



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

Return to the United States after Prevailing in Federal Court

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This practice advisory contains practical and legal suggestions for attorneys representing clients who have prevailed on a petition for review or other legal action and who are outside of the United States. In general, these clients are outside the United States either because the court of appeals and/or Board of Immigration Appeals denied their request for a stay of removal or the person chose to leave the country. The advisory is divided into five steps: formulating a return plan; contacting opposing counsel to propose the return plan; determining litigation forum and format; articulating litigation arguments; and obtaining payment by or attorney fees from the government.

There are no formal procedures for arranging the return of someone who has been deported. This advisory contains suggestions based on AILF's experience with this and similar situations. These suggestions may be used as a guide but should not be used as a substitute for individual legal advice and decision-making supplied by a lawyer familiar with a client's case. Readers are cautioned to check for new cases and legal developments.

STEP 1 - Formulate a Return Plan.

Confirm client's intention to return. Contact the client abroad to inform him or her of the court's decision and verify whether he or she still wishes to return to the United States. Detention is often an important factor for clients in making this decision. If the person would be subject to mandatory detention, and the court's decision does not change this, the person should expect to be detained upon return. If the person is not subject to mandatory detention, counsel may attempt to find out in advance whether the client will be detained, whether release on bond is possible and the amount of bond.

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Determine client's location and nearest port of entry. Based on the client's location, he or she generally either will return by airplane or by crossing at a land border.

If returning by airplane. Airlines will not permit passengers to board international flights without proper travel documents. The client may need to go to the nearest U.S. Embassy or consulate to obtain travel documentation. To determine the nearest embassy or consulate to the client's location abroad, consult the Department of State webpage listing of U.S. Embassies, Consulates and Diplomatic Missions, located at <http://usembassy.state.gov>.

If returning by crossing at a land border. Determine the nearest land border to the client's location. A list of U.S. ports of entry is located at: <http://cbp.gov/xp/cgov/toolbox/ports/>.

Travel documentation. If the person was a lawful permanent resident (LPR) and the effect of the court's ruling is to restore such status, then he or she arguably should be able to enter using their existing LPR card.³ (If the government took the person's LPR card, see the discussion below about transportation letters). Such a situation may exist where the immigration judge and/or Board of Immigration Appeals (BIA) found the permanent resident removable solely based on a criminal conviction and the court of appeals held that the conviction does not constitute a removable offense.

In cases where the person was not a LPR before removal proceedings, a favorable court ruling arguably restores pre-removal status. However, the person's pre-removal status may not be acceptable for boarding an aircraft or other type of transport vessel. In this situation, consider obtaining the following:

Transportation Boarding Letters. Transportation boarding letters are addressed to a passenger transportation company and supervisory immigration inspector at the intending U.S. port of entry. The letters generally state that the letter holder is considered properly documented to travel to the United States and assure the carrier that it will not be subject to liability for transporting the person.

Transportation letters often are issued to permanent residents whose LPR card is lost, stolen or expired.⁴ They also can be issued to parolees under INA § 212(d)(5), asylees, refugees, and certain returning temporary residents.⁵ AILF has found no legal authority limiting the use of transportation letters to these situations. Thus, transportation letters arguably could be issued to deportees seeking to return to the United States, including

³ The government acknowledges that a person who prevails on a petition for review may be accorded pre-removal status. *See*, Brief for Respondent at p. 44 in *Nken v. Holder*, No. 08-681, 556 U.S. ___, 2009 U.S. LEXIS 3121 (2009).

⁴ *See* 22 C.F.R. § 22.1, 9 FAM 42.22 N2 and PN6, 9 FAM Appendix N, Exhibits VI A & B (sample letters for LPRs).

⁵ *See* 9 FAM Appendix E, 301.1-2 (parolees, asylees, refugees); 9 FAM 42.1 PN4 and 9 FAM Appendix N, Exhibit V (parolees); 9 FAM Appendix O, Exhibit III (asylees), 9 FAM Appendix O, Exhibits I and II (refugees); 8 C.F.R. § 264.1(c)(1)(iv) (certain temporary residents); 9 FAM Appendix R, 300 (Special Agricultural Workers).

those whose LPR card or other government issued documentation of pre-removal status was taken by the government prior to removal.

Procedures for applying for transportation boarding letters vary. The Foreign Affairs Manual (FAM) contemplates that consular officers may issue transportation letters. *See* n. 3 and 4, *supra*. Some embassies and consulate websites contain information on requesting transportation letters.⁶

However, Department of Homeland Security offices overseas also may issue transportation letters. Some overseas offices of US Citizenship & Immigration Services (USCIS) issue the letters (Rome, for example). Other USCIS offices overseas (Frankfurt, for example) refer people to the appropriate overseas office of Immigration and Customs Enforcement (ICE) for issuance of the letters. To locate a specific USCIS overseas office, consult the Immigration Overseas Offices locator available on USCIS's website, www.uscis.gov.

Visas. AILF believes that a person who has prevailed on a petition for review should not have to apply for a tourist or other nonimmigrant visa. Given that the court has deemed the removal order unlawful, it would be unfair to make the person pay the required \$100 visa application fee, any reciprocity fee and endure an often lengthy wait for a visa appointment. Moreover, in some cases, the costs associated with visa processing may prevent the person from applying. In addition, it would be manifestly unjust to permit the government to benefit financially (through the visa application and issuance fees) from the wrongful deportation of non-citizens.

However, applying for a visa might be a viable option in certain types of cases. For example, where the government is willing to facilitate visa processing and the person could apply for an immigrant visa.⁷

⁶ *See, e.g.*, the website of the U.S. Embassy in London, located at: <http://www.usembassy.org.uk/dhs/cbp/lostprc.html>.

⁷ If the court of appeals has ruled that the person is entitled to apply for adjustment of status, it may be worth exploring the possibility of obtaining an immigrant visa at a U.S. embassy or consulate abroad. Entry with an immigrant visa eliminates the need for further adjustment proceedings in the United States. An immigrant visa holder becomes a lawful permanent resident upon inspection and admission. INA §§ 101(a)(13) and (20). One risk, however, is that the discretionary denial of an immigrant visa by a consular officer generally is not reviewable. Thus, if an application reasonably could be denied based on negative discretionary factors, immigrant visa processing may not be advisable. In addition, because the consular non-reviewability doctrine insulates most consular determinations from judicial review, immigrant visa processing is not advisable for someone who might be inadmissible based on an inadmissibility ground not addressed by the court. Presumably, the government could agree to forego discretionary or legal objections to issuance of an immigrant visa to avoid protracted removal proceedings in the United States. In this case, AILF suggests getting the government to put its non-objections in writing.

Parole. Unless the person was a parolee at the time of the decision, any entry as a parolee may create significant problems. For example, because parolees are subject to the grounds of inadmissibility, not deportability, entering as a parolee may negatively impact the charges in the Notice to Appear and the type of relief available.

Notwithstanding these potential problems, parole may be a workable option in some cases. Notably, the USCIS Adjudicator’s Field Manual suggests that “significant public benefit parole” covers admission as a parolee to participate in “legal proceedings,” which should include immigration proceedings.⁸

In cases where the government offers to parole an individual into the country, attorneys should be aware that the government recently has represented to the Supreme Court that a parolee still may be accorded their pre-removal status upon return. *See*, Brief for Respondent at p. 44 in *Nken v. Holder*, No. 08-681, 556 U.S. ___, 2009 U.S. LEXIS 3121 (2009) (“By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens’ return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal”). However, as AILF is aware of cases where the government has not taken this position, we strongly suggest obtaining written confirmation that the government will accord pre-removal status.

Waiver of entry documentation requirement. DHS district and port directors may grant a request to waive the requirement of presenting a valid, unexpired visa and passport in cases involved unforeseen emergencies. INA § 212(d)(4); 22 C.F.R. § 41.2(j). The court’s order might not be considered an unforeseen emergency but, in cases where there are compelling reasons for the person’s immediate return, requesting a waiver of entry documents may be an option.

⁸ The Manual reads:

Significant public benefit reasons - This type of parole (which is normally referred to by its initials, SPBP) is authorized for an alien who is needed to participate in a law enforcement investigation, prosecution, or other legal proceedings. The initial authorization must be made by the Immigration and Customs Enforcement Parole and Humanitarian Assistance Branch (PHAB) upon a request from a recognized law enforcement entity. After the alien has been paroled into the United States, a re-parole may be authorized by the local DHS office having jurisdiction over the alien's location in the U.S. for requests initiated by DHS entities. All other extensions are authorized by PHAB. As an adjudicator, you will not be involved in the consideration of this type of parole.

Adjudicator’s Field Manual, § 54.1(b), located at:
www.uscis.gov/propub/ProPubVAP.jsp?dockey=724ce55f1a60168e48ce159d286150e2.

Travel expenses. AILF believes that a person who has been removed under an unlawful removal order should not have to pay the travel expenses associated with their return. Indeed, the cost of such travel could prohibit return.

STEP 2 – Contact Opposing Counsel to Propose the Return Plan.

An attorney representing a deportee should not have to wait for the mandate to issue for the court’s order to take effect.⁹ Unless and until the court of appeals reverses, amends, or vacates its decision, the government is bound by, and must follow, the court’s existing decision.¹⁰

When a case is “in litigation,” an attorney representing one party must refrain from communicating about the case with another party who also is represented by counsel (unless opposing counsel has consented or the attorney is authorized to do so by law or a court order). Model Rule of Professional Conduct 4.2. In an immigration petition for review, since the Board of Immigration Appeals and/or U.S. Immigration and Customs Enforcement are technically represented parties, attorneys should initiate contact with opposing counsel to propose the return plan.¹¹

Having a paper trail memorializing efforts to arrange return may be helpful if efforts fail and the issue must be brought to the court’s attention. Thus, it is advisable to make the initial proposal in writing and keep notes detailing any follow-up conversations with opposing counsel.

In the written return request, you may wish to:

- briefly remind opposing counsel about the case and the court’s decision;
- set forth the specific return route the works best for your client (land, air, sea);
- suggest appropriate travel documentation (and ask for an appointment at the U.S. Embassy/consulate if appropriate);

⁹ The mandate will issue approximately fifty-two days after the issuance of a decision entering judgment unless the government has sought, and the court has granted, an extension of time for seeking rehearing or a stay of the mandate pending a petition for a writ of certiorari. Federal Rules of Appellate Procedure 40(a)(1) and 41(b).

¹⁰ See *Wedbush, Noble, Cooke, Inc. v. Securities and Exchange Commission*, 714 F.2d 923, 924 (9th Cir. 1983) (“even though the mandate has not yet issued . . . the judgment filed by the panel in that case . . . is nevertheless final for such purposes as stare decisis . . . unless it is withdrawn by the court”); *Vo Van Chau et al. v. Department of State*, 891 F. Supp. 650, 654 (D.D.C. 1995) (“the District Court is bound by the principle of stare decisis to ‘abide by a recent decision of one panel of [the Court of Appeals] unless the panel has withdrawn the opinion or the court en banc has overruled it’”) quoting *Association of Civilian Technicians, Montana Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985).

¹¹ Attorneys from the Office of Immigration Litigation (OIL), a division within the Civil Division of the Department of Justice, litigate on behalf of the Board (removal cases) or ICE (reinstatement or administrative removal cases).

- ask about the logistics of arranging travel (for example, ask where the client should pick up the airplane ticket);
- request the name of the supervising officer to whom the client should report upon arrival at a land border or the airport;
- seek confirmation that the government will pay transportation expenses; and
- confirm whether the client will be detained upon arrival, whether release on bond is possible and, if so, the amount of bond.

See sample letter requesting return at end of the advisory.

STEP 3 – Determining Litigation Forum and Format.

After informing opposing counsel of the return proposal, the next step is deciding whether to negotiate or litigate. This decision will depend largely on the government’s response to the return proposal. The government may be willing to comply with the return proposal in whole or in part, not at all, or may not respond at all.

If the government is willing to negotiate, it is advisable to pursue negotiations seriously and quickly. Government counsel could suggest contacting DHS directly to arrange return. In this event, AILF still suggests copying government counsel on all written correspondence since OIL has an interest in ensuring compliance with the court’s order.

If the government is unwilling to facilitate return, is non-responsive, or negotiations fail, then litigation options should be considered. An express or constructive refusal to return the client to the United States arguably constitutes a refusal to comply with the court’s order granting the petition for review. After all, prevailing on a petition for review or other legal action is meaningless unless the client can obtain the benefit of the court’s order.

Deciding to litigate leads to the questions “where and what do I file?” These questions do not have definitive answers. Below are a few suggestions.

Motions Requesting Return (Circuit Court)

In cases where the court of appeals already has exercised its jurisdiction over the case, for example, in a petition for review or district court appeal, the court should have jurisdiction to entertain motions related to the main case. Thus, the court should have jurisdiction over a motion asking the court to order the person’s return. *See* Federal Rule of Appellate Procedure 27(a)(1) (“An application for an order or other relief is made by motion unless otherwise provided by these rules”). There is no particular name for such a motion, but some ideas include: motion to enforce court’s order, motion to order respondent to cause petitioner’s return to the United States, motion for ancillary relief to enforce court’s order. In extreme situations, some attorneys also have filed contempt motions for refusal to comply with the court’s order.

Mandamus (Circuit Court)

Mandamus is appropriate to maintain the integrity of an earlier court decision.¹² For example, in *Ramon-Sepulveda v. Immigration & Naturalization Service*, the Ninth Circuit issued a writ of mandamus to preserve the effectiveness of its prior decision to grant a non-citizen's petition for review. 824 F.2d 749 (9th Cir. 1987). In the first case, the court reversed an immigration court's decision to reopen deportation proceedings because the evidence of alienage on which reopening was based (a birth certificate) was not "newly discovered" as required by the immigration regulations. *Id.* at 750. Following the Ninth Circuit's first decision, the Immigration and Naturalization Service initiated new deportation proceeding based solely on the same birth certificate that the court held could not be used to reopen proceedings. *Id.* The petitioner filed a mandamus action with the court of appeals, seeking to terminate the new deportation proceedings because the new proceedings violated the court's prior order. The court agreed and issued a writ of mandamus, stating "[i]t is our mandate that the INS flouts. We have the authority and the duty to preserve the effectiveness of our earlier judgment." *Id.* at 751.

Arguably, the government flouts a circuit or district court decision by failing to return a petitioner to the United States for execution of that decision. Thus, in this situation, the court should have the authority and the duty preserve the effectiveness of their earlier decision by exercising mandamus jurisdiction.

For further information on mandamus actions, see AILF's practice advisories on this topic, located at http://www.aifl.org/lac/lac_pa_topics.shtml#section6.

Actions for Declaratory Judgment and Injunctive Relief (District Court)

District courts regularly review declaratory judgment and injunctive relief actions and, therefore, may be more comfortable with exercising their equitable authority to order someone back to the United States. Thus, even if the petitioner prevailed on a petition for review, a district court may still have jurisdiction to entertain an action seeking to enforce the circuit court's decision.

¹² *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999) ("[Federal courts] have not only the power, but also a duty to enforce our prior mandate to prevent evasion") (citation omitted); *Oswald v. McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980) ("Mandamus is appropriate to review compliance with discretionary standards and nondiscretionary commands set forth in an earlier opinion concerning the parties"); *American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982) ("[W]e hold that we have jurisdiction to enforce our prior mandate. Having the power, we also have the duty to clarify the mandate and to direct future compliance with it by mandamus"); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (mandamus appropriate to correct violations of "the letter or spirit" of previous judicial mandate) (internal citations omitted). See also *Miguel v. McCarl*, 291 U.S. 442, 451-52 (1934) (holding that an act involving some discretion can still be compelled by mandamus to conform to applicable governing statutes).

Whether filing a motion, mandamus petition or a complaint for declaratory and injunctive relief, the filing should inform the court of its authority to order petitioner's return to the United States (see next section), the efforts made to arrange for petitioner's return, the reasonableness of petitioner's proposed return plan, the government's actions/position (and/or noncompliance), and it should ask the court to order petitioner's return. Document the filing with written correspondent to the extent possible. If the only evidence of the government's refusal to return the client is oral, submit a sworn declaration from a person with personal knowledge, attesting to the conversation.¹³ While attorneys generally should avoid becoming witnesses for their clients, alternative evidence of the government's refusal to return petitioner may not be available.

STEP 4 – Articulating Litigation Arguments.

The filing, whatever it is labeled, also should explain why the court has jurisdiction and/or authority to order petitioner's return in conjunction with the petition for review. AILF offers the following as grounds for the court's authority. Additional arguments may be available in non-petition for review cases.

The inherent equitable powers of federal courts.

As part of the court's traditional equitable authority, the court should have authority to order petitioner's return. See *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction"); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the [federal courts] are available for the proper and complete exercise of that jurisdiction"); *Obale v. Attorney General*, 453 F.3d 151, 156 (3d Cir. 2006) ("It follows that we have jurisdiction over all matters related to a particular proceeding except where Congress has explicitly stated otherwise"). In *Zalawadia v. Ashcroft*, 371 F.3d 292 (5th Cir. 2004), the Fifth Circuit held that a habeas court could not order someone returned to the United States after removal. However, the court distinguished habeas jurisdiction from petition for review jurisdiction, stating "[t]his case is not the direct appeal of the BIA's decision, in which we could review the full scope of Zalawadia's claims and order the BIA to correct its mistakes."

Equitable relief contemplates granting all relief, including ancillary relief, necessary to fully accomplish justice. For example, several courts have held that courts of appeals have equitable power to stay the voluntary departure period pending judicial review. See *Obale v. Attorney General*, 453 F.3d 151, 155 n. 1 (3d Cir. 2006) (listing cases). See also *Xiao v. Reno*, 930 F. Supp. 1377, 1380 (N.D. Cal. 1996) (ordering INS to provide documents necessary to allow Xiao to remain lawfully and work in United States). Thus, as petitioner's presence in the United

¹³ Declarations attesting to return efforts or the position of the government should be scrupulously accurate. Declarations should be professionally written in that the tone should be detached and written to provide the court with information supporting the facts on which the motion is based. Such declarations should not overstate the facts or give personal opinions about actions of government actors or opposing counsel. An unprofessional declaration could undermine (rather than corroborate and bolster) the motion.

States is necessary to implement the court's decision, the court should have jurisdiction to order petitioner's return.

The authority to adjudicate removal orders under INA § 242(a).

The circuit courts' statutory jurisdiction, under INA § 242(a), to review final immigration orders would be meaningless if the court also did not have the power to enforce its orders. When construing statutes, courts must avoid interpretations that would lead to an absurd result. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting government's reading of statutory provision where it "would produce an absurd and unjust result which Congress could not have intended") (citation omitted). Interpreting INA § 242(a) to authorize the courts of appeals to vacate a removal order but not remedy the person's unlawful removal would lead to an absurd result.

In *Nken v. Holder*, No. 08-681, 556 U.S. ___, 2009 U.S. LEXIS 3121 (April 22, 2009), the Supreme Court addressed the inherent equitable power of appellate courts to stay removal pending review, noting "Congress's failure expressly to confer the authority in a statute allowing appellate review should not be taken as an implicit denial of that power." *Id.* at *15 citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). The Court viewed its equitable authority to grant a stay, despite the absence of express statutory authority, as "a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process." *Id.* at *17. This rationale applies equally to the courts' inherent power to order a person returned to the United States even without an explicit grant of statutory authority to do so. Without the ability to carry out their orders, the courts of appeals cannot responsibly fulfill their role in the judicial review process.

In addition, the court's authority to order a petitioner's return is consistent with and should be presumed from Congress' repeal of the departure bar to judicial review. Prior to IIRIRA,¹⁴ the courts of appeals lost jurisdiction to review a final immigration order if the person was deported. See former INA § 106a(c), 8 U.S.C. § 1105a(c). Through IIRIRA § 306(b), Congress repealed the departure bar. Thus, in the post-IIRIRA era, the courts of appeals continue to have jurisdiction over a petition for review even after the person has been deported.¹⁵ Given that Congress authorized the courts of appeals to adjudicate petitions for review after departure, Congress must have intended that courts have authority to issue orders to effectuate their decisions and that petitioners benefit from a favorable decision.

Courts must have the authority to order return to preserve the uniform application of law.

While DHS has admitted it has the authority to facilitate a litigant's return from abroad, it exercises this authority at its discretion: facilitating return in some cases while refusing to arrange return or simply doing nothing in other cases. Moreover, if the litigant is *pro se*, the

¹⁴ Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 (Sept. 30, 1996).

¹⁵ See, e.g., *Ngarurih v. Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); *Tapia-Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001).

likelihood of DHS arranging return is greatly diminished. Thus, the federal courts must step in to ensure that their decisions are uniformly enforced.

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court considered the case of an immigration petitioner who had been deported. The Court held that the conviction underlying Lopez's removal order had not been an aggravated felony. In footnote 2 of the decision, the Court expressly stated that Lopez's deportation did not render the case moot because he "can benefit from relief in this Court by pursuing his application for cancellation of removal, which the Immigration Judge refused to consider after determining that [he] had committed an aggravated felony." As immigration judges consider cancellation of removal applications in the first instance, a necessary implication of the Court's statement is that the petitioner should be returned to the United States for that purpose.

Since the *Lopez* decision, the government sometimes but not always has acknowledged its ability to return a prevailing litigant.

For example, in *Nken v. Holder*, No. 08-681, 556 U.S. ___, 2009 U.S. LEXIS 3121 (2009), the government's brief at p. 44 provided:

By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.

The Supreme Court relied on the government representation, stating:

Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. See Brief for Respondent 44.

Nken, 2009 U.S. LEXIS 3121 at *30-31.

The Sixth Circuit Court of Appeals relied on a similar government admission:

... the government indicated in a footnote to its brief that, should we decide that further administrative proceedings are required (a point it now explicitly argues in favor of), "there is no basis for assuming that the Government would not return [Rashid] to the United States, if necessary to conduct those proceedings." Based on the government's apparent concession that it will return Rashid to the United States for the proceedings that we now require, any dispute regarding this issue can be resolved by the BIA.

Rashid v. Mukasey, 531 F.3d 438, 448 (6th Cir. 2008).

The Board of Immigration Appeals also has acknowledged the government's ability to return a prevailing litigant from abroad, stating:

Moreover, a removed alien whose removal order is vacated by a Federal court of appeals or the United States Supreme Court might also be permitted to lawfully reenter the United States and continue to pursue any remedy that falls within the scope of the Court's mandate.

Matter of Armendarez, 24 I&N Dec. 646, 656-57 n.8 (BIA 2008) (citing *Lopez v. Gonzales*, 127 S. Ct. 625, 692 n.2 (2006)).¹⁶

Despite these clear admissions that the government is able to return a prevailing litigant, AILF has heard reports of cases where the government said it is either unwilling or unable to return a prevailing litigant. For example, the government has argued: (1) a case is moot because the court has no authority to return a person even if the petitioner prevails; (2) a person need not be returned because a telephonic hearing is sufficient; (3) the court's order on a petition for review applies to the named respondent (usually the Attorney General) and the Board of Immigration Appeals, but the Board lacks the authority and ability to return someone; and, framed differently, (4) the court's order on a petition for review does not apply to the Department of Homeland Security, which is the only agency that can facilitate return.¹⁷

Thus, it seems the government's position is that it has the ability to return a prevailing litigation but will not do so in every case. If the prevailing litigant is pro se, it would seem much less likely that the government would affirmatively arrange for his or her return. As a result, the government effectively controls which litigants may return to the United States, even if they have all prevailed. The federal courts, therefore, must have the authority to order return to preserve the uniform application of law.

The authority to stay removal under INA § 242(b)(3)(C).

Section § 242(b)(3)(C) of the INA, as construed by the courts of appeals, authorizes courts to stay execution of a removal order. Arguably, if the court had jurisdiction to invoke its stay authority at the time of removal, it also has authority to invoke a stay nunc pro tunc.¹⁸ Technically, a nunc pro tunc stay of removal should have the same effect as a return order.

¹⁶ The Board claims to lack the authority to return someone who has been removed. *Matter of Armendarez*, 24 I&N Dec. 646, 656-57 n.8 (BIA 2008).

¹⁷ To protect the identity of the petitioner's in whose cases these arguments were made, some of whom are in ongoing proceedings, AILF has not provided case numbers for these cases.

¹⁸ Courts have long possessed the equitable power to grant relief nunc pro tunc. *See, e.g., Mitchell v. Overman*, 103 U.S. 62, 64-65 (1880) (holding that "[a] nunc pro tunc order should be granted or refused, as justice may require in view of the circumstances of the particular case"); *Iavorski v. INS*, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (the "far-reaching equitable remedy of granting relief nunc pro tunc in certain exceptional cases has long been available under immigration law"). *See also Batanic v. INS*, 12 F.3d 662, 667-68 (7th Cir. 1993) (affording petitioner the right to apply for asylum nunc pro tunc); *Matter of Rapacon*, 14 I&N Dec. 375,

The argument might also be framed in terms of the court's power to reverse decisions it unquestionably has the authority to make. A court of appeals has the authority to grant or deny stay requests in the first instance. If the court previously denied a stay request in the petitioner's case, the court should have the authority to reverse that decision.

STEP 5 – Obtaining Payment by or Attorneys' Fees from the Government

Attorneys who are required to seek a court order to return their client, and who win such a court order, may seek attorneys' fees and costs for the work involved in litigating return. For further information, *see* AILF's Practice Advisory entitled "Requesting Attorney Fees Under the Equal Access to Justice Act," located at: http://www.aifl.org/lac/lac_pa_topics.shtml#section6.

Furthermore, attorneys may consider filing an action under The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in cases where:

- (1) EITHER the government has refused to return the person despite having prevailed in federal court OR the person has been removed in violation of an administrative or federal court stay order; AND
- (2) the person has suffered mental, emotional, physical harm as a result of removal.

As these cases involve knowledge of state tort and constitutional law, AILF suggests that attorneys considering bringing these actions consult with local counsel who is familiar with such claims.

378 (BIA 1973) (application for permission to reapply for admission to the United States after deportation is granted nunc pro tunc). *Accord Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 11167 (9th Cir. 2005) (if petitioner is eligible to show that he was unlawfully removed from the country he "will be entitled to the relief available at the time of his original hearing").

SAMPLE LETTER TO OPPOSING COUNSEL

Name and Address of Opposing Counsel

Re: _____ v. _____
_____ Circuit Case Number _____

Dear _____,

As you know, the Court granted the petition for review in the above-referenced case. Specifically, the Court vacated the decision of the BIA / ICE and _____. Mr./Mrs./Ms. X is currently in _____, _____. In light of the Court’s decision, we would like to arrange Mr./Mrs./Ms. X return to the United States as soon as possible.

Land border: Mr./Mrs./Ms. X has informed me that he/she is able to present himself/herself to the ___ Port of Entry on any date after _____. Please inform the Port Director of his/her situation and let us know the name/s of the person to whom Mr./Mrs./Ms. X should report upon arrival.

Airport: Mr./Mrs./Ms. X has informed me that he/she is able to present himself/herself at the U.S. Embassy/ USCIS Overseas Office in _____, _____ on any date after _____. We have reviewed _____ (Embassy/consulate or DHS Overseas Office) procedures for issuing a border transportation letter (*see* www. _____) and request that DHS issues such a letter on Mr./Mrs./Ms. X’s behalf so that he may board a return flight to the United States. Please inform the Port Director at _____ Airport of Mr./Mrs./Ms. _____’s situation and let us know the name/s of the person to whom Mr./Mrs./Ms. X should report upon arrival.

Please confirm that DHS will arrange and cover the transportation costs associated with Mr./Mrs./Ms. X’s return, including the cost of his/her bus/airplane ticket from _____, _____ to _____, _____.

Finally, please advise whether DHS intends to detain Mr./Mrs./Ms. X’s upon his/her return and, if so, how much money Mr./Mrs./Ms. X’s family can expect to post for bond.

I am hopeful we can work together to effectuate Mr./Mrs./Ms. X’s return without the need for further litigation. If I do not hear back from you by _____, I will presume your client is unwilling to facilitate my client’s return.

Sincerely,

Name
Attorney for _____