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POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER¹ **(December 2012)**²

I. INTRODUCTION

This Practice Advisory provides guidance on filing motions to reopen or reconsider on behalf of clients who have been ordered deported, excluded, or removed and who have already departed the United States. **Individuals seeking to reopen their immigration proceedings after having departed or having been removed face significant hurdles. This Practice Advisory provides information on the legal issues surrounding post-departure motions. 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 and on the regulatory “post-departure bar.” Section III discusses cases decided by the Board of Immigration Appeals and Courts of Appeals that may be relevant to those seeking reopening or reconsideration after departure or deportation. Section IV considers issues that may arise if a client is removed while a motion to reopen or reconsider is pending.

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II. BACKGROUND

A. Reopening vs. Reconsideration

A **motion to reopen** is based on “facts or evidence not available at the time of the original decision.”³ A motion to reopen must be supported by affidavits or other evidence,⁴ 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.⁵ Situations in which motions to reopen are 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.⁶ In contrast, a **motion to reconsider** asks that a decision be reexamined “in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier,”⁷ including errors of law or fact in the previous order.⁸

The term “MTR” is generally used in this practice advisory to refer both to motions to reopen and motions to reconsider. Where the distinction is relevant, the specific type of motion concerned is identified.

An MTR must be filed with the adjudicatory body that last had jurisdiction over the case – either the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA).⁹ Where the IJ last exercised jurisdiction, the motion must be filed with the IJ who entered the order.¹⁰ If the BIA last exercised jurisdiction, the motion must be filed with the BIA.¹¹ Determining where jurisdiction last vested is not always as straightforward as it may seem (for example, jurisdiction does not vest with the BIA if it dismisses an appeal solely based on lack of jurisdiction),¹² so practitioners should pay close attention to the procedural history of the case in determining where to file an MTR.

The federal appeals courts have jurisdiction to review the BIA’s denial of an MTR, as well as the BIA’s affirmance of an IJ’s denial of such a motion, through a petition for review.¹³ 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.¹⁴ In two recent decisions, 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 motions.¹⁵

³ *Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004).

⁴ See INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B).

⁵ See 8 C.F.R. § 1003.2(c)(1); *Kaur v. BIA*, 413 F.3d 232, 234 (2d Cir. 2005).

⁶ See, e.g. *Patel*, 378 F.3d at 612 (changed country conditions); *Siong v. INS*, 376 F.3d 1030, 1036-39 (9th Cir. 2004) (ineffective assistance of counsel); *Ituribarria 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).

⁷ *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002).

⁸ See INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. §§ 1003.2(b)(1), 1003.23(b)(2).

⁹ See 8 C.F.R. § 1003.23 (Immigration Court); 8 C.F.R. § 1003.2 (BIA). See also BIA Practice Manual, § 5.2(a)(iii), App. K-1, available at: <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/AppK.pdf>.

¹⁰ See 8 C.F.R. § 1003.23(b)(1)(ii).

¹¹ See 8 C.F.R. § 1003.2(a).

¹² See, e.g. *Matter of Mladineo*, 14 I&N Dec. 591, 592 (BIA 1974).

¹³ INA § 242(a)(1), 8 U.S.C. § 1252(a)(1).

¹⁴ INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

¹⁵ See *Dada v. Mukasey*, 554 U.S. 1 (2008) (recognizing that MTRs are an “important safeguard” intended “to ensure a proper and lawful disposition” of immigration proceedings); *Kucana v. Holder*, 130 S. Ct. 827 (2010) (affirming federal court

B. Statutory Authority and Overview of MTRs

Prior to 1996, MTRs were governed solely by regulation. As part of the Illegal Immigration and Immigrant Responsibility Reform Act of 1996 (“IIRIRA”),¹⁶ however, Congress codified the right to file MTRs. These provisions are now located at 8 U.S.C. §§ 1229a(c)(6) (motions to reconsider) and (c)(7) (motions to reopen) (INA §§ 240(c)(6) and (c)(7)).

In its current form, the statute imposes time, number, and content requirements on motions to reopen or reconsider.¹⁷ In addition to the statute, there are regulations governing motions to reopen and reconsider.¹⁸ Also, 8 U.S.C. § 1229a(b)(5)(C) (INA § 240(b)(5)(C)), provides that a person who is ordered removed *in absentia* may file a motion to reopen to rescind the order.

Time and Number Limits

Practitioners must always be mindful of the significant restrictions on MTRs imposed by statute and regulation.

Motions to Reconsider: An individual who has been ordered removed is permitted to file only one motion to reconsider.¹⁹ The motion must be filed within 30 days of the date of entry of a final administrative order.²⁰

Motions to Reopen: An individual who has been ordered removed is permitted to file one motion to reopen within 90 days of the date of entry of a final administrative order.²¹ Statutory exceptions to these time and numerical limitations exist if the petitioner is seeking asylum based on changed country conditions (motion may be filed any time);²² is a battered spouse or child seeking certain forms of relief under the Violence Against Women Act (motion may be filed within one year, or at any time under certain circumstances);²³ or was ordered removed *in absentia* (motion may be filed at any time if basis for reopening is lack of notice of the hearing or confinement in federal or state custody, and failure to appear was no fault of the person subject to the order; or motion may be filed within 180 days if basis for reopening is “exceptional circumstances”).²⁴ In addition, most circuit courts have recognized that the

jurisdiction to review BIA denials of MTRs). Whether there is jurisdiction to review the denial of a *sua sponte* motion to reopen, however, has been the subject of contention. *See intra* note 31.

¹⁶ Pub. L. No. 104-208, 110 Stat. 3009 (1996).

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

¹⁸ 8 C.F.R. §§ 1003.23, 1003.2.

¹⁹ *See* INA § 240(c)(6)(B), 8 U.S.C. § 1229a(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).

²⁰ *See* INA § 240(c)(6)(A), (B), 8 U.S.C. § 1229a(c)(6)(A),(B).

²¹ *See* INA § 240(c)(7)(A), (c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(A), (c)(7)(C)(i).

²² *See* INA § 240(c)(7)(C)(ii), 8 U.S.C. § 1229a(c)(7)(C)(ii).

²³ *See* INA § 240(c)(7)(C)(iv), 8 U.S.C. § 1229a(c)(7)(C)(iv).

²⁴ *See* INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C). The 180 day time limit on motions to reopen *in absentia* orders for “exceptional circumstances” does not apply to pre-June 13, 1992 *in absentia* orders where “reasonable cause” is sufficient. In addition, there are no numerosity limits on motions to reopen to rescind an *in absentia* order. 8 C.F.R. 1003.23(b)(4)(iii)(D). *See generally*, Beth Werlin, “Rescinding an *In Absentia* Order of Removal,” American Immigration Council, Legal Action Center Practice Advisory (March 31, 2010), available at <http://www.legalactioncenter.org/practice-advisories/rescinding-absentia-order-removal>.

filing deadlines, and in some instances the numerical limitations, are not jurisdictional and are thus subject to *equitable tolling*.²⁵

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.²⁶ The BIA has stated, in general, that it will exercise *sua sponte* jurisdiction only in “exceptional situations.”²⁷ Exceptional situations include a change in law if it is fundamental rather than incremental.²⁸ Additionally, the BIA has regularly exercised *sua sponte* authority to reopen proceedings where a conviction that formed the basis of an order has subsequently been vacated.²⁹

The Supreme Court has confirmed federal court jurisdiction over motions to reopen, noting that motions to reopen are an “important safeguard.”³⁰ 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 an MTR 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 such a decision.³¹

²⁵ See *Neves v. Holder*, 613 F.3d 30 (1st Cir. 2010) (assuming, but not deciding, that time and number limitations are subject to equitable tolling); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000) (time limitation subject to equitable tolling); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005) (180 day time limitation to reopen *in absentia* order subject to equitable tolling); *Davies v. US INS*, 10 Fed.Appx. 223 (4th Cir. 2001) (unpublished) (time and number limitations subject to equitable tolling); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004) (time limitation subject to equitable tolling); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) (time limitation subject to equitable tolling); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005) (time limitation subject to equitable tolling); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1183-85 (9th Cir. 2001) (equitable tolling applies to time limitation where alien is unable to obtain vital information on existence of claim, not limited to ineffective assistance of counsel or fraud); *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) (time limitations subject to equitable tolling). *But See*, *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1150 (11th Cir. 2005) (time limitation is jurisdictional therefore not subject to equitable tolling) *compare Ruiz-Turcios v. U.S. Atty. Gen.*, No. 12-11503, 2012 U.S. App. LEXIS 23085, n.1 (Nov. 8, 2012) (citing to the Supreme Court’s decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010) for the presumption that a statute of limitations is subject to equitable tolling and stating that “nothing in the statute governing motions to reopen that demonstrates that Congress intended the 90-day limitation to be “an inflexible rule requiring dismissal”); *Pereira v. U.S. Atty. Gen.*, 258 Fed Appx. 277 (11th Cir. 2007) (unpublished) (statements in *Abdi* should be regarded as dicta). The Fifth Circuit has treated requests for equitable tolling as equivalent to requests for *sua sponte* reopening, and has held that it lacks jurisdiction to review the BIA’s denial of such motions. See e.g. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). Notwithstanding the Fifth Circuit’s position, the court may still review claims of equitable tolling. See, e.g. *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded “no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence...”).

²⁶ 8 C.F.R §§ 1003.2(a) (BIA), 1003.23(b)(1) (IJ).

²⁷ See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998).

²⁸ See *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *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 X-G-W-*, 22 I&N Dec. 71, 74 (reopening *sua sponte* on the basis of legislative change).

²⁹ See *Cruz v. Att’y Gen. of U.S.*, 452 F.3d 240, 246 n.3 (3d Cir. 2006) (citing ten unpublished BIA cases granting untimely motions to reopen based on vacated 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 an alien is no longer convicted for immigration purposes”).

³⁰ *Dada v. Mukasey*, 554 U.S. 1, 18 (2008), *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010).

³¹ See, e.g., *Luis v. INS*, 196 F.3d 36 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472 (3d Cir. 2003); *Mosere v. Muksey*, 552 F.3d 397 (4th Cir. 2009); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-411 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003); *Tamenut v. Mukasey* 521 F.3d 1000 (8th Cir. 2008); *Ochoa v. Holder*, 604 F.3d 546 (8th Cir. 2010) (*petition for re-*

Practice Pointer → It may be more difficult or impossible to obtain federal court review of the denial of a motion for *sua sponte* reopening or reconsideration. In addition (as detailed below) some circuits have invalidated the post-departure bar only in the context of “statutory” MTRs. Therefore, and whenever possible, attorneys should argue that a motion should be treated as falling within the statutory right to file an MTR. A post-departure MTR that is otherwise numerically barred or is filed outside of the 30/90 day time limit should preserve the following arguments where applicable:

- (1) The MTR 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 MTR);
- (2) The time or numerical limit does not apply under an applicable statutory and/or regulatory scheme;³² and/or
- (3) Equitable tolling applies and renders the motion statutory.³³

C. What is the Post-Departure Bar?

Although the statutes codifying MTRs do not contain a bar to motions filed after a person departs, two federal regulations do: 8 C.F.R. § 1003.2(d) (MTRs filed with the BIA) and 8 C.F.R. § 1003.23(b)(1) (MTRs filed with the IJ). Both regulations contain identical language prohibiting adjudication of post-departure motions, providing that MTRs “shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States.” 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.³⁴

In addition, both of these 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 of withdrawals of BIA appeals at 8 C.F.R. § 1003.4. That regulation 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 IV.

hearing en banc denied); *Mejia-Hernandez v. Holder*, 633 F.3d 818 (9th Cir. 2011); *Belay-Gebbru v. INS*, 327 F.3d 998 (10th Cir. 2003); *Lenis v. Attorney General*, 525 F.3d 1291 (11th Cir. 2008). *But see Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010), (*rehearing and rehearing en banc denied*) (opinion of the court and opinion concurring in part and concurring in judgment urged *en banc* review to reexamine whether there is jurisdiction to review denial of a motion to reopen in light of the Supreme Court’s decision in *Kucana*); *Riley v. INS*, 310 F.3d 1253, 1257 (10th Cir. 2002) (finding abuse of discretion where BIA failed to consider whether case warranted equitable tolling of deadline for motion to reopen based on ineffective assistance of counsel); *Pllumi v. Attorney General*, 2011 WL 1388508 (3d Cir. 2011) (court may review denial “to the limited extent of recognizing when the BIA has relied on incorrect legal premise”); *Cevilla v. Gonzalez*, 446 F.3d 658 (7th Cir. 2006) (not reviewable when based on discretion, but reviewable when based on application of a legal standard).

³² See *supra* note 24.

³³ See *supra* note 25 for discussion on equitable tolling.

³⁴ See *Dada v. Mukasey*, 554 U.S. 1, 6-7 (2008).

The BIA has upheld the validity of the post-departure bar as a jurisdictional bar, with the exception of motions to rescind an *in absentia* order based on lack of notice. Federal circuit courts have varied in their conclusions and approaches to the applicability of the post-departure bar. Relevant BIA and Circuit Court decisions are discussed in detail in Section III.

III. CASE LAW ON POST-DEPARTURE MOTIONS

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 it lacked jurisdiction to consider a *sua sponte* 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 stepped back from its reasoning in *Armendarez-Mendez* and held that an exception could be made in the case of a motion to reopen an *in absentia* order where the individual did not receive notice.

The respondent in *Armendarez-Mendez* filed a motion to reopen *sua sponte* with the BIA to seek § 212(c) relief. The BIA held that it did not have jurisdiction to consider respondent's MTR and rejected the Ninth Circuit's reasoning that the bar did not apply to those who filed an MTR after being removed, as they were no longer "the subject of" removal proceedings.³⁵ The BIA reasoned that the post-departure bar should be viewed in the context of the entire Immigration and Nationality Act 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) which had found the regulation to be in conflict with the statute. The BIA also stated that the post-departure bar deprived the Board of jurisdiction to consider the motion *sua sponte*, citing a previous Fifth Circuit case.³⁶

In *Bulnes-Nolasco*, the BIA held that an IJ has jurisdiction to consider a motion to reopen an *in absentia* proceeding based on lack of notice even if the motion was filed after the respondent's departure from the United States. The BIA concluded that the regulatory language permits the reopening of an *in absentia* order "at any time" despite the post-departure bar, and held that "an alien ordered deported *in absentia* possesses a robust right to challenge the removal order on improper notice grounds."³⁷ In a footnote, the BIA stated 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* MTRs based on lack of notice.³⁸

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 aliens have, by virtue of their departure, literally passed

³⁵ See *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007).

³⁶ *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).

³⁷ 25 I&N Dec. at 59.

³⁸ *Id.* at n. 3.

beyond our aid.”³⁹ 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. Nevertheless, three courts that have considered the post-departure bar in the limited context of *sua sponte* authority have not found the *sua sponte* authority to trump the post-departure bar.⁴⁰

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

Nine circuits have thus far invalidated the post-departure bar regulation.⁴¹ Three of them – the Second, Third, and Fifth circuits – have invalidated the regulation in the context of MTRs filed pursuant to the statute (i.e. timely, not numerically barred MTRs), but have upheld the regulation in the context of non-statutory, regulatory *sua sponte* MTRs. Most decisions invalidating the regulation have adopted one of two lines of reasoning:

(1) In the first instance, courts have engaged in a *Chevron* analysis⁴² and concluded that the regulation is in conflict 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.⁴³ This approach has generally been adopted by the Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.

(2) In the second instance, courts have relied on the reasoning in the Supreme Court’s decision *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S.Ct. 584 (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.

Both of these rationales for invalidating the post-departure bar are examined in more detail in the context of the cases in which these arguments were raised and discussed. Because some decisions do not fall neatly into either of these categories, and because additional arguments have been endorsed in reaching the conclusion that the post-departure bar is invalid, the decisions are summarized and discussed below by circuit.

³⁹ 24 I&N Dec. at 656. But see discussion of *Matter of Diaz Garcia*, 25 I&N Dec. 794 (BIA 2012) in Section IV.

⁴⁰ See *Zhang v. Holder*, 617 F.3d 650, 654 (2010); *Ovalles v. Holder*, 577 F.3d 288, 300 (5th Cir. 2009); *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012).

⁴¹ The reasoning applied to MTRs filed with the BIA under 8 C.F.R. § 1003.2 should also apply to motions filed with the IJ under 8 C.F.R. § 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.

⁴² Under the principles set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court engages in a two step process. It must first determine whether “Congress has directly spoken to the precise question” at issue by examining the plain meaning of the statute and, if necessary, employing traditional rules of statutory construction. *Id.* at 842. If the statutory language is clear, then the court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 843. If the court is not able to discern the intent of Congress, it moves on to step two of the analysis to determine whether the agency interpretation is reasonable. *Id.*

⁴³ See *Nat’l Cable and Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

➤ **Second Circuit** (covers those ordered removed by IJ sitting in CT, 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 petitioners 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, in order 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.⁴⁴ 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 8 U.S.C. § 1229a(c)(7).⁴⁵

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

➤ **Third Circuit** (covers those ordered removed by IJ sitting in NJ, PA)

In *Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011), the petitioner 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:

- (1) The plain text of the statute provides each alien with the right to file an MTR;
- (2) The Supreme Court has recognized the importance of this right;
- (3) Congress chose to incorporate some limitations on MTRs 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 an MTR by removing the alien within the filing window;
- (5) Congress included geographic limitations on special MTRs for victims of violence but did not include such a limitation on all MTRs;
- (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* MTR (see discussion below in Part C).

⁴⁴ *Luna*, 637 F.3d at 95.

⁴⁵ *Id.* at 100.

➤ **Fourth Circuit** (covers those ordered removed by IJ sitting in MD, NC, 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 8 U.S.C. § 1229a(c)(7)(A); (INA § 240(c)(7)(A)). The petitioner 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 MTR 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 § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country. This is so because, in providing that “an alien may file,” the statute does not distinguish between those aliens abroad and those within the country – both fall within the class denominated by the words “an alien.”... Accordingly, the Government’s view of § 1229a(c)(7)(A) simply does not comport with its text and cannot be accommodated absent a rewriting of its terms.⁴⁶

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.”⁴⁷ 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,⁴⁸ and noted that it would be meaningless if the underlying right to file MTRs 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 petitioner’s argument that the regulation violated his right to due process under the Fifth Amendment.

➤ **Fifth Circuit** (covers those ordered removed by IJ sitting in LA, TX)

In *Garcia-Carias v. Holder*, No. 11-60550, 2012 U.S. App. LEXIS 20284 (5th Cir., Sept. 27, 2012), the Fifth Circuit invalidated the post-departure bar regulation in the context of motions to reopen, finding it to be in conflict with the statute. The Court concluded that the statutory language granting “an alien” 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*, Nos. 11-60549 & 11-60706, 2012 U.S. App. LEXIS 20302 (5th Cir., Sept. 27, 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*, which upheld the departure bar in the context of *sua sponte* MTRs (see discussion below in Part C).

⁴⁶ *William*, 499 F.3d at 332.

⁴⁷ *Id.* at 333 (quoting *U.S. v. Johnson*, 529 U.S. 53, 58 (2000)).

⁴⁸ *Id.* The exception, which is codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV), was first enacted as part of the Victims or Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The “physical presence” element was added as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825, 119 Stat. 2960 (2006).

➤ **Sixth Circuit** (covers those ordered removed by IJ sitting in MI, OH, TN)

The Sixth Circuit has invalidated the post-departure bar, strongly wording its conclusion that the BIA’s interpretation of divestiture of its jurisdiction to hear motions to reopen following removal has “no 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.”⁴⁹ The court was further convinced by the fact that the Board 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.”⁵⁰ Furthermore, the Court found that the Board’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 an alien,” and therefore the Board’s reasoning failed under step one of the *Chevron* analysis.⁵¹

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.⁵²

The Sixth Circuit has also found invalid the regulatory provision stating that an appeal to the BIA is withdrawn by departure, and held that an involuntary departure cannot effect the withdrawal of a pending appeal of an MTR.⁵³ (See discussion on withdrawal in Section IV).

➤ **Seventh Circuit** (covers those ordered removed by IJ sitting in IL)

The post-departure bar was invalidated as a jurisdictional rule in the Seventh Circuit in *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010).⁵⁴ In that case, the BIA had granted the petitioner’s timely MTR, but withdrew its decision after being informed by the government that petitioner had been removed while his motion was pending. Resting on the Supreme Court’s decision in *Union Pacific*, 130 S. Ct. 584 (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 affect the legal rights of departed aliens.”⁵⁵ The court remanded to the BIA, holding that, “[a]s a rule about subject-matter jurisdiction, § 1003.2(d) is untenable.”⁵⁶

⁴⁹ *Pruidze*, 632 F.3d at 239.

⁵⁰ *Id.*

⁵¹ *Id.* at 240.

⁵² In an unpublished decision, *Lisboa v. Holder*, 436 Fed. Appx. 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.

⁵³ See *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009).

⁵⁴ 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).

⁵⁵ *Marin-Rodriguez*, 612 F.3d at 594.

⁵⁶ *Id.* at 593.

➤ **Ninth Circuit** (covers those ordered removed by IJ sitting in AZ, CA, NV, OR, 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 MTR 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 MTR is filed following departure in *Reyes-Torres v. Holder*, 645 F.3d 1073 (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.

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 MTRs 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.⁵⁷ In *Armendarez-Mendez*, the 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.⁵⁸

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 in light of the Supreme Court’s decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), holding that the Sixth Amendment requires criminal defense attorneys to advise their noncitizen clients of the immigration consequences of their pleas, the absence of which may afford 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 petitioner 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 petitioner was entitled to a new hearing where the conviction was vacated following deportation) and *Wiedersperg v. Immigration and Naturalization Service*, 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 to deny the MTR alleging that petitioner had “slept on his rights” when he filed the MTR seven years after the vacatur). Both of these cases relied in turn on *Mendez v. Immigration and Naturalization Service*, 563 F.2d 956, 958-59 (9th Cir. 1977), in which the court concluded that because the petitioner’s counsel had not been given notice of his client’s deportation, the deportation was not legally

⁵⁷ *Singh v. Gonzales*, 412 F.3d 1117, 1121 (9th Cir. 2005) (invalidating regulation for those who departed prior to commencement of proceedings); *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (invalidating regulation for those who are removed prior to the filing of the MTR). Though *Lin* concerned an MTR filed before the IJ, the court subsequently extended its holding to MTRs filed with the BIA. *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007).

⁵⁸ 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 Fed. Appx. 622, 624 (9th Cir. 2009) (unpublished); *Chaiban v. Mukasey*, 299 Fed. Appx. 702 (9th Cir. 2008) (unpublished).

executed. The court held that, for purposes of the post-departure bar to judicial review then contained in the statute,⁵⁹ “departure” meant “‘legally executed’ departure when effected by the government.”

➤ **Tenth Circuit** (covers those ordered removed by IJ sitting in CO, 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 is in conflict with the language of the statute and impermissibly interferes with Congress’ clear intent that an alien 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.”⁶⁰

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.

➤ **Eleventh Circuit** (covers those ordered removed by IJ sitting in AL, FL, GA)

The Eleventh Circuit invalidated the post-departure bar in *Lin v. US AG*, 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. Petitioner had departed after filing an MTR seeking asylum based on changed country conditions (and therefore was not subject to time or numerical restriction), thus the applicable portion of the regulation was the part deeming an MTR withdrawn upon departure or removal. 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*.

C. Circuit Court Decisions That Have Upheld the Post-Departure Bar in Some Contexts

➤ **First Circuit** (covers those ordered removed by IJ sitting in MA, Puerto Rico)

The First Circuit upheld the validity of the regulatory post-departure bar in *Pena-Muriel v. Gonzales*, 489 F.3d 438, 443 (1st Cir. 2007), but did so on very narrow grounds and did not consider whether the regulation contradicts the statute or whether the agency impermissibly contracted its own jurisdiction. Rather, the court rejected the petitioner’s arguments that Congress necessarily repealed the post-departure regulation when it repealed the departure bar to judicial review (former 8 U.S.C. § 1105a) in 1996, as well as his argument that the post-departure bar violates the constitutional right to procedural due process. The First Circuit acknowledged that it was not deciding the case on statutory grounds, and because no *Union Pacific* argument has been made, the post-departure bar is vulnerable on both of these grounds in this circuit.⁶¹

⁵⁹ Former 8 U.S.C. § 1105a(c) (repealed 1996) provided that “[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.”

⁶⁰ *Contreras-Bocanegra*, 678 F.3d at 816.

⁶¹ In denying the petition for rehearing, the court made this clear by stating: “Not having been asked to do so, we did not decide whether 8 C.F.R. § 1003.23(b)(1) conflicts with 8 U.S.C. § 1229a(c)(7).” *Pena-Muriel v. Gonzales*, 510 F.3d 350 (1st Cir. 2007) (denying petition for rehearing).

At the time of writing this Advisory, there is at least one case currently pending before the First Circuit challenging the validity of the regulation on grounds not raised or considered by the court in *Pena-Muriel*, including statutory conflict grounds.

➤ **Second Circuit** (covers those ordered removed by IJ sitting in CT, NY)

Though invalidating the post-departure bar in the context of “statutory 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 petitioner had filed an untimely MTR requesting *sua sponte* reopening following the denial of his asylum petition.

The Second Circuit held that the departure bar does not conflict with the BIA’s regulatory *sua sponte* authority under §1003.2(a). It also rejected the argument made by Zhang that the MTR 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 petitioner 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 an alien as ‘constitut[ing] a withdrawal’ of any pending motions filed by the alien,” 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.⁶² 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 CFR §1003.2. But, in 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.”⁶³

➤ **Third Circuit** (covers those ordered removed by IJ sitting in NJ, PA)

In ***Desai v. U.S. AG of the United States***, 695 F.3d 267 (3d Cir. 2012), the Third Circuit upheld the post-departure bar in the context of a *sua sponte* MTR. Petitioner 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 MTR based on the post-departure bar but also stated that it would deny the MTR 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.”⁶⁴ 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

⁶² *Zhang*, 617 F.3d at 660.

⁶³ *Id.*

⁶⁴ *Desai*, 695 F.3d at 270.

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.⁶⁵

➤ **Fifth Circuit** (covers those ordered removed by IJ sitting in LA, 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* MTR. The court held that because the motion was untimely and there is no statutory right to file an untimely MTR, petitioner could not rely on the argument that the regulation was in conflict with the statute.

The respondent in *Ovalles* filed a *sua sponte* MTR, 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 Fifth Circuit focused on the untimeliness of respondent’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*. 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), and held that it lacked *sua sponte* authority to reopen.⁶⁶

IV. REMOVAL WHILE MTR OR APPEAL OF DENIAL OF MTR IS PENDING

A. Removal While an MTR is Pending

With the exception of motions to an IJ seeking to reopen *in absentia* removal proceedings, the filing of an MTR does not automatically stay a removal order.⁶⁷ Someone seeking reopening or reconsideration should simultaneously seek a discretionary stay of removal. If a person is physically removed from the United States while an MTR is pending, the IJ or the BIA may conclude they lack jurisdiction over the MTR 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.”⁶⁸

Any decision invalidating the BIA’s jurisdictional interpretation of the post-departure bar should apply equally to the clauses of the regulations deeming an MTR withdrawn upon departure or deportation. The same questions arise with regard to the conflict between the automatic withdrawal provision and the statutory language granting a right to file one motion to reopen and one motion to reconsider, and with regard to the agency’s ability to restrict its own jurisdiction. Some of the decisions discussed above in Section III also dealt directly with these withdrawal provisions, and case law supports this view. See, e.g. *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Marin-Rodriguez*, 612 F.3d 591, 593 (7th Cir. 2010) (invalidating the regulation and stating that “it amounts to saying that, by putting an alien on a bus, the agency may ‘withdraw’ its adversary’s motion”); *Lin v. US AG*, 681 F.3d 1236 (11th Cir. 2012); but see *Zhang v. Holder*, 617 F.3d 650, 660 (2d Cir. 2010) (noting that “it is linguistically awk-

⁶⁵ *Id.*

⁶⁶ See also *Toora v. Holder*, 603 F.3d 282 (5th Cir. 2010) (upholding post-departure bar and finding that IJ lacked jurisdiction where individual departed after proceedings had commenced (i.e. after the NTA had been filed) but before the removal order had been entered).

⁶⁷ INA § 240(b)(5)(C); 8 U.S.C. § 1229a(b)(5)(C).

⁶⁸ 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

ward to consider the forcible removal of an alien as ‘constitut[ing] a withdrawal’ of any pending motions,” but ultimately finding that the BIA’s interpretation was not plainly erroneous.”)

One can also argue that following the reasoning of the Ninth Circuit in *Cardoso-Tlaseca*,⁶⁹ a departure while an MTR is pending was not “legally executed” and the post-departure bar therefore should not apply.

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

When a person is physically removed or departs from the United States while an appeal of the IJ’s denial of an MTR is pending,⁷⁰ a further hurdle may be presented by 8 C.F.R. § 1003.4, which 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.

Though this Practice Advisory does not provide a full analysis of the jurisprudence surrounding this provision, a couple of relevant decisions are worth mentioning. The Ninth Circuit has held that this regulation applies only to those who voluntarily depart from the United States while an appeal is pending.⁷¹ The Sixth Circuit has similarly held that the doctrine of waiver and principles of “fundamental fairness” lead to the conclusion that involuntary departure (i.e. removal) does not act to withdraw a pending appeal, and that to allow the government to cut off the statutory right to an appeal through removal appears to be a “perversion of the administrative process.”⁷² Thus, attorneys should consider arguing that being subjected to removal does not constitute a “departure” for purposes of the withdrawal of an appeal. The Fifth Circuit, in a narrow ruling, has held that § 1003.4 does not apply when the individual departs – voluntarily or not – after the BIA has decided the appeal and while a habeas petition is pending.⁷³

The BIA recently considered this regulation and held that an unlawful removal in violation of an automatic stay of removal does not deprive it of jurisdiction to consider an appeal under § 1003.4. The BIA stated, in part: “fundamental fairness dictates that an unlawful act by the DHS should not serve to deprive us of jurisdiction.”⁷⁴

⁶⁹ 460 F.3d at 1107.

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

⁷¹ *Aguilera-Ruiz v. Ashcroft*, 348 F.3d 835, 838 (9th Cir. 2003).

⁷² *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) (holding withdrawal provision of 8 C.F.R. § 1003.4 inapplicable where non-citizen was forcibly removed). The Second Circuit also noted that “[i]t is unclear whether this regulation applies where an alien does not voluntarily depart but instead is deported,” but did not decide the issue. *Ahmad v. Gonzales*, 204 Fed. Appx. 98 (2d Cir. 2006) (unpublished).

⁷³ *Rodriguez-Barajas*, 624 F.3d 678 (5th Cir. 2010)

⁷⁴ *Matter of Diaz-Garcia*, 25 I&N Dec. 794 (BIA 2012).

V. FILING POST-DEPARTURE 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, or is unconstitutional should be raised in the MTR filed with the IJ or BIA, and in any appeal to the BIA of an IJ's denial. Although IJs and the BIA do not have the authority to rule on these issues, any post-departure MTR should preserve these arguments for review by the Court of Appeals. However, such issues do not have to be fully developed at the administrative level.

Cases challenging the validity of the post-departure bar are currently pending in the First Circuit. For updates on these or other cases you can visit PDHRP at www.bc.edu/postdeportation or email us at pdhrp@bc.edu.

The arguments against the post-departure bar will vary depending on the facts of the case and the applicable circuit law. The PDHRP is involved in litigating this issue and PDHRP, as well as the American Immigration Council (AIC) and the National Immigrant Project (NIP), can offer assistance and amicus support in such cases. If you have a case that involves the post-departure bar, please contact Jessica Chicco at pdhrp@bc.edu.

APPENDIX A: Chart of Principal Cases by Circuit

	<i>Cases Invalidating the Regulation</i>	<i>Cases Upholding the Regulation</i>
1st Cir.		<i>Pena-Muriel v. Gonzales</i> , 489 F.3d 438 (1st Cir. 2007): finding that repeal of departure bar to judicial review did not invalidate regulatory post-departure bar on MTRs, but explicitly leaving open the question of whether the regulation conflicts with the statute.
2d Cir.	<i>Luna v. Holder</i> , 637 F.3d 85 (2d Cir. 2011): BIA’s interpretation of post-departure bar is an impermissible constriction of its jurisdiction, and post-departure MTRs must remain available in order for MTRs to provide an adequate and effective substitute for habeas.	<i>Zhang v. Holder</i> , 617 F.3d 650 (2d Cir. 2010): post-departure bar does not conflict with the BIA’s regulatory <i>sua sponte</i> authority under §1003.2(a).
3d Cir.	<i>Espinal v. AG of the United States</i> , 653 F.3d 213 (3d Cir. 2011): regulatory post-departure bar is in conflict with the statute granting the right to a motion to reopen.	<i>Desai v. AG of the United States</i> , 695 F.3d 267 (3d Cir. 2012): upholds validity of post-departure bar in the context of <i>sua sponte</i> motions to reopen.
4th Cir.	<i>William v. Gonzales</i> , 499 F.3d 329 (4th Cir. 2007): regulatory post-departure bar is in conflict with the statute granting the right to a motion to reopen.	
5th Cir.	<i>Garcia-Carias v. Holder</i> , No. 11-60550, 2012 U.S. App. LEXIS 20284 (5th Cir. 2012): post-departure bar is in conflict with the statute granting the right to file a motion to reopen, but upholds <i>Ovalles</i> in the context of <i>sua sponte</i> MTRs. <i>Lari v. Holder</i> , Nos. 11-60549 & 11-60706, 2012 U.S. App. LEXIS 20302: post-departure bar is in conflict with the statute granting the right to file a motion to reconsider.	<i>Ovalles v. Holder</i> , 577 F.3d 288 (5th Cir. 2009): upholding BIA’s interpretation that it lacks jurisdiction over post-departure <i>sua sponte</i> MTRs.
6th Cir.	<i>Pruidze v. Holder</i> , 632 F.3d 2345 (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.	<i>Marin-Rodriguez v. Holder</i> , 612 F.3d 591 (7th Cir. 2010): BIA’s interpretation of post-departure bar is an impermissible constriction of its jurisdiction.	

8th Cir. ⁷⁵		
9th Cir.	<p>Coyt v. Holder, 593 F.3d 902 (9th Cir. 2010): regulatory post-departure bar is in conflict with the statute granting the right to a motion to reopen.</p> <p>Reyes-Torres v. Holder, 645 F.3d 1073 (9th Cir. 2011): regulatory post-departure bar is in conflict with the statute granting the right to a motion to reopen.</p>	
10th Cir.	<p>Contreras-Bocanegra v. Holder, 678 F.3d 811 (10th Cir. 2012): the post-departure bar is in conflict with Congress' intent and the statute granting the right to file an MTR.</p>	
11th Cir.	<p>Lin v. US AG, 681 F.3d 1236 (11th Cir. 2012): the departure bar is invalid because in conflict with the statute granting the right to file a motion to reopen.</p> <p>Contreras-Rodriguez v. Att'y Gen., 462 F.3d 1314 (11th Cir. 2006): post-departure bar does not bar MTRs of <i>in absentia</i> orders based on lack of notice.</p>	

⁷⁵ 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 remanding the case for a determination of whether the motion was equitably tolled.

APPENDIX B: Summary of Potential Challenges to the Post-Departure Bar

A number of potential arguments can be considered when challenging the post-departure regulation. Some of them are presented briefly here. **This is by no means an exhaustive list. Not all of these arguments may be applicable to every case, and practitioners may have strong tactical or strategic reasons for choosing to include some but not all of the applicable arguments.** For more information and support for these and other potential challenges, see the cases discussed throughout Section III.

- (1) *The BIA cannot contract its own jurisdiction through regulation or case law:* Pursuant to Supreme Court precedent, agencies cannot contract their own jurisdiction through regulation or case law. Therefore the post-departure bar cannot be treated as a jurisdictional limitation.⁷⁶
- (2) *The regulation conflicts with the statute and is therefore ultra vires:*
 - Section 1229a(c)(7)(A) clearly states that an alien “may file one motion to reopen” (§ 1229a(c)(6)(A) contains the same language with regards to motions to reconsider). The statute goes on to spell out time and number limitations on such motions, but does not mention a requirement that the individual be inside the country.
 - The statute authorizing motions to reopen makes physical presence a requirement for special motions by battered spouses, thus indicating that Congress knew how to include this requirement when it wished to do so (§ 1229a(c)(7)(C)(IV)(iv)).
 - Congress implicitly repealed the post-departure bar on motions to reopen when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 and repealed 8 U.S.C. § 1105a(c) (barring post-departure judicial review).
- (3) *The IJ and BIA retain sua sponte jurisdiction despite the regulation:* The BIA has repeatedly held that the post-departure bar strips it of jurisdiction to consider MTRs even under the regulation giving the immigration courts and the BIA authority to reopen cases *sua sponte*.⁷⁷ However, the regulation granting *sua sponte* jurisdiction states that the IJ or BIA may reopen “at any time.” Furthermore, the post-departure bar purportedly restricts the alien’s right to file an MTR, whereas the *sua sponte* regulation authorizes the IJ and BIA to reopen or reconsider.⁷⁸ When discretion is granted to an agency it must be exercised on a case-by-case basis.⁷⁹
- (4) *The departure bar applies only to an individual who “is the subject of” removal proceedings:* The language of the regulation uses the present tense. Therefore, individuals who departed after the conclusion of proceedings are no longer subject to removal proceedings and are not barred from reopening.⁸⁰ This same reasoning can be used to argue that individuals who departed prior to the commencement of proceedings are also not “the subject of” removal proceedings and therefore not barred.⁸¹

⁷⁶ See *Union Pacific R.R. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584 (2009).

⁷⁷ See *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 656 (BIA 2008).

⁷⁸ *Rosillo-Puga*, 580 F.3d at 1170 (Lucero, J. dissenting) *overruled by Contreras-Bocanegra*, 678 F.3d 811.

⁷⁹ See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957).

⁸⁰ See *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007).

⁸¹ See *Singh v. Gonzales*, 412 F.3d 1117, 1121 (9th Cir. 2005).

- (5) *The regulation conflicts with the statutory 90 day removal period, and the 60 and 120 day voluntary departure periods:* IIRIRA established a statutory right to file MTRs, setting a 90 day time limitation. At the same time, it also set forth a requirement that individuals be removed within a period of 90 days following a final order of removal, and limited the voluntary departure period to 60 or 120 days. The statutory right to seek reopening would be meaningless if precluded by removal or departure pursuant to voluntary departure.⁸²
- (6) *Departure is not a “transformative event” as opined in Armendarez-Mendez:* In *Armendarez-Mendez*, the BIA stated that individuals who have departed have “literally passed beyond our aid.”⁸³ However, the BIA clearly has jurisdiction in cases in which the alien is out of the country but prevails on a petition for review. Further, the BIA itself, in *Bulnes-Nolasco*, found it had jurisdiction to review a post departure MTR an *in absentia* order based on lack of notice.⁸⁴ Thus, the BIA’s reasoning appears to be flawed and inconsistent insofar as it purports to lack jurisdiction by virtue of the individual’s departure.
- (7) *Due process violation:* Particularly in the case of former legal permanent residents, the denial to consider the merits of an MTR violates an individual’s constitutionally-protected liberty interest in remaining in and/or returning to the U.S. without affording due process consistent with the Fifth Amendment. Due process requires an adjudication on the merits of the MTR.⁸⁵
- (8) *Arbitrary and capricious application:* Agency action is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem.”⁸⁶ In the case of those seeking to reopen because the underlying removal order was not “legally executed,” the regulation as interpreted forecloses agency review of a removal order that was erroneous when issued or was subsequently rendered invalid by a change of law.⁸⁷

⁸² See *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010). See also *Dada v. Mukasey*, 554 U.S. 1 (2010) (recognizing the conflict between voluntary departure and motion to reopen rules, and holding that aliens may withdraw a request for voluntary departure when seeking to reopen immigration proceedings).

⁸³ *Armendarez-Mendez*, 24 I&N Dec. at 656.

⁸⁴ *Bulnes-Nolasco*, 25 I&N Dec. 57. See also *Matter of Diaz Garcia*, 25 I&N Dec. 794 (BIA 2012).

⁸⁵ See generally, *Landon v. Plasencia*, 459 U.S. 21 (1982).

⁸⁶ *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). See also *Judulang v. Holder*, 132 S. Ct. 476 (2011) (applying the Administrative Procedure Act and finding the BIA’s interpretation and application of INA 212(c) to be arbitrary and capricious).

⁸⁷ See *Estrada-Rosales*, 645 F.2d at 821.