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FILING AND ADJUDICATION OF MOTIONS TO REOPEN AND RECONSIDER AFTER DEPARTURE FROM THE UNITED STATES

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As interpreted by the Board of Immigration Appeals (TBIAУ), regulations in effect for more than 50 years have long been thought to prevent an alien who has departed the United States under an order of removal from filing a motion to reopen or reconsider a decision of the BIA or an Immigration Judge (TIJУ), or continuing to pursue such a motion that was previously filed. Recent caselaw, however, indicates that this rule is not as uniform as many had previously supposed.

The traditional view can be readily gleaned from the text of the current regulation governing motions before the BIA:

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

8 C.F.R. ¤ 1003.2(d). A similar regulation, 8 C.F.R. ¤ 1003.23(b)(1), applies to motions before an IJ. The BIA explained in *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008) that in its view, these regulations and their predecessors dating back to 1952, as interpreted in its caselaw, establish Tthat reopening is unavailable to any alien who departs the United States after being ordered removed.У[1] Under this traditional view of what is sometimes referred to as the Tdeparture barУ, departure from the United States, whether voluntarily or

through forcible deportation, results in the withdrawal of any pending motions and precludes the filing of future motions.

The traditional view, however, has not survived entirely intact in recent years. Although the trend is not a uniform one, a substantial number of Court of Appeals and BIA cases have opened up the possibility that certain aliens may be able to file or pursue motions to reopen and reconsider even after departing from the United States.

One exception to the departure bar, recognized by the BIA itself subsequent to *Matter of Armendarez*, is of nationwide application. In *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57 (BIA 2009), the BIA distinguished the case in which a motion is made to rescind an order of deportation or removal that was issued in the respondentXs absence, where the motion is based on the respondentXs claim of lack of notice of the proceedings. In such a case, the BIA explained, Tn in absentia . . . order issued in proceedings of which the respondent had no notice is voidable from its inception and becomes a legal nullity upon its rescission, with the result that the respondent reverts to the same immigration status that he or she possessed prior to entry of the order.У[2] Thus, the BIA held Tthat an alien's departure from the United States while under an outstanding order of deportation or removal issued in absentia does not deprive the Immigration Judge of jurisdiction to entertain a motion to reopen to rescind the order if the motion is premised on lack of notice.У[3]

Beyond this exception, several Courts of Appeals have recognized the ability of an alien to reopen even an order issued with proper notice. These cases fall essentially into two categories: those which allow the filing of a motion to reopen or reconsider subsequent to an alienXs departure, and those which hold only that a motion filed before the alienXs departure remains viable if the departure is a result of forcible deportation by the Department of Homeland Security (DHS).

The Court of Appeals for the Fourth Circuit, whose jurisdiction encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina, held in *William v. Gonzales* that the general bar on post-departure motions to reopen contained in 8 C.F.R. ¤ 1003.2(d) is categorically invalid because it conflicts with the governing statute. Specifically, the Fourth Circuit found a conflict with INA ¤ 240(c)(7)(A), also known as 8 U.S.C. ¤ 1229a(c)(7)(A), which states, *inter alia*, that

Tn alien may file one motion to reopen proceedings under this section....У. As the Fourth Circuit explained:

> 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 T

an alien

> may file,У the statute does not distinguish between those aliens abroad and those within the country-both fall within the class denominated by the words Tan alien.У Because the statute sweeps broadly in this reference to Tan alien,У 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.FN2 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.

> TalienУ) 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.

[4]

This holding was deemed unpersuasive by the BIA in *Matter of Armendarez*, and was specifically rejected by the Court of Appeals for the Tenth Circuit (covering Utah, Colorado, Wyoming, Kansas, Oklahoma, and New Mexico) in *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), but it is still binding for cases arising within the jurisdiction of the Fourth Circuit.[5] The same argument could also be pursued in circuits that have not yet addressed the issue.

The Court of Appeals for the Ninth Circuit, in *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007), limited the reach of the departure bar through a different sort of

logic. The departure-bar regulation as written, that court pointed out, Tis phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she Φ*is* the subject of removal ...

proceedings.ХУ[6] Thus, it should not bar a motion to reopen by someone whose removal proceedings have already concluded and who has been removed. The BIA subsequently rejected this holding in *Matter of Armendarez*, claiming the authority under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) to refuse to apply it even within the jurisdiction of the Ninth Circuit (Alaska, Hawaii, California, Washington, Oregon, Idaho, Montana, Nevada and Arizona). However, aliens and attorneys within the jurisdiction of the Ninth Circuit may wish to challenge this refusal in the Court of Appeals.

Most recently, the Court of Appeals for the Seventh Circuit, with jurisdiction over Illinois, Indiana, and Wisconsin, limited the effect of the departure bar on yet a third ground. In *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010), that court held that while the departure bar might be justifiable as a categorical exercise of the BIAXs discretion if the BIA chose to justify it in that way, it could not be justified based on the BIAXs purported lack of jurisdiction because an agency may not contract its own jurisdiction by regulation. Unless and until the BIA rethinks the theoretical basis for the departure bar, therefore, motions to reopen survive will survive an alienXs departure in the Seventh Circuit as well.

Even Courts of Appeals which are not prepared to go as far as a blanket rejection of the departure bar sometimes take a stricter view when what is at issue is the BIAXs claim that an alienXs already-filed motion to reopen or reconsider was rendered void by DHSXs forcible removal of that alien from the United States. Because this reading of the regulations allows DHS, a party to the removal proceedings, to preclude a type of challenge to those proceedings by its own unilateral action, it is particularly lacking in intuitive appeal, and it has been rejected by the Sixth Circuit (covering Michigan, Ohio, Kentucky and Tennessee), in *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009), and the Ninth Circuit, in *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010). As Judge Kethledge said in his concurring opinion in *Madrigal*, quoted in *Coyt*: TThe government forcibly removed Maria Madrigal from the United States, and now claims she abandoned her appeal because she left the country. To state that argument should be to refute it. . . .У[7] Unlike the decision in *Lin*, the Ninth CircuitXs decision in *Coyt* has not been rejected by the BIA under *Brand X*, so forcible

removal does not withdraw a motion to reopen or reconsider in either the Sixth or Ninth Circuits.

It is important to note that these exceptions to the departure bar may not apply equally to all sorts of motions to reopen. Some Courts of Appeals, while not specifically rejecting cases such as *William* and *Madrigal*, have held that the logic of those cases can at most only extend to motions to reopen (or reconsider) which are timely filed or fall under one of the exceptions to the filing time limit, as opposed to requests that the BIA *sua sponte* (that is, on its own motion) reopen a case in which an ordinary motion to reopen would be time-barred. The Court of Appeals for the Fifth Circuit (with jurisdiction over Texas, Louisiana and Mississippi), in *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2010), and most recently the Court of Appeals for the Second Circuit (with jurisdiction over New York, Connecticut and Vermont), in *Zhang v. Holder*, ___ F.3d ___, Docket No. 09-2628-ag, 2010 WL 3169292, have drawn this distinction, and have thus so far avoided either accepting or rejecting *William* and the *Madrigal*/*Coyt* line of cases.

In the context of a motion to reopen which is filed within 90 days of the final order of removal or which is said to fall into one of the exceptions to that time limit other than the BIAXs authority to reopen *sua sponte*, however, such cases as *William* and *Marin-Rodriguez* provide arguments worth pursuing even outside the Fourth and Seventh Circuits, so long as one is also outside the Tenth Circuit (which, as noted above, has already upheld the departure bar).[8] No Court of Appeals, moreover, appears yet to have accepted the BIAXs counterintuitive argument, rejected in *Madrigal* and *Coyt*, that forcible removal can TwithdrawУ a timely filed motion to reopen. Although pursuing post-departure motions in those portions of the United States where a Court of Appeals has not spoken on the issue may require a willingness to bring the issue all the way to the appropriate Court of Appeals, it is an option that respondents in removal proceedings, and their attorneys, should keep firmly in mind.

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[*] **David A. Isaacson is an Associate at Cyrus D. Mehta & Associates, P.L.L.C., where he practices primarily in the area of immigration and nationality law. DavidXs practice includes asylum cases, other removal proceedings such as those based on criminal convictions or denied applications for adjustment of status, and federal appellate litigation, as well as a variety of family-based and employment-based applications for both**

nonimmigrant visas and permanent residence. David also assists clients in citizenship matters and late legalization matters. He is a graduate of Yale Law School, where he served as a Senior Editor of the Yale Law Journal. Following law school, David clerked for the Honorable Leonard B. Sand of the United States District Court for the Southern District of New York, and then worked in the Litigation Department at the law firm of Davis Polk & Wardwell, where he devoted a significant amount of time to *pro bono* immigration matters. David is the author of *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 Ariz. L. Rev. 313 (2005), *reprinted in* 26 Immigr. & Nat'lity L. Rev. 515 (2006). He is admitted to practice in New York and New Jersey, in the Courts of Appeals for the Second and Third Circuits, and in the U.S. District Courts for the Southern and Eastern Districts of New York and the District of New Jersey, and is a member of the American Immigration Lawyers Association.

[1] 24 I&N Dec. at 648 (citing Immigration and Nationality Regulations, 17 Fed. Reg. 11,469, 11,475 (Dec. 19, 1952) (codified at 8 C.F.R. ¤ 6.2); 8 C.F.R. ¤ 1003.2(d) (2008); 8 C.F.R. ¤ 1003.23(b)(1) (2008); *Matter of G-N-C-*, 22 I&N Dec. 281, 288 (BIA 1998); *Matter of Okoh*, 20 I&N Dec. 864, 864-65 (BIA 1994); *Matter of Estrada*, 17 I&N Dec. 187, 188 (BIA 1979), *rev'd on other grounds, Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); *Matter of Palma*, 14 I&N Dec. 486, 487 (BIA 1973); and *Matter of Yih-HsiungWang*, 17 I&N Dec. 565 (BIA 1980)).

[2] 25 I&N Dec. at 59.

[3] *Id.* at 60.

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

[5] *See Matter of Armendarez*, 24 I&N Dec. at 660. The BIA likely did not feel free to disregard the Fourth CircuitXs decision in cases arising within its jurisdiction because the decision in *William* was based on what the Fourth Circuit thought to be the unambiguous text of the statute, and thus *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), did not apply.

[6] *Lin*, 473 F.3d at 982. The opinion in *Lin* quotes 8 C.F.R. ¤ 1003.23(b)(1), the regulation pertaining to motions to reopen before an Immigration Judge, but the language of 8 C.F.R. ¤ 1003.2(d), pertaining to motions before the BIA, is in relevant part identical.

[7] *Madrigal*, 572 F.3d at 245-246 (Kethledge, *Circuit Judge*, concurring), *quoted in Coyt*, 593 F.3d at 907.

[8] The Court of Appeals for the First Circuit, in *Pena-Muriel v. Gonzales*, 489 F.3d 438 (1st Cir 2007), rejected an argument superficially similar to that made in *William*, but, as the Fourth Circuit noted in its decision in *William*, 499 F.3d at 322 n.1, the First Circuit in *Pena-Muriel* does not appear to have been confronted with the specific statutory argument at issue in *William*. Thus, the issue may still be open in the First Circuit.

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