PRACTICE ADVISORY

Post-Departure Motions to Reopen and Reconsider[1]

Updated September 2023

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I. Introduction

Individuals seeking to reopen their immigration proceedings after departing or being removed from the United States face significant hurdles. This practice advisory provides information on the legal issues surrounding post-departure motions to reopen or reconsider. However, each practitioner must decide whether a motion is warranted in a specific case. Such a decision should be based on many factors, including the likelihood of success, costs, the availability of other legal remedies, etc.

Section II provides background information on motions to reopen and reconsider. Section III discusses the regulatory "post-departure bar." Section IV reviews cases decided by the Board of Immigration Appeals (BIA) and federal circuit courts that may be relevant to those seeking reopening or reconsideration after departure or deportation. Section V provides practice pointers for filing post-departure motions to reopen. Section VI considers issues that may arise if a client is removed while a motion to reopen or reconsider is pending.

This practice advisory is limited in its scope. Practitioners are advised to consult additional resources for detailed advice on how to develop and file a successful motion to reopen.[2] This practice advisory also does not provide an overview of the process for securing an individual's return to the United States after a successful motion to reopen.[3]

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[2] There are a wide variety of resources available to assist practitioners with motions to reopen. *See, e.g.,* National Immigration Litigation Alliance (NILA) & American Immigration Council, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (April 2022), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf; National Immigration Project (NIPNLG) & Immigrant Legal Resource Center (ILRC), *Practice Advisory: Post-Conviction Relief Motions to Reopen* (June 2022), https://www.ilrc.org/sites/default/files/resources/ilrc_nipnlg_pcr_mtr_pa_6.24.2022_final.docx.pdf; CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Oct. 2020), https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders.

In formulating a motion to reopen strategy, advocates may also want to assess what bars to relief are triggered by the prior removal order. *See* NIPNLG & Ready to Stay, *Practice Advisory: Understanding and Overcoming Bars to Relief Triggered by a Prior Removal Order* (updated Feb. 2023), https://nipnlg.org/sites/default/files/2023-02/2022_29June-removal-related-bars.pdf.

[3] For information on the return process and advocacy strategies, see NIPNLG, American Immigration Council, & NYU Immigrant Rights Clinic, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (Apr. 2015), https://nipnlg.org/work/resources/practice-advisory-return-united-states-after-prevailing-petition-review-or-motion.

II. Background

A. Motion to Reopen Basics

A **motion to reopen** is an "important safeguard" intended "to ensure a proper and lawful disposition" of immigration proceedings.[4] Prior to 1996, motions to reopen were governed solely by regulation. As part of the Illegal Immigration and Immigrant Responsibility Reform Act of 1996 (IIRIRA), however, Congress codified the right to file motions to reopen. These provisions are now located at section 240(c)(7) of the Immigration and Nationality Act (INA). Regulations further explaining the procedures and requirements for filing a motion to reopen can be found at 8 C.F.R. §§ 1003.2(c) (BIA), 1003.23(b)(1) (immigration court).[5]

At its core, a motion to reopen is a request that the immigration judge (IJ) or the Board of Immigration Appeals (BIA) reopen proceedings in which a final removal order[6] has already been entered. A motion to reopen seeks a fresh determination based on newly discovered facts or a change in the individual's circumstances since the time of the hearing.[7]

A motion to reopen must be supported by affidavits or other evidence,[8] and must establish that the evidence is material, was unavailable at the time of the original hearing, and could not have been discovered or presented at the original hearing.[9] Situations in which motions to reopen are

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[4] *Dada v. Mukasey*, 554 U.S. 1, 18 (2008).

[5] Practitioners should be aware that online sources may not reflect the current, enjoined status of the motion to reopen regulations. *See Centro Legal de la Raza, v. Exec. Of. for Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021); *Catholic Legal Immigration Network, Inc. v. Exec. O. for Immigr. Rev.*, No. 21-94, 2021 WL 3609986 (D.D.C. Apr. 4, 2021). For a chart and links to the effective versions of these regulations as of May 3, 2023, see OIL's Currently Effective Regulations Handout, available at https://nipnlg.org/sites/default/files/2023-05/2023_3May-EOIR-regs-chart.pdf.

[6] *See* 8 CFR § 1241.1 (explaining that an order of removal made by the IJ at the conclusion of proceedings under INA § 240 becomes final: "(a) Upon dismissal of an appeal by the Board of Immigration Appeals; (b) Upon waiver of appeal by the respondent; (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time; (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal; (e) If an immigration judge orders a[] [noncitizen] removed in the [noncitizen]'s absence, immediately upon entry of such order; or (f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.")

[7] *See* INA § 240(c)(7)(B); 8 CFR §§ 1003.2(c), 1003.23(b).

[8] *See* INA § 240(c)(7)(B). Importantly, statements of counsel are not evidence, *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980), and thus it is critical to include affidavits and other documentary evidence.

[9] *See* 8 CFR § 1003.2(c)(1); *Kaur v. BIA*, 413 F.3d 232, 234 (2d Cir. 2005).

appropriate include, but are not limited to, changed country conditions with regard to asylum claims; allegations of ineffective assistance of counsel; new eligibility for relief from removal; and vacatur of a conviction that formed the basis for the order of removal.[10]

B. Motions to Reopen vs. Motions to Reconsider

A **motion to reconsider** seeks a new determination based on alleged errors of fact or law.[11] In contrast to a motion to reopen, there need not be any change in the noncitizen's circumstances or any factual changes to file a motion to reconsider. Instead, a motion to reconsider asks that an IJ or the BIA reexamine a decision "in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier,"[12] including errors of law or fact in the previous order.[13]

The statutory provisions governing motions to reconsider are located at INA § 240(c)(6). Regulations further explaining the procedures for filing a motion to reconsider can be found at 8 C.F.R. §§ 1003.2(b), 1003.23(b)(1).

C. Where to File Motions to Reopen and Motions to Reconsider

Practitioners must pay close attention to the procedural history of a case to determine where jurisdiction last vested. This is because motions to reopen and motions to reconsider must be filed with the agency adjudicator that last had jurisdiction over the case—either the IJ or the BIA.[14] This rule, known as the last adjudicator rule, means that if the IJ last exercised jurisdiction, the motion must be filed with the IJ who entered the order.[15] If the BIA last exercised jurisdiction, the motion must be filed with the BIA.[16] As a general matter, an adjudicator has exercised jurisdiction if it made a substantive decision on the matter. A substantive decision includes the BIA's dismissal of the motion following its affirmance of an IJ's denial of a motion to reopen. However, if the BIA dismissed the appeal for lack of jurisdiction, such as where a respondent failed to timely file the appeal, then

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[10] *See, e.g., Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004) (per curium) (changed country conditions); *Siong v. INS*, 376 F.3d 1030, 1036-39 (9th Cir. 2004) (ineffective assistance of counsel); *Iturribarria v. INS*, 321 F.3d 889, 894-97 (9th Cir. 2003) (ineffective assistance of counsel); *De Faria v. INS*, 13 F.3d 422 (1st Cir. 1993) (vacatur of conviction).

[11] *See* INA § 240(c)(6)(C); 8 CFR § 1003.2(b)(1).

[12] *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002).

[13] *See* INA § 240(c)(6)(C); 8 CFR §§ 1003.2(b)(1) (proceedings before the BIA), 1003.23(b)(2) (proceedings before the immigration court).

[14] *See* 8 CFR § 1003.23 (Immigration Court); 8 CFR § 1003.2 (BIA). *See also* BIA Practice Manual, § 5.2(a), App. J, available at https://www.justice.gov/eoir/reference-materials/bia/chapter-5/2.

[15] *See* 8 CFR § 1003.23(b)(1)(ii).

[16] *See* 8 CFR § 1003.2(a).

jurisdiction does not vest with the BIA and the motion should be filed with the IJ.[17] Importantly, the last adjudicator rule still applies even if the noncitizen has filed a petition for review with a federal circuit court. Should a practitioner seek to file a motion to reopen or reconsider at that stage, the motion should be filed with the last agency adjudicator that rendered a decision in the matter—likely the BIA.

D. Procedural Requirements for Filing Motions to Reopen and Motions to Reconsider

The INA imposes time, number, and content requirements on motions to reopen or reconsider.[18] The regulations on motions to reopen and reconsider list additional procedural requirements.[19]

1. Time and Number Limits

Motions to Reconsider: In general, an individual who has been ordered removed is permitted to file only <u>one</u> motion to reconsider.[20] The motion must be filed <u>within 30 days</u> of the date of entry of a final removal order.[21]

Motions to Reopen: In general, an individual who has been ordered removed is permitted to file <u>one</u> motion to reopen <u>within 90 days</u> of the date of entry of a final removal order.[22]

Motions to Reopen and Rescind In Absentia *orders*: Where an individual challenges an *in absentia* removal order*,* the motion to reopen and rescind generally must be filed within <u>180 days</u> of the final removal order.[23]

- There is no deadline for a motion to reopen and rescind where an individual did not receive notice of their hearing in which an *in absentia* removal order was issued, or where the individual was in state and federal custody and unable to appear at the hearing. [24]

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[17] *See, e.g.*, *Matter of Mladineo*, 14 I&N Dec. 591, 592 (BIA 1974).

[18] *See* INA § 240(c)(6)(A)-(C)(reconsideration); INA §§ 240(c)(7)(A)-(C), 240(b)(5)(C) (reopening).

[19] 8 CFR §§ 1003.23 (immigration court), 1003.2 (BIA).

[20] *See* INA § 240(c)(6)(B). The Eleventh Circuit has held that 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.*, 504 F.3d 1324, 1328-30 (11th Cir. 2007).

[21] *See* INA § 240(c)(6)(A), (B).

[22] *See* INA § 240(c)(7)(A), (c)(7)(C)(i).

[23] *See* INA § 240(b)(5)(C). In addition, there are no numerical limits on motions to reopen to rescind an *in absentia* order. 8 CFR § 1003.23(b)(4)(iii)(D). *See generally*, Beth Werlin, American Immigration Council, *Practice Advisory: Rescinding an In Absentia Order of Removal*, (Mar. 31, 2010), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf.

[24] 8 USC § 1229a(b)(5)(C)(ii).

The INA and implementing regulations recognize the following exceptions to the time and numerical limitations:

- There is no deadline or numerical limitation for a motion to reopen to seek asylum, withholding, or protection under the Convention Against Torture (CAT) based on changed country conditions.[25]
- A motion to reopen for a battered spouse or child seeking certain forms of relief under the Violence Against Women Act (VAWA) should be filed within one year of the final removal order.[26]
    - This one-year deadline may be waived in extraordinary circumstances or situations of "extreme hardship to the [noncitizen's] child."[27]
    - However, the individual must be physically present in the United States at the time of filing the motion.[28]

In addition, most circuit courts have recognized that the filing deadlines, and in some instances the numerical limitations, are not jurisdictional and are thus subject to equitable tolling.[29]

2. Joint Motions to Reopen

The regulations provide that a motion to reopen agreed to by all parties and jointly filed is not subject to time and numerical limitations.[30] The availability of a joint motion to reopen strategy will depend

[25] *See* INA § 240(c)(7)(C)(ii) (no time limit on filing motion to reopen based on changed country conditions). The regulations exempt changed country conditions motions to reopen from the numerical limitations. 8 CFR § 1003.23(b)(4); 8 CFR § 1003.2(c)(3)(ii) (same). However, in the Fifth Circuit, motions to reopen based on changed country conditions are subject to the number bar. *See Djie v. Garland*, 39 F.4th 280, 282 (5th Cir. 2022) (holding regulation providing exception to number bar is invalid because it contradicts INA).

[26] INA § 240(c)(7)(C)(iii).

[27] *Id.*

[28] INA § 240(c)(7)(C)(iv).

[29] *See Williams v. Garland*, 59 F.4th 620, 640 (4th Cir. 2023), *as amended* (Feb. 10, 2023) (holding statutory time and number limitations for motions to reconsider subject to equitable tolling); *Daoud v. Barr*, 948 F.3d 76, 83 (1st Cir. 2020) ("We assume, but do not decide, that equitable tolling is available to [] toll the filing deadline."); *Lugo-Resendez v. Lynch,* 831 F.3d 337 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (en banc) (per curiam)); *Alzaarir v. Att'y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Yuan Goa v. Mukasey*, 519 F.3d 376, 377 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Iturribaria v. INS*, 321 F.3d 889 (9th Cir. 2003) (number limitation subject to equitable tolling); *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190-93 (9th Cir. 2001) (en banc); *Iavorski v. INS*, 232 F.3d 124, 129-33 (2d Cir. 2000) (Sotomayor, J.).

[30] 8 CFR § 1003.23(b)(4)(iv) (IJ); 8 CFR § 1003.2(c)(3)(iii) (BIA).

on the current presidential administration's prosecutorial discretion policy and the local ICE OPLA's office's willingness to exercise prosecutorial discretion.[31]

3. *Sua sponte* Authority to Reopen or Reconsider "At Any Time"

The regulations provide that the BIA and IJs have *sua sponte* authority to reopen or reconsider their own decisions "at any time," without regard to the time and number limitations.[32] The BIA has stated that it will generally exercise *sua sponte* jurisdiction only in "exceptional situations."[33] Exceptional situations include a change in law that represents a departure from established principles or a fundamental change, rather than merely an incremental change.[34] Additionally, the BIA has frequently exercised *sua sponte* authority to reopen proceedings where a conviction that formed the basis of a removal order has subsequently been vacated.[35]

E. Appealing the Denial of a Motion to Reopen or Motion to Reconsider to a Federal Court

The federal appeals courts have jurisdiction to review the BIA's denial of a motion to reopen or reconsider, as well as the BIA's affirmance of an IJ's denial of such a motion, through a petition for review.[36] The federal circuit court with jurisdiction over the place where the IJ completed proceedings will have jurisdiction over a petition to review the BIA's action.[37] In two key decisions,

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[31] For a discussion of considerations and strategy to request that ICE join a motion to reopen, see ILRC & NIPNLG, *Practice Advisory: Post-Conviction Relief Motions to Reopen*, *supra* note 2, at 12-14. A template prosecutorial discretion request—for a joint motion to reopen an *in absentia* removal order—is available at https://nipnlg.org/sites/default/files/2023-03/2022_26Aug-template-PD-request-reopening-absentia.pdf.

[32] 8 CFR §§ 1003.2(a) (BIA), 1003.23(b)(1) (IJ). Note that 85 Fed. Reg. 81,588, 81,654-55 (Dec. 16, 2020) intended to limit the instances in which an IJ or the BIA may exercise *sua sponte* reopening authority but has since been enjoined until further court order and is not in effect. *See supra* note 5.

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

[34] *See Matter of Vasquez-Muniz*, 23 I&N Dec. 207, 208 (BIA 2002) (reconsidering *sua sponte* upon government motion 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 G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of X-G-W-*, 22 I&N Dec. 71, 74 (BIA 1998) (reopening *sua sponte* on the basis of legislative change).

[35] *See, e.g., Cruz v. U.S. Att'y Gen.*, 452 F.3d 240, 246 n.3 (3d Cir. 2006) (citing ten unpublished BIA cases granting untimely motions to reopen based on vacated convictions, 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 a[] [noncitizen] is no longer convicted for immigration purposes"). For additional discussion of *sua sponte* arguments where a conviction has been vacated, see ILRC & NIPNLG, *Practice Advisory: Post-Conviction Relief Motions to Reopen*, *supra* note 2. In March of 2022, the BIA invited amicus briefing on the question of what factors the BIA should consider when weighing an untimely motion to reopen predicated on vacatur of a criminal conviction. *See* BIA, Amicus Invitation No. 22-16-03 (Mar. 16, 2022).

[36] INA § 242(a)(1).

[37] INA § 242(b)(2).

the Supreme Court has recognized the importance of the statutory right to motions to reopen and has confirmed that courts of appeals have jurisdiction to review BIA decisions denying these motions.[38]

The Supreme Court has confirmed federal court jurisdiction over motions to reopen, noting that motions to reopen are an "important safeguard."[39] However, in *Kucana v. Holder*, 130 S. Ct. 827, n. 18 (2010), the Court expressly declined to decide whether federal courts may review a denial of a motion requesting *sua sponte* reopening. Most circuits have held that because 8 C.F.R. § 1003.2 grants such broad discretion to the BIA to reopen or reconsider *sua sponte*, the courts lack jurisdiction to review a discretionary denial of a motion requesting *sua sponte* reopening,[40] but retain jurisdiction to review denials based on legal or constitutional error.[41]

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[38] *See Kucana v. Holder*, 558 U.S. 233 (2010); *Dada v. Mukasey,* 554 U.S. 1 (2008).

[39] *Kucana v. Holder*, 558 U.S. 233, 242 (2010); *Dada v. Mukasey*, 554 U.S. 1, 18 (2008).

[40] *See, e.g., Mejia-Hernandez v. Holder*, 633 F.3d 818 (9th Cir. 2011); *Ochoa v. Holder*, 604 F.3d 546 (8th Cir. 2010) (petition for rehearing en banc denied); *Mosere v. Muksey*, 552 F.3d 397 (4th Cir. 2009); *Lenis v. U.S. Att'y Gen.* 525 F.3d 1291 (11th Cir. 2008); *Tamenut v. Mukasey,* 521 F.3d 1000 (8th Cir. 2008); *Ali v. Gonzales*, 448 F.3d 515 (2d Cir. 2006); *Harchenko v. INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003); *Belay-Gebru v. INS*, 327 F.3d 998 (10th Cir. 2003); *Calle-Vujiles v. Ashcroft* 320 F.3d 472 (3d Cir. 2003); *Luis v. INS*, 196 F.3d 36 (1st Cir. 1999).

[41] The First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have held that courts have jurisdiction to review of *sua sponte* denials where the denial was based on legal error. *See Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) (holding that courts retain jurisdiction to review denial of *sua sponte* reopening for 'legal or constitutional error"); *Thompson v. Barr*, 959 F.3d 476, 483–484 (1st Cir. 2020) (finding limited jurisdiction to review "constitutional claims or errors of law that arise in motions to reopen sua sponte"); *Fuller v. Whitaker,* 914 F.3d 514, 519 (7th Cir. 2019) (claiming jurisdiction "to recognize and address constitutional transgressions and other legal errors that the Board may have committed in disposing of" a motion to reopen *sua sponte*); *Rodriguez-Saragosa v. Sessions,* 904 F.3d 349, 355 (5th Cir. 2018) (courts have jurisdiction to review the BIA's determination that a legal barrier prevents it from reopening a case *sua sponte*); *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1271 (10th Cir. 2013) (courts have jurisdiction to review questions of law presented where Board makes a legal determination); *Pllumi v. Attorney General of the United States*, 642 F.3d 155, 160 (3d Cir. 2011) ("If the reasoning given for a decision not to reopen sua sponte reflects an error of law, we have the power and responsibility to point out the problem[.]"); *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) (courts have jurisdiction to review *sua sponte* denials of reopening where BIA "misperceived the legal background"). The Fourth Circuit has not ruled directly on this question but recognizes that seven circuits have found jurisdiction to review legal errors in the denial of *sua sponte* reopening or reconsideration. *See Williams v. Garland*, 59 F.4th 620, 643 n.10 (4th Cir. 2023), *as amended* (Feb. 10, 2023). The Sixth, Eighth, and Eleventh Circuits have found that courts do not have jurisdiction to review alleged legal errors in the Board's exercise of its *sua sponte* authority. *See Chong Toua Vue v. Barr,* 953 F.3d 1054, 1057 (8th Cir. 2020) (holding courts have no jurisdiction to review denial of *sua sponte* reopening based on an "incorrect legal premise" but retain jurisdiction over colorable constitutional claims); *Butka v. U.S. Att'y Gen.*, 827 F.3d 1278, 1285 (11th Cir. 2016) (courts have no jurisdiction to review BIA's denial of a motion to *sua sponte* reopen proceedings "with the possible exception of constitutional issues"); *Rais v. Holder,* 768 F.3d 453, 464 (6th Cir. 2014) (court lacks jurisdiction to review denials of *sua sponte* motions even where petition for review "alleges constitutional claims or questions of law.").

III. The Post-Departure Bar

The post-departure bar is a jurisdictional limitation that precludes the BIA and the immigration courts from considering motions to reopen or reconsider filed by noncitizens who have been removed or deported from the United States. The post-departure bar is found in two federal regulations, but, significantly, does not appear in the statutes governing motions to reopen. The two federal regulations—8 C.F.R. § 1003.2(d) (motions filed with the BIA) and 8 C.F.R. § 1003.23(b)(1) (motions filed with the IJ)—contain identical language prohibiting adjudication of post-departure motions, providing that motions to reopen "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." These regulations have been interpreted to apply to persons who have been physically removed by the government, those who have left the country voluntarily while subject to an order of removal, and those who have left the country after a grant of voluntary departure.[42] The regulations have also been interpreted to apply to individuals who have been deported and subsequently re-entered the United States.[43]

In addition, both regulations include an automatic withdrawal provision and state that any departure, "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." This language is parallel to that found in the regulation regarding withdrawals of BIA appeals found at 8 C.F.R. § 1003.4. Section 1003.4 states that "[d]eparture from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal." Both of these withdrawal provisions are discussed briefly in Section VI.

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[42] *See, e.g., In re Mancera-Guevara,* AXXX XX6 849, 2009 WL 1653770 (BIA May 22, 2009) (unpublished) (applying departure bar after respondents left country after a grant of voluntary departure).

[43] *See, e.g., Dias Oliveira v. Barr,* 776 Fed. Appx. 252, 253 (5th Cir. 2019) (per curiam) (applying departure bar to *sua sponte* motion brought by individual who was deported and subsequently reentered United States); *Gaytan-Aragon v. Lynch*, 614 F. App'x 536, 538–39 (2d Cir. 2015) (same). Individuals who have subsequently reentered the United States after deportation may also be prevented from filing a motion to reopen if they are placed in reinstatement of removal proceedings after reentry. *See, e.g., Alfaro-Garcia v. United States Att'y Gen.,* 981 F.3d 978, 982-83 (11th Cir. 2020) (collecting cases across Fifth, Seventh, and Ninth Circuits holding that reinstatement of removal bars individuals from reopening the underlying removal proceeding). For resources on how to challenge the application of the reinstatement bar, see American Immigration Council and NIPNLG, Reinstatement of Removal: Practice Advisory 23-25 (May 2019), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf.

IV. Case Law on Post-departure Motions

The BIA has interpreted the regulatory post-departure bar as generally barring BIA or IJ jurisdiction over motions to reopen or reconsider but have found an exception for motions to reopen and rescind an *in absentia* orders based on lack of notice. Federal circuit courts have varied in their conclusions and approaches to the applicability of the post-departure bar, but all courts to examine the issue have struck down the post-departure bar as applied to statutory motions to reopen.

A. Board of Immigration Appeals

The BIA has considered two major cases involving post-departure motions. In the first decision, *Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008), the BIA found that the regulations deprived the BIA of jurisdiction to consider a motion to reopen for an individual who had been removed from the United States. However, in *Matter of Bulnes-Nolasco,* 25 I&N Dec. 57 (BIA 2009), the BIA held that the post-departure bar regulation does not apply to motions to reopen and rescind *in absentia* removal orders based on lack of notice.

The noncitizen in *Armendarez-Mendez* filed a motion to reopen *sua sponte* with the BIA to seek relief under INA § 212(c). The BIA held that it did not have jurisdiction to consider the noncitizen's motion because of the regulatory departure bar. In so holding, it rejected the Ninth Circuit's reasoning that the bar did not apply to those who filed a motion to reopen after being removed because, according to the Ninth Circuit, those noncitizens were no longer "the subject of" removal proceedings.[44] The BIA reasoned that the post-departure bar should be viewed in the context of the entire INA, and applying the bar only to individuals who are currently in removal proceedings contradicts the plain language meaning of a "motion to reopen." The BIA was persuaded by the long history of the post-departure bar, and claimed that nothing in the legislative history of IIRIRA indicated that Congress intended to repeal the post-departure bar in 1996. In *dicta*, the BIA also disagreed with the Fourth Circuit's analysis in *William v. Gonzales* (discussed below in Section IV.B.1), which had found the regulation to conflict with the statute. The BIA also stated that the post-departure bar deprived the BIA of jurisdiction to consider the motion *sua sponte*, citing a previous Fifth Circuit case.[45]

In *Bulnes-Nolasco***,** the BIA held that an IJ has jurisdiction to consider a motion to reopen and rescind an *in absentia* removal order based on lack of notice even if the motion was filed after the

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

[45] *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003) (finding reasonable the BIA's interpretation that the post-departure bar overrides its *sua sponte* authority).

noncitizen's departure from the United States. The BIA concluded that the regulation permitting motions to reopen *in absentia* orders "at any time" trumped the post-departure bar because "a[] [noncitizen] ordered deported *in absentia* possesses a robust right to challenge the removal order on improper notice grounds."[46] In a footnote, the BIA further explained that the regulation regarding the reopening of an *in absentia* order, 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2), is both more specific and more recent in time than the post-departure bar regulation, and therefore the former overrides the latter with regard to *in absentia* motions to reopen based on lack of notice.[47]

B. Circuit Court Precedent on the Post-Departure Bar

Federal circuit courts have generally treated statutory motions (defined as those motions filed within the 90-day or 30-day filing period or subject to statutory exception to that time period) differently than *sua sponte* motions (which are governed only by regulation) for purposes of the post-departure bar. All circuit courts except for the Eighth Circuit have invalidated the post-departure bar in the context of statutory motions. The Eighth Circuit has not yet ruled on the issue.

In contrast, several circuit courts have not addressed the departure bar's applicability to *sua sponte* motions, which are regulatory, thus leaving the regulations and the BIA's decision in *Matter of Armendarez-Mendez* intact regarding *sua sponte* motions. Three circuits that have addressed the applicability of the post-departure bar to *sua sponte* motions have found the post-departure bar to be valid in this context. Two circuits have invalidated the post-departure bar in the context of *sua sponte* reopening, with another circuit holding that the post-departure bar cannot be read as a jurisdictional limitation on *sua sponte* reopening authority.

This section explains the circuit court's reasoning in greater detail, including discussions of key cases in each circuit. Charts of key cases for each circuit are provided in the Appendix.

[46] 25 I&N Dec. at 650.

[47] *Id.* at n.3. The BIA's decision in *Bulnes-Nolasco* is in clear tension with the justification put forth by the BIA in *Armendarez-Mendez* that "[r]emoved [noncitizens] have, by virtue of their departure, literally passed beyond our aid." 24 I&N Dec. at 656. Further, the regulatory language relied upon by the BIA in reaching its decision in *Bulnes-Nolasco* – "at any time" – is mirrored in the regulations giving the IJ and the BIA *sua sponte* authority to reopen. *See* 8 CFR § 1003.23(b)(1) (2020); 8 CFR § 1003.2(a) (2020).

1. Circuit Court Decisions Invalidating the Post-Departure Bar and/or Carving Out Exceptions

Ten circuits have invalidated the post-departure bar regulation.[48] Three of them—the Second, Third, and Fifth Circuits—have invalidated the regulation in the context of motions filed pursuant to the statute (i.e. timely, not numerically barred motions), but have upheld the regulation in the context of non-statutory, regulatory *sua sponte* motions.

Most decisions invalidating the regulation in the context of **statutory motions** have adopted one of two lines of reasoning:

(1) In the first line of cases, courts have engaged in a *Chevron* analysis and concluded that the regulation conflicts with the clear statutory language granting the right to file a motion to reopen and with Congress's intent. Where the courts have found that the regulatory post-departure bar conflicts with the statute and is thus *ultra vires*, the BIA's jurisdictional interpretation of the regulation in *Armendarez-Mendez* cannot override the court's interpretation of an unambiguous statute.[49] This approach has generally been adopted by the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

(2) In the second line of cases, courts have relied on the reasoning in the Supreme Court's decision *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), to hold that the regulation is an impermissible contraction of the agency's own jurisdiction. In *Union Pacific*, the Supreme Court held that the National Railroad Adjustment Board could not promulgate a regulation that contracted its own jurisdiction. Similarly, courts have found that because Congress delegated authority to the BIA to hear a motion to reopen, the BIA cannot curtail its own jurisdiction. This approach has been adopted by the Second, Sixth, and Seventh Circuits.

After the Supreme Court's 2019 decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), several federal circuit courts have issued new precedent invalidating the post-departure bar in the context of ***sua sponte* reopening**. In *Kisor,* the Court clarified how courts should interpret agencies' interpretation of their own regulations. Before *Kisor,* federal courts generally evaluated an agency's interpretation of its

[48] The reasoning applied to motions filed with the BIA under 8 CFR § 1003.2 should also apply to motions filed with the IJ under 8 CFR § 1003.23 and vice versa, as the relevant language in the two regulations is identical. As the statutory language granting the right to file a motion to reconsider is parallel to the language for filing a motion to reopen, the reasoning of the decisions should also extend to motions to reconsider.

[49] *See Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 982-83 (2005).

own regulation using the "deferential standard" of *Auer v. Robbins,* under which an agency's interpretation was "controlling unless plainly erroneous or inconsistent with the regulation. "[50] In *Kisor,* the Court held that *Auer* deference applies only to an agency's interpretation of its own "genuinely ambiguous" regulation, and even then, deference is only required in narrow circumstances.[51]

Following *Kisor,* the Ninth and Tenth Circuits have invalidated the post-departure bar regulation in the context of *sua sponte* reopening, holding that: (1) the regulations containing the post-departure bar are not ambiguous; (2) deference to the agency's interpretation of the post-departure bar is not warranted; and (3) the regulations do not strip the agency of jurisdiction to *sua sponte* reopen removal proceedings post-departure.[52] The Third Circuit has also applied *Kisor* to hold that the BIA can choose not to exercise *sua sponte* discretion because an individual has been removed but cannot invoke the post-departure bar as a jurisdictional restriction.

- **First Circuit** *(covers those ordered removed in immigration court proceedings in MA and Puerto Rico)*

In ***Perez-Santana v. Holder***, 731 F.3d 50 (1st Cir. 2013), the First Circuit struck down the departure bar finding it to be in direct conflict with the unambiguous language of the statute granting the right to file one timely motion to reopen. In this case, the noncitizen had filed a timely motion to reopen based on post-conviction relief obtained after his removal.

In a decision issued the same day, the court also considered the applicability of the departure bar in the context of a motion to reopen filed outside the 90-day limit. In that case, ***Bolieiro v. Holder***, 731 F.3d 32 (1st Cir. 2013), the noncitizen argued, in part, that principles of equitable tolling rendered her motion statutory, and that therefore the departure bar was in direct conflict with her statutory right to file the motion. Because the BIA had not decided the issue of the motion's timeliness and had instead applied the departure bar without distinction, the court did not rule on the equitable tolling argument and instead granted the petition for review based on the same reasoning as that in *Perez-Santana*. In remanding the case to the BIA, however, it noted that, though the First Circuit has not

[50] *Kisor*, 139 S. Ct. at 2411-12.

[51] *Id.* at 2415-18.

[52] *Rubalcaba v. Garland,* 998 F.3d 1031 (9th Cir. 2021); *Reyes-Vargas v. Barr*, 958 F.3d 1295 (10th Cir. 2020).

explicitly adopted equitable tolling in the context of motions to reopen, the majority of other courts to have considered the issue had concluded that equitable tolling applies to motions to reopen.[53]

- **Second Circuit** *(covers those ordered removed in immigration court proceedings in CT and NY)*

The Second Circuit has invalidated the post-departure bar in the context of statutory motions to reopen. In ***Luna v. Holder***, 637 F.3d 85, 92 (2d Cir. 2011), the court considered two cases in which noncitizens argued that the jurisdictional 30-day deadline on petitions for review violated the Suspension Clause because it barred them from raising constitutional claims through a habeas petition or adequate substitute. The court concluded that there was no Suspension Clause violation because the statutory motion to reopen process provides an adequate and effective substitute for habeas. However, for the motion to reopen process to be an adequate substitute, the court reasoned, the BIA must retain jurisdiction over statutory motions even post-departure. In addition, the court specified that it included in the category of "statutory motions" those motions that are filed outside of the filing deadlines but that are equitably tolled.[54] The court adopted the reasoning of the Supreme Court's decision in *Union Pacific*, and held that the BIA's contraction of its jurisdiction over post-departure motions was impermissible because Congress alone controls the BIA's jurisdiction to hear motions to reopen filed under INA 240(c)(7).[55]

However, the Second Circuit has, rather reluctantly, upheld the post-departure bar in the context of *sua sponte* motions (see discussion below in Part C).

- **Third Circuit** *(covers those ordered removed in immigration court proceedings in NJ and PA)*

In ***Prestol-Espinal v. Att'y Gen.***, 653 F.3d 213 (3d Cir. 2011), the noncitizen had filed a timely motion to reconsider following his removal. The Third Circuit conducted a *Chevron* analysis and invalidated the post-departure bar under step one of *Chevron* as in conflict with the statute and Congressional intent. The court enumerated the following reasons in reaching its conclusion:

[53] The First Circuit has since presumed that equitable tolling is available for motions to reopen but has not directly ruled on the question. *See Daoud v. Barr*, 948 F.3d 76, 83 (1st Cir. 2020) ("We assume, but do not decide, that equitable tolling is available to [] toll the filing deadline.").

[54] *Luna*, 637 F.3d at 95.

[55] *Id.* at 100.

(1) The plain text of the statute provides each noncitizen with the right to file a motion to reconsider;
(2) The Supreme Court has recognized the importance of this right;
(3) Congress chose to incorporate some limitations on motions but did not include a post-departure bar in the statute;
(4) The post-departure bar would allow the government to eviscerate the right to file a motion by removing the noncitizen within the filing window;
(5) Congress included geographic limitations on special motions to reopen for victims of violence but did not include such a limitation on all motions to reopen or reconsider; and
(6) Congress repealed the statutory post-departure bar on judicial review, in conformity with its intent to expedite removal while increasing accuracy, and these objectives would be undermined by the post-departure bar.

Only months after issuing this decision, however, the court upheld the validity of the post-departure bar in the context of an untimely *sua sponte* motion (see discussion below in Part C).

In the unpublished decision ***Ovalle v. Att'y Gen.,*** 791 F. App'x 333, 335-37 (3d Cir. 2019), the Third Circuit recognized that it was bound by its prior decision in *Desai v. U.S. Atty' Gen.,* 695 F.3d 267 (3d Cir. 2012) (discussed below in Part C), in which the Third Circuit held that the BIA could rely on the post-departure bar as a basis for refusing to reopen proceedings *sua sponte.* However, the court held that the Supreme Court's decision in *Kisor* required a reexamination of the basis for and limitations of the decision in *Desai.*

The court noted that there are two different ways *Desai* could be read:
(1) The BIA can invoke the post-departure bar to deny *sua sponte* motions as a matter of discretion;
(2) Courts must defer, under *Auer*, to the BIA's "view that the post-departure bar deprives it of jurisdiction [over *sua sponte* motions to reopen]."[56]

The court held that that the first interpretation remains good law, but that the logic of the second interpretation could not survive the Supreme Court's decision in *Kisor v. Wilkie* that "*Auer* deference is cabined to cases where an 'agency's interpretation . . . in some way implicate[s] its substantive expertise."[57] The "basis for deference ebbs . . . when the subject matter of the dispute is distant from the agency's ordinary duties. . . as is the case when the interpretive issue falls more naturally into a[n

[56] *Ovalle,* 791 F. App'x at 336.
[57] *Id.*

Article III] judge's bailiwick."[58] Applying the reasoning in *Kisor,* the Third Circuit held that the "scope of the BIA's *sua sponte* jurisdiction is precisely the kind of interpretive issue that falls more naturally into our bailiwick [and thus] deference to the BIA's interpretation of the post-departure bar as jurisdictional is no longer warranted."[59]

The Third Circuit concluded that the "application of the post-departure bar in a given case is properly understood as an exercise of the BIA's discretion, not a limitation on its jurisdiction."[60] The court then remanded the case for the BIA to decide whether to invoke the post-departure bar as a matter of discretion. [61]

- **Fourth Circuit** *(covers those ordered removed in immigration court proceedings in MD, NC, and VA)*

In ***William v. Gonzales***, 499 F.3d 329 (4th Cir. 2007), the Fourth Circuit was the first court to invalidate the post-departure bar on the ground that it conflicts with the clear statutory language of INA § 240(c)(7)(A). The noncitizen in *William* sought to reopen with the BIA following the vacatur of the conviction that formed the basis of his removal. The BIA held that it lacked jurisdiction over the motion to reopen due to the post-departure bar in 8 C.F.R. § 1003.2(d). The Fourth Circuit overturned, 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 [INA § 240(c)(7)(A)] unambiguously provides a[] [noncitizen] 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 [noncitizens] abroad and those within the country – both fall within the class denominated by the words "an alien." . . . Accordingly, the Government's view of [INA § 240(c)(7)(A)] simply does not comport with its text and cannot be accommodated absent a rewriting of its terms.[62]

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[58] *Id.* (quoting *Kisor v. Wilkie,* 139 S. Ct. at 2417).

[59] *Id.*

[60] *Id.* at 336-37. ("[A]fter *Kisor, Desai*—to the extent it was susceptible to such an interpretation—can no longer be read as affirming the BIA's view of the post-departure bar as jurisdictional.")

[61] A significant drawback to this interpretation is that leaves open the possibility that IJs and/or the BIA will regularly invoke the departure bar as a matter of categorical discretion, rather than declining to apply the departure bar or truly considering the circumstances in each removed individual's case. For an argument that such a categorical exercise of discretion is not permitted, see note 67.

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

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."[63] 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,[64] and noted that it 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 the *Chevron* analysis, and did not reach the argument that the regulation violated the noncitizen's right to due process under the Fifth Amendment.

- **Fifth Circuit** *(covers those ordered removed in immigration court proceedings in LA and TX)*

In ***Garcia-Carias v. Holder***, 697 F.3d 257 (5th Cir. 2012), the Fifth Circuit invalidated the post-departure bar regulation in the context of motions to reopen, finding it in conflict with the statute. The court concluded that the statutory language granting a noncitizen the right to file a motion to reopen is clear and unambiguous and thus invalidated the regulation under step one of *Chevron*. In a companion case decided the same day, ***Lari v. Holder***, 697 F.3d 273 (5th Cir. 2012), the court applied the same analysis to invalidate the departure bar to motions to reconsider.

The court stopped short, however, of overturning its prior decision in *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009), which upheld the departure bar in the context of *sua sponte* motions (see discussion below in Part C).

- **Sixth Circuit** *(covers those ordered removed in immigration court proceedings in MI, OH, KY, and TN)*

The Sixth Circuit has invalidated the post-departure bar, strongly wording its conclusion that the BIA's interpretation that it lacks jurisdiction to hear motions to reopen following removal has "no

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

[64] *Id.* The exception, which is codified at INA § 240(c)(7)(C)(iv)(IV), was first enacted as part of the Victims of 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).

roots in any statutory source and misapprehends the authority delegated to the Board by Congress." ***Pruidze v. Holder***, 632 F.3d 234, 235 (2011). The court found the holding in *Union Pacific* applicable and concluded that "the agency may not disclaim jurisdiction to handle a motion to reopen that Congress empowered it to resolve."[65] The court was further convinced by the fact that the BIA itself undermined a jurisdictional approach by acknowledging jurisdiction over some post-departure motions to reopen in *Bulnes-Nolasco*, concluding that "[e]ven the Board does not buy everything it is trying to sell."[66] Furthermore, the court found that the BIA's jurisdictional interpretation of the regulation was contrary to the statute, as "Congress left no gap to fill when it empowered the agency to consider all motions to reopen filed by a[] [noncitizen]," and therefore the BIA's reasoning failed under step one of the *Chevron* analysis.[67]

In ***Gordillo v. Holder***, 640 F.3d 700 (6th Cir. 2011), the Sixth Circuit applied the reasoning of *Pruidze* and concluded the post-departure bar was invalid in the context of an untimely but equitably tolled motion to reopen.

In an unpublished decision, ***Lisboa v. Holder,*** 436 F. App'x 545 (6th Cir. 2011), the Sixth Circuit relied on its analysis in *Pruidze* to conclude that the IJ had jurisdiction to consider a *sua sponte* post-departure motion to reopen.

- **<u>Seventh Circuit</u>** *(covers those ordered removed in immigration court proceedings in IL)*

The Seventh Circuit invalidated the post-departure bar as a jurisdictional rule in ***Marin-Rodriguez v. Holder***, 612 F.3d 591 (7th Cir. 2010).[68] In that case, the BIA had granted the noncitizen's timely motion, but withdrew its decision after being informed by the government that the noncitizen had been removed while his motion was pending. Resting on the Supreme Court's decision in *Union Pacific*, 558 U.S. 67 (2009), the Seventh Circuit stated that "nothing in the statute undergirds a conclusion that the Board lacks 'jurisdiction'—which is to say, adjudicatory competence. . . to issue decisions that

[65] *Pruidze*, 632 F.3d at 239.

[66] *Id.*

[67] *Id.* at 240.

[68] The court left open the possibility that the BIA may be able to "recast its approach as one resting on a categorical exercise of discretion." 612 F.3d at 595. In *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), however, the Supreme Court held that where an agency has been granted jurisdiction, it must exercise that discretion on a case by case basis. *See also Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957) (requiring that where discretion has been granted it be properly exercised, and reviewing a BIA decision for abuse of discretion and failure to exercise discretion).

affect the legal rights of departed [noncitizens]."[69] The court remanded to the BIA, holding that, "[a]s a rule about subject-matter jurisdiction, § 1003.2(d) is untenable."[70]

In *Shah v. Holder,* 736 F.3d 1125 (7th Cir. 2013), the Seventh Circuit presumed, without directly addressing the issue, that the post-departure bar did not prevent the BIA from entertaining a *sua sponte* motion to reopen.[71]

- **Ninth Circuit** *(covers those ordered removed in immigration court proceedings in the Northern Mariana Islands, HI, AZ, CA, NV, OR, and WA)*

The Ninth Circuit has issued a series of decisions invalidating the post-departure bar. ***Coyt v. Holder***, 593 F.3d 902 (9th Cir. 2010), held, pursuant to *Chevron*, that the regulation stating that a pending motion is withdrawn upon departure conflicts with Congress's clear intent in enacting IIRIRA—of expediting removal while increasing the accuracy of removal determinations—and is thereby invalid.

The Ninth Circuit extended this holding to instances in which the motion is filed following departure in ***Reyes-Torres v. Holder***, 645 F.3d 1073 (9th Cir. 2011). The court, referencing *Coyt*, found "no principled legal distinction" between the two cases, and again held that the post-departure bar was invalid as in conflict with the statutory language and the intent of Congress. In ***Toor v. Lynch***, 789 F.3d 1055 (9th Cir. 2015), the Ninth Circuit found the departure bar invalid regardless of whether the departure is voluntary or involuntary.

Prior to the statutory conflict analysis, the Ninth Circuit had relied on another line of cases holding that the post-departure bar does not apply where the individual departs prior to the commencement of proceedings or following the completion of proceedings. The court noted that, on its face, the regulation bars post-departure motions by individuals who are "the subject of removal, deportation or exclusion proceedings," and reasoned that those who depart prior to the commencement or following completion of their proceedings are not "the subject of" removal proceedings at the time of their departure and hence not subject to the post-departure bar.[72] In *Armendarez-Mendez*, the

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[69] *Marin-Rodriguez*, 612 F.3d at 594.

[70] *Id.* at 593.

[71] *Shah,* 736 F.3d at 1127 ("Although *Marin–Rodriguez v. Holder,* 612 F.3d 591 (7th Cir.2010), holds that the Board has the power to reopen a removal proceeding after a[] [noncitizen] has left this nation, it recognizes that the [noncitizen]'s current location is a factor that the Board may consider in considering a request that an order of removal be set aside.") (discussing in context of *sua sponte* motion).

[72] *Lin v. Gonzales,* 473 F.3d 979, 982 (9th Cir. 2007) (invalidating regulation for those who are removed prior to the filing of the motion); *Singh v. Gonzales*, 412 F.3d 1117, 1121 (9th Cir. 2005) (invalidating regulation for those who departed prior to

BIA disagreed with this line of reasoning and stated that it declined to follow the holdings in those cases even in cases arising in the Ninth Circuit.[73]

Relying on a separate line of cases, the Ninth Circuit has also held that those who have been removed may seek reopening of proceedings where a conviction that formed a "key part" of the removal proceeding has been vacated. This argument is especially significant considering the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), holding that the Sixth Amendment requires criminal defense attorneys to advise their noncitizen clients of the immigration consequences of their pleas, and that failure to do so may afford the noncitizen the possibility of vacating past criminal convictions.

In ***Cardoso-Tlaseca v. Gonzales***, 460 F.3d 1102, 1107 (9th Cir. 2006), the court held that where the conviction that was a "key part" of the removal proceedings had been vacated on the merits, the noncitizen was entitled to reopen the proceedings, since the vacatur rendered him eligible for relief from removal. In reaching this conclusion, the court relied on two prior cases, ***Estrada-Rosales v. Immigration and Naturalization Service,*** 645 F.2d 819, 821 (9th Cir. 1981) (holding that the deportation was not "legally executed" and the noncitizen was entitled to a new hearing where the conviction was vacated following deportation) and ***Wiedersperg v. INS,*** 896 F.2d 1179, 1183 (9th Cir. 1990) (holding that vacatur established prima facie eligibility for relief and that the BIA had abused its discretion in denying the motion alleging that noncitizen had "slept on his rights" when he filed the motion seven years after the vacatur). Both cases relied in turn on ***Mendez v. INS,*** 563 F.2d 956, 958-59 (9th Cir. 1977), in which the court concluded that because the noncitizen'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,[74] "departure" meant "'legally executed' departure when effected by the government." In ***Toor v. Lynch,*** 789 F.3d 1055 (9th Cir. 2015), however, the Ninth Circuit held that the post-departure bar is invalid irrespective of the manner in which the noncitizen departed.

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commencement of proceedings). Though *Lin* concerned a motion filed before the IJ, the court subsequently extended its holding to motions filed with the BIA. *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007).

[73] 24 I&N Dec. at 653 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005)). However, in at least two unpublished decisions, the Ninth Circuit has found that its holding in *Lin* trumps the BIA's holding in *Armendarez-Mendez*. *See Kureghyan v. Holder*, 338 F. App'x 622, 624 (9th Cir. 2009) (unpublished); *Chaiban v. Mukasey*, 299 F. App'x 702 (9th Cir. 2008) (unpublished).

[74] Former 8 USC § 1105a(c) (repealed 1996) provided that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the [noncitizen] 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."

In ***Rubalcaba v. Garland,*** 998 F.3d 1031 (9th Cir. 2021), the Ninth Circuit followed the Tenth Circuit's lead and struck down the post-departure bar in the context of *sua sponte* reopening. Applying the deference framework articulated in *Kisor,* the court determined that 8 C.F.R. § 1003.23(b)(1) was not "genuinely ambiguous" and thus the BIA's interpretation in *Armendarez-Mendez* that the regulation deprived an IJ of jurisdiction to *sua sponte* reopen removal proceedings was not entitled to deference.[75]

The Ninth Circuit analysed the "text, structure, history and purpose of [8 C.F.R. § 1003.23(b)(1)]" and concluded that it was clear that the post-departure bar provision "does not apply in the context of *sua sponte* reopening."[76] The court enumerated the following reasons in reaching its conclusion:

1. **Text:** the plain language of the regulation distinguishes between an IJ's *sua sponte* reopening authority and a noncitizen's right to file one motion to reopen within 90 days of an order of removal. The post-departure bar provision limits only a noncitizen's ability to "make" a "motion to reopen or reconsider" and contains no reference to the IJ's *sua sponte* reopening authority.[77] Therefore, the post-departure bar provision cannot be read to limit the IJs *sua sponte* authority, only statutory motions to reopen brought by the parties.
2. **Structure:** the first sentence of the regulation establishes the IJ's authority to reopen cases *sua sponte* "at any time." The regulation "then provides, in the alternative, that either party may file a motion to reopen."[78] The next three sentences then establish time and number limits that restrict a party's ability file a motion to reopen—which the government acknowledges does not apply to *sua sponte* reopening. The following sentence contains the post-departure bar. The placement of the post-departure bar after the number and time limits supports the conclusion that this restriction, like the limitations laid out in the preceding three sentences, does not apply to *sua sponte* reopening.[79]
3. **History:** the Attorney General promulgated the regulation containing the post-departure bar in 1952, prior to the first regulation providing for *sua sponte* reopening (1958). In the following decades, the Attorney General promulgated regulations establishing time limits for motions to reopen but continuing to affirm that *sua sponte* reopening was available "at any time." The current regulation, promulgated in 1997, allow for *sua sponte* reopening "at any time" but establishing limitations on a "motion to reopen"—including the departure bar. Looking at this

[75] 998 F.3d at 1040.

[76] *Id.* at 1038.

[77] *Id.*

[78] *Id.* at 1039.

[79] *Id.*

history, the court concluded that "*sua sponte* reopening has long provided a separate mechanism for reopening that is not subject to the other regulatory limits on reopening."[80]

4. **Purpose:** the purpose of *sua sponte* reopening is to provide an "entirely discretionary mechanism" that "gives the agency flexibility in truly unusual cases in which a noncitizen cannot meet the regulatory requirements for a 'motion to reopen' but the agency determines that reopening is still justified by the circumstances."[81]

- **<u>Tenth Circuit</u>** *(covers those ordered removed in immigration court proceedings in NM,CO, and UT)*

In ***Contreras-Bocanegra v. Holder,*** 678 F.3d 811 (10th Cir. 2012) (en banc), the Tenth Circuit joined the majority of circuits in holding that the post-departure bar conflicts with the language of the statute and impermissibly interferes with Congress' clear intent that a noncitizen have the right to pursue a motion to reopen. The court therefore invalidated the regulation under step one of *Chevron*, finding it unnecessary to consider whether the regulation is an impermissible contraction of jurisdiction under *Union Pacific*, though it noted that "these inquiries may not be altogether separate."[82]

In this case, the Tenth Circuit explicitly overruled *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009), in which it had reached step two of the *Chevron* analysis and concluded that the regulation was based on a permissible construction of the statute and its progeny.

In ***Reyes-Vargas v. Barr,*** 958 F.3d 1295 (10th Cir. 2020), the Tenth Circuit held that, post-*Kisor,* the regulatory post-departure bar did not limit an IJ's ability to *sua sponte* reopen removal proceedings.[83]

The Tenth Circuit first analyzed the language and structure of § 1003.23(b)(1) to conclude that it was clear that the post-departure bar limited only a party's ability to bring a "motion to reopen," not an IJ's "sua sponte motion to reopen removal proceedings."[84] Second, the Tenth Circuit held that this reading of the "regulation's plain language leads to a sensible result."[85] The court noted that "oftentimes, the [noncitizen]'s good reason for reopening removal proceedings takes time to manifest itself," sometimes "more time than a[] [noncitizen] has in which to stave off removal."[86] If

[80] *Id.*

[81] *Id.* at 1039-40.

[82] *Contreras-Bocanegra*, 678 F.3d 811, 816 (10th Cir. 2012) (en banc).

[83] *Reyes-Vargas,* 958 F.3d at 1298, 1305-06.

[84] *Id.* at 1305.

[85] *Id.*

[86] *Id.*

the agency had "written its regulations to attach a post-departure bar to the IJ's and Board's *sua sponte* authority to reopen removal proceedings, the resulting sua sponte authority would be next to worthless."[87]

The Tenth Circuit thus concluded that the regulation was not "genuinely ambiguous" and thus it would not defer to the agency's interpretation that the post-departure bar eliminated the IJ's jurisdiction to *sua sponte* reopen proceedings.[88]

- **Eleventh Circuit** *(covers those ordered removed in immigration court proceedings in FL and GA)*

The Eleventh Circuit invalidated the post-departure bar in ***Lin v. U.S. Att'y Gen.***, 681 F.3d 1236 (11th Cir. 2012), finding that the regulation impermissibly conflicts with the statute granting the right to file one motion to reopen. The case concerned the regulatory provision deeming a motion withdrawn upon the noncitizen's departure or removal because the noncitizen had departed the United States after filing a motion to reopen seeking asylum based on changed country conditions.[89] Looking to the plain language of the statute, as well as the statutory scheme as a whole, the court invalidated the post-departure bar under step one of *Chevron*.

2. Circuit Court Decisions Upholding the Post-Departure Bar in the Context of *Sua Sponte* Reopening[90]

The Second, Third and Fifth Circuits have all upheld the validity of the post-departure bar in the context of *sua sponte* reopening. As a note, all these decisions were issued prior to the Supreme Court's 2019 decision in *Kisor v. Wilkie,* in which the Supreme Court limited the scenarios in which courts should defer to an agency's interpretation of its own regulations. Neither the Second nor Fifth Circuit have contemplated the impact of *Kisor* on the validity of the post-departure bar in the *sua sponte* context. As discussed above, the Third Circuit has recently held that *Kisor* calls into question

[87] *Id.* at 1305-06.

[88] *Id.*

[89] Motions to reopen based on changed country conditions are generally not subject to the time or number bars. *See supra* note 25.

[90] Some courts have found that they lacked jurisdiction to even consider whether the BIA wrongly applied the departure bar in the *sua sponte* context. *See, e.g., Carrasco-Palos v. Sessions*, 695 F. App'x 992 (8th Cir. 2017) (unpublished) (stating that even if the noncitizen's initial removal order had not been reinstated, the court still would not have jurisdiction to review the BIA's denial of *sua sponte* reopening unless a "colorable constitutional claim" were raised). However, many circuits have found that they do have jurisdiction to review legal errors in the BIA's exercise of its *sua sponte* authority. *See supra* note 41.

the circuit's prior decision upholding the post-departure bar as a jurisdictional limitation. Recent decisions from other circuits, discussed above, indicate that the *Kisor* deference framework may lead to the Second and Fifth Circuits revisiting and overruling earlier decisions upholding the post-departure bar in the context of *sua sponte* reopening.

- **Second Circuit** *(covers those ordered removed in immigration court proceedings in CT and NY)*

Though the Second Circuit invalidated the post-departure bar in the context of "statutory motions," meaning timely motions or those brought within the confines of the statute through equitable tolling, in *Luna v. Holder* (see discussion in Part B above), the court upheld the regulation in ***Zhang v. Holder***, 617 F.3d 650 (2d Cir. 2010), where the noncitizen had filed an untimely motion requesting *sua sponte* reopening following the denial of his asylum petition.[91]

The Second Circuit held that the departure bar does not conflict with the BIA's regulatory *sua sponte* authority under 8 C.F.R. § 1003.2(a). It also rejected the noncitizen's argument that the motion should have been considered *nunc pro tunc* as of the day his request for a stay of removal had been denied, which would have rendered the departure bar inapplicable. The court did not, however, address whether the regulation conflicts with the statutory language, finding that the noncitizen had abandoned the argument.

Though noting that "the BIA's construction is anything but airtight," and that it is "linguistically awkward to consider the forcible removal of a[] [noncitizen] as 'constitut[ing] a withdrawal' of any pending motions filed by the [noncitizen]," the court reasoned that if the Attorney General has authority to vest *sua sponte* jurisdiction through regulation, then he or she would also have the authority to regulate that jurisdiction, including through a departure bar.[92] Thus, the court concluded that the BIA's interpretation of the departure bar as jurisdictional was not plainly erroneous. However, it signaled that if it were not for the BIA's clear precedent it might have held differently:

> Were we writing on a blank slate, we might reach a different conclusion than that of the BIA regarding the relationship between these portions of 8 C.F.R. § 1003.2. But, in

[91] *See also Gaytan-Aragon v. Lynch*, 614 F. App'x 536 (2d. Cir. 2015) (unpublished) (recognizing that the departure bar applies to motions for *sua sponte* reopening filed with the BIA or an IJ).

[92] *Zhang*, 617 F.3d at 660.

light of *In re Armendarez-Mendez*, we are not presented with a blank slate . . . we cannot say that the Board's construction is plainly erroneous.[93]

- **Third Circuit** *(covers those ordered removed in immigration court proceedings in NJ and PA)*

In ***Desai v. U.S. Att'y Gen.***, 695 F.3d 267 (3d Cir. 2012), the Third Circuit upheld the post-departure bar in the context of a *sua sponte* motion to reopen. The noncitizen had requested *sua sponte* reopening based on the vacatur of one of the two convictions which had formed the basis of his removal. The BIA denied the motion to reopen based on the post-departure bar but also stated that it would deny the motion on the merits. While acknowledging that it had invalidated the regulation in *Prestol-Espinal* (see discussion in Part B above), the court stated that it had "invalidated the post-departure bar only in those cases where it would nullify a statutory right, i.e., where a petitioner's motion to reopen falls within the statutory specifications."[94] Mirroring the reasoning of the Second Circuit in *Zhang*, the court concluded that "[b]ecause the BIA considers motions *sua sponte* pursuant to a grant of authority from the Attorney General, there is no statutory basis for a motion to reopen in the *sua sponte* context," and thus the concerns underlying its decision in *Prestol-Espinal* were absent.[95]

Following the Supreme Court's decision in *Kisor v. Wilkie,* 139 S. Ct. 2400 (2019), the Third Circuit has called its decision in *Desai* into question in an unpublished decision, ***Ovalle v. Att'y Gen.,*** 791 F. App'x 333, 335-37 (3d Cir. 2019), which is discussed above.

- **Fifth Circuit** *(covers those ordered removed in immigration court proceedings in LA and TX)*

In ***Ovalles v. Holder***, 577 F.3d 288, 300 (5th Cir. 2009), the Fifth Circuit held that the BIA does not have jurisdiction to consider an untimely filed *sua sponte* motion. The court held that because the motion was untimely and there is no statutory right to file an untimely motion, the noncitizen could not rely on the argument that the regulation was in conflict with the statute.

The noncitizen in *Ovalles* filed a *sua sponte* motion, arguing that a Supreme Court decision issued after his removal made clear that his single conviction for drug possession should not have been deemed an aggravated felony. The BIA held that it lacked jurisdiction to consider the motion. The

[93] *Id.*

[94] *Desai*, 695 F.3d at 270.

[95] *Id.*

Fifth Circuit focused on the untimeliness of the noncitizen's motion, as it was filed years after his removal order became final and eight months after the Supreme Court's decision on which it rested, and treated it as a request to reopen *sua sponte*.[96] The court followed its ruling in ***Navarro-Miranda v. Ashcroft****,* 330 F.3d 672, 676 (5th Cir. 2003) (finding reasonable the BIA's interpretation that the post-departure bar overrides its *sua sponte* authority),[97] and held that the BIA lacked *sua sponte* authority to reopen.[98]

Importantly, the Fifth Circuit later clarified in *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016), that the deadline for filing a motion to reopen is subject to equitable tolling, and noted that if the BIA finds that equitable tolling should be applied, then the motion will be considered a statutory motion to which the post-departure bar cannot be applied. In so concluding, the Fifth Circuit distinguished its ruling in *Ovalles*, noting that the noncitizen in *Ovalles* had conceded that his motion to reopen was untimely, whereas *Lugo-Resendez* had made no such concession and instead had argued that he was entitled to equitable tolling of the 90-day deadline. Finding that the BIA had abused its discretion in failing to consider whether the deadline should be equitably tolled, the court remanded to the BIA for such a determination. The court further admonished the BIA to "give due consideration to the reality that many departed [noncitizens] are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions."[99]

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[96] Prior to *Mata v. Lynch,* 135 S.Ct. 2150 (2015), when individuals filed motions past the statutory deadline, and requested that the deadline be equitably tolled, the Fifth Circuit routinely treated these requests as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*, and held that it had no jurisdiction to review the BIA's refusal to exercise its *sua sponte* power to reopen cases because the BIA's *sua sponte* authority was purely discretionary. *Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). In *Mata*, the Supreme Court ruled that the Fifth Circuit may not decline to exercise jurisdiction over requests for equitable tolling by recharacterizing them as challenges to the BIA's *sua sponte* decisions. Furthermore, it rejected the false equivalence between a request for exercise of equitable tolling and exercise of *sua sponte* authority.

[97] In *Navarro*, the noncitizen had conceded that the post-departure regulation barred his motion, but argued that the BIA should exercise its *sua sponte* power to reopen anyway based on extraordinary circumstances, namely, a change in law. The BIA declined to exercise jurisdiction over the motion, holding that the post-departure bar trumped its *sua sponte* power to reopen.

[98] *Accord Salgado v. Sessions*, 715 F. App'x 375 (5th Cir. 2017) (unpublished); *see also Toora v. Holder*, 603 F.3d 282 (5th Cir. 2010) (upholding post-departure bar and finding that IJ lacked jurisdiction where the individual departed after proceedings had commenced but before the removal order had been entered).

[99] *Lugo-Resendez v. Lynch*, 831 F.3d at 345; *but see Avila-Perez v. Lynch*, 672 F. App'x 402 (5th Cir. 2016) (unpublished) (reviewing the BIA's denial of a motion to reopen as untimely and holding that the BIA had not abused its discretion in failing to equitably toll the deadline because the noncitizen had not provided any explanation for his delay in consulting an attorney only years after changes in the law that impacted his removal case and thus had not proven due diligence).

V. Practice Pointers for Filing Post-Departure Motions

Frame your motion as a statutory motion to reopen or reconsider: As discussed above, nearly all circuit courts have invalidated the post-departure bar in the context of statutory motions to reopen. Therefore, it is important to include a statutory basis for the motion to reopen and to explain the post-departure bar's inapplicability to the motion.

Attorneys in circuits that have already invalidated the post-departure bar in the *sua sponte* context should also present a statutory argument for reopening wherever possible, as it is far more difficult or impossible to obtain federal court review of a discretionary denial of a motion for *sua sponte* reopening or reconsideration.

A post-departure motion that is otherwise numerically barred or is filed outside of the 30/90 day time limit should develop and preserve the following arguments where applicable:

- The 30/90 day time or numerical limit does not apply under an applicable statutory and/or regulatory scheme;[100] and/or
- Equitable tolling applies and renders the motion statutory.[101]

Present a *sua sponte* argument in the alternative: Two circuits (Ninth and Tenth) have invalidated the post-departure bar in the context of *sua sponte* motions to reopen, and the Third Circuit has held that the post-departure bar cannot be invoked as a jurisdictional limitation. Motions filed in these circuits should include an alternative *sua sponte* basis for reopening where the motion does not fall within the statutory numerical and time restrictions and explain the post-departure bar's inapplicability to the motion.

Preserve arguments against the post-departure bar for appeal:

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[100] *See* discussion *supra* Parts I.D.1-3 (explaining exceptions to the time and numerical limitations).

[101] See note 29 for caselaw on equitable tolling. An equitable tolling argument should include, where relevant, an argument that the motion to reopen or motion to reconsider was filed within 30/90 days of a triggering event (*i.e.*, vacated conviction, change in circuit law, or recently obtained knowledge regarding availability of a motion to reopen or motion to reconsider). *See, e.g., Gonzalez-Hernandez v. Garland,* 9 F. 4th 278, 282 (5th Cir. 2021) (affirming agency determination that equitable tolling only tolled the time prior to a noncitizen's discovery of the impact of changed law on his removal order).
For a more in-depth discussion on equitable tolling arguments, see ILRC & NIPNLG, *Practice Advisory: Post-Conviction Relief Motions to Reopen*, *supra* note 2, at 14-18. *See also* Boston College Post-Deportation Human Rights Project, Equitable Tolling of Motions to Reopen (2013), https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Equitable%20tolling%20of%20motions%20to%20reopen_FINAL.pdf.

- **Argue that the post-departure bar does not limit statutory motion to reopen:** In the Eighth Circuit, which has yet to rule on this issue in the context of statutory motions, arguments that the post-departure bar is in conflict with the language of the statute, is an impermissible contraction of the IJ's or BIA's jurisdiction, and/or is unconstitutional should be raised in the motion filed with the IJ or BIA, in any appeal to the BIA of an IJ's denial.

- **Argue that *sua sponte* reopening is available after departure:** Individuals filing motions to reopen in circuits that have yet to invalidate the post-departure bar in the context of *sua sponte* motions should raise the argument that the regulations are clear that the post-departure bar does not apply to *sua sponte* reopening and that deference to the agency's interpretation is not warranted post-*Kisor*. Such arguments should be raised in the motion filed with the IJ or BIA, and in any appeal to the BIA of an IJ's denial.

VI. Removal While a Motion or Appeal is Pending

Generally, the filing of a motion to reopen or reconsider does not automatically stay a removal order.[102] An individual seeking reopening or reconsideration while in the United States must also seek a discretionary stay of removal to prevent potential removal while the motion is pending.[103]

Where an individual initially files a motion to reopen or reconsider while in the country but does not receive a stay of removal, they may be removed while the motion or appeal of the denial of the motion is pending resolution. In this situation, advocates may have to confront additional arguments that the "departure from the United States" serves to withdraw the pending motion or appeal.

[102] 8 CFR § 1003.23(b)(1)(v); 8 CFR § 1003.2(f). There are two exceptions to this rule. There is an automatic stay provision for motions to reopen *in absentia* removal orders. 8 CFR §§ 1003.23(b)(1)(v); 1003.2(f). There is also an automatic stay provision for motions to reopen filed by certain individuals seeking relief under VAWA, which extends through the appeals process. *See* INA 240(c)(7)(C)(iv).

[103]For a resource on successfully filing stay requests, see CLINIC, *Practice Advisory: Stays of Removal* (June 28, 2021), https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-stays-removal.
Practitioners in the Eighth Circuit representing individuals on motions to reopen *prior* to removal who have a stay of removal denied may also have a colorable argument that the Eighth Circuit's failure to invalidate the departure bar provides the basis for a habeas petition and temporary restraining order to prevent removal while said motion to reopen is pending. *See Adbi v. Sessions*, No. CV 17-5474, 2017 WL 11697876, at *2 (D. Minn. Dec. 19, 2017) (holding that petitioner's constitutional right to file a motion to reopen would be violated by the application of the departure bar and granting a temporary restraining order to enjoin removal before a decision on motion to reopen issued).

A. Removal While a Motion is Pending

If a person is physically removed from the United States while a motion is pending, the IJ or the BIA may conclude they lack jurisdiction over the motion pursuant to 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."[104] Therefore, while an IJ or the BIA outside of the jurisdiction of the Eighth Circuit is limited in its ability to rely on the post-departure bar to disavow jurisdiction over these motions to reopen, an IJ or the BIA may nonetheless claim to lack jurisdiction over the motion to reopen based on the withdrawal clause of the regulation.

Some cases examining the departure bar do directly address and invalidate the withdrawal provision,[105] but not all courts have addressed this provision specifically. If faced with the withdrawal provision, advocates should argue that any decision invalidating the BIA's jurisdictional interpretation of the post-departure bar should apply equally to the regulatory provisions deeming a motion withdrawn upon departure or deportation.

B. Removal While a BIA Appeal from the Denial of a Motion is Pending

8 C.F.R. § 1003.4 presents a further hurdle when a person is physically removed or departs from the United States while an appeal of the IJ's denial of a motion to reopen or reconsider is pending.[106] That regulation provides that:

> Departure from the United States of a person who is the subject of deportation or removal proceedings . . . 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.[107]

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[104] 8 CFR §§ 1003.2(d) (BIA), 1003.23(b)(1) (immigration court).

[105] *See, e.g., Lin v. U.S. Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012); *Coyt v. Holder*, 593 F3d 902 (9th Cir. 2010); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010) (invalidating the regulation and stating that "it amounts to saying that, by putting a[] [noncitizen] on a bus, the agency may 'withdraw' its adversary's motion"); *but see Zhang v. Holder*, 617 F.3d 650, 660 (2d Cir. 2010) (noting that "it is linguistically awkward to consider the forcible removal of a[] [noncitizen] as 'constitut[ing] a withdrawal' of any pending motions," but ultimately finding that the BIA's interpretation that the departure bar limited its *sua sponte* authority was not plainly erroneous.").

[106] INA § 240(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.

[107] 8 CFR § 1003.4.

Though a full analysis of the jurisprudence surrounding this provision is beyond the scope of this practice advisory, several decisions are worth noting. The BIA has held that unlawful removals (removal in violation of a stay) do not constitute a "departure" for purposes of 8 C.F.R. § 1003.4. and thus do not deprive the BIA of jurisdiction to consider a pending appeal.[108] The Sixth and Ninth Circuits have gone further and both ruled that any involuntary departure (i.e. removal) while an appeal of a motion to reopen is pending does not act to withdraw the pending appeal.[109]

In contrast, the Tenth Circuit has stated that the noncitizen's intentions or motives do not make a difference, and instead "even inadvertent, unwanted, or accidental departures can lawfully trigger the regulation."[110] Thus, in some circuits, practitioners should consider arguing that being subjected to removal does not constitute a "departure" for purposes of the withdrawal of an appeal.

I. Conclusion

Obtaining reopening or reconsideration of a final removal order is not an easy or straightforward task, as described in Section II of this practice advisory. Noncitizens who seek reopening or reconsideration after deportation face a further barrier—they must establish that the regulatory post-departure bar does not bar the agency adjudicator from reopening their removal proceedings.

There have been numerous positive developments in this area of law over the past decade. First, every federal circuit court to consider the question has invalidated the post-departure bar in the statutory motion to reopen context. Second, in the past three years, two circuit courts have adopted new arguments to further invalidate the post-departure bar in the context of *sua sponte* reopening.

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[108] *Matter of Diaz-Garcia*, 25 I&N Dec. 794 (BIA 2012) ("[F]undamental fairness dictates that an unlawful act by the DHS should not serve to deprive us of jurisdiction").

[109] *Madrigal v. Holder,* 572 F.3d 239, 245 (6th Cir. 2009) (to allow the government to cut off the statutory right to an appeal through removal appears to be a "perversion of the administrative process") *Lopez-Angel v. Barr,* 952 F.3d 1045, 1049 (9th Cir. 2019) (§ 1003.4 only authorizes withdrawal where an individual "engage[s] in conduct that establishes a waiver of the right to appeal); *cf. Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835, 838 (9th Cir. 2003) (voluntary departures, even if "brief, casual, and innocent," do withdraw an appeal under § 1003.4).

[110] *Montano-Vega v. Holder*, 721 F.3d 1175, 1180 (10th Cir. 2013) (Gorsuch, J.); *see also Long v. Gonzales*, 420 F.3d 516, 520 n.6 (5th Cir. 2005) (per curiam) (declining to read an "involuntary departure" exception into § 1003.4). Both *Montano-Vega* and *Long* concerned cases where the individuals in question had voluntarily departed—not cases where individuals had been deported—and thus practitioners could argue that the language about involuntary departures constitutes *dicta* and should not be determinative in a case where an individual was in fact removed by the government while an appeal was pending. The Second Circuit has left this question open, noting that "[i]t is unclear whether this regulation applies where [a noncitizen] does not voluntarily depart but instead is deported," but did not decide the issue. *Ahmad v. Gonzales*, 204 F. App'x 98 (2d Cir. 2006) (unpublished).

Advocates representing individuals on motions to reopen after deportation must understand the shifting law around the post-departure bar in their given circuit. Further, advocates in circuits that have yet to fully invalidate the post-departure bar should make sure to advance and preserve strong arguments that the recent legal developments in the Supreme Court and other circuits compel the conclusion that the regulatory post-departure bar does not prevent either statutory or *sua sponte* reopening.

NIPNLG is involved in litigating issues related to the post-departure bar and can offer assistance and amicus support in such cases. If you have a case that involves the post-departure bar, please contact Michelle Méndez at michelle@nipnlg.org.

APPENDIX: Charts of Principal Cases by Circuit

Cases on the Impact of the Post-Departure Bar on Statutory Motions to Reopen		
	Cases Invalidating the Regulation	*Cases Upholding the Regulation*
1st Cir.	***Perez-Santana v. Holder***, 731 F.3d 50 (1st Cir. 2013); ***Bolieiro v. Holder***, 731 F.3d 32 (1st Cir. 2013): post-departure bar conflicts with the statutory right to file a motion.	
2d Cir.	***Luna v. Holder***, 637 F.3d 85 (2d Cir. 2011): BIA's interpretation of post-departure bar is an impermissible constriction of its jurisdiction, and post-departure motions must remain available in order for motions to reopen to provide an adequate and effective substitute for habeas.	
3d Cir.	***Prestol Espinal v. Att'y Gen.***, 653 F.3d 213 (3d Cir. 2011): post-departure bar conflicts with the statutory right to file a motion.	
4th Cir.	***William v. Gonzales***, 499 F.3d 329 (4th Cir. 2007): post-departure bar conflicts with the statutory right to file a motion.	
5th Cir.	***Garcia-Carias v. Holder***, 697 F.3d 257 (5th Cir. 2012): post-departure bar conflicts with the statutory right to file a motion to reopen, but upholds *Ovalles* in the context of *sua sponte* motions. ***Lari v. Holder***, 697 F.3d 273 (5th Cir. 2012): post-departure bar conflicts with the statutory right to file a	

	motion to reconsider.	
6th Cir.	***Pruidze v. Holder***, 632 F.3d 234 (6th Cir. 2011): BIA's interpretation of post-departure bar is an impermissible constriction of its jurisdiction and the regulation is in conflict with the clear language of the statute.	
7th Cir.	***Marin-Rodriguez v. Holder***, 612 F.3d 591 (7th Cir. 2010): BIA's interpretation of post-departure bar is an impermissible constriction of its jurisdiction.	
8th Cir.[111]		
9th Cir.	***Coyt v. Holder***, 593 F.3d 902 (9th Cir. 2010); ***Reyes-Torres v. Holder***, 645 F.3d 1073 (9th Cir. 2011): post-departure bar conflicts with the statutory right to file a motion. ***Toor v. Lynch***, 789 F.3d 1055 (9th Cir. 2015): post-departure bar conflicts with the statute granting the right to a motion to reopen regardless of whether an individual left voluntarily or involuntarily.	
10th Cir.	***Contreras-Bocanegra v. Holder***, 678 F.3d 811 (10th Cir. 2012): post-departure bar conflicts with the statutory right to file a motion.	

[111] In *Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011), the Eighth Circuit was presented with the question of the validity of the post-departure bar, but did not decide the issue. Instead, the court remanded the case for a determination of whether the motion was equitably tolled.

11th Cir.	***Lin v. U.S. Att'y Gen.***, 681 F.3d 1236 (11th Cir. 2012): post-departure bar conflicts with the statutory right to file a motion. ***Contreras-Rodriguez v. U.S. Att'y Gen.,*** 462 F.3d 1314 (11th Cir. 2006): post-departure bar does not bar motions to reopen of *in absentia* orders based on lack of notice.	

Cases on the Impact of the Post-Departure Bar on Sua Sponte Reopening		
	Cases Invalidating the Regulation	*Cases Upholding the Regulation*
1st Cir.		
2d Cir.		***Zhang v. Holder***, 617 F.3d 650 (2d Cir. 2010): upholds validity of post-departure bar in the context of *sua sponte* motions.
3d Cir.	***Ovalle v. Attorney General United States,*** 791 F. App'x 333 (3d Cir. 2019) (unpublished): called *Desai*'s application of the post-departure bar to *sua sponte* motions into question post-Kisor and held bar is only a discretionary consideration, not a jurisdictional limitation.	***Desai v. Att'y Gen.,*** 695 F.3d 267 (3d Cir. 2012): upholds validity of post-departure bar in the context of *sua sponte* motions.
4th Cir.		
5th Cir.		***Ovalles v. Holder,*** 577 F.3d 288 (5th Cir. 2009): upholds validity of post-departure bar in the context of *sua sponte* motions.
6th Cir.	***Lisboa v. Holder,*** 436 F. App'x 545 (6th Cir. 2011) (unpublished): finding BIA had jurisdiction to consider a *sua sponte* post-departure motion to reopen.	
7th Cir.	***Shah v. Holder,*** 736 F.3d 1125, 1127 (7th Cir. 2013): presuming, without directly addressing the issue, that the BIA has the jurisdiction to consider post-departure *sua sponte* motions to reopen.	
8th Cir.		
9th Cir.	***Rubalcaba v. Garland,*** 998 F.3d 1031 (9th Cir. 2021): post-departure bar does not strip IJ of jurisdiction to *sua sponte* reopen proceedings.	

10th Cir.	***Reyes-Vargas v. Barr,*** 958 F.3d 1295 (10th Cir. 2020): post-departure bar does not limit an IJ's *sua sponte* reopening authority.	
11th Cir.		