus review is available. In addition, the Second Circuit has permitted habeas review where a *pro se* petitioner filed an untimely petition for review. These courts have applied the rationale of the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

i. Post-St. Cyr Theories

In *INS v. St. Cyr*, the Court held that habeas corpus review remains available to individuals found removable based on certain criminal grounds and who are barred under INA § 242(a)(2)(C) from filing petitions for review in the courts of appeals. The Court in *St. Cyr* interpreted IIRIRA and AEDPA not to preclude federal habeas jurisdiction because such preclusion raised serious constitutional concerns under the Suspension Clause and because there was no clear, unambiguous, and express statement of congressional intent to preclude habeas review.

Courts that have permitted habeas corpus review where the person failed to timely file a petition for review reasoned that there was no indication that Congress intended to retain habeas corpus jurisdiction for criminal deportees but repeal it for non-criminal deportees.

In *Chmakov v. Blackmun*, 266 F.3d 210 (3d Cir. 2001), the petitioners alleged that they failed to timely file a petition for review due to ineffective assistance of prior counsel. They subsequently filed a habeas corpus petition, which was dismissed by the district court for lack of jurisdiction. On appeal, the Third Circuit held that it was "beyond dispute that Congress did not explicitly state its intention to repeal the district courts' 28 U.S.C. § 2241 jurisdiction over habeas petitions filed by aliens subject to a final order of removal." *Chmakov*, 266 F.3d at 214 (citations omitted). Thus, the absence of specific and unambiguous congressional intent to repeal habeas jurisdiction, which was determinative of its continued existence for individuals found removable on criminal grounds, was equally determinative of the writ's continued existence for individuals found removable on non-criminal grounds, the court held. The court rejected the government's argument that although the *St. Cyr* Court had interpreted IIRIRA and AEDPA not to repeal federal habeas jurisdiction over *criminal* deportees, the Court's interpretation of those statutes did not apply to petitioners because, as *non-criminal*

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[13] *See Malvoisin v. INS*, 268 F.3d 74, 75 (2d Cir. 2001) (holding that attorney's failure to inform petitioner of BIA decision did not excuse untimely filing of petition for review). *See also Gaur v. Ashcroft*, 2003 U.S. App. LEXIS 6861, *7-11 (3d Cir. 2003) (unpublished) (finding that the BIA did not erred in sending decision to attorney's last known address where the attorney failed to notify the BIA of his address change and noting that alien's proper recourse was to request sua sponte reopening from the BIA).

deportees, the Suspension Clause could not be a cause for constitutional concern. *Chmakov*, 266 F.3d at 214. The court reasoned that the provisions of IIRIRA and AEDPA at issue in *St. Cyr* "have a particular meaning, and that meaning does not indicate a congressional intent to repeal habeas jurisdiction. It simply cannot be that the meaning will change depending on the background or pedigree of the petitioner." *Chmakov*, 266 F.3d at 215. Thus, the court held that "Congress has preserved the right to habeas review for both criminal and non-criminal aliens." *Id*.

In *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002), the petitioner filed a habeas corpus petition two years after his deportation order became final. Petitioner alleged, in part, that prior counsel's ineffective assistance of counsel rendered his deportation order unlawful. The district court exercised habeas jurisdiction and the Tenth Circuit, adopting the rationale of the *Chamkov* and *Luya Liu* courts, affirmed the availability of habeas jurisdiction to non-criminal deportees.

In *Luya Liu v. INS*, 293 F.3d 36 (2d Cir. 2002), the petitioner filed a *pro se* habeas petition after the Second Circuit dismissed her petition for review as untimely. Concluding that petitioner's "sole means to obtain review of the BIA's decision consisted of a direct appeal," the district court dismissed the petition for lack of jurisdiction. *Luya Liu*, 293 F.3d at 38. The Second Circuit reversed, stating that "[n]othing in *St. Cyr* suggests that its holding – in substance, an extended exercise in statutory construction – applies only to criminal aliens." *Luya Liu*, 293 F.3d at 40. Thus, the court concluded that habeas corpus jurisdiction remained regardless of the petitioner's status or grounds of removability. *Luya Liu*, 293 F.3d at 41.

In addition, in an unpublished decision, the Ninth Circuit noted that ineffective assistance of counsel for failure to file an appeal brief to the BIA and a petition for review might permit habeas review. *Harmeet Singh v. BIA*, 2003 U.S. App. LEXIS 20794 (9th Cir. 2003) (unpublished). Citing *Chamkov* and *Luya Liu*, the court noted that "[i]t remains open to Petitioner to raise this Fifth Amendment claim in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241."

Some district courts have been receptive to exercising habeas jurisdiction despite the availability of direct review in the court of appeals. *See, for example, Kaweesa v. Ashcroft*, 345 F. Supp. 2d 79, 2004 U.S. Dist. LEXIS 24503, *41 (D.Mass. 2004) ("the provisions in 8 U.S.C. § 1252 limiting 'judicial review' to direct review in the courts of appeals do not foreclose habeas jurisdiction in the district courts."); *Saba v. INS*, 52 F. Supp. 2d 1117, 1123 (N.D.Cal. 1999) (habeas jurisdiction exists where "no other avenue of judicial review" available to petitioners due to the ineffective assistance rendered by counsel).

ii. Pre-St. Cyr Habeas Jurisdiction Case

The Ninth Circuit has expressed an inclination to find that habeas jurisdiction remains available to non-criminal deportees seeking review after untimely filing of the petition for review. In *Dearinger v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000), a pre-*St. Cyr*

published decision, petitioner's prior counsel filed a petition for review of a BIA order one day late and the court dismissed the petition as untimely. Petitioner's friends then filed a habeas petition as next of friends based on the ineffective assistance rendered by counsel in failing to timely file a petition for review. The district court granted the petition and ordered the government to reenter the BIA's order denying the appeal and restart the thirty-day period for filing the petition for review in the court of appeals. Relying on its earlier decision in *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999), the court found that neither AEDPA nor IIRIRA repealed statutory habeas for individuals challenging executive detention and affirmed the district court's grant of jurisdiction and the court's order granting the writ.

iii. Exhaustion of Administrative and Judicial Remedies

On the other hand, a petitioner who did not timely file a petition for review but who files a habeas corpus petition may face exhaustion problems. Some courts have held that the filing a petition for review constitutes a *judicial* remedy which, absent certain extenuating circumstances, must be exhausted before a petitioner may obtain habeas review in district court.[14] In addition, a court may require that a habeas petitioners to exhaust *administrative* remedies with respect to ineffective assistance of counsel claims by filing a motion to reopen with the Board prior to proceeding in federal district court.[15]

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[14] *See e.g. Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004) (holding that failure to file a timely petition for review challenging aggravated nature of felony conviction bars habeas review); *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539 (9th Cir. 2004) (same), *but see Nakaranurack v. United States*, 68 F.3d 290, 294 (9th Cir. 1995) (district court should have waived the exhaustion requirement and exercised habeas jurisdiction because it was unfair to impute the negligence of the alien's attorney in filing an untimely petition for review to the alien himself).

[15] *See, e.g. Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001) ("... to the extent that the Board does provide currently available remedies as a matter of grace, a court is free to require exhaustion of such remedies--not because of any jurisdictional objection or statutory command but simply because it makes sense.") (citations omitted). *See also Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001) ("we require, as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before seeking relief under § 2241").

V. Requesting Transfer to Cure Lack of Jurisdiction

Under 28 U.S.C. § 1631, a court may transfer an action filed in the wrong court to cure a lack of jurisdiction. The transfer statute is meant to help parties who are confused about which court has jurisdiction by preserving the opportunity to present the merits of their claim.[16] Thus, the transfer statute may be invoked to obtain court of appeals review of claims raised in an improperly filed district court action or to obtain district court review of claims raised in an improperly filed petition for review for review. A court of appeals can transfer an improperly filed district court action to itself. Transfer can be requested or invoked *sua sponte* by a court.

The transfer statute states:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interests of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

In sum, transfer is appropriate under § 1631 if three conditions are met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action or appeal was filed; and (3) the transfer is in the interest of justice. Importantly, the statute provides that the court "shall" transfer the case to the appropriate court if these conditions are met.

The first requirement – that the transferring lacks jurisdiction – depends on the individual facts of the case and the governing jurisdiction law.

The second requirement -- that the action or appeal could have been brought in the transferee court – means that the action or appeal must have been *timely filed*, even if it was brought before the wrong court. Thus, a district court can only transfer a case that

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[16] The courts are split over whether the transfer statute cures a lack of personal jurisdiction or only cures a lack of subject matter jurisdiction. *See Roman v. Ashcroft*, 340 F.3d 314, 328-329 (6th Cir. 2003) (discussing circuit split and finding that transfer statute may be invoked to cure lack of personal jurisdiction).

should have been filed in the court of appeals if the district court action was filed within thirty days of the final order.[17] Similarly, the court of appeals can only exercise its authority to *sua sponte* transfer a case to itself if the district court action was filed within thirty days of the final order.

For example, two of the petitioners in *Castro-Cortez v. INS*, 239 F.3d 1037, 1046-1047 (9th Cir. 2001) filed habeas corpus petitions seeking review of their final reinstatement orders. The district court exercised jurisdiction. On appeal, the Ninth Circuit concluded that reinstatement orders are reviewable via petitions for review. However, because petitioners' habeas corpus petitions were filed within thirty days of their final reinstatement orders, the court transferred the cases to itself and construed them as if they were filed as petitions for review. *Id.* at 1046 (the transfer statute "permits us to transfer the cases to this court and consider the petitions as though they had never been filed in the district court.").

Moreover, at least one court has held that the transferee court must have been able to exercise jurisdiction over the specific *type of action or appeal* that was brought in the wrong court. In *Dragenice v. Ridge, 389 F.3d 92, 100* (4th Cir. 2004), the Fourth Circuit concluded, *sua sponte*, that the district court improperly transferred a habeas corpus petition to the court of appeals because only district courts, the Supreme Court and a *single* circuit judge have authority to entertain habeas petitions. Thus, the court held that that the requirement of § 1631 that a case be transferred to a *court* in which it could have been brought was not satisfied in that case. To avoid this issue, a petitioner who asks the district court to transfer a habeas petition to the court of appeals may want to specifically request that the district court first construe the habeas corpus petition as a petition for review before ordering transfer.

The third requirement – that transfer is in the interest of justice – also is fact-based. Some courts have invoked the transfer statute where filing in the wrong court was reasonable due to ambiguity in the law regarding jurisdiction[18] or justifiable reliance on a statute or court decision.[19] Other courts have ordered transfer to preserve review that

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[17] Where a district court action was not filed within 30 days of the final order but was filed within 30 days of another event that reactivated or triggered the final order, it might be possible to successfully argue that this requirement has been met. *See Castro-Cortez*, 239 F.3d 1046, n. 10 (finding that the reactivation of the reinstatement order, not the actual reinstatement order, triggered the petition for review deadline in the case of Petitioner Salinas-Sandoval).

[18] *Matthews v. United States*, 810 F.2d 109, 113 (6th Cir. 1987) (ordering transfer where jurisdictional issue had not yet been decided by the circuit court).

[19] *See Castro-Cortez v. INS*, 239 F.3d 1037, 1046-1047 (9th Cir. 2001) (transferring habeas action seeking review of a reinstatement order to court of appeals where "petitioners had good reason to believe that direct review was not available and that a habeas corpus petition was their only avenue to secure judicial review").

would otherwise be time barred for failure to file a timely petition for review[20] or to prevent undue delay.[21]

A district court order transferring a case to circuit court is generally not considered a final order that can be appealed because the propriety of the transfer can be reviewed by the transferee circuit court.[22]

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[20] *See, e.g. Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003) (transferring habeas action seeking review of a reinstatement order to court of appeals because, without transfer "the petitioner will have lost his opportunity to present the merits of the claim due to a statute of limitations bar").

[21] *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 965 (9th Cir. 2004) (transferring petition for review seeking collateral review in reinstatement case to district court where petitioner raised a "colorable constitutional claim" and transfer would prevent unnecessary delay that would be caused by requiring petitioner to file a habeas petition). *See also Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir. 2003) (noting district court transfer of habeas action seeking review of a reinstatement order to court of appeals), at 16 (retransferring case to the district court for further proceedings on habeas challenge to detention).

[22] *Cruz v. Ridge*, 383 F.3d 62, 65 (2d Cir. 2004).