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FILING POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER[1]

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I. INTRODUCTION

This practice advisory provides guidance on filing motions to reopen or reconsider on behalf of clients who have been ordered deported, excluded, or removed and who have already departed the United States. Section II provides background on motions to reopen and reconsider and on the regulatory "post-departure bar." Section III discusses cases within the First, Fourth, Fifth, Ninth, and Eleventh Circuits and the Board of Immigration Appeals that may be relevant to deportees seeking reopening or reconsideration. Section IV considers issues that may arise if a client is removed while a motion to reopen or reconsider is pending. Section V provides practical tips on filing motions to reopen or reconsider.

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[1] The PDHRP gratefully acknowledges the input and assistance of Beth Werlin, Trina Realmuto, and Kathleen Gillespie. This practice advisory does not constitute legal advice. Attorneys should perform their own research to ascertain whether the state of the law has changed since publication of this advisory.

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II. BACKGROUND

Reopening vs. Reconsideration

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

A motion to reconsider is based on legal grounds alone. It asks that a decision be reexamined "in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier"[4] including errors of law or fact in the previous order.[5]

A motion to reopen, in contrast, is based on "facts or evidence not available at the time of the original decision."[6] A motion to reopen must be supported by affidavits or other evidence,[7] and must establish that the evidence is material, was unavailable at the time of original hearing, and could not have been discovered or presented at the original hearing.[8] Situations in which motions to reopen are appropriate include changed country conditions with regard to asylum claims; allegations of ineffective assistance of counsel; newly eligible relief from removal; and vacatur of a conviction that formed the basis for the order.[9]

An MTR must be filed at the adjudicatory body that last had jurisdiction over the case – either the Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA").[10] Where jurisdiction lies with the IJ, the motion must be filed with the IJ who entered the order.[11]

The federal appeals courts have jurisdiction to review the BIA's denial of an MTR, as well as the BIA's affirmance of an IJ's denial of such a motion, through a petition for review filed under 8 U.S.C. § 1252(a)(1). The place where the IJ completed proceedings determines which circuit will have jurisdiction over a petition to review the BIA's action.[12]

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[4] *Matter of Ramos*, 23 I. & N. Dec. 336, 338 (BIA 2002).
[5] *See* INA § 240(c)(6)(C), 8 U.S.C. § 1229(c)(6)(C); 8 C.F.R. § 1003.2(b)(1).
[6] *Patel v. Ashcroft*, 378 F.3d 610, 611 (7th Cir. 2004).
[7] *See* INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7).
[8] *See* 8 C.F.R. § 1103.2(c)(1); *Kaur v. BIA*, 413 F.3d 232, 234 (2d Cir. 2005).
[9] *See Patel v. Ashcroft*, 378 F.3d 610, 611 (changed country conditions are appropriate ground for motion to reopen); *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004) (motion to reopen rather than motion to reconsider was appropriate for claim of ineffective assistance of counsel); *Iturribarria v. INS*, 321 F.3d 889, 894-97 (9th Cir. 2003) (treatment of ineffective assistance claim as motion to reconsider rather than motion to reopen was an abuse of BIA's discretion); *De Faria v. INS*, 13 F.3d 422 (1st Cir. 1993) (vacatur of conviction was appropriate basis for seeking reopening).
[10] *See* BIA Practice Manual, § 5.2(a), App. K-1, *available at* http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm
[11] *See* 8 C.F.R. § 1003.23(b)(1)(ii).
[12] *See* INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

What is the Post-Departure Bar?

Two federal regulations govern MTRs: 8 C.F.R. § 1003.2 (MTRs directed to the BIA) and 8 C.F.R. § 1003.23 (MTRs directed to the IJ). Both regulations contain identical language prohibiting adjudication of post-departure motions, providing that MTRs "shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States."[13] These regulations apply to not only to those who have been physically removed by the government but also those who have "self-deported," *i.e.*, left the country voluntarily while subject to an order of deportation, exclusion, or removal.[14]

As discussed below in Section III, the Fourth Circuit has held that the post-departure bar conflicts with the clear language of the motion to reopen provision in the Immigration and Nationality Act ("INA") (INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7)) and is therefore invalid. Persons covered by the Fourth Circuit's decision may now be eligible to seek reopening or reconsideration even if they are outside the United States. The First and Fifth Circuits have upheld the validity of the post-departure bar against some arguments. Importantly, however, neither court considered the argument that the regulation conflicts with the motion to reopen statute. Thus, the regulation is still subject to challenge based on this argument in the First and Fifth Circuits. The Ninth Circuit has not reached the question of the validity of the regulations, but it has all but eliminated the post-departure bar through its narrow interpretation of the regulatory language. The Eleventh Circuit has held that the bar does not apply to those seeking to reopen *in absentia* proceedings based on lack of notice. The BIA, in one unpublished decision, has concurred with this conclusion.

What Does the Statute Say?

Prior to 1996, MTRs were governed solely by regulation. As part of the Illegal Immigration and Immigrant Responsibility Reform Act of 1996 ("IIRIRA"),[15] Congress codified the right to file MTRs. These provisions are now located at 8 U.S.C. §§ 1229a(c)(6) (motions to reconsider) and (c)(7) (motions to reopen).[16]

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[13] *See* 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

[14] *See Stone v. INS*, 514 U.S. 386 at 398 (1995) ("Deportation orders are self-executing orders, not dependent upon judicial enforcement."). However, in *Singh v. Gonzales*, 412 F.3d 1117 (9th Cir. 2005), discussed in Section III, the Ninth Circuit rejected the BIA's ruling that the post-departure bar applied to a person who departed prior to proceedings being commenced.

[15] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[16] IIRIRA § 304 originally added these provisions at, respectively, 8 U.S.C. §§ 1229a(c)(5) and 1229a(c)(6). Recent amendments to the INA moved these provisions to their current location without any substantive changes. REAL ID Act of 2005, Pub. L. No. 109-13 § 101(d), 119 Stat. 231 (May 11, 2005).

In its current form, the statute imposes time,[17] number, [18] and content[19] requirements on motions to reopen or reconsider, but does not distinguish between pre- and post-departure motions except with regard to the deadline for motions to reopen filed by battered spouses and children under certain circumstances.[20]

In addition, 8 U.S.C. § 1229a(b)(5)(C) provides that a person who is ordered removed *in absentia* may file a motion to reopen to rescind the order. Congress first codified this provision in 1990.[21]

Time and Numerosity Limits

Departure from the U.S. no longer bars the filing of an MTR in the Fourth Circuit or, in some circumstances, in the Ninth and Eleventh Circuits. However, practitioners must be mindful in *all* circuits of the other significant restrictions on MTRs (both pre- and post-departure) imposed by statute and regulation.

An individual who has been ordered removed is permitted to file only one motion to reconsider.[22] The motion must be filed within 30 days of the date of entry of a final administrative order.[23]

The INA also limits an individual ordered removed to filing one motion to reopen, within 90 days of the date of entry of a final administrative order.[24] However, the statute provides for exceptions to the time and number requirements in the following circumstances: those seeking asylum based on changed country conditions (motion may be filed any time);[25] battered spouses and children seeking certain forms of relief under the Violence Against Women Act (motion may be filed within one year, or at any time under certain circumstances);[26] and those ordered removed *in absentia* (at any time if basis for reopening is lack of notice of the hearing, or confinement in federal or state custody and failure to appear was no fault of the person subject to the order; 180 days if basis for reopening is exceptional circumstances).[27] In addition, some cir-

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[17] *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(6)(B) (reconsideration); INA §§ 240(b)(5)(C)(ii), (c)(7)(C), 8 U.S.C. §§ 1229a(b)(5)(C)(ii), (c)(7)(C).

[18] *See* INA § 240(c)(6)(A), 8 U.S.C. § 1229a(c)(6)(A) (reconsideration); INA § 240(c)(7)(A), 8 U.S.C. § 1229a(c)(7)(A) (reopening).

[19] *See* INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C) (reconsideration); INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B) (reopening).

[20] *See* INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).

[21] *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5061, § 545(a) (November 29, 1990).

[22] *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(6)(B). The Eleventh Circuit recently held that the 8 C.F.R § 1003.2(b)(2) imposes a limit of one motion to reconsider *per decision*, rather than per case. *See Calle v. U.S. Att'y Gen.*, No. 06-14672 (11th Cir., Oct. 23, 2007).

[23] *See* INA § 240(c)(6)(A),(B), 8 U.S.C. § 1229a(c)(6)(A),(B).

[24] *See* INA § 240(c)(7)(A), (c)(i), 8 U.S.C. § 1229a(c)(7)(A), (c)(i).

[25] *See* INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii).

[26] *See* INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).

[27] *See* INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C). The 180 day time limit on motions to reopen *in absentia* orders for "exceptional circumstances" does not apply to pre-June 13, 1992 *in absentia* orders where "reasonable

cuits have allowed equitable tolling of the deadline for motions to reopen based on ineffective assistance of counsel or fraud.[28]

Motions to Reopen *In Absentia* Proceedings Based on Lack of Notice

Both the statute and the regulations provide that motions to reopen *in absentia* proceedings based on lack of notice may be filed "at any time." The Eleventh Circuit has held that this language trumps the post-departure bar, [29] and the BIA has concurred with this conclusion in an unpublished decision (see Section III for a discussion of these decisions).

***Sua Sponte* Authority to Reconsider or Reopen "at any time"**

The regulations also provide that the BIA and IJs have *sua sponte* authority to reopen or reconsider their own decisions "at any time." *See* 8 C.F.R §§ 1003.2(d) (BIA) and 1003.23(b)(1) (IJ). However, the BIA has interpreted the post-departure bar to prohibit even *sua sponte* reopening or reconsideration subsequent to departure from the U.S.[30] The Fifth Circuit has upheld this interpretation.[31]

It should be noted that the regulations use the same phrase – "at any time" – with regard to both lack of notice MTRs and *sua sponte* authority to reopen or reconsider. Thus, it may be argued that the Eleventh Circuit's decision in *Contreras-Rodriguez*, and the BIA's unpublished decision concurring with *Contreras-Rodriguez*, should be extended to the interpretation of the phrase "at any time" within sections 1003(d) and 1003.23(b)(1) as well.

The BIA has stated that it will exercise *sua sponte* jurisdiction only in "exceptional circumstances."[32] Exceptional circumstances include a change in law, if it is fundamental rather than incremental.[33] Additionally, the BIA has regularly exercised *sua sponte* authority to reopen

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cause" can be shown. In addition, there are no numerosity limits on motions to reopen to rescind an *in absentia* order. *See generally*, Beth Werlin, "Rescinding an *In Absentia* Order of Removal," AILF Practice Advisory (Sept. 21, 2004), *available at* http://www.ailf.org/lac/lac_pa_092104.pdf.

[28] *See* Beth Werlin, "Protecting Your Client When Prior Counsel was Ineffective," AILF Practice Advisory (Apr. 2002) *available at* http://www.ailf.org/lac/lac_pa_050202c.pdf.

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

[30] *See Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003).

[31] *Id.*

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

[33] *See Matter of Vasquez-Muniz,* 23 I. & N. Dec. 207 at 208 (BIA 2002) (reconsidering *sua sponte* where the prior decision had held that a particular offense was not an aggravated felony, and a court of appeals subsequently held that it was); *Matter of X-G-W-*, 22 I. & N. Dec. 71, 74 (reopening *sua sponte* on the basis of legislative change).

proceedings where a conviction that formed the basis of an order has subsequently been vacated.[34]

The regulations provide that "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief."[35] A number of circuits have held that because 8 C.F.R. § 1003.2 grants such broad discretion to the BIA in deciding whether to invoke its authority to reopen or reconsider *sua sponte*, the courts lack jurisdiction to review such a decision.[36] However, the Eighth Circuit has reviewed such cases for abuse of discretion,[37] and the Seventh Circuit has limited non-reviewability to cases in which the BIA's decision not to exercise *sua sponte* jurisdiction is "indeed based on an exercise of uncabined discretion rather than on the application of a legal standard."[38] The Third Circuit has commented that even a decision regarding the exercise of *sua sponte* authority may not deviate, without explanation, from a settled practice of decision-making:

> Where there is a consistent pattern of administrative decisions on a given issue, we would expect the BIA to conform to that pattern or explain its departure from it. Should the Board determine on remand that [the petitioner] is no longer "convicted" under the INA, we would expect it to reopen his proceedings despite the untimeliness of his motion, as it has routinely done in other cases where a conviction was vacated under *Pickering*, or at least explain logically its unwillingness to do so.[39]

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[34] *See Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240, 246 n.3 (3d Cir. 2006) (citing ten unpublished BIA cases granting untimely motions to reopen based on vacated sentences, and noting that "the parties have not identified, and we have not found, a single case in which the Board has rejected a motion to reopen as untimely after concluding that an alien is no longer convicted for immigration purposes").

[35] *See* 8 C.F.R. § 1003.2(d). It should be noted that the corresponding regulation regarding the IJ's *sua sponte* authority contains no such grant of discretion. *See* 8 C.F.R. § 1003.23(b)(1).

[36] *See, e.g.*, *Harchenko v. INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472 (3d Cir. 2003); *Belay-Gebru v. INS*, 327 F.3d 998 (10th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002); *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999); *Luis v. INS*, 196 F.3d 36 (1st Cir. 1999). *But see Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002)(finding abuse of discretion where BIA failed to consider whether case warranted equitable tolling of deadline for motion to reopen based on ineffective assistance of counsel).

[37] *See Recio-Prado v. Gonzales*, 456 F.3d 819, 821-22 (8th Cir. 2006); *Ghasemimehr v. Gonzales*, 427 F.3d 1160, 1162 (8th Cir. 2005). Neither decision was *en banc*, however, and in a subsequent case, another panel of the Eighth Circuit cast doubt on the continuing viability of the *Recio-Prado* holding. The panel noted that other circuits have found such a decision to be unreviewable, and concluded: "Given [Eighth Circuit] precedent, we review the BIA's decision for abuse of discretion and leave resolution of the jurisdictional issue to the court en banc at the appropriate time." *Tamenut v. Gonzales*, 477 F.3d 580, 582 (8th Cir. 2007).

[38] *Cevilla v. Gonzales*, 446 F.3d 658, 660 (7th Cir. 2006) (holding that BIA decision not to exercise *sua sponte* authority to reopen was reviewable where BIA based its decision on its finding that person seeking reopening had not established eligibility for relief).

[39] *Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240, 249 (3d Cir. 2006).

III. CASE LAW ON POST-DEPARTURE MOTIONS

First Circuit

The First Circuit upheld the validity of the regulatory post-departure bar in ***Pena-Muriel v. Gonzales***, 489 F.3d 438 (1st Cir. 2007). The court rejected the petitioner's argument that Congress repealed the post-departure bar in 1996 when it eliminated the statutory post-departure bar to judicial review contained in former 8 U.S.C. § 1105a, as well as his argument that the post-departure bar violates the constitutional right to procedural due process.

It is important to note, however, that the primary argument regarding the validity of the post-departure bar – that the regulation conflicts with the language of the motion to reopen statute – was not raised in *Pena-Muriel*. In denying a petition for rehearing, the court made clear that it did not rule on this argument:

> When this case was presented to the panel, petitioner presented only one statutory argument, asserting that Congress's deletion of 8 U.S.C. § 1105a(c) when passing IIRIRA removed the statutory foundation for the regulation barring motions to reopen from being filed outside of the United States, 8 C.F.R. § 1003.23(b)(1). We rejected this argument. **Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1) conflicts with 8 U.S.C. § 1229a(c)(7).** [40]

The conflict between the regulation and the statutory language is precisely the argument that the Fourth Circuit deemed persuasive in *William v. Gonzales* (see below). Because the court did not consider it in *Pena-Muriel*, it may be raised in future cases in the First Circuit. It should also be noted that the court in *Pena-Muriel* did not consider the significance of regulatory language permitting *sua sponte* reopening or reconsideration "at any time."

Fourth Circuit

In ***William v. Gonzales***, 499 F.3d 329 (4th Cir. 2007), *petition for rehearing en banc denied*, No. 06-1284 (4th Cir. Nov. 7, 2007), the Fourth Circuit held that the post-departure bar contained in 8 C.F.R. § 1003.2(d) is invalid on the grounds that it conflicts with the clear statutory language of 8 U.S.C. § 1229a(c)(7)(A).

The petitioner in *William* was removed on the basis of a criminal conviction. Following his removal, the conviction was vacated. William filed a motion to reopen with the BIA, which denied the motion, citing the post-departure bar in 8 C.F.R. § 1003.2(d).

[40] *See Pena-Muriel v. Gonzales*, 05-1937 (1st Cir. Oct. 24, 2007) (denying petition for rehearing) (emphasis added), attached as Appendix 1.

The Fourth Circuit granted William's petition for review, finding that the INA provides a right to file one motion to reopen, regardless of whether it is filed from inside or outside the country:

> **We find that § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country.** This is so because, in providing that "an alien may file," the statute does not distinguish between those aliens abroad and those within the country – both fall within the class denominated by the words "an alien." Because the statute sweeps broadly in this reference to "an alien," it need be no more specific to encompass within its terms those aliens who are abroad. Thus, the Government's view that Congress was silent as to the ability of aliens outside the United States to file motions to reopen is foreclosed by the text of the statute. The statutory language does speak to the filing of motions to reopen by aliens outside the country; it does so because they are a subset of the group (*i.e.*, "alien[s]") which it vests with the right to file these motions. Accordingly, the Government's view of § 1229a(c)(7)(A) simply does not comport with its text and cannot be accommodated absent a rewriting of its terms.[41]

In support of this conclusion, the court cited the well-established principle that "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."[42]

The court also pointed to the provision of the INA that grants a special extension of the filing deadline to a battered spouse or child who is "physically present in the United States" at the time of filing such a motion.[43] The court noted that this physical presence requirement would be meaningless if the underlying right to file motions to reopen did not include motions filed from both inside and outside the country.

Because the court found the statutory language to be clear, it invalidated the regulation under the first step of a *Chevron* analysis,[44] and did not reach the petitioner's argument that the regulation violated his right to due process under the Fifth Amendment.

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[41] *William v. Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007) (emphasis added).

[42] *Id*. at 333 (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000)).

[43] *Id*. The exception, which is codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV), was first enacted as part of the Victims or Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The "physical presence" element was added as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825, 119 Stat. 2960 (2006).

[44] *Id*. at 333. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court must first determine whether "Congress has directly spoken to the precise question" at issue by examining the plain meaning of the statute and, if necessary, employing traditional rules of statutory construction. *Id*. at 842. If the statutory language is clear, then the court "must give effect to the unambiguously expressed intent of Congress." *Id*. at 843. If the court is not able to discern the intent of Congress, a secondary inquiry is necessary to determine whether the agency interpretation is reasonable. *Id*.

The Fourth Circuit denied the government's petition in *William* for rehearing *en banc.*

Who is Covered by* William*?

The *William* decision covers those who have departed the U.S. after being ordered deported, excluded, or removed by an IJ sitting within the territorial jurisdiction of the Fourth Circuit. The two Immigration Courts that are located within the Fourth Circuit are in Maryland and Virginia.

Although *William* concerns a motion to reopen filed with the BIA under 8 C.F.R. § 1003.2, the decision should apply to motions filed with the IJ (which fall under 8 C.F.R. § 1003.23), since the relevant language in the two regulations is identical. The decision should also extend to motions to reconsider, as the statutory language regarding motions to reconsider is as broad as the language in the motion to reopen statute cited by the court in *William*.[45]

Fifth Circuit

In ***Navarro-Miranda v. Ashcroft,*** 330 F.3d 672 (5th Cir. 2003), the Fifth Circuit considered whether the BIA has *sua sponte* authority to reopen a proceeding after an individual ordered removed has departed the U.S.[46] The petitioner had been removed as an aggravated felon on the basis of a DUI conviction that was classed as a felony under Texas law. He sought to reopen his removal proceeding after the Fifth Circuit ruled in a separate case that this type of conviction is not an aggravated felony under the INA. The BIA held that the post-departure bar is jurisdictional, and thus bars not only the filing of a motion to reopen but also the exercise of the Board's *sua sponte* authority to reopen. The Fifth Circuit upheld the Board's interpretation as reasonable.

Significantly, the court did not consider whether the post-departure bar is unconstitutional or conflicts with the clear language of the statutory language governing motions to reopen. Hence, even a panel of the Fifth Circuit, which is bound by *Navarro-Miranda*, may invalidate the post-departure bar on these grounds.

Ninth Circuit

The Ninth Circuit has held that the post-departure bar does not apply in three specific circumstances. These circumstances, taken together, cover the vast majority of deportees who may wish to seek reopening or reconsideration.

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[45] INA § 240(5)(A) provides that "[t]he Alien may file one motion to reconsider a decision that the alien is removable from the United States."

[46] The *sua sponte* provision was located at 8 C.F.R. § 3.2(a) but has since been moved to 8 C.F.R. § 1003.2(a). It provides that "The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."

1) Departure prior to commencement of proceedings

In ***Singh v. Gonzales,*** 412 F.3d 1117 (9th Cir. 2005), the Ninth Circuit held that a person is not the "subject of removal, deportation, or exclusion proceedings," and hence not subject to the post-departure bar contained in 8 C.F.R. § 1003.2(d),[47] if he or she departed the United States before the proceedings began.

The petitioner in *Singh* entered the country in 1997, overstayed his non-immigrant visa, and filed an asylum application. Several months later, he withdrew the asylum application and departed the United States voluntarily. He was subsequently ordered removed *in absentia*. He later reentered the U.S. on a non-immigrant visa, and moved to reopen proceedings. The Ninth Circuit reasoned that because Singh left the United States before removal proceedings had commenced against him, he was not the "subject of" removal proceedings when he departed, and therefore did not fall within the scope of the post-departure bar.

2) Departure after proceedings have been completed

The court held in ***Lin v. Gonzales,*** 473 F.3d 979 (9th Cir. 2007), that the post-departure bar contained in 8 C.F.R. § 1003.23(b)(1) does not apply to someone whose removal order is executed prior to the person's filing a motion to reopen. Citing its decision in *Singh*, the court concluded that the petitioner was no longer "the subject of" removal proceedings and thus was not barred from filing a motion to reopen with the IJ. The court explained:

> Because petitioner's original removal proceedings were completed when he was removed to China, he did not remain the subject of removal proceedings after that time. While the regulation may have been intended to preclude aliens in petitioner's situation from filing motions to reopen their completed removal proceedings, the language of the regulation does not unambiguously support this result. Because ambiguity must be construed in favor of the petitioner, we decline to adopt the government's construction of the regulation and cannot affirm the denial of petitioner's motion to reopen on this ground.[48]

In *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007), the court subsequently extended this holding to MTRs filed with the BIA under 8 C.F.R. § 1003.2(d).

3) Departure before or after a conviction that formed a "key part" of the proceeding has been vacated

The Ninth Circuit has also held that those who have been deported, excluded, or removed may seek reopening of proceedings where a conviction that formed a "key part" of the proceeding has been vacated.

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[47] It should be noted that Singh filed the motion to reopen with the IJ, and that the relevant post-departure bar was thus contained in 8 C.F.R. § 1003.23(b)(1) and not, as cited by the BIA and the Ninth Circuit, § 1003.2(d). However, as the Ninth Circuit has acknowledged elsewhere, "[t]he language of the two regulations is, in all material respects, identical." *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 at 1002 (9th Cir. 2007).

[48] *Lin v. Gonzales,* 473 F.3d 979, 982 (9th Cir. 2007).

The most recent case in which it has reached this conclusion is ***Cardoso-Tlaseca v. Gonzales***, 460 F.3d 1102 (9th Cir. 2006). The petitioner's marijuana cultivation conviction, one of two grounds of removal, was vacated following his removal. The court, finding that the conviction was a "key part of his removal proceeding," held that if the conviction was vacated on the merits, and was thus no longer a basis for removal, then the petitioner was entitled to reopen the proceedings.

In reaching this conclusion, the court relied on two prior cases, *Estrada-Rosales v. INS* and *Wiedersperg v. INS*. In *Estrada-Rosales*, the petitioner's motion to set aside his conviction for procedural error was pending at the time of his deportation, and was decided a few months later. The BIA denied his motion to reopen, relying on the regulatory post-departure bar (which at that time was located at 8 C.F.R. § 3.2). The court held that in light of the vacatur of the conviction, the deportation was not legally executed and Estrada-Rosales was entitled to a new hearing. [49] *Wiedersperg* concerned a petitioner who waited seven years after his conviction was vacated to seek reopening of his deportation proceedings. The court reaffirmed its holding in *Estrada-Rosales*, concluding that "Wiedersperg's successful overturning of his state conviction establishes a prima facie showing for relief. We hold that it was an abuse of discretion for the BIA to deny Wiedersperg a reopened hearing on the speculative grounds that he had 'slept on his rights' in such a way as to prevent his retrial."[50]

Both *Estrada-Rosales* and *Wiedersperg* relied in turn on *Mendez v. INS*,[51] a 1977 case in which the court concluded that because the petitioner's counsel had not been given notice of his client's deportation, the deportation was not legally executed. The court held that, for purposes of the post-departure bar to judicial review then contained in the statute,[52] "departure" meant "legally executed departure when effected by the government."[53]

Who is covered by* Singh, Lin *and* Cardoso-Tlaseca*?

These decisions apply to individuals who were ordered deported, excluded, or removed by an Immigration Judge sitting within the Ninth Circuit. This includes the Immigration Courts in Arizona, California, Colorado, Oregon, Washington, Hawaii, and Nevada.

Eleventh Circuit

In ***Contreras-Rodriguez v. Attorney General,*** 462 F.3d 1314 (11th Cir. 2006), the Eleventh Circuit held that the post-departure bar does not apply to a motion to reopen and rescind an *in absentia* removal order based on lack of proper notice. The court concluded that the peti-

[49] *Estrada-Rosales v. INS*, 645 F.2d 819, 821-22 (9th Cir. 1981).
[50] *Wiedersperg v. INS*, 896 F.2d 1179, 1183 (9th Cir. 1990).
[51] *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977).
[52] Former 8 U.S.C. § 1105a(c) (repealed 1996) provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order."
[53] *Mendez*, 563 F.2d at 958.

tioner was entitled to seek reopening, despite the post-departure bar, because both 8 U.S.C. § 1229a(b)(5)(C) and 8 C.F.R. § 1003.23(b)(4)(ii) provide that *in absentia* orders may be rescinded "at any time" where lack of proper notice can be demonstrated.

Who is Covered by Contreras-Rodriguez?

Contreras-Rodriguez applies to individuals who departed the U.S. following an *in absentia* order issued by an IJ within the Eleventh Circuit. The territorial jurisdiction of the Eleventh Circuit includes Immigration Courts in Florida and Georgia. Although the BIA is not bound by *Contreras-Rodriguez* outside the Eleventh Circuit, it has treated the decision as persuasive authority in at least one unpublished decision (see below).

It should be noted that the phrase "at any time," which the court cited as grounds for its decision, also appears in 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1) with regard to the BIA and IJ's authority to reopen or reconsider on their own motion. (See Section II for a discussion of *sua sponte* authority to reopen/reconsider.) Thus, it may be possible to extend the *Contreras-Rodriguez* holding to cover *sua sponte* reopening and reconsideration.[54]

Board of Immigration Appeals

In a recent unpublished decision, *Matter of Shawn Anthony Mascoe*, A 44 500 897 - Fishkill, NY, 2007 WL 3318162 (September 25, 2007) (attached here as Appendix 2), the Board held that an IJ had jurisdiction to consider a motion to reopen an *in absentia* proceeding based on lack of notice even though the motion was filed subsequent to the respondent's departure from the U.S. The respondent was ordered removed *in absentia*, was physically removed from the U.S. the following year and, following reentry, filed a motion to reopen. The IJ initially denied the motion. On remand from the BIA, with instructions to consider the respondent's due process arguments and the exhibits submitted in support of the motion, the IJ granted the motion, stating that the cassette tapes of the hearing were missing, and that he therefore was "unable to comply with the Board's decision and ha[d] little choice but to issue such an order." The government appealed the order, arguing that the IJ lacked jurisdiction due to the post-departure bar.

Denying the government's appeal, the Board held that that the post-departure bar did not apply to the case because 8 C.F.R. § 1003.23(b)(4)(ii) allows reopening of an *in absentia* order for lack of notice "at any time." The Board stated: "Although only persuasive authority, we con-

[54] It should be noted that the reopening of *in absentia* motions "at any time" for lack of notice has a statutory as well as regulatory basis, *see* 8 U.S.C. § 1229a(c)(5)(C)(ii), 8 C.F.R. § 1003.23(b)(4)(ii), (iii), whereas the basis for *sua sponte* reopening or reconsideration exists solely within the regulations. Significantly, however, the court in *Contreras-Rodriguez* based its conclusion primarily on the interplay between the two regulations, rather than on the conflict between the regulation and the statute. *See Contreras-Rodriguez*, 462 F.3d at 1317 ("[A] motion to reopen *in absentia* proceedings can be made at any time if the alien can show that he did not receive notice. 8 C.F.R. § 1003.23(b)(4)(ii). Consequently, we hold that the IJ and BIA retain jurisdiction to reopen the proceedings to address whether Contreras-Rodriguez received sufficient notice of the removal hearing.")

cur with the reasoning and conclusion in *Contrera-Rodriguez* [sic] regarding reopening proceedings to address whether an alien received sufficient notice of an *in absentia* hearing." [55]

Significantly, the Board cited only the regulatory language of 8 C.F.R. § 1003.23(b)(4)(ii), and not the statutory language, in holding that such motions are exempt from the post-departure bar. It may be argued that the same reasoning should extend to the use of the term "at any time" in the regulations governing *sua sponte* authority to reopen or reconsider.

Pending Cases

Cases challenging the validity of the post-departure bar are currently pending in the Second, Fifth, and Tenth Circuits.[56]

IV. SPECIAL SITUATIONS

Removal While an MTR is Pending

With the exception of motions to an IJ seeking to reopen *in absentia* removal proceedings, the filing of an MTR does not automatically stay a removal order. Someone seeking reopening or reconsideration should simultaneously seek a discretionary stay of removal. If a person is physically removed from the United States while an MTR is pending, it is possible that an IJ or the BIA will deny the MTR as moot under the second clause of the post-departure bar, which provides that "[a]ny departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."[57]

Although this provision has not been the subject of litigation, the Fourth Circuit's decision in *William* arguably applies equally to departures during the pendency of an MTR, since the same question arises with regard to conflict between the regulation and the broad statutory language. Likewise, it could be argued under *Cardoso-Tlaseca* that such a departure was not "legally executed" and that the post-departure bar therefore does not apply.

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[55] *Matter of Shawn Anthony Mascoe*, A 44 500 897 - Fishkill, NY, 2007 WL 3318162 (September 25, 2007) (unpublished).

[56] *Mansilla-Palencia v. Keisler*, Docket No. 07-1032-ag (2d Cir. *filed* Mar. 14, 2007, oral argument scheduled); *Ovalles v. Mukasey*, Docket No. 07-60836 (5th Cir., *filed* Oct. 24, 2007); *Rosillo-Puga v. Mukasey*, Docket No. 07-9564 (10th Cir., *filed* Sept. 4, 2007, briefing ongoing as of date of this advisory).

[57] See 8 C.F.R. §§ 1003.2(d); 1003.23(b)(1).

It may be difficult to extend the Ninth Circuit's decisions in *Lin* and *Singh* to departures that occur following the filing of an MTR, because these decisions rely on specific regulatory language that does not appear in the second clause of the post-departure bar. Thus, where a client ordered removed within the Ninth Circuit is physically removed from the U.S. while an MTR is pending, and the case does not fall under *Cardoso-Tlaseca*, it may be necessary to argue that the clause is unconstitutional and/or in conflict with the language of the INA.

Removal While a BIA Appeal of an IJ Denial of an MTR is Pending

When a person is physically removed from the U.S. while an appeal of the IJ's denial of an MTR is pending,[58] a further hurdle may be presented by 8 C.F.R. § 1003.4, which provides that "[d]eparture from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens . . ., subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken."

The Ninth Circuit has held that this regulation applies only to those who voluntarily depart the U.S. while an appeal is pending.[59] Thus, it may be argued that being subjected to removal does not constitute a voluntary departure.

V. TIPS FOR FILING POST-DEPARTURE MOTIONS

TIP #1: Outside the Fourth Circuit and, in certain circumstances, the Ninth and Eleventh Circuits, a post-departure MTR that is not based on lack of notice will require litigation at the Court of Appeals.

With the possible exception of motions to reopen *in absentia* proceedings based on lack of notice, the BIA has broadly interpreted the post-departure bar. In addition, the BIA and IJs are bound by their own regulations and lack authority to find that a regulation is unlawful. Thus, clients not covered by the positive case law discussed in this advisory should be informed that a motion to reopen or reconsider has little chance of success unless it is litigated on a petition for review.

[58] 8 U.S.C. § 1229a(b)(5)(C) provides an automatic stay of removal while a motion to reopen and rescind an *in absentia* order is pending before the IJ, but does not provide an automatic stay pending appeal. In deportation cases, however, the stay remains in effect during the pendency of an appeal to the BIA. *See Matter of Rivera*, 21 I&N Dec. 232, 234 (BIA 1996).

[59] *See Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835, 838 (9th Cir. 2003).

TIP # 2 : Assistance is available from organizations that are challenging the validity of the regulations.

Both the American Immigration Law Foundation (AILF) and the Post-Deportation Human Rights Project (PDHRP) are involved in litigating this issue in various circuits. If you have a case that involves post-departure bar, please contact Rachel Rosenbloom at rachel.rosenbloom@bc.edu or Beth Werlin at clearinghouse@ailf.org.

TIP #3: Conflict between the post-departure bar and the statutory language is an open question in every circuit but the Fourth (which has ruled favorably).

Although the First and Fifth Circuits have upheld the post-departure bar, the Fourth Circuit is **the only court** to have considered the argument that the post-departure bar is invalid on the ground that it conflicts with the plain language of 8 U.S.C. § 1229a(c)(7). Thus, even a panel in the First or Fifth Circuit, which is bound by a prior decision upholding the post-departure bar, may invalidate the regulation based on conflict with the statutory language.

TIP #4: Arguments that the post-departure bar is unconstitutional or is in conflict with the language of the motion to reopen statute should be raised in the MTR filed with the IJ or BIA, and in any appeal to the BIA of an IJ's denial.

Although IJs and the BIA do not have the authority to rule that the post-departure bar is in conflict with the INA or is unconstitutional, any post-departure MTR should mention these arguments to preserve the issues for review by the Court of Appeals. However, there is no need to go into detail regarding these arguments.

APPENDIX 1

United States Court of Appeals
For the First Circuit

No. 05-1937

FREDY HUGO PENA-MURIEL,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

Before
Boudin, Chief Judge,
Torruella, Lynch, Lipez and Howard, Circuit Judges

ORDER OF COURT
Entered: October 24, 2007

The petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk

By: Julie Gregg, Operations Manager

[Certified copy to Board of Immigration Appeals. Copies to Mr. Olen, Mr. Crowley, Ms. Livers, Mr. Cashman, Mr. Sady, Mr. Sandhu, & Mr. McConnell.]

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United States Court of Appeals
For the First Circuit

No. 05-1937

FREDY HUGO PENA-MURIEL,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

Before
Boudin, Chief Judge,
Campbell, Senior Circuit Judge,
and Lipez, Circuit Judge.

ORDER OF COURT
Entered: October 24, 2007

In this petition for panel rehearing, petitioner argues for the first time that the text of 8 U.S.C. § 1229a(c)(7)(A), a provision added to the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in 1996, which states that "[a]n alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)," unambiguously provides an alien the right file a motion to reopen either from within the United States or abroad.

When this case was presented to the panel, petitioner presented only one statutory argument, asserting that Congress's deletion of 8 U.S.C. § 1105a(c) when passing IIRIRA removed the statutory foundation for the regulation barring motions to reopen from being filed outside of the United States.

8 C.F.R. § 1003.23(b)(1). We rejected this argument. Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1) conflicts with 8 U.S.C. § 1229a(c)(7). We will not address that issue now on rehearing. See American Policyholders Ins. Co. v. Nyacol Prods., Inc., 989 F.2d 1256, 1264 (1st Cir. 1993) ("[A] party may not raise new and additional matters for the first time in a petition for rehearing.").

The petition for panel rehearing is denied.

By the Court:
Richard Cushing Donovan, Clerk

Julie Gregg

By: Julie Gregg, Operations Manager

[Certified copy to Board of Immigration Appeals. Copies to Mr. Olen, Mr. Crowley, Ms. Livers, Mr. Cashman, Mr. Sady, Mr. Sandhu, & Mr. McConnell.]

File: A44 500 897 - Fishkill, NY Date: SEP 25 2007

In re: SHAWN ANTHONY MASCOE a.k.a. Peter Nelson a.k.a. Peter H. Nelson a.k.a. Shawn A. Mascoe a.k.a. Shawn Smalls

IN REMOVAL PROCEEDINGS

INTERLOCUTORY APPEAL

ON BEHALF OF RESPONDENT: Thomas H. Nooter, Esquire

ON BEHALF OF DHS: Matthew J. O'Brien
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in sections 101(a)(43)(F), (U)

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in sections 101(a)(43)(A), (U)

APPLICATION: Reopening

The respondent, a native and citizen of Jamaica, was ordered removed from the United States on June 24, 2002, based on the above-captioned charge after he failed to appear for a scheduled removal hearing. In accordance with that order, the Department of Homeland Security ("DHS") removed the respondent from the United States on November 20, 2003. The respondent subsequently re-entered the United States and moved to reopen the removal proceedings, but the Immigration Judge denied the motion in a December 13, 2006, decision. The respondent then appealed to the Board and, on March 19, 2007, the Board remanded the record to the Immigration Judge because he did not consider the exhibits submitted by the respondent in support of his motion to reopen and did not address the respondent's due process arguments. On May 30, 2007, the Immigration Judge granted the respondent's motion to reopen removal proceedings because, as a result of missing cassette tapes of the *in absentia* hearing, he believed he was "unable to comply with the Board's decision and ha[d] little choice but to issue" such order.

On appeal, DHS argues that the Board and the Immigration Judge do not have jurisdiction to issue any decisions regarding the respondent's motion to reopen as the respondent previously departed the United States pursuant to a lawful removal order (DHS Notice of Appeal, filed June 14, 2007). DHS supports this claim by citing to 8 C.F.R. § 1003.23(b)(1), which states in pertinent part that "[a] motion to reopen or to reconsider shall not be made by or on behalf of a person who is the

subject of removal . . . proceedings subsequent to his or her departure from the United States." The respondent opposes DHS's appeal and essentially argues that the language of *id.* § 1003.23(b)(1) does not apply to *in absentia* removal orders and the respondent should not be barred from challenging a removal order that has been issued in violation of the respondent's due process rights. For the reasons set out below, DHS's appeal will be dismissed and the case will be remanded for further proceedings in accordance with this order.

We disagree with DHS's assertion that the Board and the Immigration Judge do not have jurisdiction to address the respondent's motion to reopen and that our past decisions should be reversed as they were "improperly issued" and in "direct violation of 8 C.F.R. § 1003.23(b)(1)." *See* DHS Notice of Appeal at 3. We acknowledge that there is Board precedent indicating that the Board and Immigration Judges do not have jurisdiction to reopen removal or deportation proceedings after an alien departs from the United States. *See, e.g., Matter of Okoh*, 20 I&N Dec. 864, 864-65 (1994); *Matter of G-N-C-*, 22 Dec. 281 (BIA 1998); *Matter of Estrada*, 17 I&N Dec. 187, 188 (BIA 1979); *Matter of Palma*, 14 I&N Dec. 486 (BIA 1973); *Matter of G- y B-*, 6 I&N Dec. 159, 159-60 (BIA 1954); *but see William v. Gonzales*, 2007 WL 2494763 (4th Cir. 2007). However, the present case is distinguishable from these cases, and constitutes an exception to this general rule, because it involves an *in absentia* removal order. Under 8 C.F.R. § 1003.23(b)(4)(ii), "[a]n order entered *in absentia* . . . may be *rescinded at any time* if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, or . . . he or she was in . . . custody and the failure to appear was through no fault of the alien." (emphasis added).[1] Here, the respondent claims, *inter alia*, that he was not notified of the removal hearing and he was unable to appear due to his incarceration. Consequently, the Immigration Judge and the Board have jurisdiction to reopen the proceedings to address whether the respondent received sufficient notice of the hearing and failed to appear through no fault of his own. *See Contreras-Rodriguez v. United States Atty. Gen.*, 462 F.3d 1314, 1317 (11th Cir. 2006) (finding that the Board and the Immigration Judge retain jurisdiction to reopen proceedings to address whether an alien received sufficient notice of the *in absentia* removal hearing).[2]

However, we find that the Immigration Judge acted prematurely in reopening the removal proceedings in their entirety prior to the alien demonstrating that he qualifies for either exception in 8 C.F.R. § 1003.23(b)(4)(ii). Accordingly, upon remand the parties shall be permitted to submit relevant evidence, including testimony, and the Immigration Judge shall hold additional hearings, as necessary, regarding whether the respondent received notice or was unable to attend the hearing

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[1] 8 C.F.R. § 1003.2(c)(3), *Reopening or reconsideration before the Board of Immigration Appeals*, also provides that time limits "shall not apply to a motion to reopen filed pursuant to . . . § 1003.23(b)(4)(ii)."

[2] There is currently a dearth of decisions in the United States Court of Appeals for the Second Circuit, the jurisdiction in which this case arises, as well as other United States Court of Appeals. *Cf. Long v. Gonzales*, 420 F.3d 516 (5th Cir. 2005). Although only persuasive authority, we concur with the reasoning and conclusion in *Contrera-Rodriguez, supra*, at 1317, regarding reopening proceedings to address whether an alien received sufficient notice of an *in absentia* hearing.

pursuant to *id.* § 1003.23(b)(4)(ii). In addition, the Immigration Judge may only rescind the *in absentia* removal order, and reopen the removal proceedings in their entirety, if he first determines upon remand that the respondent qualifies for either exception in *id.* § 1003.23(b)(4)(ii), *i.e.*, the respondent did not receive notice or was unable to attend the hearing through no fault of his own.

ORDER: DHS's appeal is dismissed.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings and entry of a new decision consistent with this opinion.

FOR THE BOARD