



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

REINSTATEMENT OF REMOVAL

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April 23, 2008

A person who has been removed and unlawfully reenters the United States may be subject to reinstatement of removal under § 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5). This practice advisory provides an overview of the reinstatement statute and implementing regulations, including how the reinstatement process is currently being carried out by the Department of Homeland Security (DHS). The advisory addresses who is subject to reinstatement, where to obtain federal court review of reinstatement orders and what arguments are available to challenge the legality of reinstatement orders in federal court, including challenges to the underlying removal order. It also addresses the Supreme Court's decision in *Fernandez-Vargas v. Gonzales*, 547 U.S. 30, 126 S. Ct. 2422 (2006) regarding the retroactive application of the reinstatement provision. Finally, the advisory includes a list of circuit court cases that have addressed the reinstatement provision.

The first inquiry, before a client's reinstatement case is litigated in federal court, is whether the client would be eligible for relief from removal but for the reinstatement order. In cases where the client is not or not likely to be eligible for ultimate relief, the client may be better advised not to pursue litigation.

Court decisions addressing INA § 241(a)(5) may change the existing law or create new law. Counsel are advised to independently confirm whether the law in their circuit has changed since the date of this advisory.

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I. BACKGROUND

What is reinstatement of removal?

Reinstatement of removal is the term for removal pursuant to INA § 241(a)(5) as amended by IIRIRA³ § 305(a). The regulations implementing the statute are located at 8 C.F.R. § 241.8. Section 241(a)(5) took effect on April 1, 1997. The provision states:

(5) Reinstatement of removal orders against aliens illegally reentering.

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act,⁴ and the alien shall be removed under the prior order at any time after the reentry.

Who is subject to reinstatement of removal?

Noncitizens who return to the United States illegally after having been removed under a prior order of deportation, exclusion, or removal are subject to removal under § 241(a)(5) unless they meet a statutory or judicial exemption.

Who is statutorily exempt from reinstatement of removal under INA § 241(a)(5)?

Congress has enacted legislation that specifically exempts the following individuals from being subject to reinstatement of removal:

- Individuals applying for adjustment of status under INA § 245A (the legalization program) who are covered by certain class action lawsuits.⁵
- Nicaraguans and Cuban applicants for adjustment under § 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).⁶
- Salvadoran, Guatemalan, and Eastern European applicants under NACARA § 203.⁷

³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-575 (1996).

⁴ Some online versions incorrectly use the word “chapter” rather than “Act.”

⁵ See Legal Immigration Family Equity Act (LIFE Act), § 1104(g), Pub. L. No. 106-555, 114 Stat. 2763 (2000). The relevant class action law suits include *Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc.* 509 U.S. 43 (1993); and *Zambrano v. INS vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993).

⁶ LIFE § 1505(a)(1) codified in NACARA § 202(a)(2), 8 C.F.R. § 241.8(d).

⁷ LIFE § 1505(c).

- Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).⁸

Who is judicially exempt from reinstatement of removal under INA § 241(a)(5)?

Litigation has resulted in some court-created exemptions to § 241(a)(5). That is, some courts have said that certain people are not subject having their prior orders reinstated. As of the date of this advisory, these should include individuals whose reinstatement orders were issued in the:

- First, Seventh, and Eleventh Circuits, who applied for discretionary relief before April 1, 1997;⁹
- Tenth Circuit, who took affirmative steps to legalize their immigration status prior to April 1, 1997.¹⁰
- Ninth Circuit, who filed an application for adjustment of status and application for permission to reapply for admission to the United States after deportation or removal (aka I-212 waiver) prior to the reinstatement determination.¹¹

After issuance of a reinstatement order, can a person apply for any “relief” from removal?

A final reinstatement order triggers § 241(a)(5)’s bar to relief. However, DHS previously has taken the position that withholding of removal is not a form of relief because it is mandatory, not discretionary. Thus, if a person expresses a fear of return during the reinstatement process, the regulations provide for an interview with an asylum officer. If an asylum officer determines that the person has a “reasonable fear of persecution or torture,” he or she may apply for withholding before an immigration

⁸ LIFE § 1505(b)(1) codified in HRIFA §902(a)(2), 8 C.F.R. § 241.8(d).

⁹ *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004). Although these decisions pre-dated the Supreme Court’s decision in *Fernandez-Vargas*, AILF believes that the *Fernandez-Vargas* decision should not impact the continuing validity of these decisions. See discussion in retroactivity section below.

¹⁰ *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-90 (10th Cir. 2007) (finding that it would be fundamentally unfair to apply the reinstatement provision to an individual who had applied for lawful residence status prior to April 1, 1997).

¹¹ These people are entitled to adjudication of the I-212 waiver application. If the waiver application is approved, they are not subject to reinstatement. If the waiver application is denied, they are subject to the reinstatement provision. See *Duran Gonzales v. DHS*, 508 F.3d 1227, 1242 n.14 (2007) (effectively overruling *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) but not as to its holding that a successful I-212 waiver application would “avoid” the reinstatement provision) (rehearing pending). For more detailed and current information on the *Duran Gonzales* class action law suit, please see AILF’s website at: http://www.ailf.org/lac/lac_lit.shtml.

judge. 8 C.F.R. § 241.8(a)(e); 8 C.F.R. § 208.31. The person arguably also might be eligible to apply for asylum. See the discussion of *Fernandez-Vargas* in the retroactivity section below.

What is the process for assessing whether a client is subject to INA § 241(a)(5)?

First, determine whether the client has a prior deportation, exclusion or removal order. To verify whether a prior order exists, attorneys may (1) call the Executive Office for Immigration Review (800 898-7180); (2) file a Freedom of Information Act Request with the DHS/EOIR; and/or (3) file a fingerprint records request with the Federal Bureau of Investigations.

Second, determine whether the client departed under the prior order. If the client has not departed since the prior order was issued, he or she cannot be subject to reinstatement because § 241(a)(5) requires an illegal reentry “after having been removed or having departed voluntarily, under an order of removal.” However, in this situation, DHS could attempt to execute the outstanding order.

Third, determine whether the client returned to the United States illegally. In general, a person enters legally when he or she is admitted following inspection and authorization by an immigration officer. However, whether an entry is legal or not can involve complex entry and admission issues.

Individuals who meet all three statutory conditions and who do not fall under a statutory or judicial exemption are subject to reinstatement under INA § 241(a)(5).

What happens when a person’s removal order is reinstated?

Once a person is identified as subject to § 241(a)(5), a DHS officer completes the top portion of the Form I-871, titled “Notice of Intent to Reinstate.” This notice contains the factual allegations against the individual, including alienage, the date of the prior order, and the date of illegally reentry. The notice states that there is no right to a hearing before an immigration judge, but the individual can make an oral or written statement to an immigration officer. The notice contains a space for the individual to sign to acknowledge receipt of the notice and to indicate whether they wish to make a statement to contest the determination. The regulations provide “[i]f the alien wishes to make a statement, the officer shall allow the alien to do so and shall consider whether the alien’s statement warrants reconsideration of the determination.” 8 C.F.R. § 241.8(a)(3).

In cases where there is an identity dispute over whether the individual was in fact previously subject to a prior order, DHS is supposed to compare the individual’s fingerprints with those in its file before DHS issues the order. In the absence of such fingerprints, the regulations provide that DHS cannot remove the individual. 8 C.F.R. § 241.8(a)(2).

A DHS officer issues a reinstatement order by completing the bottom portion of Form I-871, labeled “Decision, Order and Officer’s Certification.” The Decision, Order and Officer’s Certification box on Form I-871 is the actual reinstatement order. The date it is completed is the date the reinstatement order is administratively final and the judicial review clock begins to run.¹² Often the DHS officer will sign the top and bottom portions of the form on the same day. Thus, reinstatement orders may be issued and even executed within a period of hours.

II. FEDERAL COURT JURISDICTION OVER REINSTATEMENT ORDERS AND TRANSFER UNDER 28 U.S.C. § 1631

Can reinstatement orders be appealed and, if so, to which court?

Yes. Every circuit court to address jurisdiction over reinstatement orders has concluded that judicial review is available in the court of appeals having jurisdiction over the place the reinstatement order was issued.¹³ Notably, a person can file a petition for review challenging a reinstatement order even after it has been executed and the person has been physically removed.

A petition for review must be filed within 30 days of the date of the reinstatement order. INA § 242(b)(1). If the petitioner has not yet been removed, a motion for a stay of removal may be filed simultaneously with a petition for review.

The 30-day deadline for filing a petition for review is jurisdictional, meaning that the court of appeals will not be able to exercise jurisdiction over an untimely petition for review. The bottom box on Form I-871, entitled Decision, Order and Officer’s Certification, when signed by the DHS officer, is the final order. The date on this document begins the 30-day clock for filing a petition for review.¹⁴

¹² See, generally, *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 (1st Cir. 2004).

¹³ *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Delgado v. Mukasey*, __ F.3d __, 2008 U.S. App. LEXIS 2655, *3 (2d Cir. 2008), *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d. 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Bejjani v. INS*, 271 F.3d 670, 674 (6th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas*, 126 S. Ct. at 2427 & n.5; *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002) *overruled on other grounds, Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006); *Castro-Cortez et al v. INS*, 239 F.3d 1037, 1043-44 (9th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas*, 126 S. Ct. at 2427 & n.5; *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004).

¹⁴ Courts have not addressed the question of when the appeal period begins where the date of the reinstatement order is different from the date of service.

In addition, courts have not yet addressed if or how the finality of the reinstatement order is affected by referral to an asylum officer for a reasonable fear

If a person would otherwise be statutorily barred from filing a petition or review of a removal order, does the statutory bar also apply to reinstatement orders?

Courts that are statutorily barred under INA § 242(a)(2)(C) from considering petitions for review filed by persons with certain criminal convictions may nonetheless review a reinstatement order if the petition for review raises a question of law or constitutional issue. See INA § 242(a)(2)(D). See, e.g. *Debeato v. AG*, 505 F.3d 231, 234 (3d Cir. 2007); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 (5th Cir. 2006).

What if federal court review of the reinstatement order was sought in the wrong court?

Under 28 U.S.C. § 1631, a court may transfer an action filed in the wrong court to cure a lack of jurisdiction. The transfer statute may be invoked to obtain court of appeals’ review of claims raised in an improperly filed district court action or claims raised in a petition for review filed with the wrong court of appeals. A court of appeals can transfer an improperly-filed district court action to itself. In addition, one court of appeals can transfer a petition for review to another court of appeals. Transfer can be requested by a party or invoked *sua sponte* by a court.

In general, transfer is appropriate under § 1631 if three conditions are met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action or appeal was filed; and (3) the transfer is in the interest of justice. Importantly, the statute provides that the court “shall” transfer the case to the appropriate court if these conditions are met.

In the reinstatement context, several courts have invoked the transfer statute.¹⁵ Courts have invoked the statute based on justifiable reliance on a statute or court decision,¹⁶ to

interview or by referral to an immigration judge for a withholding application. Therefore, out of an abundance of caution, one might presume that the judicial review clock begins ticking on the date the reinstatement order is issued notwithstanding referral to an asylum officer or immigration judge. Arguably, filing a petition for review of the reinstatement order in this situation should not impact the agency’s jurisdiction or willingness to consider and decide the withholding application.

¹⁵ Although the REAL ID Act eliminated district court jurisdiction to review removal orders through habeas corpus actions as of the date of enactment, May 11, 2005, the elimination of this habeas review does not impact the district court’s authority to transfer improperly filed habeas actions to the court of appeals where the requirements of § 1631 are met. Indeed, § 1631 provides that such transfer is appropriate to cure a court’s “want of jurisdiction.”

¹⁶ See *Castro-Cortez v. INS*, 239 F.3d 1037, 1046-1047 (9th Cir. 2001) (decided prior to the REAL ID Act’s elimination of habeas jurisdiction over final removal orders) *abrogated on other grounds by Fernandez-Vargas*, 126 S. Ct. at 2427 & n.5 (transferring habeas petition where “petitioners had good reason to believe that direct review [of

preserve review that would otherwise be time barred for failure to file a timely petition for review,¹⁷ or to prevent undue delay.¹⁸

III. FEDERAL COURT CHALLENGES TO THE PRIOR REMOVAL ORDER (UNDERLYING THE REINSTATEMENT ORDER)

Do the federal courts have jurisdiction to consider a challenge to a prior order even though § 241(a)(5) says the prior order “is not subject to being . . . reviewed”?

AILF believes there must be some opportunity to challenge the legality of a prior order before DHS can use the order as the basis for a reinstatement order. To date, the Fifth, Third and Tenth Circuits courts have found jurisdiction to review the prior order in certain circumstances. *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006); *Debeato v. AG*, 505 F.3d 231, 234-35 (3d Cir. 2007); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007). The Ninth Circuit has held that it cannot review the prior order. *Martinez-Merino v. Keisler*, 504 F.3d 1068, 1071 (9th Cir. 2007) (rehearing pending).

What is the statutory basis for the federal courts to review the prior order?

INA § 242(a)(2)(D) provides for review of legal and constitutional questions notwithstanding INA §§ 242(a)(2)(B)&(C) “or any other provision [of the INA (other than INA § 242)] which limits or eliminates judicial review. The reinstatement provision, INA § 241(a)(5), provides that “the prior order of removal . . . is not subject to being . . . reviewed” Because § 241(a)(5) is a provision “which limits or eliminates judicial review” within the meaning of INA § 242(a)(2)(D), it follows that courts may review legal and constitutional challenges to prior removal orders.

Post-REAL ID, what have the circuit courts held regarding review of prior orders?

The Fifth, Third and Tenth Circuits have adopted the construction of INA § 242(a)(2)(D) set forth above. The Fifth Circuit ultimately dismissed the petition for review, however, because the petitioner had a meaningful opportunity to seek judicial review of the underlying order in the prior removal proceeding but did not do so. *Ramirez-Molina*, 436 F.3d at 515. The Third Circuit reviewed the prior order but upheld its validity under a “gross miscarriage of justice” standard. *Debeato*, 505 F.3d at 237. The Tenth Circuit

reinstatement order] was not available and that a habeas corpus petition was their only avenue to secure judicial review”).

¹⁷ See, e.g., *Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003) (transferring habeas action because, without transfer “the petitioner will have lost his opportunity to present the merits of the claim due to a statute of limitations bar”).

¹⁸ See e.g., *Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir. 2003) (noting district court transfer of habeas action seeking review of a reinstatement order), at 16 (retransferring case to the district court for further proceedings); *Cruz v. Ridge*, 383 F.3d 62, 65 (2d Cir. 2004) (discussing jurisdiction to review transfer order in reinstatement case).

held that, while § 242(a)(2)(D) provides a basis for reviewing underlying orders, it does not trump INA § 242(e)'s limitations on review of expedited removal orders. Thus, the court held that it could not review the underlying expedited order at issue in that case. *Lorenzo*, 508 F.3d at 1282-84.

Although the Eighth Circuit also has addressed the issue of collateral review, the decision pre-dated the REAL ID Act's enactment of INA § 242(a)(2)(D) and thus did not address it. *Ochoa-Carrillo v. Gonzales*, 446 F.3d 781 (8th Cir. 2006). In this case, the petitioner claimed she was not the person named in the prior expedited removal order being reinstated. She argued that the district court had habeas corpus jurisdiction to review her claim pursuant to INA § 242(e)(2) (authorizing limited habeas corpus review of expedited removal orders). The court disagreed, finding that habeas corpus review under INA § 242(e)(2) is not available in a reinstatement proceeding because review of the underlying order is barred.

The Ninth Circuit has held that it lacks jurisdiction to review any challenge to a prior order. *Martinez-Merino*, 504 F.3d at 1071. In so holding, the *Martinez-Merino* court said it was bound by the en banc decision in *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007). However, the *Morales-Izquierdo* court did not address § 242(a)(2)(D). Petitioner, supported by AILF and other amici curiae working on this issue, sought rehearing on this basis. The *Martinez-Merino* court ordered the government to respond and a decision as to whether the case will be reheard is pending as of the date of this advisory.

Prior to the enactment of the REAL ID Act, would the federal courts review prior orders in reinstatement cases?

Although pre-REAL ID case law is helpful to understanding the historical development of collateral review, practitioners should not rely on these cases in formulating jurisdictional arguments. The REAL ID Act's enactment of § 242(a)(2)(D) radically altered the relevant legal arguments in this area.

Prior to the REAL ID Act, and with little or no analysis, several courts stated that they could not review prior removal orders.¹⁹ Only the Fourth and Ninth Circuits addressed whether the bar also precluded habeas review when an individual alleged a colorable constitutional claim that he was denied judicial review in the first proceeding.²⁰ Both

¹⁹ *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 115 (3d Cir. 2003); *Smith v. Ashcroft*, 295 F.3d 425, 428-29 (4th Cir. 2002); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Gomez-Chavez v. INS*, 308 F.3d 796, 801 (7th Cir. 2002); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 327-328 (8th Cir. 2003); *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173 (9th Cir. 2001); *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061 (10th Cir. 2004).

²⁰ *Smith v. Ashcroft*, 295 F.3d 425, 428-29 (4th Cir. 2002); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963-64 (9th Cir. 2004).

courts held that such individuals may obtain habeas review of the prior order.²¹ Applying the rationale of *INS v. St. Cyr*, 533 U.S. 289 (2001), these courts reasoned that it would raise a serious constitutional question if *all* review of the prior order were barred. Thus, these circuits interpreted § 241(a)(5)'s bar to review to preclude only direct review in the courts of appeals, not habeas corpus review.²²

IV. ADMINISTRATIVE CHALLENGES TO PRIOR ORDERS

Can the agency reopen or reconsider a prior order if my client is potentially or presently subject to a reinstatement order?

If a person is potentially or presently subject to reinstatement, practitioners should not automatically rule out the possibility of an administrative challenge to the prior order even though the statute says the prior order “is not subject to being reopened or reviewed....”

Why should I bother asking the agency to reconsider or reopen the prior order when the reinstatement statute bars review or reopening of the prior order?

The law on collateral review is still developing. The courts may hold that a prior order cannot be reopened or collaterally reviewed *in a reinstatement case*. However, such a holding would not necessarily bar reopening or review in a *direct* challenge to the prior order.

Indeed, the First Circuit has suggested that an administrative motion is an appropriate avenue to remedy errors in the reinstatement process. *Ponta-Garca v. Ashcroft*, 386 F.3d 341 (1st Cir. 2004). In *Ponta-Garca*, the court dismissed an untimely petition for review of a reinstatement order. Notably, however, the petitioner had filed a motion to reconsider or reopen the reinstatement decision with the local DHS Field Office Director. Although the court rejected petitioner's contention that the motion tolled the petition for review deadline, the court stated, “[s]hould the eventual disposition of that motion not be in the petitioner's favor, he may, of course, file a separate petition for review with respect thereto.” *Ponta-Garca*, 386 F.3d at 343, n.1. The court encouraged the government “to reexamine the case with care.” *Id.* at 343.

²¹ *But cf. Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001) (finding review of prior order precluded where petitioner voluntarily waived appeal in the first proceeding).

²² *See also Sifuentes-Barraza v. Garcia*, 252 F. Supp. 2d 354, 360 (W.D.Tx. 2003) (also applying the rationale of *St. Cyr* to permit habeas review of prior order). *And see Chacon-Corral v. Weber*, 259 F. Supp. 2d 1151 (D. Col. 2003) (applying the rationale of *U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987) to permit habeas review of prior order). *Accord Avila-Macias v. Ashcroft*, 328 F.3d 108, 115 (3d Cir. 2003) (whether the district court has jurisdiction over collateral challenge can be “can be raised and decided” in district court via habeas).

In addition, the Ninth Circuit has suggested that motion to reopen might be available where the prior order was issued in absentia. *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 496 n.13 (9th Cir. 2007) (en banc).

Where can I find the regulations governing motions to reopen or reconsider if ICE issued the underlying order?

The regulations at 8 C.F.R. § 103.5 govern motions to reopen or reconsider decisions made by DHS officers. The applicable regulations include the following:

“A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” 8 C.F.R. § 103.5(a)(2).

“A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy.” 8 C.F.R. § 103.5(a)(3).

Motions to reopen or reconsider must be filed within 30 days of the decision or proceeding. 8 C.F.R. § 103.5(a)(1)(i). The deadline for reopening “may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.” *Id.*

The INA contains some restrictions on direct *federal* court review of expedited removal orders. *See* INA § 242(e). Arguably, these restrictions do not apply to requests for administrative review.

How do I ask for reopening or reconsideration if the BIA issued the underlying order?

If the BIA issued the underlying order, the respondent may file a motion to reopen or motion to reconsider, as appropriate, in accordance with the governing regulations. It is advisable to inform the BIA that DHS has reinstated the order as DHS will likely point this out in its response. If the challenge to the underlying order is based in whole or in part on an ineffective assistance of counsel claim, the respondent must comply with the procedural requirements of the BIA’s decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

What if the client already has been deported based on the reinstatement order?

The regulations governing motions to reopen and reconsider before the Service do not contain a jurisdictional bar to review of motions filed by people outside the United States. Accordingly, the motions should not be denied for this reason. If DHS nevertheless were to take this position, a circuit court could reverse it on petition for review.

The regulations governing motions to reopen and reconsider before immigration judges and the BIA purport to bar review if the person has departed the United States. *See* 8 C.F.R. § 1003.23(b)(1) (immigration court); 8 C.F.R. § 1003.2(d) (BIA). To date, at least one court has struck down this post-departure regulatory bar because it conflicts with the motion to reopen statute. *See William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007).²³ Other circuit courts are considering this argument. Some courts also have held that these regulations do not apply in certain cases, for example, where the motion to reopen is filed after departure,²⁴ where the motion seeks reopening of an in absentia order,²⁵ where basis of the order has been nullified,²⁶ and/or where the order was unlawfully executed.²⁷ The BIA also has conducted collateral review of a prior order notwithstanding a person's departure.²⁸

What if the BIA or DHS denies the motion to reopen or motion to reconsider?

The courts of appeals should have jurisdiction to consider a petition for review of a BIA or DHS denial of a motion to reopen or motion to reconsider. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004) (suggesting availability of such review).

Is there a way to “challenge” the prior order through consular processing?

Maybe. Individuals who are applying for visas from abroad and who have viable claims that their prior order or reinstatement order is unlawful can try to convince a consular officer that they are not subject to INA §§ 212(a)(9)(A) or (C), and, thus do not need a waiver of their previous removal order/s. One could argue that a person is not inadmissible based on an unlawful order and/or an I-212 waiver should not be required for unlawful orders.

²³ AILF appeared as amicus curiae in this case and is interested in working with attorneys litigating this issue in other circuits. Please bring cases to the attention of AILF by emailing the AILF's Litigation Clearinghouse at clearinghouse@ailf.org.

²⁴ *Zi-Xing Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007); *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007).

²⁵ *Contreras-Rodriguez v. US AG*, 462 F.3d 1314 (11th Cir. 2006). *See also, Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 496 n.13 (9th Cir. 2007) (en banc) (suggesting possibility).

²⁶ *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179, 1181 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981).

²⁷ *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977).

²⁸ *Matter of Malone*, 11 I&N Dec. 780 (BIA 1966); *Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967); *Matter of Roman*, 19 I&N Dec. 855, 856-57 (BIA 1988).

V. “RETROACTIVE” APPLICATION OF INA § 241(a)(5)

Did “reinstatement” exist prior to § 241(a)(5)’s April 1, 1997 effective date?

Yes, but the *only* individuals subject to reinstatement under former INA § 242(f) (1995) were those who had been previously deported (not excluded) on grounds relating to certain criminal convictions, failing to register or falsification of documents, or security or terrorist related grounds and subsequently re-entered the country illegally.

How does reinstatement under former INA § 242(f) compare with reinstatement under current INA § 241(a)(5)?

Under pre-IIRIRA reinstatement procedures, legacy INS was required to issue an Order to Show Cause charging the individual with deportability under former INA § 242(f). 8 C.F.R. § 242.23 (1995). At a deportation hearing, an immigration judge would determine deportability and adjudicate any application for relief. The regulations further provided that reinstatement proceedings were to be conducted in general accordance with the rules governing deportation hearings before immigration judges. *Id.*

The current reinstatement provision substantively differs from its predecessor provision. The new provision expands the scope of individuals subject to reinstatement proceedings and broadens the consequences of issuance of a reinstatement order by providing that the prior order is not subject to “being reopened or reviewed” and the individual is “not eligible and many not apply for any relief under the INA.”

What did the Supreme Court hold in *Fernandez-Vargas*?

In *Fernandez-Vargas v. Gonzales*, 547 U.S. 30, 126 S. Ct. 2422 (2006), the Supreme Court held that § 241(a)(5) may be applied to an individual who (1) reentered the United States before April 1, 1997 and (2) did not take any affirmative steps to legalize their unlawful status in the United States before that date. The petitioner in *Fernandez-Vargas* was last deported in 1981 and reentered illegally shortly thereafter. Although he fathered a U.S. citizen son in 1989 (before April 1, 1997), he did not marry the boy’s U.S. citizen mother or file an application for adjustment of status and request to waive his prior deportation order until March 2001 (after April 1, 1997).

What was the Supreme Court’s rationale in *Fernandez-Vargas*?

The Court’s decision rested on the retroactivity analysis from *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). First, the Court noted that Congress did not expressly prescribe whether the statute could be applied retroactively. 126 S. Ct. at 2428. The Court then concluded that application of traditional statutory construction rules failed to indicate whether Congress intended the provision to apply retroactively or prospectively. 126 S. Ct. at 2428-29. Next, the Court moved on to consider whether application of § 241(a)(5) would produce a retroactive effect. A statute has a retroactive effect only when it applies to conduct completed prior to the change in law.

The Court concluded that “Fernandez-Vargas has no retroactivity claim based on a new disability consequent to a completed act . . .” 126 S. Ct. at 2432. The Court reasoned that, in reinstatement cases, “it is the conduct of remaining in the country after entry that is the predicate action” triggering § 241(a)(5)’s application, not the person’s illegal reentry. 126 S. Ct. at 2432. The Court stated that § 241(a)(5) does not penalize illegal reentry but, rather, establishes a process to “stop an indefinitely continuing [immigration] violation.” Therefore, because the petitioner continued his illegal presence after new § 241(a)(5) took effect, his conduct was not completed prior to the change in law.

The Court also noted that the petitioner had six months following § 241(a)(5)’s enactment in which he could have left the United States before the statute took effect. 126 S. Ct. at 2432.

Can persons who took an affirmative step/s to legalize their status prior to April 1, 1997 claim that INA § 241(a)(5) should not apply retroactively to them?

Yes. Importantly, the *Fernandez-Vargas* Court expressly declined to decide whether the provision can be applied retroactively to someone who took affirmative steps to legalize their status, 126 S. Ct. at 2432-33, for example, by filing an adjustment of status application, an immigrant visa petition or labor certification application, asylum application, or by seeking temporary protective status (TPS). Indeed, there are several places in the decision where the Court expressly noted that the petitioner’s situation is different from a petitioner who took some action to legalize their status before the change in law.²⁹

Before the *Fernandez-Vargas* decision, the First, Seventh and Eleventh Circuits held that § 241(a)(5) does not apply retroactively a person who applied for adjustment of status prior to April 1, 1997. *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004).³⁰ AILF believes these decisions are still good law. *See also Valdez-*

²⁹ *Fernandez-Vargas*, 126 S. Ct. at 2425 (limiting holding to the “continuing violator of the INA now before us.”); 2427 n.5 (noting that whether a noncitizen’s marriage or application for adjustment of status before April 1, 1997 renders § 241(a)(5) impermissibly retroactive as applied are “facts not in play here”); 2432 n.10 (noting that petitioner’s retroactivity claim was not based on a claim that § 241(a)(5) cancelled vested rights because he “never availed himself” of cancellation, adjustment or voluntary departure and did not take an “action that enhanced their significance to him in particular”); 2433 & n. 12 (declining to express an opinion on whether § 241(a)(5) would have retroactive effect had the petitioner married a U.S. citizen and applied for adjustment of status before the change in law); 2434 (concluding “that § 241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas.....”). Emphasis added.

³⁰ *Compare Velasquez-Gabriel v. Crocetti*, 263 F.3d. 102, 110 (4th Cir. 2001) (reasoning that § 241(a)(5) did not have an impermissible effect because the petitioner did not file an adjustment application before April 1, 1997).

Sanchez v. Gonzales, 485 F.3d 1084, 1089-90 (10th Cir. 2007) (discussing ongoing validity of these cases).

Two circuits have addressed retroactivity claims post-*Fernandez-Vargas*. The Tenth Circuit has held that § 241(a)(5) cannot be applied retroactively to an individuals who had applied for lawful residency prior to April 1, 1997. *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007). The Fifth Circuit has held that § 241(a)(5) can apply retroactively to someone who married a U.S. citizen and filed an I-130 visa petition but did not file an adjustment application before April 1, 1997. *Silva Rosa v. Gonzales*, 490 F.3d 403 (5th Cir. 2007).³¹

How does *Fernandez-Vargas* impact potential asylum applicants?

Footnote 4 of the *Fernandez-Vargas* decision states: “Notwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to § 241(a)(5) may seek withholding of removal” under INA § 241(b)(3)(A) or 8 C.F.R. § 241.8(e) and 208.31 (2006). Interestingly, the parenthetical following the Court’s citation of 8 C.F.R. § 208.31, the regulation regarding the “reasonable fear” process, states: “raising the possibility of asylum to aliens whose removal order has been reinstated under INA § 241(a)(5).” Since the Supreme Court has indicated that asylum remains available, individuals subject to reinstatement who have potential asylum claims may pursue these claims and cite to footnote 4 for the authority to do so.

Does *Fernandez-Vargas* overturn any circuit court case law?

Yes, the decision overturns *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001) and *Castro-Cortez v. INS*, 239 F.3d 1037(9th Cir. 2001). These courts had held that § 241(a)(5) cannot apply retroactively to pre-April 1, 1997 reentrants.

The *Fernandez-Vargas* decision also may have overturned *Dinnall v. Gonzales*, 421 F.3d 247 (3d Cir. 2005) (holding that § 241(a)(5) cannot apply retroactively if persons was eligible for voluntary departure before April 1, 1997). The Court suggests a petitioner must take “some action” towards legalizing status to prevail on a retroactivity claim. *Fernandez-Vargas*, 126 S. Ct. at 2433 n.10.

Are there any defenses available to people in removal proceedings who are subject to reinstatement pursuant to *Fernandez-Vargas* and DHS now moves to terminate proceedings in order to reinstate?

³¹ Prior to *Fernandez-Vargas*, the courts were divided on whether the filing of immigrant visa petition prior to April 1, 1997 was sufficient to invoke retroactivity concerns. Compare *Lopez-Flores v. DHS*, 376 F.3d 793 (8th Cir. 2004) (holding that § 241(a)(5) cannot be applied retroactively where person filed an I-140 petition before April 1, 1997) with *Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005) (holding that the filing of an I-130 petition before April 1, 1997 is not sufficient to render § 241(a)(5) impermissibly retroactive).

Possibly. Once removal proceedings have commenced in immigration court, only the immigration judge has the authority to terminate proceedings. *Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998); 8 C.F.R. § 1239.2(c). A motion to terminate made “must be adjudicated on the record and pursuant to the regulations as would any other motion;” it is “not just and automatic grant...but an informed adjudication by the Immigration Judge...based on an evaluation of the factors underlying the Service’s motion.” 22 I&N Dec. 281 at 284. Thus, an immigration judge can refuse to terminate proceedings to permit DHS to issue a reinstatement order if the judge believes that reinstatement is not lawful or if reinstatement would have an impermissible retroactive effect.

In addition, an immigration judge could refuse to terminate proceedings if he or she concludes that DHS waived its opportunity to pursue reinstatement against the person. Arguably, at the time DHS issued the Notice to Appear, it was aware the petitioner was subject to reinstatement but nonetheless choose to initiate removal proceedings, rather than reinstatement proceedings. By choosing to initiate removal proceedings, the government waived its opportunity to subject the person to reinstatement under INA § 241(a)(5).

This waiver argument applies equally to immigration cases within the jurisdiction of the Sixth and Ninth Circuits where the circuit courts in *Bejjani* and *Castro-Cortez*, respectively, had previously held that § 241(a)(5) did not apply retroactively to a pre-IIRIRA reentrant. By deciding not to petition the Supreme Court for certiorari in those cases, arguably, the government acquiesced to the holdings in those decisions.

VI. DUE PROCESS CONSIDERATIONS

What are the due process concerns in the reinstatement process?

The due process concerns in the reinstatement process include, but are not limited to:

- Lack of a full and fair hearing;
- Lack of an impartial adjudicator;
- Lack of meaningful opportunity to present evidence;
- Lack of a meaningful opportunity to cross-examine evidence;
- Inability to develop an adequate administrative record;
- Right to counsel issues, including lack of access to counsel during the reinstatement process and lack of notice to existing counsel in violation of 8 C.F.R. § 292.5; and
- Lack of notice of the right to seek federal court review.

How have the circuit courts ruled on due process claims?

To date, no court has found that the current reinstatement process violates due process.

Some courts have expressed concern regarding the due process issues surrounding the reinstatement process.³² Nonetheless, courts have upheld the reinstatement procedures.³³ In many cases, however, the petitioner was unable to show actual and specific prejudice from the alleged due process violation. Petitioners who challenge the existence (or, possibly, the legality) of the prior order, departure, or reentry might be able to establish prejudice.

One court held that the reinstatement procedures, including fingerprinting procedures, did not violate petitioner's due process rights where petitioner argued that she was not the person named in the prior removal order. *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 845-48 (8th Cir. 2006). *But see Rafaelano v. Wilson*, 471 F.3d 1091 (9th Cir. 2006) (transferring case to BIA to resolve factual dispute regarding the existence of the prior order).

Notably, consistent with the canon of constitutional avoidance, if a petitioner raises a non-constitutional claim along with a due process challenge to a reinstatement order, presumptively courts will rule on the non-constitutional claim before reaching the due process issue.

VII. OTHER POTENTIAL ARGUMENTS AND ISSUES

Can someone who is eligible for adjustment of status under INA § 245(i) argue that INA § 245(i) trumps the bar to relief in INA § 241(a)(5)?

Unless it already has been rejected by the relevant circuit court, this argument may be available. Unfortunately, however, many circuits have rejected this argument. *See Delgado v. Mukasey*, ___ F.3d ___, 2008 U.S. App. LEXIS 2655, Case No. 06-5035-ag (2d Cir. Feb. 7, 2008) (rejecting argument and discussing similar decisions of the First, Sixth, Seventh, Tenth, and Eleventh Circuits).

³² See, e.g., *Castro-Cortez v. INS*, 239 F.3d 1037, 1047-50 (9th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas*, 126 S. Ct. 2422, 2427 & n.5 (2006); *United States v. Charleswell*, 456 F.3d 347 (3d Cir. 2006); *Lattab v. Ashcroft*, 384 F.3d 8, 21 n.6 (1st Cir. 2004); *Bejjani v. INS*, 271 F.3d 670, 675-76 (6th Cir. 2001); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002) *overruled on other grounds, Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006).

³³ See, e.g., *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007) (en banc), *Warner v. Ashcroft*, 381 F.3d 534, 539 (6th Cir. 2004); *Lattab v. Ashcroft*, 384 F.3d 8, 20-21 (1st Cir. 2004); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 302 (5th Cir. 2002); *Gomez-Chavez v. INS*, 308 F.3d 796, 802 (7th Cir. 2002); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 327-328 (8th Cir. 2003); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162-63 (10th Cir. 2003); *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842 (8th Cir. 2006).

Can someone challenge the existence of the factual elements of reinstatement?

Yes, a person can challenge a reinstatement order by arguing that he or she was not previously ordered removed, did not depart under a removal order and/or reentered the country pursuant to a legal admission.

A few courts have addressed such claims. *See, e.g., Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 845-48 (8th Cir. 2006) (rejecting challenge to the existence of a prior order against petitioner); *Rafaelano v. Wilson*, 471 F.3d 1091 (9th Cir. 2006) (transferring case to BIA to resolve factual dispute regarding whether person was previously departed under a removal order or pursuant to a grant of voluntary departure). *Accord Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001) (transferring case to district court to resolve genuine issue of fact regarding citizenship claim made by person subject to reinstatement order).

What is the status of the *Morales-Izquierdo* case?

Although the Ninth Circuit previously held that only immigration judges can issue reinstatement orders, an en banc panel of the court reversed this conclusion. *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007). Thus, DHS officers within the Ninth Circuit can issue reinstatement orders. The en banc panel further rejected petitioner's due process arguments and refused to consider his collateral attack on the prior order. *But see* discussion of *Martinez-Merino* in the collateral review section above.

Can a person with an approved I-212 waiver application avoid reinstatement?

In all circuits that have decided this issue, with the exception of the Ninth Circuit, an approved I-212 waiver application generally will not protect a person from issuance of a reinstatement order.

In the Ninth Circuit, pursuant to *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), persons who file an I-212 waiver application prior to a reinstatement determination are entitled to adjudication of the I-212 waiver application. If the waiver application is approved, they are not subject to reinstatement. If the waiver application is denied, they are subject to the reinstatement provision. *See Duran Gonzales v. DHS*, 508 F.3d 1227, 1242 n.14 (2007) (effectively overruling *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) but not as to its holding that a successful I-212 waiver application would "avoid" the reinstatement provision) (rehearing pending). For more detailed and current information on the *Duran Gonzales* class action law suit, please see AILF's website at: http://www.ailf.org/lac/lac_lit.shtml.

Does a person who qualifies for VAWA adjustment, U Visa, or T Visa have any additional arguments to avoid reinstatement?

Persons who qualify for adjustment of status under the Violence Against Women Act and trafficking victims who qualify for a visas as defined by INA § 101(a)(15)(T) or (U) may

have additional arguments that they should be allowed to apply for such relief notwithstanding the bar to relief in INA § 241(a)(5). As Congress enacted waivers to exempt these individuals from virtually all inadmissibility grounds, including INA § 212(a)(9)(C)(i), there is an equitable argument that the bar to relief in INA § 241(a)(5) should be similarly construed. In addition, Congress has stated its desire that I-212 waiver applications should be granted in these cases. See *Violence Against Women and Department of Justice Reauthorization Act of 2005*, § 813(b), Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

What avenues are available to individuals who are otherwise eligible for an immigrant or nonimmigrant visa but for having previously been subject to a reinstatement order?

People applying for a visa abroad must establish that they are admissible. A person who was deported based on a reinstatement order may be inadmissible under INA § 212(a)(9)(C)(i)(II).

Importantly, the Department of State has interpreted INA § 212(a)(9)(C)(i)(II) as *only* applying to reentries after April 1, 1997.³⁴ Therefore, if the person's reinstatement order was based on a pre-April 1, 1997 reentry, he or she is not inadmissible under INA § 212(a)(9)(C)(i)(II). However, the person may still be inadmissible under INA § 212(a)(9)(A) for having been previously removed, but could apply for a waiver under INA § 212(a)(9)(A)(ii). See also 8 C.F.R. §§ 212.2(b)(nonimmigrant visas) and 212.2(d) (immigrant visas).

If the person's reinstatement order was based on a post-1997 reentry, he or she is inadmissible under INA § 212(a)(9)(C)(i)(II) and generally cannot apply for a waiver of inadmissibility unless 10 years have elapsed since the date of last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) (holding that a person who enters the United States without inspection after removal is not eligible for a waiver of inadmissibility unless 10 years have elapsed since the date of last departure from the United States). Whether a person must wait the 10 years to apply for such waiver is the subject of litigation in *Duran Gonzales*, the Ninth Circuit-wide class action, referenced in the question above.

Individuals who are applying for visas abroad and who have viable claims that their prior order or reinstatement order is unlawful also can try to convince a consular officer that they are not subject to INA §§ 212(a)(9)(A) or (C), and, thus they do not need a waiver of their previous removal order/s. The argument is that the person should not be subjected to inadmissibility based on an unlawful order and/or an I-212 waiver should not be required where the order was unlawful.

³⁴ See U.S. Department of State cable to the field, transmitted April 4, 1997. See also Memorandum of Paul W. Virtue, INS Acting Executive Associate Commissioner, dated June 17, 1997 (adopting same interpretation).

**ADDENDUM OF
PUBLISHED APPELLATE COURT REINSTATEMENT DECISIONS**

Supreme Court

Fernandez-Vargas v. Gonzales, 547 U.S. 30, 126 S. Ct. 2422 (2006)

First Circuit

Batista v. Ashcroft, 270 F.3d 8 (1st Cir. 2001)

Arevalo v. Ashcroft, 344 F.3d 1 (1st Cir. 2003)

Ponta-Garca v. Ashcroft, 386 F.3d 341 (1st Cir. 2004)

Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004)

Second Circuit

Cruz v. Ridge, 383 F.3d 62 (2d Cir. 2004)

Delgado v. Mukasey, ___ F.3d ___, 2008 U.S. App. LEXIS 2655, Case No. 06-5035-ag (2d Cir. Feb. 7, 2008)

Third Circuit

Avila-Macias v. Ashcroft, 328 F.3d 108 (3d Cir. 2003)

Dinnall v. Gonzales, 421 F.3d 247 (3d Cir. 2005)

United States v. Charleswell, 456 F.3d 347 (3d Cir. 2006)

Debeato v. AG, 505 F.3d 231 (3d Cir. 2007)

Fourth Circuit

Velasquez-Gabriel v. Crocetti, 263 F.3d 102 (4th Cir. 2001)

Smith v. Ashcroft, 295 F.3d 425 (4th Cir. 2002)

Fifth Circuit

Ojeda-Terrazas v. Ashcroft, 290 F.3d 292, 295 (5th Cir. 2002)

Ramirez-Molina v. Ziglar, 436 F.3d 508 (5th Cir. 2006)

Silva Rosa v. Gonzales, 490 F.3d 403 (5th Cir. 2007)

Sixth Circuit

Bejjani v. INS, 271 F.3d 670 (6th Cir. 2001) *abrogated by Fernandez-Vargas Gonzales*, 126 S. Ct. 2422, 2427 & n.5 (2006)

Warner v. Ashcroft, 381 F.3d 534 (6th Cir. 2004)

Seventh Circuit

Gomez-Chavez v. INS, 308 F.3d 796 (7th Cir. 2002)

Faiz-Mohammed v. Ashcroft, 395 F.3d 799 (7th Cir. 2005)
Labojewski v. Gonzales, 407 F.3d 814 (7th Cir. 2005)
Lino v. Gonzales, 467 F.3d 1077 (7th Cir. 2006)

Eighth Circuit

Alvarez-Portillo v. Ashcroft, 280 F.3d 858 (8th Cir. 2002) *overruled by Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006).
Briseno-Sanchez v. Heinauer, 319 F.3d 324 (8th Cir. 2003)
Lopez v. Heinauer, 332 F.3d 507 (8th Cir. 2003)
Flores v. Ashcroft, 354 F.3d 727 (8th Cir. 2003)
Lopez-Flores v. DHS, 376 F.3d 793 (8th Cir. 2004)
Ochoa-Carrillo v. Gonzales, 437 F.3d 842 (8th Cir. 2006)
Ochoa-Carrillo v. Gonzales, 446 F.3d 781 (8th Cir. 2006)

Ninth Circuit

Castro-Cortez et al. v. INS, 239 F.3d 1037 (9th Cir. 2001) *abrogated by Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2427 & n.5 (2006)
Gallo-Alvarez v. Ashcroft, 266 F.3d 1123 (9th Cir. 2001)
Alvarenga-Villalobos v. Ashcroft, 271 F.3d 1169 (9th Cir. 2001)
Padilla v. Ashcroft, 334 F.3d 921 (9th Cir. 2003)
Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), *effectively overruled in part by Duran Gonzales v. DHS*, 508 F.3d 1227 (2007)
Arreola-Arreola v. Ashcroft, 383 F.3d 956 (9th Cir. 2004), *overruled by, Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007) (en banc)
Rafaelano v. Wilson, 471 F.3d 1091 (9th Cir. 2006)
Morales-Izquierdo v. Ashcroft, 486 F.3d 484 (9th Cir. 2007) (en banc)
Martinez-Merino v. Keisler, 504 F.3d 1068 (9th Cir. 2007)

Tenth Circuit

Duran-Hernandez v. Ashcroft, 348 F.3d 1158 (10th Cir. 2003)
Garcia-Marrufo v. Ashcroft, 376 F.3d 1061 (10th Cir. 2004)
Fernandez-Vargas v. Ashcroft, 394 F.3d 881 (10th Cir. 2005), *affirmed* 547 U.S. 30 (2006)
Berum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004)
Valdez-Sanchez v. Gonzales, 485 F.3d 1084 (10th Cir. 2007)
Lorenzo v. Mukasey, 508 F.3d 1278 (10th Cir. 2007)

Eleventh Circuit

Sarmiento-Cisneros v. Ashcroft, 381 F.3d 1277 (11th Cir. 2004)
Guijosa De Sandoval v. United States AG, 440 F.3d 1276 (11th Cir. 2006)