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PRACTICE ADVISORY¹

“Finality” of Removal Orders for Judicial Review Purposes

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The Immigration and Nationality Act (INA) authorizes the courts of appeals to review “final” removal orders. If an order is not final at the time the petitioner filed the petition for review, most court of appeals will dismiss the petition as prematurely filed. However, if the individual foregoes the opportunity to file a petition for review when one should have been filed, later review in the court of appeals may be precluded. This practice advisory addresses whether a removal order issued by the Board of Immigration Appeals (BIA) or by an immigration judge (IJ) is “final” for purposes of obtaining judicial review in the court of appeals.

The advisory first sets forth the statutes and regulations on finality and discusses the Second Circuit’s exception to prematurely filed petitions for review. The advisory then addresses the case law governing the following situations: (1) where the BIA denies relief and also remands the case to the IJ; (2) where the BIA orders the person removed in the first instance; (3) where the petition for review follows an IJ decision, bypassing a second BIA appeal; (4) where the Board orders voluntary departure with an alternative removal order; and (5) miscellaneous situations, including decisions to withhold removal, visa revocation decisions, and decisions denying asylum, withholding or Convention Against Torture (CAT) relief to Visa Waiver entrants in limited removal proceedings.

I. Statutory Provisions and Regulations Addressing Finality

The general requirement that a removal order is “final” before it may be judicially reviewed is set forth in INA § 242(a)(1). This provision provides that, with the exception of expedited removal orders, “[j]udicial review of a final order of removal” is

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governed by 28 U.S.C. § 158. This statute, commonly known as the Hobbs Administrative Review Act, vests the courts of appeals with jurisdiction to review final orders of removal.

The “finality” requirement is repeated throughout INA § 242. *See, e.g.* INA §§ 242(a)(2)(C) (barring review of “any final order of removal” against criminal aliens), § 242(b)(1) (providing that a petition for review must be filed within 30 days “after the date of the final order of removal”); 242(b)(3)(A) (requiring service of the petition for review on the Service officer “in charge of the Service district in which the final order of removal” was entered”); 242(b)(9) (mandating consolidation of all questions of law and fact “in judicial review of a final order under this section”); 242(d) (court may review a final order of removal only if person exhausted administrative remedies); 242(f)(2)(limiting court’s ability to “enjoin removal of any alien pursuant to a final order”).

Determining whether a removal order exists is essential to determining whether an order of removal is final. The statutory definition of an “order of deportation” in INA § 101(a)(47) governs this analysis, despite the change in terminology to “order of removal.”³

Section 101(a)(47) of the INA provides:

(A) The term “order of deportation” means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of--

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

³ Congress enacted INA § 101(a)(47) in 1996 in § 440(b) of the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-207, 110 Stat. 3009 (April 24, 1996). A year later, through the enactment of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress created “removal” proceedings with resulting removal orders. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). IIRIRA § 309(d)(2) provides that references to orders of removal are deemed to include references to orders of deportation. Accordingly, INA § 101(a)(47) applies to orders of removal.

This statutory provision was enacted in 1996, but the immigration service did not promulgate a regulation implementing it until nine years later. In 2005, DHS promulgated 8 C.F.R. § 1241.1, which states:

An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final:

- (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
- (b) Upon waiver of appeal by the respondent;
- (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;
- (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;
- (e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or
- (f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period except where the respondent has filed a timely appeal with the Board. In such a case, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General. (*But see* Section VI, *infra*, discussing cases invalidating this subsection of the regulation).

8 C.F.R. § 1003.1(d)(7) addresses the finality of a BIA decision. It reads:

The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

In addition, 8 C.F.R. § 1003.39 addresses the finality of an IJ decision. It reads:

Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first.

II. Prematurely Filed Petitions for Review (Filed Before the BIA has Ruled on an Appeal)

Most circuit courts will dismiss a petition for review that is filed after IJ's decision but before the BIA has ruled on an appeal. *See, e.g., Moreira v. Mukasey*, 509 F.3d 709 (5th Cir. 2007) (no jurisdiction over prematurely filed petition for review and issuance of a

BIA decision while petition for review is pending does not cure want of jurisdiction); *Jaber v. Gonzales*, 486 F.3d 223 (6th Cir. 2007) (same); *Brion v. INS*, 51 F. App'x 732, 733 (9th Cir. 2002) (unpublished) (same).

However, the Second Circuit may exercise jurisdiction over a premature petition for review if the BIA affirms the petitioner's removal order while the petition for review is pending and the government has not shown prejudice by the premature filing. *Lewis v. Gonzales*, 481 F.3d 125, 129 (2d Cir. 2007). In *Lewis*, the Board failed to properly serve its decision on petitioner and, thus, he filed a late petition for review. Petitioner also filed a motion with the BIA asking it to reissue its decision. The Board recognized its service error and granted the motion. The Second Circuit exercised jurisdiction over the petition for review, noting that the government failed to demonstrate that it was prejudiced by the premature filing of the petition for review. *See also, Foster v. INS*, 376 F.3d 75, 77 (2d Cir. 2004) (reviewing prematurely filed petition for review by *pro se* petitioner where the BIA later affirmed the removal order and the government failed to demonstrate prejudice).

III. BIA Decisions Denying Relief and Ordering Remand to the IJ

The BIA often (1) affirms the denial of relief or reverses a grant of relief and (2) remands the case back to the IJ for resolution of another matter. For example, the Board might reverse an IJ decision granting cancellation of removal and remand the case to the IJ to determine eligibility for voluntary departure. Is the part of its decision denying cancellation judicially reviewable? Or must the person wait, appeal to the Board again after the IJ adjudicates the voluntary departure application, and then file a petition for review of the Board's second appeal decision?

In this situation, courts have looked to the purpose of the remand. If remand is ancillary to the main issue on appeal, most courts will adjudicate a petition for review without requiring resolution of the issue and a subsequent BIA appeal. If the Board remands for security checks, however, a subsequent BIA appeal may be required. *See discussion below.*

Some circuit courts have held that a BIA decision is final even if the Board remands for voluntary departure. *See, e.g., Saldarriaga v. Gonzales*, 402 F.3d 461 (4th Cir. 2005) *cert denied*, 126 S.Ct. 1330 (2006) (BIA decision was final notwithstanding remand for voluntary proceedings); *Perez-Vargas v. Gonzales*, 478 F.3d 191, n.4 (4th Cir. 2007) (same); *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995) (same); *Moreno v. INS*, 2001 U.S. App. LEXIS 15907 (9th Cir. 2001) (unpublished). *And see, Zahren v. Gonzales*, 487 F.3d 1039, 1040 n.2 (7th Cir. 2007) (treating BIA decision as final where IJ ultimately granted voluntary departure but not deciding "whether an order of removal is 'final' if there remains an unresolved application for voluntary departure)

Circuit courts have said that other types of ancillary remand orders similarly do not impact finality. *See, e.g., De Pilar v. United States*, 326 F.3d 1154 (11th Cir 2003) (per curiam) (BIA decision was final notwithstanding remand to allow petitioner to designate

country of removal); *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994) (BIA decision final notwithstanding remand for IJ order designating country of deportation and adjudication of any application for voluntary departure); *Virachacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008) (BIA decision on asylum/withholding issue final notwithstanding remand for a background check to ensure eligibility for withholding of removal).

If the purpose of the remand might prevent deportation, however, courts are more willing to require the completion of remand proceedings and a second BIA appeal. *Perkovic v. INS*, 33 F.3d 615, 618 (6th Cir. 1994) (defining final order as extending “to any denial of discretionary relief during a deportation proceeding, where such relief, if granted, would foreclose deportation”); *De Pilar v. United States*, 326 F.3d 1154, 1157 (11th Cir. 2003) (per curiam) (BIA’s order is final where all of the issues were presented to the BIA and “the only thing left for the IJ to determine is the country to which [petitioner] will be removed...”).

For example, if the BIA reverses an asylum grant and remands the case for adjudication of an adjustment application, a court likely will not exercise jurisdiction over a petition for review challenging the BIA’s asylum decision. Such premature court review of the asylum decision might waste judicial and attorney resources because a favorable decision on the adjustment application would prevent deportation. *Singh v. Gonzales*, 432 F.3d 533, 537 n.4 (3d Cir. 2006) (requiring both IJ adjudication of withholding and CAT applications on remand and second BIA appeal before BIA’s first decision -- finding petitioner removable as an aggravated felon -- would be final); *Brion v. INS*, 51 F. App’x 732, 733 (9th Cir. 2002) (unpublished) (dismissing petition for review filed before the completion of remand proceedings to allow petitioner to apply for asylum, withholding, and voluntary departure).

If the BIA remands a case for completion of background and security checks, the applicable regulation requires the IJ to consider the results of the investigation. *In re Alcantara-Perez*, 23 I&N Dec. 882, 883 (BIA 2006), summarizing 8 C.F.R. § 1003.47(h). If new information is presented, the IJ may hold a hearing if necessary to consider any legal or factual issues. The IJ “shall then enter an order granting or denying” relief. Whether new information is presented or not, the BIA believes this latter IJ order “becomes the final administrative order in the case.” *Alcantara-Perez*, 23 I&N Dec. at 885. The parties have the right to appeal this IJ decision for the BIA’s review. *Id.* at 884.

Citing the Board’s decision in *In re Alcantara-Perez*, the Third Circuit noted that ordinarily, when the Board remands a case for completion of background and security checks and the results of those checks might impact the petitioner’s eligibility for withholding of removal, the IJ’s decision after remand is the “final” order. *Vakker v. Atty General*, 519 F.3d 143, 147-48 (3d Cir. 2008) *petition for cert. filed* (U.S. June 12, 2008) (No. 08-5). However, in another opinion filed the same day as *Vakker*, another panel of the Third Circuit held that the Board’s order is a final order for judicial review purposes, even though the Board also remanded for completion of background and security checks. *Yusupo v. Attorney General*, 518 F.3d 185, 196 (3d Cir. 2008). The court explained that,

unlike in *Vakker*, the petitioners in *Yusupov* had been denied withholding of removal but granted deferral of removal. Because a grant of deferral of removal may be withdrawn only if the likelihood of torture changes, the panel reasoned, “[n]othing in their background checks could affect” their eligibility for relief. The BIA order provided a “final adjudication of the substantive rights...” *Yusupov*, 518 F.3d at 196, n.19.

IV. BIA Decisions Ordering Removal in the First Instance

In many cases, the BIA reverses an IJ’s decision to grant a relief application. When the Board also concludes the person is not eligible for any other form of relief, it has ordered removal in the first instance. In this situation, to determine whether the BIA’s order is final, a court will look to whether the IJ previously found the person removable or issued a removal order.

If the IJ found the person removable, the courts have held that the BIA’s order is final for judicial review purposes. The courts reason that (1) the IJ’s finding of removability satisfies the definition of a removal order in INA § 101(a)(47); and (2) the BIA’s order essentially gives effect to the IJ’s previous ruling and/or eliminates the impediment to removal (*i.e.* the grant of relief). *Solano-Chicas v. Gonzales*, 440 F.3d 1050, 1053-53 (8th Cir. 2006); *Delgado-Reynua v. Gonzales*, 450 F.3d 596, 600-01 (5th Cir. 2006); *Lazo v. Gonzales*, 462 F.3d 53, 54-55 (2d Cir. 2006); *Cruz-Camey v. Gonzales*, 504 F.3d 28, 29-30 (1st Cir. 2007); *Lolong v. Gonzales*, 484 F.3d 1173, 1177 (9th Cir. 2007) (*en banc*).⁴ *See also Sosa-Valenzuela v. Gonzales*, 483 F.3d 1140, 1145 (10th Cir. 2006). At least one court also noted that remand for entry of a removal order would waste judicial resources. *Solano-Chicas v. Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006).

Notably, at least one court requires the IJ’s removability finding (or removal order) to be explicit. *See, e.g., Sosa-Valenzuela v. Gonzales*, 483 F.3d 1140, 1144-45 (10th Cir. 2006) (no final order because IJ’s implicit removability finding and granting of relief is not a substitute for the explicit removability finding/order of removal required by the INA). At least one other court does not. *Virachacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008) *petition for cert. filed* (U.S. April 28, 2008) (No. 07-1363) (reasoning that “[a]ny order withholding removal supposes that the alien is ‘removable’” and thus finding that the order was final for judicial review purposes) (citations omitted).

If the IJ concluded the person was not removable and terminated proceedings and the BIA reverses the IJ’s decision and orders removal, at least two courts have held that the BIA’s decision is not final. *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 880-81 (9th Cir. 2003); *James v. Gonzales*, 464 F.3d 505, 513-14 (5th Cir. 2006). These courts have held that the Board lacks authority to order removal in the first instance because INA § 101(a)(47) (definition of removal order) and INA § 240(a)(3) (immigration judge role in removal proceedings) vests this responsibility exclusively with the IJ.

⁴ In *Lolong*, the Ninth Circuit vacated its earlier panel decision in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004) (holding that the BIA action of ordering removal in the first instance was *ultra vires* to the statute).

V. Finality of IJ Decisions When Petitioner Bypasses a Second BIA Appeal

Petitioning for review of an IJ decision is generally prohibited. However, a circuit court might exercise jurisdiction over a petition for review of an IJ decision if the IJ decision follows a remand from the BIA and the BIA already fully resolved the issues covered by the petition for review. At least two courts have addressed this scenario. *Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005); *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994).

In *Popal*, the IJ terminated proceedings, finding that Mr. Popal was not removable. The BIA reversed the IJ's decision and remanded the case to permit him to apply for relief before the IJ. In the remanded proceedings, Popal did not apply for relief. Instead, he asked the IJ to issue a "Final Administrative Order" and stated in writing his intention to immediately seek federal court review of the IJ's order. The IJ issued the order. Popal then filed a petition for review of the IJ's decision. The government argued that the IJ's order was not final and that Popal failed to exhaust administrative remedies by not appealing to the BIA.

With respect to finality, the Third Circuit stated: "The government is plainly wrong that an IJ's order can *never* constitute a final order of removal." *Popal*, 416 F.3d at 252 (emphasis in the original). The court relied on the regulation at 8 C.F.R. § 1003.39, which provides that an IJ's decision "becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first." Although Popal filed the petition for review one day before the expiration of time to file a BIA appeal, the court found that he gave sufficient notice of his intention to file a petition for review of the IJ's decision.

With respect to exhaustion, the *Popal* Court found that a second BIA appeal essentially would be frivolous and not serve judicial economy, reasoning that the BIA already fully considered Popal's claim that he was not removable based on his criminal conviction. Thus, the court held that exhaustion was not required in this particular case.

Recently, and without explanation, the Third Circuit classified its holding in *Popal* as "concern[ing] exhaustion rather than what constitutes a 'final order,' ..." *Vakker v. Atty General of the US*, 519 F.3d 143, 148 (3d Cir. 2008) *petition for cert. filed* (U.S. June 12, 2008) (No. 08-5). In *Vakker*, the court rejected the government's reliance on *Popal* for the proposition that there were multiple final orders in that case. It is unclear what impact, if any, the *Vakker* court's comment may have on the viability of the *Popal* decision.

Similarly, in *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994), the BIA reversed an asylum grant and remanded the case. The IJ designated a country of deportation and granted voluntary departure. Perkovic then filed a petition for review following the IJ's decision without filing a second BIA appeal. The Sixth Circuit accepted the order as final and rejected the government's contention that petitioner was required to file a second BIA appeal to exhaust administrative remedies. The court concluded the BIA definitively had

reviewed and resolved the merits of the asylum claims and, therefore, the exhaustion requirement was satisfied.

These cases would support an argument that a second (or third or fourth) BIA appeal was not required if the BIA had already fully considered an issue and the person had no other relief available.⁵ If a person is detained, bypassing a second BIA appeal may limit the time in detention. To fit squarely within the rationale of *Popal*, however, a person may wish to give notice of their intention to file a petition for review of the IJ's decision. In addition, to fit within 8 C.F.R. § 1003.39 (IJ's decision becomes final upon the waiver of BIA appeal or upon expiration of appeal period), one must forego the right to appeal to the BIA.

In circuits other than the Third and Sixth, the person would need to decide whether to risk foregoing the appeal without knowing for certain how the court of appeals will rule on the finality and exhaustion issues.

VI. BIA Decisions Granting Voluntary Departure with an Alternative Removal Order

The Supreme Court has held that a BIA order granting voluntary departure, and ordering removal in the alternative should the applicant overstay the grant of voluntary departure, is a final order of removal subject to judicial review. *Foti v. INS*, 375 U.S. 217, 220 n.1 (1963). A 2005 regulation promulgated by DHS conflicts with this principle and, consequently, has been struck down by at least two circuit courts.

Under subsection (f) of 8 C.F.R. § 1241.1, a BIA decision denying long-term relief but granting voluntary departure and providing for an alternative removal order is not final unless and until the person overstays the voluntary departure period. Finding that this regulation is inconsistent with both the INA and common practice, the Third and Second Circuits have declined to enforce it. *Obale v. AG*, 453 F.3d 151, 157-58 (3d Cir. 2006); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006).

In *Obale*, an IJ found petitioner removable but granted voluntary departure. The BIA affirmed the IJ's decision and granted 30 days of voluntary departure. The court held that it had jurisdiction to grant a stay of the voluntary departure period pending judicial review provided that the BIA's grant of voluntary departure was part of the "final order" that the court was reviewing. The Third Circuit concluded that 8 C.F.R. § 1241.1(f) was inconsistent with Congress' intent to permit judicial review if the person has departed the country. The court also found it inconsistent with the common practice of the BIA and of courts of appeals to review claims when a person departs within the voluntary departure period. Thus, the court held that petitioner's removal order became final on the date the

⁵ If relief were available, most courts, including the Third Circuit, would not consider the order final. *See, e.g., Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006) (order affirming removability for an aggravated felony was not final where BIA remanded to permit petitioner to pursue withholding and CAT relief). *See also*, § III, *supra*.

BIA dismissed it, not upon overstay of the voluntary departure period granted by the BIA.⁶

The Second Circuit's subsequent decision in *Thapa* relies on the *Obale* Court's analysis. In *Thapa*, the BIA had granted a 60-day voluntary departure period. The Second Circuit raised the legality of the regulation *sua sponte*. In addition to citing *Obale* with approval, the court also reasoned that 8 C.F.R. § 1241.1(f) "seems to conflict with Congress's intent in the IIRIRA to allow aliens to pursue petitions for review from abroad: If an alien complied with an order of voluntary departure and left the country within the allotted time, no final order of removal would ever come into existence under the new regulation, and thus the alien would be prohibited from appealing." *Thapa*, 460 F.3d at 334.

VII. Miscellaneous Cases

Decision to withhold removal. In *Virachacha v. Mukasey*, 518 F.3d 511, 514 (7th Cir. 2008) *petition for cert. filed* (U.S. April 28, 2008) (No. 07-1363), the Seventh Circuit held that an order withholding removal is a final order because it "supposes that the alien is 'removable.'"

BIA decision affirming District Director decision to revoke visa. In *Hamilton v. Gonzales*, 485 F.3d 564 (10th Cir. 2007), the Tenth Circuit held that it lacked jurisdiction to review a BIA decision affirming a visa revocation by a District Director. The court reasoned that the BIA's decision was not a final order reviewable as defined by INA § 101(a)(47) due to the absence of IJ involvement.

BIA orders denying asylum, withholding or CAT relief to Visa Waiver entrants in limited removal proceedings. Persons who enter the United States without a visa pursuant to the Visa Waiver Program are not entitled to a full removal proceeding. However, they are entitled to apply for asylum, withholding and CAT relief before an immigration judge and to appeal any denial to the BIA. Reasoning that BIA decisions affirming the IJ denial of asylum, withholding and/or CAT relief in visa waiver proceedings is the functional equivalent of a final removal order, all courts to consider the issue have found that such orders are final for judicial review purposes. *See, e.g., Kanacevic v. INS*, 448 F.3d 129, 134-35 (2d Cir. 2006); *Nreka v. United States Attorney General*, 408 F.3d 1361, 1367 (11th Cir. 2005); *Shehu v. AG of the United States*, 482 F.3d 652, 656-57 (3d Cir. 2007); *Mitondo v. Mukasey*, 523 F.3d 784, 787 (7th Cir. 2008); *Ferry v. Gonzales*, 457 F.3d 1117, 1126 (10th Cir. 2006). *Accord Zine v. Mukasey*, 517 F.3d 535 (8th Cir. 2008) (implicitly accepting BIA decision as final and reviewing merits claims).

⁶ The *Obale* Court further noted: "§ 1241.1 may have been intended solely to specify when an order of removal may be executed, as opposed to when an order of removal is final for purposes of review. Indeed, this may explain the Government's failure to mention the regulation in its briefing." *Obale*, 453 F.3d at 160 n.9.