



## REINSTATEMENT OF REMOVAL

### Practice Advisory<sup>1</sup>

May 23, 2019

“Reinstatement of removal” is a summary removal procedure pursuant to § 241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(5), 8 C.F.R. § 241.8. With limited statutory and judicial exceptions, the reinstatement statute applies to noncitizens who return to the United States without authorization after having been removed under a prior order of deportation, exclusion, or removal. According to government data, reinstatement orders generally account for forty percent of all deportations annually and more deportations than any other source.<sup>2</sup> Reinstatement orders can be issued anywhere in the United States and can be issued against noncitizens who have been living in the country for many years. Their summary nature has led to unjust deportations of individuals fleeing persecution, longtime U.S. residents, and others with claims or even existing rights to be in the United States.

This practice advisory provides an overview of the reinstatement statute and implementing regulations, including how the Department of Homeland Security (DHS) issues and executes reinstatement orders. The advisory addresses who is covered by INA § 241(a)(5), where and how to obtain judicial and administrative review of reinstatement orders, potential arguments to challenge reinstatement orders, and detention during reinstatement proceedings. Finally, the advisory includes a list of published circuit court reinstatement decisions, a sample letter requesting a copy of the reinstatement order and accompanying paperwork, a sample reinstatement order, and a memorandum listing the documents that DHS believes belong in the federal court record.<sup>3</sup>

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<sup>2</sup> See Dep’t of Homeland Security, *Immigration Enforcement Action Annual Report: 2017* 9, 12 (2019).

<sup>3</sup> The government produced additional [documents](#) of interest related to reinstatement in *Nat’l Immig. Project v. DHS*, No. 1:15-cv-11583-NMG (D. Mass., filed Apr. 13. 2015), including a comprehensive manual on reinstatement law and training materials. This advisory contains links to documents in that production.

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## I. BACKGROUND

### A. Who Is Subject to INA § 241(a)(5)?

#### **Who is subject to reinstatement of removal?**

Unless an individual meets a statutory or judicial exemption, discussed below, the reinstatement statute applies to noncitizens who have reentered the United States illegally after having been removed under a prior order of deportation, exclusion, or removal. It states:

(5) Reinstatement of removal orders against aliens illegally reentering.

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act,<sup>4</sup> and the alien shall be removed under the prior order at any time after the reentry.

INA § 241(a)(5); 8 U.S.C. § 1231(a)(5); *see also* § 309(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>5</sup> (deeming “any reference in law to an order of removal . . . to include a reference to an order of exclusion and deportation or an order of deportation”).

#### **Who is statutorily exempt from reinstatement of removal under INA § 241(a)(5)?**

The following individuals are statutorily exempt from § 241(a)(5):

- Individuals applying for adjustment of status under INA § 245A (legalization) who are covered by certain class action lawsuits<sup>6</sup>
- Nicaraguans and Cuban applicants for adjustment under § 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)<sup>7</sup>
- Salvadoran, Guatemalan, and Eastern European applicants under NACARA § 203<sup>8</sup>
- Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA)<sup>9</sup>

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<sup>4</sup> Some online versions incorrectly use the word “chapter” rather than “Act.”

<sup>5</sup> Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>6</sup> *See* Legal Immigration Family Equity Act (LIFE Act), Pub. L. No. 106-553, § 1104(b), 114 Stat. 2762A-142 (2000), as amended by LIFE Act Amendments of 2000, Pub. L. No. 106-554, § 1503(a)(3), 114 Stat. 2763A-324 (2000). The relevant class action law suits include *Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc.* 509 U.S. 43 (1993); and *Zambrano v. INS, vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993).

<sup>7</sup> LIFE Act Amendments of 2000, § 1505(a)(1) (amending NACARA § 202(a)(2)); 8 C.F.R. § 241.8(d).

<sup>8</sup> LIFE Act Amendments of 2000, § 1505(c); 8 C.F.R. § 241.8(d).

<sup>9</sup> LIFE Act Amendments of 2000, § 1505(b)(1) (amending HRIFA § 902(a)(2)); 8 C.F.R. § 241.8(d).

### **Who is judicially exempt from reinstatement of removal under INA § 241(a)(5)?**

Several courts have held that INA § 241(a)(5) does not apply retroactively to individuals who reentered the United States *and* took adequate steps to apply for immigration relief (*e.g.*, affirmative adjustment of status, asylum) before April 1, 1997, the date § 241(a)(5) took effect. The First, Seventh, Ninth, Tenth, and Eleventh Circuits have favorable retroactivity decisions, although some decisions pre-date the Supreme Court’s decision in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2009).<sup>10</sup> See § II.C.1, *infra*, for further discussion of these cases.

### **How does one assess whether a noncitizen is subject to INA § 241(a)(5)?**

First, determine whether the noncitizen has a prior deportation, exclusion, or removal order. In addition to asking him or her and reviewing any documentation provided, counsel could: (1) call the Executive Office for Immigration Review (800-898-7180); (2) file Freedom of Information Act requests with [U.S. Citizenship and Immigration Services \(USCIS\)](#), [U.S. Customs and Border Protection \(CBP\)](#), [DHS Office of Biometrics Identity Management \(OBIM\)](#), and the [Executive Office for Immigration Review \(EOIR\)](#); and/or (3) file a fingerprint records request with the Federal Bureau of Investigation.

Second, determine whether the noncitizen departed under the prior order. The plain language of § 241(a)(5) requires an illegal *reentry* “after having been removed or having departed voluntarily, under an order of removal.” If the noncitizen has not departed the country since the removal order, the statute does not apply. However, in this situation, DHS could attempt to execute the outstanding order. If the noncitizen timely departed under an order of voluntary departure, the statute also does not apply.<sup>11</sup> Likewise, if the noncitizen departed before the prior order issued, he or she did not depart “under an order of removal.”

Third, determine whether the noncitizen reentered the United States illegally. Generally, a person enters legally when they are admitted following inspection and authorization by an immigration officer at a port of entry. However, whether an entry is legal can involve complex entry and admission issues. See § II.C.2, *infra*, for further discussion.

Individuals who meet all three factual predicates – a prior order, a departure from the United States under that order, and a subsequent illegal reentry – and who are not covered by a statutory or judicial exemption are subject to INA § 241(a)(5).

### **How does one determine if DHS has issued a reinstatement order?**

Many individuals are not aware that DHS has issued a reinstatement order. DHS is supposed to serve noncitizens with a copy of the reinstatement order. See 8 C.F.R. § 241.8(b) (mandating that DHS provide written notice of reinstatement determination to the individual). DHS also is supposed to serve the noncitizen’s attorney with a copy of the reinstatement order if the attorney

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<sup>10</sup> *Arevalo v. Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799, 810 (7th Cir. 2005); *Sarmiento-Cisneros v. U.S. Att’y Gen.*, 381 F.3d 1277, 1285 (11th Cir. 2004); *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-91 (10th Cir. 2007); *Chay Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011).

<sup>11</sup> See [select documents produced by USCIS in response to FOIA request](#) at p.14 (“[Reinstatement] does not include an individual who is granted voluntary departure and leaves the United States before the expiration of the voluntary departure period.”).

has filed a Notice of Entry of Appearance (Form G-28) with DHS. *See* 8 C.F.R. § 292.5(a) (requiring notice and service of papers on counsel or the individual if unrepresented); *see also* 8 C.F.R. § 103.8(c)(2) (related to personal service of persons in penal or mental institutions, incompetents, and minors under the age of 14). Troublingly, however, DHS often neglects to serve a copy of the final order on the noncitizen or counsel. A sample letter to DHS requesting a copy of the reinstatement order and accompanying documentation is attached as Appendix B.

DHS often issues reinstatement orders to individuals charged with criminal prosecution under INA § 276, 8 U.S.C. § 1326 (illegal reentry after deportation) around the same time the prosecutor files the criminal charges. If the client currently is facing or has faced a § 1326 charge, the prosecution likely produced a copy of the reinstatement order to the defense attorney in the § 1326 case. In this situation, counsel should contact the individual’s federal defender or private defense attorney to request a copy of the order, any immigration documentation produced in the case, and/or information regarding the disposition of the criminal case.

For suggested strategies and legal arguments related to DHS’ failure to serve a reinstatement order, see § II.A, *infra*.

## **B. Bar to Statutory Relief, Exemptions, and Other Considerations**

### **After DHS issues a reinstatement order, can a person apply for “relief” from removal?**

Under the plain language of § 241(a)(5), once DHS reinstates a prior order, “the [person] is not eligible and may not apply for any relief under this Act . . . .”

### **Are there any “exemptions” to this statutory bar to “relief”?**

Notwithstanding the bar to “relief,” the following immigration options may be available:

#### **1. Withholding of Removal and the UN Convention Against Torture (CAT)<sup>12</sup>**

DHS takes the position that a person who is subject to reinstatement is not eligible for asylum. However, if a person indicates a fear of return, DHS must refer him or her to an asylum officer to determine whether she or he can articulate a “reasonable fear of persecution or torture.” 8 C.F.R. §§ 208.31, 241.8(e). If so, the person is referred to an immigration judge (IJ) to apply for withholding or protection under the United Nations Convention Against Torture (CAT). 8 C.F.R. §§ 208.31(e) (requiring asylum officer to refer case to IJ); 1208.31(e) (same); 241.8(e) (same); 1241.8(e) (same); 208.2(c)(2) (IJ jurisdiction in referred cases); 1208.2(c)(2) (same); 1208.16 (withholding only hearings before IJ). To qualify for either of these forms of protection, the person must establish a much higher likelihood of future harm than required for asylum—i.e., that persecution or torture is more likely than not. 8 C.F.R. §§ 208.16(b)(2), (c)(2). If the IJ denies the application, the person may appeal that decision to the BIA. 8 C.F.R. §§ 208.31(g)(2); 1208.31(g)(2).

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<sup>12</sup> Under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the United States has agreed not to “expel, return (‘refouler’) or extradite” a person to another state where he or she would be tortured. Allowing persons subject to reinstatement to present a claim for withholding of removal or CAT protection is necessary to fulfilling the United States’ obligations under Article 3. *See generally* 64 Fed. Reg. 8478 (Feb. 19, 1999).

If the asylum officer determines the person did not establish a reasonable fear, the person may seek review of that determination by an IJ. 8 C.F.R. §§ 208.31(f), (g); 1208.31(f), (g). If the IJ disagrees with the asylum officer's determination, the person then may apply for withholding of removal and CAT protection before the IJ. 8 C.F.R. §§ 208.31(g)(2); 1208(g)(2). If the IJ agrees with the asylum officer's determination, the person cannot appeal to the BIA. 8 C.F.R. §§ 208.31(g)(1); 1208.31(g)(1).

## 2. VAWA Adjustment

Individuals who qualify for adjustment of status under the Violence Against Women Act (VAWA) may consider arguing that § 241(a)(5)'s bar to relief should not preclude adjustment if they establish eligibility for a special VAWA waiver under INA § 212(a)(9)(C)(iii).<sup>13</sup>

As Congress enacted waivers to exempt VAWA beneficiaries from virtually all inadmissibility grounds, including INA § 212(a)(9)(C), DHS, and the courts, should similarly equitably construe § 241(a)(5)'s bar to relief as inapplicable. In fact, in 2006, Congress stated that agencies should grant applications to waive inadmissibility for prior orders in these cases.<sup>14</sup> In a 2009 policy memorandum, DHS acknowledged that VAWA self-petitioners who qualify for this special waiver under INA § 212(a)(9)(C)(iii) may seek adjustment of status, but nonetheless also determined that § 241(a)(5) applies to VAWA self-petitioners who are inadmissible under INA § 212(a)(9)(C)(i)(II) for reentering illegally after a prior order.<sup>15</sup> Significantly, however, the policy memorandum did not address Congress's 2006 direction to grant I-212 waiver applications, nor

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<sup>13</sup> Under this section, VAWA self-petitioners are eligible for a waiver of INA § 212(a)(9)(C) if a connection exists between the battering or subjection to extreme cruelty and the person's removal, departure, reentry, or attempted reentry.

<sup>14</sup> See § 813(b) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006), which provides:

Discretion to Consent to an Alien's Reapplication for Admission.

(1) In General. The Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion.

(2) Sense of Congress.—It is the sense of Congress that the officials described in paragraph (1) should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994, cases involving nonimmigrants described in subparagraph (T) or (U) of section 101(a)(15) of the [INA] . . . , and relief under section 240A(b)(2) or 244(a)(3) of such Act (as in effect on March 31, 1997) pursuant to [8 C.F.R. § 212.2].

<sup>15</sup> *Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of Gonzalez v. DHS, 508 F.3d. 1227 (9th Cir. 2007)*, Michael Aytes, USCIS Acting Deputy Director, at 6 n.5 (May 19, 2009).

has any court. Some practitioners report success with adjusting the status of VAWA self-petitioners who qualify for the special waiver.<sup>16</sup>

For more information on VAWA adjustment and structuring waiver requests, contact Laura Flores Bachman at [laura@asistahelp.org](mailto:laura@asistahelp.org) or Amy Cheung at [amy@asistahelp.org](mailto:amy@asistahelp.org).

### 3. T and U Nonimmigrant Status

Victims of trafficking who qualify for nonimmigrant status under INA § 101(a)(15)(T) and victims of crime who qualify for nonimmigrant status under INA § 101(a)(15)(U) can argue that § 241(a)(5) does not apply to them. These individuals may apply for waivers of most inadmissibility grounds. *See* INA § 212(d)(13) (waiver for trafficking victims); INA § 212(d)(14) (waiver for crime victims). On the waiver application, practitioners should specifically seek to waive inadmissibility under INA § 212(a)(9)(A) for a prior order and INA § 212(a)(9)(C)(i)(II) for post-April 1, 1997 illegal reentries after a prior order, *see* n.18, *infra*. If approved, arguably the approval would waive inadmissibility under INA § 212(a)(9)(A) and (C)(i)(II) and would waive the prior order for purposes of INA § 241(a)(5).<sup>17</sup> Moreover, as set forth above in § I.B.2, Congress has indicated that agencies should consent to qualifying T and U nonimmigrant status seekers' reapplication for admission after a prior order. One could argue that this sentiment extends to waiver applications under INA § 212(d)(13) and 212(d)(14).

In addition, the regulations governing U nonimmigrant status provide that orders of exclusion, deportation, or removal *issued by DHS* will be “deemed canceled by operation of law as of the date of USCIS’ approval of Form I-918 [petition for U nonimmigrant status].” 8 C.F.R. § 214.14(c)(5)(i), (f)(6). Removal orders issued by DHS include reinstatement orders, expedited removal orders under INA § 235(b), administrative removal orders under INA § 238(b), and orders against Visa Waiver Program entrants under INA § 217(b). Thus, USCIS’ approval of a U visa petition automatically cancels a reinstatement order.

For more information regarding § 241(a)(5) and T and U nonimmigrant status, contact Laura Flores Bachman at [laura@asistahelp.org](mailto:laura@asistahelp.org) or Amy Cheung at [amy@asistahelp.org](mailto:amy@asistahelp.org)

### 4. Consular processing and I-212 Waivers

Some individuals subject to reinstatement may be eligible to consular process; i.e., apply for an immigrant or nonimmigrant visa at a U.S. embassy or consulate abroad. A consular officer may approve such a visa application provided the applicant is admissible under INA § 212 or, if inadmissible, provided DHS approves an application to waive inadmissibility. Individuals who are eligible or may become eligible in the future to consular process also may challenge any reinstatement order administratively or in federal court as discussed in this advisory. Individuals

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<sup>16</sup> For example, the Administrative Appeals Office (AAO) has found a VAWA self-petitioner who reentered after a removal order to be eligible for adjustment of status upon approval of a waiver under INA § 212(a)(9)(C)(iii). *See* [Matter of XXXX, ID# XXXX](#) (AAO Feb. 4, 2013) (unpublished).

<sup>17</sup> The AAO has held that USCIS can approve a U visa petition despite the existence of a reinstatement order. *See* [Matter of A-L-, ID# XXXX](#) (AAO Jan. 12, 2017) (unpublished).

considering consular processing in lieu of litigation, however, should understand that courts generally will not review consular decisions denying a visa application.

Individuals who are deported based on reinstatement orders are inadmissible under INA § 212(a)(9)(A) (previous removal order) and also may be inadmissible under INA § 212(a)(9)(C)(i)(II) (illegal reentry after prior order). A person who is inadmissible under INA § 212(a)(9)(A) may apply for a waiver under INA § 212(a)(9)(A)(iii). 8 C.F.R. § 212.2(b), (d).

Inadmissibility under INA § 212(a)(9)(C)(i)(II) is more complicated. This inadmissibility ground applies *only* to persons who reentered or attempted to reenter after April 1, 1997.<sup>18</sup> Therefore, if a reinstatement order is based on a pre-April 1, 1997 reentry, INA § 212(a)(9)(C)(i)(II) does not apply. However, if a reinstatement order is based on a post-April 1, 1997 reentry, INA § 212(a)(9)(C)(i)(II) applies and the person cannot apply for a waiver unless 10 years have elapsed since his or her last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

For people who are inside the United States, a pending or approved I-212 waiver application will not prohibit DHS from reinstating a prior order if the person reentered *after* April 1, 1997 (and therefore is subject to INA § 212(a)(9)(C)(i)(II)).<sup>19</sup> People who reentered before April 1, 1997 and are considering filing an I-212 waiver application can contact Stacy Tolchin at [stacy@tolchinimmigration.com](mailto:stacy@tolchinimmigration.com).

## **5. Duran Gonzalez Class Members and I-212 Waivers**

*Duran Gonzalez* was a Ninth Circuit-wide class action challenging DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). *Duran Gonzalez v. DHS*, No. CV 06-1411-MJP (W.D. Wash., settlement approved Jul. 21, 2014). In *Perez-Gonzalez*, the Ninth Circuit held that previously deported individuals who subsequently entered without inspection may apply for adjustment of status under former INA § 245(i) along with an accompanying I-212 waiver application. After ten years of litigation, the district court approved a settlement agreement that provided remedies for class members who filed adjustment of status and I-212 waiver applications within the jurisdiction of the Ninth Circuit on or after August 13, 2004 and on or before November 30, 2007. Class members had until January 21, 2016 to seek relief under the settlement agreement. For detailed information about *Duran Gonzalez*, see [Adjustment of Status Under §245\(i\) for Noncitizens Previously Removed](#).

## **6. Prosecutorial Discretion**

DHS officers may exercise prosecutorial discretion to vacate an existing reinstatement order or to place someone in removal proceedings under INA § 240 in lieu of issuing a reinstatement order under INA § 241(a)(5). *Morales de Soto v. Lynch*, 824 F.3d 822, 825 (9th Cir. 2016). The

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<sup>18</sup> See U.S. Department of State Cable to the field, April 4, 1997; 9 Foreign Affairs Manual 302.11-4(B)(1)(a). See also *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*, Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs (June 17, 1997) (AILA Doc. No. 97061790).

<sup>19</sup> See generally *Duran Gonzalez* Memo, n.15, *supra*, regarding applicability of INA § 212(a)(9)(C) to post-April 1, 1997 reentries.



discretionary nature of a DHS officer's charging decision is addressed in § II.C.8, and motions seeking to vacate an existing reinstatement order are addressed in § III.B.

### **C. Reinstatement Process and the Agency Record**

#### **What is the regulatory process for reinstatement proceedings?**

In reinstatement proceedings, a DHS officer conducts an interrogation to determine whether an individual has a prior removal order, is in fact the person identified in the prior order, and unlawfully reentered. 8 C.F.R. § 241.8(a). This interrogation usually takes place under oath, resulting in a written sworn statement on Form I-877. In making this determination, the officer "must obtain the prior order." 8 C.F.R. § 241.8(a)(1). If there is an identity dispute, DHS must compare the person's fingerprints with those in its file. 8 C.F.R. § 241.8(a)(2). In those cases, in the absence of such fingerprints, DHS cannot remove the individual. *Id.*

Section 241(a)(5) applies only after an unlawful reentry. In assessing whether a reentry was unlawful, DHS "shall consider all relevant evidence, including statements made by the [individual] and any evidence in the [individual's] possession" and "shall attempt to verify [the] claim, if any, that [the individual] was lawfully admitted, which shall include a check of Service data systems available to the officer." 8 C.F.R. § 241.8(a)(3).

DHS procedures require officers to ask whether the person has a fear of return.<sup>20</sup> If the person indicates a fear of return during reinstatement proceedings, DHS must refer him or her to an asylum officer for a reasonable fear interview. 8 C.F.R. §§ 208.31, 241.8(e); *see also* §§ I.B.1, *supra*, and § II.A-B, *infra*, for further discussion of reasonable fear proceedings.

At the conclusion of the interrogation, the officer completes the top portion of Form I-871, titled "Notice of Intent/Decision to Reinstate Prior Order." This portion of the form contains the factual allegations against the individual, including that he or she is not a U.S. citizen, the date of the prior order, and the date of illegal reentry. It also states that there is no right to a hearing before an immigration judge.

DHS must inform the individual that he or she has the right to make a written or oral statement contesting the conclusion that he or she is subject to reinstatement. 8 C.F.R. § 241.8(b). The officer must present the notice portion of Form I-871 to the individual to sign and to indicate whether he or she wishes to make a statement contesting the determination. *Id.* ("If the [individual] wishes to make . . . a statement, the officer shall allow the [individual] to do so and shall consider whether the [individual]'s statement warrants reconsideration of the determination.").

A different officer then signs the bottom portion of Form I-871, labeled "Decision, Order and Officer's Certification." DHS officers often sign the top and bottom portions of the form on the same day, which renders the order immediately executable and begins the 30-day period for filing a petition for review, unless the person expresses a fear of return to his or her country of origin. A sample Form I-871 is attached as Appendix C.

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<sup>20</sup> *See* [Email from Redacted, RE: reinstatement & withholding](#) (Nov. 30, 2012) (containing the reinstatement of removal sub-chapter of the Detention and Removal Operations Policy and Procedure Manual (DROPPM)); *see also* n.3, *supra*.

### **Is there a way to correct or supplement the agency’s reinstatement record?**

Yes. If the person did not contest (or did not contest adequately) the reinstatement determination *and* there is a basis to challenge the reinstatement order, it is important to correct or supplement the agency’s record in order to:

- Ensure that the agency has an opportunity to rule on all the person’s claims.
- Document and preserve legal and factual arguments to raise in a petition for review before the circuit court. The reinstatement order and all related documentation constitute the administrative record. *See* Federal Rule of Appellate Procedure 16; *see also* Appendix D. Importantly, “the court of appeals shall decide the petition only on the administrative record on which the order of removal is based.” INA § 242(b)(4)(A).<sup>21</sup>

In general, there are two ways to correct or supplement the agency’s record:

- File supplemental documentation directly with DHS (usually U.S. Immigration and Customs Enforcement).
- File an administrative motion to reconsider or reopen the reinstatement order with the DHS office that issued it. *See* 8 C.F.R. § 103.5 (governing motions to reopen or reconsider DHS decisions); *see also* § III.B, *infra*. Courts have suggested that a person may file a separate petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004); *Perez-Garcia v. Lynch*, 829 F.3d 937, 942 (8th Cir. 2016) (assuming but not deciding that the court has jurisdiction). *But see* *Tapia-Lemos v. Holder*, 696 F.3d 687, 689-90 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen a reinstatement order under 8 C.F.R. § 103.5 for lack of jurisdiction); *Aguilar-Aguilar v. Napolitano*, 700 F.3d 1238, 1242 n.3 (10th Cir. 2012) (suggesting 8 C.F.R. § 103.5 is limited to reopening or reconsidering benefit request denials).

Note that supplementing the agency’s reinstatement record, which provides the agency an opportunity to consider new evidence or arguments, is different from supplementing the record before the court of appeals for purposes of judicial review. *See* § II.B, *infra*.

## **II. CHALLENGING REINSTATEMENT ORDERS IN CIRCUIT COURT**

### **What are some of the factors to consider before challenging a reinstatement order in the court of appeals?**

A successful challenge to a reinstatement order in the court of appeals could result in vacatur of the reinstatement order or remand for further proceedings. If successful, DHS arguably still could place the person in removal proceedings before an IJ pursuant to INA § 240. Therefore, before seeking circuit court review, consider what immigration relief/status would be available if the reinstatement order were vacated. For example, would the person otherwise qualify for

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<sup>21</sup> *See also* *Miller v. Mukasey*, 539 F.3d 159, 164 (2d Cir. 2008) (“[W]hen [a noncitizen] declines to challenge at the agency level the findings that support reinstatement of a prior order of removal, he has no grounds to complain in court that the reinstatement procedures deprived him of the due process of law.”).

asylum, cancellation of removal, or voluntary departure in removal proceedings? Note that individuals subject to reinstatement also are subject to inadmissibility under INA § 212(a)(9)(C)(i)(II) for having reentered illegally after a prior deportation if they reentered after April 1, 1997 (*see* n.18, *supra*). A waiver of this ground is not available until ten years after the person's departure. INA § 212(a)(9)(C)(ii); *Matter of Torres-Garcia*, 23 I&N 866 (BIA 2006).

Other factors to consider include the strength of the arguments and the cost of representation. One advantage to challenging the order is the ability to obtain the administrative record in order to assess the availability and strength of arguments to challenge the reinstatement order.

## **A. Jurisdiction, Venue, and Transfer**

### **What court has jurisdiction over a challenge to a reinstatement order?**

A person may challenge a reinstatement order in the court of appeals by filing a petition for review.<sup>22</sup> All circuits recognize jurisdiction over petitions for review of reinstatement orders.<sup>23</sup>

### **Will filing a petition for review of a reinstatement order automatically stay deportation?**

No, filing a petition for review alone does not automatically stay deportation. However, a person can file a separate motion asking the court to stay deportation.<sup>24</sup> Some circuits have special rules governing stays of removal and will temporarily stay deportation until the court has an opportunity to adjudicate a fully briefed stay motion.<sup>25</sup> In other circuits, the court must grant the stay motion before deportation is stayed.

*Importantly*, deportation does *not* bar filing or litigating a petition for review. As long as it is timely filed, the court of appeals has jurisdiction to decide a petition for review of a reinstatement order if the petition is filed from abroad or if the court of appeals denies a stay.

### **What is the deadline for filing a petition for review?**

Under 8 U.S.C. § 1252(b)(1), the deadline for filing a petition for review is 30 days after the date of the final order. The Supreme Court has construed this filing deadline as “mandatory and jurisdictional.” *Stone v. INS*, 514 U.S. 386, 405 (1995). Courts will not exercise jurisdiction over

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<sup>22</sup> For further information on how to file and litigate a petition for review, see the Council's practice advisory entitled [How to File a Petition for Review](#).

<sup>23</sup> *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Warner v. Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Gomez-Chavez v. Perryman*, 308 F.3d 796, 800 (7th Cir. 2002); *Briones-Sanchez v. Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Sarmiento-Cisneros v. U.S. Att'y Gen.*, 381 F.3d 1277, 1278 (11th Cir. 2004).

<sup>24</sup> For further information on how to file motion to stay deportation, see [Seeking a Judicial Stay of Removal in the Court of Appeals](#).

<sup>25</sup> *See, e.g.*, First Circuit Local Rule 18.0; *In re Immigration Petitions*, 702 F.3d 160, 162 (2d Cir. 2012); Third Circuit Standing Order Regarding Immigration Cases (Aug. 5, 2015); Ninth Circuit General Order 6.4(c).

untimely petitions for review. If DHS did not serve the reinstatement order, it may be possible to argue that the 30-day clock begins on the date of service (*see* next question).

In reinstatement cases that do not involve fear-based claims, the deadline for filing a petition for review is 30 days from the date that DHS signed the bottom portion of Form I-871 (entitled Decision, Order and Officer's Certification).<sup>26</sup>

If a person indicates a fear of return and DHS refers that person for a reasonable fear interview before an asylum officer, several circuits have held that the 30-day petition for review clock does not begin until the conclusion of reasonable fear proceedings.<sup>27</sup> Under this rule, the 30-day clock starts either on the date that an IJ affirms an asylum officer's negative reasonable fear determination<sup>28</sup> or, if the person had a positive reasonable fear determination, on the date that withholding only proceedings concluded before the BIA.<sup>29</sup>

Because the petition for review deadline is rigid, and the Supreme Court theoretically could disagree with the circuit rulings, attorneys may consider filing a petition for review within 30 days of the reinstatement order and a second petition for review at the conclusion of reasonable fear proceedings to safeguard an individual's right to judicial review.

#### **What if DHS did not timely serve the final reinstatement order?**

It is widely reported that DHS fails to serve a written copy of final reinstatement orders at the time of issuance. Indeed, the following DHS training materials lack service instructions:

- The reinstatement of removal sub-chapter of the Detention and Removal Operations Policy and Procedure Manual (DROPPM) expressly instructs service of the top portion of Form I-871 and a Warrant of Removal (Form I-205), but does not instruct service of the bottom portion of Form I-871 (i.e., the final order). *See* [Email from Redacted, RE: reinstatement & withholding](#) (Nov. 30, 2012) (containing DROPPM, Reinstatement of Final Orders, sub-chapter 14.8).
- The [U.S. ICE Academy ICE Instructor Guide, Alternative Orders of Removal, Detention](#)

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<sup>26</sup> *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 342-43 (1st Cir. 2004); *Lemos v. Holder*, 636 F.3d 365, 366-67 (7th Cir. 2011).

<sup>27</sup> *See, e.g., Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-06 (5th Cir. 2016); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957-59 (9th Cir. 2012); *Ayala v. Sessions*, 855 F.3d 1012, 1017-20 (9th Cir. 2017); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1184-87 (10th Cir. 2015); *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016). Some courts that have not expressly decided this issue but have exercised jurisdiction over petitions for review filed within 30 days of the conclusion of withholding and CAT proceedings, not the reinstatement order. *See, e.g., Garcia-Villeda*, 531 F.3d at 144; *Cazun v. Att'y Gen.*, 856 F.3d 249, 254 n.9 (3d Cir. 2017); *Mejia v. Sessions*, 866 F.3d 573, 583, 588 (4th Cir. 2017).

<sup>28</sup> *See Bonilla v. Sessions*, 891 F.3d 87, 90 n.4 (3d Cir. 2018).

<sup>29</sup> *See Ayala v. Sessions*, 855 F.3d 1012, 1017-20 (9th Cir. 2017). If the IJ granted withholding or CAT and DHS did not appeal to the BIA, presumably it would be futile to require the person to nevertheless appeal to the BIA before filing a petition for review. *Accord Popal v. Gonzales*, 416 F.3d. 249, 252-53 (3d Cir. 2005).

[and Removal Operations Training Division Lesson Plan](#), at 10-11 (Dec. 2008), also instructs service of the top portion of Form I-871 and a notice of penalties (Form I-294), but does not instruct service of the final reinstatement order.

- The [U.S. ICE Academy Participant Workbook, Re-Entry After Removal](#), at 9, 11 (Aug. 2004) addresses service of the top portion of Form I-871 and the Warrant of Removal/Deportation (I-205), but does not instruct service of the final reinstatement order.

Failing to serve a reinstatement order violates statutory, constitutional, and regulatory rights. Individuals also have statutory and constitutional rights to judicial review of a reinstatement order. *See* 8 U.S.C. § 1252(a); *INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *see also* INA § 242(c)(1) (stating that a copy of any removal order must be submitted with a petition for review). Due process requires timely notice of DHS' issuance of a final order of reinstatement against them, which impacts their ability to seek judicial review and their detention status. *See generally Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Regulations also protect these interests. *See* 8 C.F.R. § 241.8(b) (mandating written notice of reinstatement determination to the individual); 8 C.F.R. § 292.5 (requiring service of documents); and 8 C.F.R. § 103.8(c)(2) (requiring service of decisions in administrative proceedings upon the person in charge of institution if the person is detained). In *Villegas de la Paz v. Holder*, 640 F.3d 650, 654-55 (6th Cir. 2010), the court held that the 30-day clock did not start until service of the reinstatement order.<sup>30</sup>

To determine whether a reinstatement order exists, consider requesting a copy of the order and accompanying paperwork from DHS. *See* sample letter attached as Appendix B. It is advisable to also file a petition for review within 30 days of learning of the order even if there is no copy of the order that can be attached to the petition as required by INA § 242(c). The petition should detail and provide corroborating evidence of efforts to obtain the reinstatement order and ask the court to compel DHS to produce the reinstatement order.

### **What is the proper venue for a petition for review of a reinstatement order?**

The INA provides that petitions for review “shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.” INA § 242(b)(2). In reinstatement cases, courts regularly adjudicate petitions for review filed with the judicial circuit where DHS issued the reinstatement order.

However, most circuits have held that INA § 242(b)(2) is a non-jurisdictional venue provision.<sup>31</sup> If the prior order was issued by an immigration judge, one could argue that venue lies in the

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<sup>30</sup> *But see Lemos*, 636 F.3d at 366-67 (suggesting that the court would not find that the petition for review deadline commences upon service of the reinstatement order). In other contexts, courts have exercised jurisdiction over petitions for review filed within 30 days of service of a final order. *See, e.g., Radkov v. Ashcroft*, 375 F.3d 96, 99 (1st Cir. 2004); *Zaluski v. INS*, 37 F.3d 72, 73 (2d Cir. 1994); *Ouedraogo v. INS*, 864 F.2d 376, 378 (5th Cir. 1989); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258-59 (9th Cir. 1996).

<sup>31</sup> *See Bibiano v. Lynch*, 834 F.3d 966, 973 (9th Cir. 2016) (agreeing with cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits). *But see Hyun*

circuit where the IJ completed those proceedings. The government likely will move to transfer the petition to the circuit court having jurisdiction over the place where DHS issued the reinstatement order. *See, e.g., Bibiano v. Lynch*, 834 F.3d 966, 970 (9th Cir. 2016).

In *Bibiano*, the Ninth Circuit held that venue in a reinstatement case can be “multi-jurisdictional.” 834 F.3d at 973. In that case, the individual’s prior order was issued in the Ninth Circuit, but the reinstatement order and subsequent withholding only proceedings took place in the Eleventh Circuit. The court declined to transfer the case under 28 U.S.C. § 1631 because “transferring the case would waste judicial resources and cause unnecessary delay.” *Id.* at 974.

### **What if the person mistakenly filed a district court action instead of a petition for review?**

If a challenge to a reinstatement order is mistakenly filed in district court instead of the court of appeals, the district court may transfer the action to the court of appeals to cure the lack of jurisdiction under 28 U.S.C. § 1631. Transfer under this provision is appropriate if: (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. Courts have invoked § 1631 where the parties justifiably relied on a statute or court decision in deciding to file in an improper venue, where transfer was necessary to preserve review that would otherwise be time barred, and where transfer would prevent undue delay.<sup>32</sup>

### **Are there any options available for individuals who miss the petition for review deadline?**

Individuals who miss the 30-day petition for review deadline still may file an administrative motion to reopen or reconsider the reinstatement order with DHS and then seek judicial review if that motion is denied. For more information on administrative motions to reopen or reconsider reinstatement orders, see § III.B, *infra*.

## **B. Scope and Standard of Review**

### **What is the scope of review in a reinstatement case?**

As with all petitions for review, the circuit court’s review is limited to the administrative record. INA § 242(b)(4)(B). However, the court can consider a variety of factual, legal, and constitutional claims, including challenges to the propriety of the reinstatement order and to the retroactive application of the reinstatement statute, as well as claims to eligibility for relief notwithstanding a reinstatement order and citizenship and nationality claims. For further information about the types of arguments courts have reviewed, see § II.C, *infra*.

Notably, the circuit court also can review challenges to negative reasonable fear determinations or denials of withholding and/or CAT protection.

### **What is the standard of review in a reinstatement case?**

The courts review legal and constitutional questions raised in a petition for review de novo, including in reinstatement cases. *See, e.g., McNary v. Haitian Refugee Center*, 498 U.S. 479, 493

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*Min Park v. Heston*, 245 F.3d 665, 666 (8th Cir. 2001) (suggesting potentially contrary conclusion without analysis).

<sup>32</sup> *See, e.g., Castro-Cortez v. INS*, 239 F.3d 1037, 1046-47 (9th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003); *Ruiz v. Mukasey*, 552 F.3d 269, 276 (2d Cir. 2009).

(1991); *Chay Ixcot*, 646 F.3d at 1206. The court will treat DHS’ factual findings as “conclusive unless any reasonable adjudicator would be compelled to the contrary.” INA § 242(b)(4)(B). When reviewing the denial of withholding and/or CAT protection, courts apply traditional review standards for fear-based claims.

**Is there a different standard for review of negative reasonable fear determinations?**

Reasonable fear proceedings conclude when an IJ affirms an asylum officer’s decision that the person has not demonstrated a reasonable fear of persecution or torture. In this situation, the individual can file a petition for review within 30 days of the IJ’s decision and challenge the reinstatement order and/or the IJ’s reasonable fear determination.<sup>33</sup> Courts should review fear-based claims under traditional standards of review.

Troublingly, the government has urged courts of appeals to review IJ decisions affirming negative reasonable fear determinations under the highly deferential “facially legitimate and bona fide” standard as opposed to the traditional standards for review of fear-based claims.<sup>34</sup> The Ninth Circuit has rejected that argument.<sup>35</sup>

**Are there some reinstatement-related decisions that the circuit court will not review?**

Yes. For example, the Ninth Circuit has held it lacks jurisdiction to review decisions terminating removal proceedings to allow DHS to issue a reinstatement order because these decisions do not meet the definition of a final removal order under INA § 101(a)(47). *Galindo-Romero v. Holder*, 640 F.3d 873, 877-81 (9th Cir. 2011); *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009). The Seventh Circuit lacks jurisdiction to review the denial of a U visa petition and inadmissibility waiver as part of its review of a reinstatement order. *Torres-Tristan v. Holder*, 656 F.3d 653, 663 (7th Cir. 2011).

**If a petitioner has criminal convictions that would preclude the court of appeals from reviewing a petition for review, does the statutory bar also apply to reinstatement orders?**

Yes, the statutory bar to review of cases involving certain criminal convictions, INA § 242(a)(2)(C), applies. However, pursuant to INA § 242(a)(2)(D), courts nevertheless may review legal or constitutional questions. *See* INA § 242(a)(2)(D); *see also Debeato v. Att’y Gen.*, 505 F.3d 231, 234 (3d Cir. 2007); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 (5th Cir. 2006).

**C. Potential Arguments for Challenging Reinstatement Orders**

**1. Retroactivity**

**Did “reinstatement” exist prior to IIRIRA?**

Yes, but the only individuals subject to reinstatement under former INA § 242(f) (1995) were individuals previously deported (not excluded) on grounds relating to certain criminal convictions, failing to register, falsification of documents, or security or terrorist related grounds. Under pre-IIRIRA reinstatement procedures, the former Immigration and Naturalization Service

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<sup>33</sup> *See, e.g., Bonilla*, 891 F.3d at 90 n.4; *Andrade-Garcia v. Lynch*, 828 F.3d 829, 834 (9th Cir. 2016).

<sup>34</sup> *See, e.g., Andrade-Garcia*, 828 F.3d at 834; *Telles v. Lynch*, 639 Fed. Appx. 658, 662 (1st Cir. 2016) (unpublished).

<sup>35</sup> *Andrade-Garcia*, 828 F.3d at 836.

(INS) issued an Order to Show Cause charging the individual with deportability under former INA § 242(f). 8 C.F.R. § 242.23 (1995). At a deportation hearing, an IJ would determine deportability and adjudicate any relief application. 8 C.F.R. § 242.23 (1995).

In 1996, Congress enacted § 305(a) of IIRIRA, which amended and redesignated former INA § 242(f) by expanding the scope of individuals subject to reinstatement, purporting to bar reopening and review of the prior order, and barring all relief under the INA. The current version of INA § 241(a)(5) became effective on April 1, 1997. IIRIRA § 309(a).

### **What did the Supreme Court hold in *Fernandez-Vargas v. Gonzales*?**

In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), the Court held that § 241(a)(5) may be applied to an individual who (1) reentered the United States before April 1, 1997; and (2) did nothing to legalize his unlawful status before that date. The petitioner in *Fernandez-Vargas* was last deported in 1981 and reentered illegally shortly thereafter. *Id.* 45 at n.11. Although he fathered a U.S. citizen son in 1989, he did not marry the boy's U.S. citizen mother or file an adjustment application and I-212 waiver application until March 2001 (after April 1, 1997). *Id.* at 35. The decision abrogated decisions of the Sixth and Ninth Circuits, which previously found that § 241(a)(5) did not apply to pre-April 1, 1997 reentrants. *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001); *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001).

### **What was the Supreme Court's rationale in *Fernandez-Vargas*?**

The Court found that application of § 241(a)(5) to petitioner did not have impermissible retroactive effect, reasoning that the person's illegal reentry does not trigger § 241(a)(5). *Fernandez-Vargas*, 548 U.S. at 44. Rather, "it is the conduct of remaining in the country after entry that is the predicate action" triggering § 241(a)(5)'s application, the Court said. *Id.* The Court further stated that § 241(a)(5) does not penalize illegal reentry but, rather, establishes a process to "stop an indefinitely continuing [immigration] violation." *Id.* Because the petitioner continued his illegal presence after § 241(a)(5) took effect, the Court concluded that his conduct was not completed prior to the change in law. *Id.* at 45.

### **Does INA § 241(a)(5) apply retroactively to individuals who took affirmative steps to legalize status prior to April 1, 1997?**

Whether § 241(a)(5) applies retroactively to someone who tried to legalize status before April 1, 1997 depends on the facts of the case and circuit law. In *Fernandez-Vargas*, the Court expressly declined to decide this issue. *Fernandez-Vargas*, 548 U.S. at 46.<sup>36</sup> Examples of affirmative steps to legalize status include filing an application for asylum, adjustment of status, or temporary protective status or filing an immigrant visa petition or labor certification application.

Pre-*Fernandez-Vargas* decisions holding that § 241(a)(5) does not apply retroactively to individuals who applied for adjustment before April 1, 1997 arguably remain good law because the Supreme Court's rationale did not change the retroactive effect analysis employed by those courts. *See, e.g., Arevalo*, 344 F.3d at 4; *Faiz-Mohammed*, 395 F.3d at 810; *Sarmiento-Cisneros*,

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<sup>36</sup> *See also id.* at 33 (limiting holding to the "continuing violator of the INA now before us"); 36 n.5 (referring to pre-IIRIRA marriage or adjustment application as "facts not in play here"); 44 n.10 (noting that petitioner "never availed himself of [cancellation, adjustment or voluntary departure] or took action that enhanced their significance to him in particular"); 47 ("§ 241(a)(5) has no retroactive effect when applied to [noncitizens] like *Fernandez-Vargas*.").



381 F.3d at 1278. *Accord Valdez-Sanchez*, 485 F.3d at 1089-90 (discussing ongoing validity of these cases).

Since *Fernandez-Vargas*, the Ninth and Tenth Circuits have held that § 241(a)(5) cannot apply retroactively to individuals who filed for asylum or application to remove the condition on lawful permanent resident status, respectively, prior to April 1, 1997. *See Chay Ixcot*, 646 F.3d at 1213; *Valdez-Sanchez*, 485 F.3d at 1091. This rationale should extend to other types of applications also.<sup>37</sup>

Other courts have upheld the retroactive application of § 241(a)(5). *See Molina Jerez v. Holder*, 625 F.3d 1058, 1070 (8th Cir. 2010) (pre-April 1, 1997 asylum application); *Montoya v. Holder*, 744 F.3d 614, 616-17 (9th Cir. 2014) (pre-April 1, 1997 approved visa petition, but no adjustment application filed); *Ortega v. Holder*, 747 F.3d 1133, 1135 (9th Cir. 2014) (adjustment application denied in 1987 and petitioner took no subsequent action to renew or reapply for adjustment prior to April 1, 1997); and *Silva Rosa v. Gonzales*, 490 F.3d 403, 410 (5th Cir. 2007) (pre-April 1, 1997 marriage to a U.S. citizen and approved visa petition, but adjustment application filed after April 1, 1997).<sup>38</sup>

## 2. Manner of Reentry

### **Did DHS follow the regulations for determining whether reentry was illegal?**

The regulations provide that DHS “officer[s] shall consider all relevant evidence, including statements made by the [individual] and any evidence in the [individual’s] possession” and “shall attempt to verify [the] claim, if any, that [the individual] was lawfully admitted, which shall include a check of Service data systems available to the officer.” 8 C.F.R. § 241.8(a)(3).

DHS violates this regulation when it fails to consider all relevant evidence or does not attempt to verify a claim that entry was lawful. The viability of this argument may depend on whether the violation prejudiced the person. *See* § II.C.5, *infra*, discussing regulatory violations.

### **What if the reentry was legal but the agency record lacks evidence of it?**

The plain language of INA § 241(a)(5) requires that the person “has reentered the United States illegally,” therefore, DHS should not issue reinstatement orders to people who have reentered *legally*. Whether a person’s entry was lawful can involve complex entry and admission issues. If the DHS officer did not understand why the person’s reentry was legal or did not have evidence establishing or supporting a lawful reentry, counsel should try to provide the explanation and/or evidence (for example, a declaration from the client). Counsel first should submit the explanation/evidence to DHS in writing and follow-up directly by either phone or written correspondence. In addition, or as an alternative, counsel could file a motion to reopen or

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<sup>37</sup> *See Chay Ixcot*, 646 F.3d at 1213 (“[T]he post IIRIRA reinstatement provision is impermissibly retroactive . . . when applied to an immigrant, . . ., who applied for immigration relief prior to [April 1, 1997].”)

<sup>38</sup> *See also Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005) (upholding retroactive application under same circumstances) (decided prior to *Fernandez-Vargas*). *But see Lopez-Flores v. Dep’t of Homeland Security*, 387 F.3d 773, 775-77 (8th Cir. 2004) (rejecting retroactive application where immigration authorities denied an adjustment application filed prior to 4/1/1997) (decided prior to *Fernandez-Vargas*).

reconsider the reinstatement order pursuant to 8 C.F.R. § 103.5 with the DHS office that issued the order. See § I.C, *supra*, for details regarding supplementing the agency record via direct submission or filing an administrative motion and seeking judicial review if it is denied.

When arguing to the court of appeals that a person’s reentry was lawful, it is imperative that the administrative record contain evidence to support the claim. The court’s review is limited to the administrative record, and it will treat DHS’ factual findings as “conclusive unless any reasonable adjudicator would be compelled to the contrary.” INA § 242(b)(4)(A) & (B).<sup>39</sup> If the administrative record does not contain such evidence and the case is before a court of appeals on a petition for review, counsel should consider filing a motion to supplement the administrative record pursuant to Federal Rule of Appellate Procedure 16(b). See § I.C, *supra*.

### **Is a reentry after inspection and admission by an immigration officer a legal entry?**

If a U.S. Customs and Border Protection officer inspects and admits someone after a prior order, there is an *argument*—supported by the definitions of “admission” and “admitted” in INA § 101(a)(13)(A), BIA precedent, and rules of statutory construction—that such a reentry is not an “illegal” reentry. However, at least five courts of appeals have rejected the argument.

The argument is that an entry following inspection and admission is procedurally regular and, therefore, a legal entry. The BIA consistently differentiates between procedurally regular and substantively legal entries. A procedurally regular entry occurs where an individual presents herself to immigration officers at a port of entry and an immigration officer inspects and admits her. This would include entries after an immigration officer waves a person through at a port of entry. A substantively legal entry meets the same procedural requirements, but also requires an individual to meet the substantive legal requirements for admission (i.e., holding a valid visa/status and demonstrating admissibility under INA § 212). See *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980); *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010). The BIA considers “procedurally regular” entries lawful, unless a noncitizen makes a false claim to U.S. citizenship. *Matter of Areguillin*, 17 I&N Dec. at 301 n.3; *Matter of Quilantan*, 25 I&N Dec. at 293.

In addition, the regulation expressly requires that, when determining whether a person unlawfully reentered the United States, DHS officers “shall consider all relevant evidence, including statements made by the [individual] and any evidence in the [individual]’s possession” and “shall attempt to verify [the] claim, if any, that [the individual] *was lawfully admitted* . . . .” 8 C.F.R. § 241.8(a)(3) (emphasis added). Notably, DHS officers are bound by the BIA’s interpretation of the procedurally regular entry standard. 8 C.F.R. § 103.10(b). Thus, under the plain language of 8 C.F.R. § 241.8(a)(3), DHS cannot deem a reentry “illegal” if the entrant was lawfully “admitted.”

The First Circuit has suggested that someone who DHS inspected and allowed entry did not reenter the country illegally. *Ponta-Garca*, 386 F.3d at 343. In this situation, the Court said, “the reinstatement provision would appear to be inapplicable by its express terms.” *Id.* However, other courts of appeals have rejected the procedural regularity argument.<sup>40</sup> Most of these

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<sup>39</sup> See also *Perez-Garcia v. Lynch*, 829 F.3d 937, 940-41 (8th Cir. 2016); *R-S-C v. Sessions*, 869 F.3d 1176, 1182 (10th Cir. 2017).

<sup>40</sup> See, e.g., *Beekhan v. Holder*, 634 F.3d 723 (2d Cir. 2011); *Mendoza v. Sessions*, 891 F.3d 672, 680 (7th Cir. 2018); *Tamayo-Tamayo v. Holder*, 725 F.3d 950 (9th Cir. 2013) (en banc);

decisions involve individuals obtaining entry through deception. In the relevant circuits, practitioners may seek to distinguish future cases on this basis.<sup>41</sup>

### 3. Collateral Challenges to the Prior Removal Order

#### **Do the federal courts have jurisdiction to consider a challenge to a prior order?**

Because reinstatement orders are predicated on the existence of a prior order, any challenge to the prior order is collateral to the reinstatement order. Although § 241(a)(5) says the prior order “is not subject to being . . . reviewed. . . .,” courts arguably can review certain prior orders.

If the prior order already is the subject of a pending petition for review when DHS issues the reinstatement order, § 241(a)(5)’s bar to review does not moot the petition for review.<sup>42</sup> If the prior order is not the subject of a pending petition for review, whether the court will collaterally review the prior order depends on the facts of the case and circuit case law.

Prior to the REAL ID Act of 2005,<sup>43</sup> with little or no analysis, some courts stated that they could not review prior removal orders.<sup>44</sup> Other courts recognized habeas jurisdiction to review the prior order if the person was denied judicial review in the prior proceeding.<sup>45</sup>

Through the REAL ID Act of 2005, Congress enacted INA § 242(a)(2)(D), which provides for review of legal and constitutional questions notwithstanding the criminal and discretionary bars to judicial review (INA §§ 242(a)(2)(B) & (C)) nor any other INA provision which “limits or eliminates judicial review,” other than a provision within INA § 242. The bar to review of the prior order in INA § 241(a)(5) is a provision “which limits or eliminates judicial review” and is not within INA § 242. Thus, courts should review legal and constitutional challenges to prior removal orders. Some courts have so held.<sup>46</sup> Other courts have held that they lack jurisdiction to

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*Tellez v. Lynch*, 839 F.3d 1175 (9th Cir. 2016); *Cordova-Soto v. Holder*, 659 F.3d 1029 (10th Cir. 2011); *cf. Anderson v. Napolitano*, 611 F.3d 275, 276-77 (5th Cir. 2010) (finding entry unlawful where individual did not receive permission from Attorney General to reapply for admission after prior removal); *Martinez v. Johnson*, 740 F.3d 1040, 1043 (5th Cir. 2014) (same).

<sup>41</sup> *But see Mendoza*, 891 F.3d at 680 (finding that “small deceptions . . . are not relevant to the core analysis because it is not procedural regularity that is at issue; rather it is substantive illegality that subjected each person to reinstatement”).

<sup>42</sup> *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 578 n.8 (2010); Resp. Br. 44 n.18, *Carachuri-Rosendo v. Holder*, 560 U.S. 563, No. 09-60 (Mar. 2010) (“[§ 241(a)(5)] does not bar review of the prior order on direct judicial review under 8 U.S.C. 1252(a)(1) where, . . . , such proceedings remain pending at the time of the reinstatement of the prior order of removal.”).

<sup>43</sup> Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

<sup>44</sup> *See, e.g., Arevalo*, 344 F.3d at 9; *Avila-Macias*, 328 F.3d at 115; *Smith v. Ashcroft*, 295 F.3d 425, 428-29 (4th Cir. 2002); *Ojeda-Terrazas*, 290 F.3d at 295.; *Gomez-Chavez*, 308 F.3d at 801; *Briones-Sanchez*, 319 F.3d at 327-28; *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173 (9th Cir. 2001); *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1063-64 (10th Cir. 2004).

<sup>45</sup> *See, e.g., Smith*, 295 F.3d at 428-29; *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963-64 (9th Cir. 2004) *overruled in part by Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007).

<sup>46</sup> *Debeato*, 505 F.3d at 234-35, 237; *Villegas de la Paz*, 614 F.3d at 610.

review a prior order without discussion of INA § 242(a)(2)(D).<sup>47</sup> In this situation, where the court did not “squarely addressed” or even consider INA § 242(a)(2)(D)’s effect on the jurisdictional analysis, these holdings should not bind future panels.<sup>48</sup>

Because § 242(a)(2)(D) does not restore review if review is otherwise barred under INA § 242, courts have found they lack jurisdiction over the prior order in the following circumstances:

- where the prior order is an expedited removal order (review curtailed by INA §§ 242(a)(2)(A) & (e))<sup>49</sup>
- where the person did not exhaust administrative remedies in the prior proceedings by appealing to the BIA (review curtailed by INA § 242(d))<sup>50</sup>
- where the person did not timely file a petition for review of the prior order (review curtailed by INA § 242(b)(1))<sup>51</sup>

Counsel should examine the case law of their circuit when raising collateral challenges.<sup>52</sup>

### **What is the standard of review on collateral review?**

Where INA § 242(a)(2)(D) restores jurisdiction over legal and constitutional challenges to the prior order, courts should apply a de novo standard of review because that is the standard courts apply to such challenges on direct review. However, where review is collateral, some courts apply a “gross miscarriage of justice” standard.<sup>53</sup> If the court adopted this standard with little or no analysis, one could argue for a de novo standard. *See* n.48, *supra*.

When arguing that a prior order constitutes a “gross miscarriage of justice,” BIA case law is helpful. The Board long has recognized the ability to invalidate a prior order (in subsequent deportation proceedings) based on a “gross miscarriage of justice” standard. *See Matter of Malone*, 11 I&N Dec. 730, 731 (BIA 1966) (finding a gross miscarriage of justice where the finding of deportability was not in accord with the law as interpreted at the time and stating that “the error should not be perpetuated”); *Matter of Farinas*, 12 I&N Dec. 467, 472-73 (BIA 1967) (finding gross miscarriage of justice where unrepresented noncitizen deported although he “was not properly subject to deportation”); *see also McLeod v. Peterson*, 283 F.2d 180, 187 (3d Cir.

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<sup>47</sup> *See, e.g., Garcia-Villeda*, 531 F.3d at 150; *Torres-Tristan*, 656 F.3d at 656; *Cruz-Martinez v. Sessions*, 885 F.3d 460, 463 (7th Cir. 2018).

<sup>48</sup> *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (stating that *stare decisis* is not applicable unless the issue was “squarely addressed” in the prior decision); *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

<sup>49</sup> *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007); *de Rincon v. Dep’t of Homeland Security*, 539 F.3d 1133 (9th Cir. 2008)

<sup>50</sup> *Ramirez-Molina*, 436 F.3d at 513-15; *Avila v. U.S. Att’y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009)

<sup>51</sup> *Verde-Rodriguez v. Att’y Gen.*, 734 F.3d 198, 201-02 (3d Cir. 2013); *Cordova-Soto*, 659 F.3d at 1032; *Avila*, 560 F.3d at 1284; *see also Cruz-Martinez*, 885 F.3d at 463.

<sup>52</sup> Individuals raising collateral challenges may email [trealmuto@immcouncil.org](mailto:trealmuto@immcouncil.org).

<sup>53</sup> *See, e.g., Debeato*, 505 F.3d at 234-35, 237; *Ramirez-Molina*, 436 F.3d at 513-15; *de Rincon*, 539 F.3d at 1138.

1960) (finding that prior order constituted a gross miscarriage of justice where the order “was promulgated only after an erroneous deprivation of the appellant’s right to discretionary relief”).

#### **What if the prior order is reopened or vacated?**

In general, if the prior order underlying a reinstatement order is reopened or vacated, the reinstatement order collapses. As courts have held, reopening vacates the underlying removal order. *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009) (“[A] determination that the BIA should have granted Nken’s motion to reopen would necessarily extinguish the finality of the removal order”); *United States v. Arias-Ordonez*, 597 F.3d 972, 978 (9th Cir. 2010) (holding that “none of the reinstatements is legally any stronger than the original order.”).<sup>54</sup>

Whether reopening *automatically* extinguishes the reinstatement order is unclear. To avoid potential problems, it is advisable to ask DHS to vacate the reinstatement order and to provide evidence of the vacated order.

#### **What if a criminal court, in dismissing a criminal charge for illegal reentry after deportation under 8 U.S.C. § 1326, finds the prior order is unconstitutional?**

In prosecutions for illegal reentry after deportation (8 U.S.C. § 1326), district court judges may consider the legality of the prior order. If the judge finds the prior order is unconstitutional, the court will dismiss the criminal charge. However, even where district court judges have found that the prior order is unconstitutional, DHS has issued reinstatement orders predicated on these prior orders. *See, e.g., Villa-Anguiano v. Holder*, 727 F.3d 873 (9th Cir. 2013). In *Villa-Anguiano*, the Ninth Circuit held that when a district court “finds constitutional infirmities in the prior removal proceedings that invalidate the prior removal for purposes of criminal prosecution, the agency cannot simply rely on a pre-prosecution determination to reinstate the prior removal order.” *Id.* at 880. Rather, the court required DHS to allow noncitizens to make a statement addressing relevant circumstances *after* related criminal proceedings are dismissed and then “independently reassess” whether to proceed with reinstatement or place the person in removal proceedings before an immigration judge. *Id.*

Where a reinstatement order is predicated on an order found to be unconstitutional by a district court, the *Villa-Anguino* decision and the court’s rationale is instructive. Notably, the court relied on the language at 8 C.F.R. § 241.8(a)(3) and (b), requiring ICE to consider “all relevant evidence” prior to making a reinstatement determination, including statements made by the noncitizen, and a noncitizen’s due process rights “to be heard prior to removal” and “to consideration of issues relevant to the exercise of an immigration officer’s discretion.” *Id.* at 880-81 (citing cases). *See also Ponta-Garcia v. Att’y Gen.*, 557 F.3d 158, 164-65 (3d Cir. 2009) (remanding reinstatement case to ICE to consider the petitioner’s assertions that a court had invalidated the prior order.)

#### **4. Eligibility for Asylum or Adjustment of Status Notwithstanding Bar to Relief**

Individuals who fear persecution or torture in their countries of origin have argued that they are eligible for asylum under INA § 208 notwithstanding § 241(a)(5)’s bar to relief. The premise of this argument is that Congress intended the asylum statute to apply to “*Any alien* who is

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<sup>54</sup> *See also Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002).

physically present in the United States or who arrives in the United States . . . , irrespective of such alien’s status . . . .” INA § 208(a)(1) (emphasis added). In order to harmonize the asylum and reinstatement statutes, and comply with international law, individuals must not be precluded from applying for asylum. However, all courts that have examined the argument have rejected it and ruled that individuals subject to § 241(a)(5) reinstatement are ineligible for asylum.<sup>55</sup>

Likewise, several courts have refused to permit individuals with reinstatement orders to apply for adjustment of status under former INA § 245(i), which specifically authorized adjustment for persons who entered without inspection.<sup>56</sup>

## 5. Regulatory Violations and Due Process Considerations

### What if DHS failed to follow the reinstatement regulations?

DHS employees must follow agency regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). When DHS officers fail to do so, they violate the law. To prevail on a challenge to a regulatory violation, some courts require a showing of prejudice. Where the regulation protects a fundamental statutory or constitutional right, however, some courts will presume, or not require, a showing of prejudice.<sup>57</sup> The reinstatement regulations are located at 8 C.F.R. § 241.8. They require, inter alia, DHS officers to obtain the prior removal order, to ask whether the individual has a fear of return, and to compare a person’s fingerprints with those in its file where there is an identity dispute. See § I.C, *supra*, for additional regulatory requirements. Counsel should research the applicable circuit law when arguing that DHS has violated a regulation.

### What are some due process concerns in the reinstatement process?

The due process concerns that might arise in the reinstatement process include, but are not limited to:

- Lack of a full and fair hearing;
- Lack of an impartial adjudicator;
- Lack of a meaningful opportunity to present and rebut evidence;
- Lack of a meaningful opportunity to cross-examine witnesses;
- Inability to develop an adequate administrative record;
- Failure to serve the reinstatement order;
- Right to counsel issues, including lack of access to counsel during the reinstatement process and lack of notice to existing counsel in violation of 8 C.F.R. § 292.5(a); and
- Lack of notice of the right to seek federal court review.

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<sup>55</sup> See *Garcia v. Sessions*, 856 F.3d 27, 35-41 (1st Cir. 2017); *Herrera-Molina v. Holder*, 597 F.3d 128, 139 (2d Cir. 2010); *Cazun*, 856 F.3d at 251; *Lara-Aguilar v. Sessions*, 889 F.3d 134, 135-36 (4th Cir. 2018); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 491 (5th Cir. 2015); *Garcia v. Sessions*, 873 F.3d 553, 555 (7th Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1070 (9th Cir. 2016); *R-S-C v. Sessions*, 869 F.3d 1176, 1177 (10th Cir. 2017); *Jimenez-Morales v. U.S. Att’y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016).

<sup>56</sup> See, e.g., *Delgado v. Mukasey*, 516 F.3d 65, 71 (2d Cir. 2008) (rejecting argument and discussing similar decisions of the First, Sixth, Seventh, Tenth, and Eleventh Circuits).

<sup>57</sup> See, e.g., *Leslie v. Att’y Gen.*, 611 F.3d 171, 180 (3d Cir. 2010); *Montilla v. Immigration & Naturalization Serv.*, 926 F.2d 162, 168-69 (2d Cir. 1991).

### **How have the circuit courts ruled on due process claims?**

Some courts have expressed concern regarding the lack of due process protections in the reinstatement process.<sup>58</sup> Nonetheless, all courts have rejected due process challenges to the reinstatement procedures.<sup>59</sup> However, in those cases, the petitioners did not demonstrate actual and specific prejudice from the alleged due process violation.

## **6. Factual Arguments and Citizenship Claims**

### **Can someone challenge the existence of the factual elements of reinstatement?**

Yes, a person can challenge a reinstatement order by arguing that he or she was not previously ordered removed, did not depart under a removal order, and/or reentered the country legally. For example, if the administrative record does not contain the prior order, the absence of the prior order is a basis for challenging the reinstatement order. Similarly, if the immigration judge previously granted voluntary departure and the individual timely departed, whether a prior order existed constitutes a factual challenge. When confronted with this situation, the Ninth Circuit transferred a case to the BIA to resolve this factual dispute. *Rafaelano v. Wilson*, 471 F.3d 1091, 1098 (9th Cir. 2006). For a discussion on challenging the manner of reentry, see § II.C.2, *supra*.

### **Who has the burden of proving the factual elements, and what is the standard of proof?**

Before DHS can reinstate a prior order, it must establish the individual is subject to a prior order of removal, a subsequent departure from the United States under that order, and an illegal reentry. INA § 241(a)(5); 8 C.F.R. § 241.8(a). The reinstatement statute does not expressly provide a standard of proof to meet this burden. *Compare* INA § 240(c)(3)(A) (providing “the Service has the burden of establishing by clear and convincing evidence that . . .the [noncitizen] is deportable. No decision on deportability shall be valid unless it is based on reasonable, substantial, and probative evidence”) *with* INA § 241(a)(5) (silence as to standard of proof). DHS arguably must meet its burden of proof by “clear, convincing and unequivocal evidence.” *Woodby v. INS*, 385 U.S. 276, 277 (1966).

When reviewing a challenge to a factual predicate of a reinstatement order, the courts of appeals only may review the “administrative record on which the [reinstated] order of removal is based” and the court treats DHS’ factual findings as “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” INA § 242(b)(4)(A)-(B). For these reasons, the administrative record (or record of proceedings) before the circuit court must contain evidence

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<sup>58</sup> See, e.g., *Castro-Cortez*, 239 F.3d at 1047-50, *abrogated on other grounds by Fernandez-Vargas*, 548 U.S. at 36 & n.5; *United States v. Charleswell*, 456 F.3d 347, 356-57 (3d Cir. 2006); *Lattab v. Ashcroft*, 384 F.3d 8, 21 n.6 (1st Cir. 2004); *Bejjani*, 271 F.3d at 687, *abrogated on other grounds by Fernandez-Vargas*, 548 U.S. at 36 & n.5; *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002) *overruled on other grounds, Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006).

<sup>59</sup> See, e.g., *Lattab*, 384 F.3d at 20-21; *Garcia-Villeda*, 531 F.3d at 150-51; *Ponta-Garcia*, 557 F.3d at 162-65; *Ojeda-Terrazas*, 290 F.3d at 302; *Warner*, 381 F.3d at 539; *Gomez-Chavez*, 308 F.3d at 802; *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 847-48 (8th Cir. 2006); *Briones-Sanchez*, 319 F.3d at 327-28; *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 495-97 (9th Cir. 2007) (en banc); *Duran-Hernandez*, 348 F.3d at 1162-63; *De Sandoval v. U.S. Att’y Gen.*, 440 F.3d 1276, 1285 (11th Cir. 2006); *Avila*, 560 F.3d at 1286.

supporting any factual challenge. A memorandum detailing the documents that DHS believes belong in the court record is attached as Appendix D. The court of appeals may correct or supplement the administrative record. *See* Federal Rule of Appellate Procedure 16(b).

### **Can the courts of appeals consider claims to U.S. nationality or citizenship raised in a petition for review of a reinstatement order?**

Yes, pursuant to INA § 242(b)(5), courts can either decide a nationality claim or transfer a case involving a genuine issue of material fact about nationality to the district court. *See, e.g., Iracheta v. Holder*, 730 F.3d 419, 427 (5th Cir. 2013) (vacating reinstatement order issued to U.S. national); *Batista v. Ashcroft*, 270 F.3d 8, 17 (1st Cir. 2001) (transferring case to district court to resolve genuine issue of fact regarding citizenship claim made by person subject to reinstatement order).

## **7. Fourth Amendment Violations**

### **What arguments are available if DHS made an arrest and/or collected evidence underlying the reinstatement order in violation of the Fourth Amendment?**

DHS sometimes issues reinstatement orders following a home or work place raid, traffic stop, unauthorized stop, or a deceptive ruse. Where DHS or another law enforcement entity makes an arrest or obtains evidence underlying the reinstatement order in violation of the Fourth Amendment, arguably DHS cannot use the arrest and/or the evidence to support its reinstatement decision. In one case, the administrative record indicated that DHS officers pretended to be police officers looking for a suspect as a ruse to gain consent to enter a woman's home. After gaining entry, they arrested her using a pain compliance technique. On petition for review, after her counsel raised a Fourth Amendment argument in the opening brief, the government vacated the reinstatement order to settle the case. In another case, the record suggested that a state trooper stopped a driver without adequate suspicion in order to turn him over to immigration authorities, who then reinstated a prior removal order. *Lopez v. Att'y Gen. United States*, 757 F. App'x 155, 157 (3d Cir. Dec. 19, 2018). In response to the Fourth Amendment argument presented in the driver's petition for review, the Third Circuit observed that the petitioner "may have a cognizable suppression argument" and remanded the matter to DHS to adjudicate his pending motion to reopen raising this challenge. *Id.* at 158-59.

In these cases, counsel should consider supplementing the agency's reinstatement record with evidence of the Fourth Amendment violation (*e.g.*, declarations, police reports, etc.). *See* FRAP 16(b). Counsel should also consider filing a motion to reopen or reconsider the reinstatement order under 8 C.F.R. § 103.5 and, once the motion is denied, filing an additional petition for review and seeking to consolidate the petitions (and administrative records) pursuant to INA § 242(b)(6). *See* § III.C.2, *supra*.

For further information on Fourth Amendment violations, see the Council's practice advisory [\*Motions to Suppress in Removal Proceedings: A General Overview\*](#) (updated Aug. 1, 2017).

## **8. *Judulang v. Holder***

### **What arguments are available under *Judulang v. Holder*?**

In *Judulang v. Holder*, the Supreme Court rejected as arbitrary and capricious a rule that categorically precluded a group of individuals from applying for immigration relief where the



BIA failed to consider “germane” factors and “the purposes and concerns of the immigration laws.” 565 U.S. 42, 55, 64 (2011). The Court expressed some disdain for immigration policies that allow deportation officers’ discretionary charging decisions to determine whether relief is available. *Id.* at 58 (criticizing system that turns on the “fortuity of an individual official’s decision”); at 59 (stating that deportation decisions cannot be made into a “sport of chance”) (citation omitted); at 56, 61, 64 (analogizing agency’s policy to the flip of a coin).

In the reinstatement context, DHS’ practices are similarly left to the whim of the charging officer. DHS has discretion either to charge a noncitizen with removability under INA § 212 or INA § 237 and place the person in removal proceedings before an IJ under INA § 240 (where the person can apply for all available relief) or to charge him or her with removability under INA 241(a)(5) (where the person is barred from all relief and denied an IJ hearing). *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013); *Morales de Soto v. Lynch*, 824 F.3d 822, 825 (9th Cir. 2016). Arguably, *Judulang* supports an argument that DHS officers cannot decide to charge someone with reinstatement without first considering “germane factors” and using an approach that is tied “to the purposes of the immigration laws or the appropriate operation of the immigration system.” *Judulang*, 565 U.S. at 55. *But see Morales de Soto*, 824 F.3d at 829.

### III. ADMINISTRATIVE MOTIONS

#### A. Motions to Reopen or Reconsider to the Executive Office for Immigration Review<sup>60</sup>

##### **If DHS has not yet issued a reinstatement order, can an IJ or the BIA reopen or reconsider a prior order?**

Although the reinstatement statute says the prior order “is not subject to being reopened or reviewed,” this language should only apply after DHS issues a reinstatement order. In other words, only a reinstatement order triggers the bar to reopening a prior order. Thus, the BIA or IJ should adjudicate motions filed before any reinstatement order issues.<sup>61</sup> If DHS subsequently issues a reinstatement order and the BIA or IJ refuses to adjudicate the motion, one might argue that § 241(a)(5)’s bar to reopening conflicts with the statutory right to file a motion to reopen. *But see Mejia v. Whitaker*, 913 F.3d 482, 489 n.3 (5th Cir. 2019).

Importantly, filing a motion may prompt DHS to arrest the individual (if DHS knows his or her address) and/or prompt criminal charges under INA § 276, 8 U.S.C. § 1326.

##### **If DHS has issued a reinstatement order, can an IJ or the BIA reopen or reconsider a prior order?**

A reinstatement order should collapse if the prior order is reopened (or favorably reconsidered). *See* § II.C.3, *supra*. However, some courts have found that the BIA and IJs cannot adjudicate motions to reopen filed after DHS issues a reinstatement order because INA § 241(a)(5) states that a prior order “is not subject to being reopened or reviewed.” *See, e.g., Rodriguez-Saragosa*

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<sup>60</sup> For more information about motions to reopen to the BIA or an IJ, see the Council’s practice advisory entitled [The Basics of Motions to Reopen EOIR-Issued Removal Orders](#).

<sup>61</sup> To date, ten courts of appeals have invalidated the “departure bar” regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1). For further information on post departure motions, see the Council’s and NIPNLG’s practice advisory entitled [Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues](#).

*v. Sessions*, 904 F.3d 349, 354-55 (5th Cir. 2018); *Cardova-Soto v. Holder*, 732 F.3d 789, 794-95 (7th Cir. 2013). Other courts have not yet addressed the validity of this argument.

The Ninth Circuit has held that the reopening bar in INA § 241(a)(5) does not prohibit motions to reopen prior in absentia orders based on lack of notice filed pursuant to INA § 240(b)(5)(C)(ii). *See Miller v. Sessions*, 889 F.3d 998, 1002-03 (9th Cir. 2018); *cf. Mejia*, 913 F.3d at 487-89 (reviewing denial of motion to reopen prior order based on lack of notice but finding the BIA did not abuse its discretion in denying motion because evidence of lack of notice in the record was ambiguous).

Filing a motion where there is a valid basis for doing so is useful in demonstrating that the individual pursued all possible options.<sup>62</sup> If the relevant circuit court has not yet addressed this issue or there is a way to distinguish unfavorable circuit law, counsel may consider filing a motion with EOIR based on any argument meriting such a motion, which may include:<sup>63</sup>

- Filing a motion to *reconsider*, which is not barred by the express language of § 231(a)(5) (stating a prior order “is not subject to being *reopened* or *reviewed*”) (emphasis added);
- Filing a motion to reopen an in absentia order based on lack of notice and arguing that the reopening bar conflicts with § 240(b)(5), *see Miller*, 889 F.3d at 1002-03;
- Filing a motion to reconsider or reopen based on a claim to U.S. citizenship, *see Gonzalez-Alarcon v. Macias*, 884 F.3d 1266 (10th Cir. 2018);
- Filing a motion to reconsider or reopen after the reinstatement proceeding is complete, *cf. Morales-Izquierdo*, 486 F.3d at 491 (noting that “INA § 241 reinstatement—unlike INA § 240 first-instance removal—deprives [noncitizens] of any relief, reopening, or review *at the reinstatement stage*”) (quotation omitted and emphasis added);
- Filing a motion to reconsider or reopen a removal order and arguing that the reopening bar conflicts with the statutory right to file one motion to reopen, INA § 240(c)(7).<sup>64</sup> *But see Rodriguez-Saragosa*, 904 F.3d at 354.

Note that, to the extent motions to reconsider or reopen prior orders are permitted, the BIA and IJs should *not* use the gross miscarriage of justice standard some courts apply to collateral attacks to prior orders. *Rodriguez-Saragosa*, 904 F.3d at 353 n.1 (“Motions to reopen are not ‘collateral’; they are attempts to revisit an order made within the same matter, akin to an appeal or motion for reconsideration.”). Rather, the usual regulatory standards of review should apply. *See, e.g.*, 8 C.F.R. § 1003.1(d)(3).

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<sup>62</sup> *See Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 496 n.13 (9th Cir. 2007) (en banc) (“The INA does have a procedure [a noncitizen] may use to reopen an in absentia removal order based on a claim of lack of notice, *see* INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii), *but Morales has failed to avail himself of it.*”) (emphasis added).

<sup>63</sup> Individuals who are seeking reopening or reconsideration of a prior order that DHS has since reinstated may email [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org).

<sup>64</sup> This argument is not applicable to deportation and exclusion orders issued prior to 1996, when motions to reopen and reconsider were provided for only by regulation. *See* 8 C.F.R. §§ 1003.2(c)(2) (providing for motions to reopen deportation or exclusion proceedings to the BIA), 1003.23(b)(1) (same, for motions to immigration courts); *see also* INA § 240(c)(7)(A) (providing right to file motion to reopen removal proceedings under INA § 240).

Even if the IJ or the Board denies the motion, the individual may appeal the denial to the Board or the court of appeals via a petition for review, respectively. In general, the courts of appeals have jurisdiction to review denials of motions to reopen and motions to reconsider by the BIA. *See* INA §§ 242(a), (b)(6); *see also Kucana v. Holder*, 558 U.S. 233, 242, 250-51 (2010). Moreover, the courts will consolidate a petition for review of a denied motion with any petition for review of the reinstatement order. *See* INA § 242(b)(6). Accordingly, the court will consider both administrative records when reviewing the petitions. *See* INA § 242(b)(4)(A).

## **B. Motions to Reopen or Reconsider DHS-Issued Orders**

### **What type of orders does DHS issue?**

While some removal orders are issued by EOIR, others are summary removal orders issued directly by officers at DHS or its component agencies, ICE and CBP. DHS issues four types of removal orders:

- Reinstatement orders under INA § 241(a)(5);
- Expedited removal orders to certain applicants for admission under INA § 235(b);
- Administrative removal orders to certain individuals convicted of aggravated felonies under INA § 238(b); and
- Orders to certain Visa Waiver Program entrants under INA § 217(b).

In some cases, DHS is the issuer of the reinstatement order *and* the prior order.

### **Can DHS reopen or reconsider a DHS-issued order?**

Yes, 8 C.F.R. § 103.5 governs motions to reopen or reconsider DHS decisions, which includes reinstatement orders. These motions are filed with office that issued the order. Although DHS officials may not acknowledge that 8 C.F.R. § 103.5 authorizes reopening or reconsideration of a reinstatement order or other DHS-issued orders, DHS does not dispute its general authority to reopen, reconsider, and rescind such orders.<sup>65</sup> An example of a rescinded reinstatement order is attached as Appendix E. Moreover, courts have recognized the availability of § 103.5 motions.<sup>66</sup>

Practitioners can file § 103.5 motions to reopen or reconsider reinstatement orders and/or motions to reopen or reconsider prior DHS-issued orders that form the basis of reinstatement orders. However, motions to *reopen* DHS-issued orders that have since been reinstated

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<sup>65</sup> *See Lopez v. Att’y Gen.*, 757 F. App’x 155, 157 n.4 (3d Cir. Dec. 19, 2018) (unpublished) (noting that § 103.5 “is a DHS regulation that, with limited exceptions, governs motions to reopen or reconsider” but that “[a]t oral argument, counsel for the government contended that § 103.5 does not apply to reinstatement orders but acknowledged that DHS has inherent authority to reconsider such orders”).

<sup>66</sup> *Escoto-Castillo v. Holder*, 658 F.3d 864, 866 (8th Cir. 2011) (“As the government notes, . . . Escoto-Castillo could have filed a timely motion to reopen the removal proceedings.”) (citing 8 C.F.R. § 103.5(a)); *Evers v. Mukasey*, 288 Fed. Appx. 441, 441 (9th Cir. 2008) (“Pursuant to 8 C.F.R. § 103.5(a)(1)(i), Evers could have filed a motion to reopen proceedings as an ‘affected party’ after the DHS’s decision.”). *But see Aguilar-Aguilar v. Napolitano*, 700 F.3d 1238, 1242 n.3 (10th Cir. 2012).

potentially are subject to the reopening bar at INA § 241(a)(5) as discussed *supra* in the context of motions to reopen EOIR orders.

### **Can courts review a DHS denial of a motion to reopen or reconsider a DHS-issued order?**

Whether the court of appeals can review DHS' denial of a motion to reconsider or reopen a DHS-issued order may depend on the type of DHS-issued order at issue.

With respect to expedited removal orders, the courts of appeals are unlikely to review the denial of a motion to reopen or reconsider. *See* INA § 242(a)(2)(A), (e).

However, there is a strong argument that courts should review the denial of motions to reopen or reconsider a reinstatement order or administrative removal order under INA § 238(b). Courts of appeals have jurisdiction under INA § 242(a) and 242(b)(6) to review denials of motions to reopen prior orders, and the statute contains no exception for 8 C.F.R. § 103.5 motions to reopen reinstatement orders or § 238(b) administrative removal orders. At least two circuit courts have assumed or suggested that they have jurisdiction to review denials of 8 C.F.R. § 103.5 motions.<sup>67</sup>

The Seventh Circuit has rejected this proposition. *Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of DHS' denial of motion to reopen reinstatement order for lack of jurisdiction). The Tenth Circuit has suggested that 8 C.F.R. § 103.5 is limited to motions to reopen or reconsider benefit request denials. *Aguilar-Aguilar*, 700 F.3d at 1242 n.3. However, practitioners may wish to argue that those cases were wrongly decided. Notably, *Tapia-Lemos* includes no jurisdictional analysis under INA § 242(a) or (b)(6) and fails to apply the presumption in favor of judicial review. *See, e.g., Kucana*, 558 U.S. at 237. Furthermore, *Aguilar-Aguilar's* limitation on § 103.5 motions is dicta and fails to acknowledge that the regulation expressly excludes matters that fall outside its general grant of authority, but DHS-issued removal orders are not among these exclusions.

Notably, if the court of appeals has jurisdiction over the denial, the INA requires the court to consolidate review of the denial with its review of the reinstatement order. INA § 242(b)(6).

### **C. Opposing a DHS Motion to Terminate Removal Proceedings**

If an individual is potentially subject to reinstatement, DHS is not required to use that process. *See Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) (explaining that reinstatement is neither “automatic” nor “obligatory”). Instead, DHS may place an individual in removal proceedings under INA § 240. In some cases, DHS subsequently seeks to terminate those proceedings to reinstate a prior order. Individuals can oppose such motions. DHS cannot simply cancel a Notice to Appear (NTA) after filing it with the immigration court. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998); *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007). Instead, DHS must move to terminate proceedings based on a reason specified in the regulations. *See* 8 C.F.R. §

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<sup>67</sup> *See Perez-Garcia v. Lynch*, 829 F.3d 937, 942 (8th Cir. 2016) (noting that “[a]ll parties agree that this court has jurisdiction to review DHS’ denial on the merits of [the] motion to reopen the reinstatement [order]”); *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004) (“Should the eventual disposition of that motion [to reopen or reconsider the reinstatement order] not be in the petitioner’s favor, he may, of course, file a separate petition for review with respect thereto.”).

239.2(c). When seeking to terminate to reinstate, DHS generally argues the NTA was “improvidently issued.” 8 C.F.R. § 239.2(a)(6). The immigration judge (or the BIA if the case is on appeal) must then review the motion and make “an informed adjudication . . . based on an evaluation of the factors” set forth in DHS’ motion. *Matter of G-N-C-*, 22 I&N Dec. at 284.

Arguably, an NTA is not “improvidently issued” where DHS exercised its prosecutorial discretion to initiate removal proceedings. This is especially true where termination wastes judicial resources because DHS was on notice of a prior removal order at the time it issued the NTA, immigration proceedings are ongoing (and lengthy), DHS trial counsel is adequately representing the agency’s position in removal proceedings, and/or where the individual is eligible for withholding of removal or CAT if placed in reinstatement proceedings. In the last situation, termination also would require duplicative proceedings.

#### **IV. DETENTION DURING REINSTATEMENT PROCEEDINGS**

##### **What statute governs the detention of a person who is subject to a reinstatement order and is *not* presently in withholding-only proceedings? Is a bond hearing available?**

DHS regularly detains individuals with reinstatement orders, including those who have indicated a fear of return. In general, the post-final order detention statute and regulations govern the detention of an individual who is subject to reinstatement and who is not in withholding-only proceedings. INA §§ 241(a)(1)-(3); 8 C.F.R. § 241.8(f). Whether a person in this situation is entitled to a bond hearing depends on a variety of factors, including which circuit law applies, whether the reinstatement order is the subject of a petition for review in which the court of appeals has granted a judicial stay of removal, and the length of detention. For more information, see ACLU, [Challenging Immigration Detention Pending the Removal Case](#).

##### **What statute governs the detention of a person who is in withholding-only proceedings? Is a bond hearing available?**

Courts of appeals are divided over whether 8 U.S.C. § 1226(a) (detention pending final removal order) or 8 U.S.C. § 1231(a) (post-order detention) governs the detention of a person in withholding-only proceedings. The Second Circuit has held that § 1226(a) governs detention and that those in withholding-only proceedings are entitled to a bond hearing. *Guerra v. Shanahan*, 831 F.3d 59, 61-64 (2d Cir. 2016).

The Third and Ninth Circuits have held that § 1231(a) governs. *Guerrero-Sanchez v. Warden York County Prison*, 905 F.3d 208, 215-19 (3d Cir. 2018); *Padilla-Ramirez v. Bible*, 882 F.3d 826, 830-34 (9th Cir. 2018). The Third Circuit held that, unless DHS establishes that removal is imminent, noncitizens detained for more than six months are entitled to bond hearings in which DHS bears the burden of proof. *Guerrero-Sanchez*, 905 F.3d at 223-26, n.15. The Ninth Circuit is considering the availability of bond hearings after six months in two pending appeals. *Banos v. Asher*, No. 18-35460 (9th Cir., appeal docketed May 31, 2018); *Gonzalez v. Sessions*, No. 18-16465 (9th Cir., appeal docketed Aug. 6, 2018).

Whether § 1226(a) or § 1231(a) governs the detention of individuals in withholding only proceedings is currently pending before the Fourth and Eleventh Circuits. Both courts are reviewing appeals of decisions holding that § 1226(a) governs. *Guzman Chavez v. Hott*, No. 18-6086 (4th Cir., argued Mar. 21, 2019); *Radzhab v. U.S. Att’y Gen.*, No. 18-14842 (11th Cir., appeal docketed Nov. 19, 2018).

## APPENDIX A

### Published Circuit Court Reinstatement Decisions

#### Supreme Court

*Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006)

#### First Circuit

*Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001)

*Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003)

*Ponta-Garca v. Ashcroft*, 386 F.3d 341 (1st Cir. 2004)

*Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004)

*Arevalo v. Ashcroft*, 386 F.3d 19 (1st Cir. 2004)

*Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017)

#### Second Circuit

*Delgado v. Mukasey*, 516 F.3d 65 (2d Cir. 2008)

*Garcia-Villeda v. Mukasey*, 531 F.3d 141 (2d Cir. 2008)

*Miller v. Mukasey*, 539 F.3d 159 (2d Cir. 2008)

*Herrera-Molina v. Holder*, 597 F.3d 128 (2d Cir. 2010)

*Beekhan v. Holder*, 634 F.3d 723 (2d Cir. 2011)

*Delgado v. Quarantillo*, 643 F.3d 52 (2d Cir. 2011)

*Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016)

#### Third Circuit

*Avila-Macias v. Ashcroft*, 328 F.3d 108 (3d Cir. 2003)

*Dinnall v. Gonzales*, 421 F.3d 247 (3d Cir. 2005)

*United States v. Charleswell*, 456 F.3d 347 (3d Cir. 2006)

*Debeato v. Att’y Gen.*, 505 F.3d 231 (3d Cir. 2007)

*Ponta-Garcia v. Att’y Gen.*, 557 F.3d 158 (3d Cir. 2009)

*Verde-Rodriguez v. Att’y Gen.*, 734 F.3d 198 (3d Cir. 2013)

*Cazun v. Att’y Gen.*, 856 F.3d 249 (3d Cir. 2017)

*Bonilla v. Sessions*, 891 F.3d 87 (3d Cir. 2018)

*Guerrero-Sanchez v. Warden York Cty Prison*, 905 F.3d 208 (3d Cir. 2018)

#### Fourth Circuit

*Velasquez-Gabriel v. Crocetti*, 263 F.3d 102 (4th Cir. 2001)

*Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 2002)

*Mejia v. Sessions*, 866 F.3d 573 (4th Cir. 2017)

*Lara-Aguilar v. Sessions*, 889 F.3d 134 (4th Cir. 2018)

#### Fifth Circuit

*Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292 (5th Cir. 2002)

*Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006)

*Silva Rosa v. Gonzales*, 490 F.3d 403 (5th Cir. 2007)

*Anderson v. Napolitano*, 611 F.3d 275 (5th Cir. 2010)

*Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013)

*Martinez v. Johnson*, 740 F.3d 1040 (5th Cir. 2014)

*Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015)  
*Ponce-Osorio v. Johnson*, 824 F.3d 502 (5th Cir. 2016)  
*Rodriguez-Saragosa v. Sessions*, 904 F.3d 349 (5th Cir. 2018)  
*Mejia v. Whitaker*, 913 F.3d 482 (5th Cir. 2019)

### **Sixth Circuit**

*Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001) *abrogated by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 & n.5 (2006)  
*Warner v. Ashcroft*, 381 F.3d 534 (6th Cir. 2004)  
*Villegas de la Paz v. Holder*, 640 F.3d 650 (6th Cir. 2010)

### **Seventh Circuit**

*Gomez-Chavez v. Perryman*, 308 F.3d 796 (7th Cir. 2002)  
*Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005)  
*Labojewski v. Gonzales*, 407 F.3d 814 (7th Cir. 2005)  
*Lino v. Gonzales*, 467 F.3d 1077 (7th Cir. 2006)  
*Lemos v. Holder*, 636 F.3d 365 (7th Cir. 2011).  
*Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011)  
*Tapia-Lemos v. Holder*, 696 F.3d 687 (7th Cir. 2012)  
*Zambrano-Reyes v. Holder*, 725 F.3d 744 (7th Cir. 2013)  
*Cordova-Soto v. Holder*, 732 F.3d 789 (7th Cir. 2013)  
*Garcia v. Sessions*, 873 F.3d 553 (7th Cir. 2017)  
*Cruz-Martinez v. Sessions*, 885 F.3d 460 (7th Cir. 2018)  
*Mendoza v. Sessions*, 891 F.3d 672 (7th Cir. 2018)

### **Eighth Circuit**

*Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002) *overruled by Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006).  
*Briones-Sanchez v. Heinauer*, 319 F.3d 324 (8th Cir. 2003)  
*Lopez v. Heinauer*, 332 F.3d 507 (8th Cir. 2003)  
*Flores v. Ashcroft*, 354 F.3d 727 (8th Cir. 2003)  
*Lopez-Flores v. Dep't of Homeland Sec.*, 387 F.3d 773 (8th Cir. 2004)  
*Ochoa-Carrillo v. Gonzales*, 437 F.3d 842 (8th Cir. 2006)  
*Ochoa-Carrillo v. Gonzales*, 446 F.3d 781 (8th Cir. 2006)  
*Molina Jerez v. Holder*, 625 F.3d 1058 (8th Cir. 2010)  
*Perez-Garcia v. Lynch*, 829 F.3d 937 (8th Cir. 2016)

### **Ninth Circuit**

*Castro-Cortez et al. v. INS*, 239 F.3d 1037 (9th Cir. 2001) *abrogated by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 & n.5 (2006)  
*Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th Cir. 2001)  
*Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001)  
*Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003)  
*Arreola-Arreola v. Ashcroft*, 383 F.3d 956 (9th Cir. 2004) *overruled by Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007) (en banc)  
*Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) *overruled in part by Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007)  
*Rafaelano v. Wilson*, 471 F.3d 1091 (9th Cir. 2006)

*Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007) (en banc)  
*Martinez-Merino v. Mukasey*, 525 F.3d 801 (9th Cir. 2008)  
*de Rincon v. Mukasey*, 539 F.3d 1133 (9th Cir. 2008)  
*Alcala v. Holder*, 563 F.3d 1009 (9th Cir. 2009)  
*Chay Ixcot v. Holder*, 646 F.3d 1202 (9th Cir. 2011)  
*Duran Gonzales v. U.S. Dep't of Homeland Sec.*, 712 F.3d 1271 (9th Cir. 2013)  
*Galindo-Romero v. Holder*, 640 F.3d 873 (9th Cir. 2011)  
*Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012)  
*Tamayo-Tamayo v. Holder*, 725 F.3d 950 (9th Cir. 2013)  
*Villa-Anguiano v. Holder*, 727 F.3d 873 (9th Cir. 2013)  
*Veltmann-Barragan v. Holder*, 717 F.3d 1086 (9th Cir. 2013)  
*Montoya v. Holder*, 744 F.3d 614 (9th Cir. 2014)  
*Ortega v. Holder*, 747 F.3d 1133 (9th Cir. 2014)  
*Andrade-Garcia v. Lynch*, 828 F.3d 829 (2016)  
*Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016)  
*Morales de Soto v. Lynch*, 824 F.3d 822 (9th Cir. 2016)  
*Tellez v. Lynch*, 839 F.3d 1175 (9th Cir. 2016)  
*Bibiano v. Lynch*, 834 F.3d 966 (9th Cir. 2016)  
*Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017)  
*Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017)  
*Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018)

#### **Tenth Circuit**

*Duran-Hernandez v. Ashcroft*, 348 F.3d 1158 (10th Cir. 2003)  
*Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061 (10th Cir. 2004)  
*Fernandez-Vargas v. Ashcroft*, 394 F.3d 881 (10th Cir. 2005), *aff'd*, 548 U.S. 30 (2006)  
*Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004)  
*Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007)  
*Lorenzo v. Mukasey*, 508 F.3d 1278 (10th Cir. 2007)  
*Cordova-Soto v. Holder*, 659 F.3d 1029 (10th Cir. 2011)  
*Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015)  
*R-S-C v. Sessions*, 869 F.3d 1176 (10th Cir. 2017)  
*Gonzalez-Alarcon*, 884 F.3d 1266 (10th Cir. 2018)

#### **Eleventh Circuit**

*Sarmiento-Cisneros v. U.S. Att'y Gen.*, 381 F.3d 1277 (11th Cir. 2004)  
*De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276 (11th Cir. 2006)  
*Avila v. U.S. Att'y Gen.*, 560 F.3d 1281 (11th Cir. 2009)  
*Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307 (11th Cir. 2016)



## Appendix B

### Sample Letter Requesting Reinstatement Documents

[LETTERHEAD]

\_\_\_\_\_, District Director  
\_\_\_\_ District Office  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security  
[Address]

RE: [Name]  
[A Number]  
**Urgent Request for Reinstatement Order under INA § 241(a)(5)  
and All Related Documents**

Dear \_\_\_\_\_:

This office represents [name] as evidenced by the enclosed Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative). We previously submitted a Form G-28 on [date] in conjunction with [\_\_\_\_\_].

We understand that Immigration and Customs Enforcement (ICE) [has issued/ may have issued] a reinstatement order under § 241(a)(5) of the Immigration & Nationality Act against [name]. By this letter, we ask that ICE provide all documentation related to the order, including, but not limited to, the reinstatement order, the alleged prior order underlying the reinstatement order, evidence related to [name]'s manner of re-entry, any sworn statement, any documentation related to [name]'s expressed fear of return, and any fingerprint analysis verifying [name]'s identity. *See* 8 C.F.R. § 292.5(a) (requiring notice and service of papers on counsel or the individual if unrepresented); *see also* 8 C.F.R. § 241.8(b) (mandating that DHS provide written notice of reinstatement determination to the individual).

As you are aware, should [name] wish to exercise his statutory right to federal court review, there is a 30-day deadline for filing a petition for review. Because [name] does not know the date ICE issued the reinstatement order and thus does not know when that deadline runs, we request expedited processing of this request to safeguard [name]'s right to judicial review.

Thank you for your immediate attention to this matter. Please email or fax the requested documents to us at [insert contact info].

Sincerely,

[Attorney's Name]

Enclosure: Form G-28

**Appendix C**  
**Notice of Intent to Reinstate and Reinstatement Order**

U.S. Department of Homeland Security

**Notice of Intent/Decision to Reinstate Prior Order**

File No. [REDACTED]

Event No: LOS [REDACTED]

FIN #: [REDACTED]

Date: [REDACTED] 2016

Name: [REDACTED]

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR 241.8, you are hereby notified that the Secretary of Homeland Security intends to reinstate the order of Removal entered against you. This intent is based on the following determinations:  
(Deportation / exclusion / removal)

1. You are an alien subject to a prior order of deportation / exclusion / removal entered on [REDACTED] 2000 at [REDACTED] CA  
(Date) (Location)

2. You have been identified as an alien who:

was removed on [REDACTED] pursuant to an order of deportation / exclusion / removal.  
(Date)

departed voluntarily on [REDACTED] pursuant to an order of deportation / exclusion / removal on or after the date on which such order took effect (i.e., who self-deported).  
(Date)

3. You illegally reentered the United States on or about [REDACTED] / [REDACTED] / 2000 at or near [REDACTED] California  
(Date) (Location)

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United States after having been previously removed or departed voluntarily while under an order of exclusion, deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may contest this determination by making a written or oral statement to an immigration officer. You **do not** have a right to a hearing before an immigration judge.

The facts that formed the basis of this determination, and the existence of a right to make a written or oral statement contesting this determination, were communicated to the alien in the English language.

[REDACTED]  
(Printed or typed name of official)

[REDACTED]  
(Signature of officer)

[REDACTED]  
**DEPORTATION OFFICER**  
(Title of officer)

**Acknowledgment and Response**

I  do  do not wish to make a statement contesting this determination.

[REDACTED]  
(Date)

[REDACTED] *refused to sign*  
(Signature of Alien)

**Decision, Order, and Officer's Certification**

Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with section 241(a)(5) of the Act.

[REDACTED] 2016  
(Date)

[REDACTED] California  
(Location)

[REDACTED]  
(Signature of authorized deciding official)

[REDACTED]  
**DEPORTATION OFFICER**  
(Title)

[REDACTED]  
(Printed or typed name of official)

## Appendix D

### Memorandum Re: Record of Proceedings in Reinstatement and Administrative Removal Cases

U.S. Department of Homeland Security  
425 I Street, NW  
Washington, DC 20536

This document was produced in litigation under the Freedom of Information Act in *Nat'l Immig. Project v. DHS*, No. 1:15-cv-11583-NMG (D. Mass., filed Apr. 13, 2015).



**U.S. Immigration  
and Customs  
Enforcement**

APR 27 2006

**MEMORANDUM FOR:** Field Office Directors and Special Agents in Charge  
**FROM:** John P. Torres (b)(6), (b)(7)(C)  
Director, Office of Detention and Removal Operations  
(b)(6), (b)(7)(C)  
Office of Investigations U  
**SUBJECT:** Record of Proceedings in Reinstatement and Administrative Removal Cases

#### Purpose

Section 241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(5) (2000), provides the Attorney General with authority to reinstate a previously executed removal order with respect to aliens who illegally reenter the United States.

Section 238(b) of the INA, 8 U.S.C. § 1228(b) (2000), provides the Attorney General with the authority to administratively remove certain criminal aliens.

This memorandum will standardize the practice in preparing and preserving records of proceedings (ROP) in these matters. This practice will allow these cases to be defended more successfully in federal courts.

#### Background

8 C.F.R. §§ 241.8 and 238.1 implement the aforementioned sections of the INA. Guidance is also provided in Chapters 14.7 and 14.8 of the Detention and Deportation Officer's Field Manual, which sets forth the procedure for reinstating a final order, the content of the ROP, and the manner of certifying a reinstatement case for judicial review. See also the Administrative Removal Proceedings Manual (M-430), Appendix I4-1 for guidance on preparation of the record in administrative removal proceedings. This memorandum reinforces guidance already in place and provides supplementary instructions to both Field Office Directors and Special Agents in Charge on how to properly create the administrative record or the ROP in reinstatement and administrative removal cases.

#### Discussion

##### A. Reinstatement:

The deciding officer (DO) must maintain a permanent ROP in each case where a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) is issued. This is necessary to facilitate development of the administrative record for possible judicial review. Processing officers (PO) are required to create the ROP for presentation to the DO. Included in the ROP are those documents the Government will rely on to reinstate the prior order, and any other pleadings or evidence pertaining to the reinstatement. At a minimum, the ROP must include copies of:

[www.ice.gov](http://www.ice.gov)

1. Notice of Intent/Decision to Reinstate Prior Order (Form I-871);
2. The prior administrative removal order;
3. Notice to Alien Ordered Removed/Departure Verification (Form I-296);
4. The record check or fingerprint match, as reflected in the Integrated Automated Fingerprint ID System (IAFIS);
5. Any documentary evidence submitted by the alien;
6. Record of Sworn Statement or the alien's declination to provide such statement (Form I-877);
7. Record of Deportable/Inadmissible Alien (Form I-213);
8. Previously executed Warrant of Removal/Deportation (Form I-205); and
9. Previously executed Warning to Alien Ordered Removed or Deported (Form I-294).

Additionally, the ROP must include any other evidence that the official relied upon to support the charges and any documents that rebut the alien's assertion that reinstatement is improper, such as a decision on an application for adjustment of status if it is related to reinstatement. See 8 C.F.R. § 241.8(a).

The issuing DO must certify the authenticity of the documents contained in the ROP. It is important that the original documents that were copied and placed in the ROP be kept in the A-File for possible use in any criminal or civil action.

#### **B. Administrative Removal:**

Similarly, a ROP must be maintained where a Final Administrative Removal Order (Form I-851A) is issued. Again, POs are required to create the ROP for presentation to the DO. The ROP must include copies of:

1. Notice of Intent to Issue a Final Administrative Removal Order (Form I-851);
2. Evidence of immigration status (CIS, RAPS, NIIS, etc.);
3. Record of Deportable/Inadmissible Alien (Form I-213);
4. Record of Sworn Statement or the alien's declination to provide such statement (Form I-877);
5. Final Administrative Removal Order (including any supplemental memorandum of decision)(Form I-851A);
6. Certified Conviction documents for commission of an aggravated felony;
7. Any response the alien offers;
8. Any evidence the Government relied upon to support the charges; and
9. All admissible evidence (briefs and other documents) submitted by either party respecting deportability.

The ROP should include all documents in support of the Notice of Intent to Issue a Final Administrative Removal Order. See 8 C.F.R. § 238.1. The original documents that were copied and placed in the ROP should be kept in the A-File and made available for use in any potential civil or criminal action.

In both instances, the PO's written findings and conclusions of law must be supported by reasonable, substantial, and probative evidence, and must also be included in the ROP. The ROP should be clearly labeled and placed in the left hand side of the A-file. Moreover, the ROP should contain an Index (see attached sample indexes) noting which documents are contained in the ROP. A blue ROP coversheet should be placed on top of the Index and the documents.

Ultimately, the DO is responsible for the certification of authenticity of the ROP (see attached sample certification). The certification should be placed under the ROP coversheet. When feasible, DOs must maintain possession and control of the ROP during the pendency of any adjudication and ensuing legal challenge or during any credible fear proceedings. If the file is required elsewhere, the DO should retain a copy of the ROP. If necessary, the Department of

**Subject: Record of Proceedings in Reinstatement and Administrative Removal Cases**  
**Page 3**

**Justice's Office of Immigration Litigation will directly contact the local U. S. Immigration and Customs Enforcement's Office of the Chief Counsel (OCC) in order to obtain a copy of the ROP, which must include the DO's certification.**

**If you have any questions on the aforementioned information, please contact your local OCC.**

**Attachments**

INDEX

RECORD FILE

Alien Name

A00-000-0

- Certification.
- Notice of Intent/Decision to Reinstate Prior Order (Form I-871).
- The prior administrative removal order.
- Notice to Alien Ordered Removed/Departure Verification (Form I-296).
- The record check or fingerprint match.
- Any documentary evidence submitted by the alien.
- Record of Sworn Statement or the alien's declination to provide such statement (Form I-877).
- Record of Deportable/Inadmissible Alien (Form I-213).
- Warrant of Removal/Deportation (Form I-205).
- Warning to Alien Ordered Removed or Deported (Form I-294).
- Any other evidence relied upon to support the charges.
- Any documents that rebut the alien's assertion that reinstatement is improper.

INDEX

RECORD FILE

Alien Name

A00-000-0

- Certification.
- Notice of Intent to Issue a Final Administrative Removal Order (Form I-851).
- Evidence of immigration status (CIS, RAPS, NIIS. etc.).
- Record of Deportable/Inadmissible Alien (Form I-213).
- Record of Sworn Statement or the alien's declination to provide such statement (Form I-877).
- Final Administrative Removal Order (including any supplemental memorandum of decision)(Form I-851A).
- Certified Conviction documents for commission of an aggravated felony.
- Any response the alien offers.
- Any evidence the government relied upon to support the charges.
- All admissible evidence (briefs and other documents) submitted by either party respecting deportability.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY  
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

**CERTIFICATION OF THE RECORD OF PROCEEDINGS**

Pursuant to 28 U.S.C.A. §§ 1732 - 1733, the attached Record of Proceedings are records of the United States Department of Homeland Security, Immigration and Customs Enforcement.

I, [name of officer], declare:

1. I am a Deportation Officer with United States Department of Homeland Security, Immigration and Customs Enforcement. I have served in this position since [month & year]. My office is located in [City, State], and my responsibilities include the maintenance and creation of the official Record of Proceedings. I am the deciding officer in the matter of [Alien Name], [A-number].
2. Attached to this Certification is a copy of the official Record of Proceedings. These documents relate to:

Subject: [Alien Name]  
File Number: [A-number]

3. These records were prepared by personnel of the United States Department of Homeland Security, Immigration and Customs Enforcement in the ordinary course of business at or near acts, conditions, or events described in the records.

I, [name of officer], do hereby certify that I have compared the copy of the Record of Proceedings attached to this certificate with the original Record of Proceedings as it appears of record and on file in my office, and it is a true and correct copy of the original.

Date: \_\_\_\_\_

\_\_\_\_\_  
[Name]  
Deportation Officer



UNITED STATES DEPARTMENT OF HOMELAND SECURITY  
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

**CERTIFICATION OF \_\_\_\_\_ :**

1. I am a     position title     with U.S. Immigration and Customs Enforcement, United States Department of Homeland Security. I have served in this position since                     . My office is located in                                      and my responsibilities include the maintenance and creation of the official Record of Proceedings. I am the deciding officer in the matter of                                     , file number A     \_\_\_\_\_    .
2. Annexed to this Certification is the official Record of Proceedings.

I hereby certify to the best of my knowledge and belief that the annexed documents are originals, or copies thereof, of the official Record of Proceedings. These documents relate to:

Subject:  
File Number: A

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name  
Title

Appendix E

Enforcement and Removal Operations

Rescinded Reinstatement Order

U.S. Department of Homeland Security  
1777 NE Loop 410, Suite 1500  
San Antonio, TX 78217



U.S. Immigration and Customs Enforcement

Re: (b)(6),(b)(7)(C) (b)(6),(b)(7)(C)

DEC 23 2011

Rescission of Reinstatement of Prior Order of Removal

Pursuant to my authority and in the exercise of my prosecutorial discretion in the case of (b)(6),(b)(7)(C) I hereby rescind the Notice of Intent / Decision to Reinstatement Prior Order (Form I-871), dated April 21, 2003, as issued in accordance with section 241(a)(5) of the Immigration and Nationality Act and 8 C.F.R. § 241.8. This rescission is retroactive to the date of reinstatement.

(b)(6),(b)(7)(C)  
(b)(6),(b)(7)(C) Acting Field Office Director

This document was produced in litigation under the Freedom of Information Act in *Nat'l Immig. Project v. DHS*, No. 1:15-cv-11583-NMG (D. Mass., filed Apr. 13. 2015).