



## AMERICAN IMMIGRATION LAW FOUNDATION

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### PRACTICE ADVISORY<sup>1</sup>

#### REINSTATEMENT OF REMOVAL

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April 18, 2005, Updated July 11, 2006

Removal pursuant to §241(a)(5) of the Immigration and Nationality Act (INA) – the reinstatement of removal provision – accounts for 40% of all removals nationwide, and two-thirds of nationwide reinstatements take place within the Ninth Circuit.<sup>3</sup> 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 takes a close look at 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 recent decision in *Fernandez-Vargas v. Gonzales*, 547 U.S. \_\_\_, 2006 U.S. LEXIS 4892 (June 22, 2006) regarding the retroactive application of the reinstatement provision and the current status of the Ninth Circuit case *Morales-Izquierdo v. Gonzales* (see n.3). Finally, the advisory includes a list of circuit court cases that have addressed the reinstatement provision to date.

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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<sup>3</sup> The government provided these statistics in its rehearing petition (at pp. 3-4) in *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) *reh'g en banc granted and decision withdrawn sub nom. Morales-Izquierdo v. Gonzales*, 423 F.3d 118 (Sept. 12, 2005), *en banc proceedings stayed*, 432 F.3d 1112 (Jan. 5, 2006).

## **I. BACKGROUND**

### **What is reinstatement of removal?**

Reinstatement of removal is the term for removal pursuant to INA §241(a)(5), which was amended by IIRIRA<sup>4</sup> §305(a). The former Immigration and Nationality Service (INS) promulgated regulations at 8 C.F.R. §241.8 implementing INA §241(a)(5). Like many other INA amendments enacted by IIRIRA, INA §241(a)(5) became effective on April 1, 1997. The provision provides:

(5) Reinstatement of removal orders against those 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 chapter, and the alien shall be removed under the prior order at any time after the reentry.

Reinstatement orders (or orders of reinstatement) are issued by low-level immigration officers, not immigration judges. The orders may be executed within hours or days. Due to the lack of a hearing and speed at which the orders are executed and issued, removal under INA §241(a)(5) is sometimes called summary removal.

Significantly, individuals subject to INA §241(a)(5) are “not eligible and may not apply for any relief” under the INA.

### **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.<sup>5</sup>

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<sup>4</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-575 (1996).

<sup>5</sup> 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.*

- Nicaraguans and Cuban applicants for adjustment under §202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).<sup>6</sup>
- Salvadoran, Guatemalan, and Eastern European applicants under NACARA §203.<sup>7</sup>
- Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).<sup>8</sup>

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

Litigation in the courts of appeals has resulted in a number of case law exemptions to §241(a)(5). As of the date of this advisory, these include individuals whose immigration cases are held in the:

- First, Seventh, and Eleventh Circuits who applied for discretionary relief before April 1, 1997;<sup>9</sup>
- 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.<sup>10</sup>

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

A final reinstatement order triggers the bar to relief in INA §241(a)(5). However, DHS has previously 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 judge. 8 C.F.R. §241.8(a)(e); 8 C.F.R. §208.31. The person may also be eligible to apply for asylum. *See* §IV on retroactivity.

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

First, determine whether the client has a prior order of deportation, exclusion or removal. Sometimes clients may be unaware of the existence of a prior order, for example, where DHS issued an expedited order of removal at the border or where the order was issued *in absentia*. 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.

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509 U.S. 43 (1993); and *Zambrano v. INS vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993).

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

<sup>7</sup> LIFE §1505(c).

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

<sup>9</sup> *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).

<sup>10</sup> *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

Second, determine whether the client departed under the prior order. If the client has not departed since the prior order was issued, then he or she cannot be subject to reinstatement under INA §241(a)(5) because the statute 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 -- after departure under the prior order -- 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 illegal can involve complex entry and admission issues.

Individuals who meet all three conditions (prior order, departure under that order, and illegal reentry), and who do not fall under a statutory or judicial exemption, are subject to removal under INA §241(a)(5). This is true regardless of the date of the prior order and the date of the subsequent illegal reentry. *See* §IV.

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

Low-level DHS officers, untrained in the intricacies of immigration statutes, regulations, and court interpretations, decide whether to reinstate a prior order. Once a person is identified as subject to §241(a)(5), an officer completes the top portion of the Form I-871, entitled “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 the reinstatement order issues. 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.<sup>11</sup> 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.

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<sup>11</sup> *See generally, Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 (1st Cir. 2004).

## **Is the reinstatement process different if the person is reinstated in the Ninth Circuit?**

Not at present. However, from November 18, 2004 until September 12, 2005, it was illegal for immigration officers to issue reinstatement orders as a result of the Ninth Circuit's decision in *Morales-Izquierdo v. Gonzales* (see n.3).

For further details on *Morales-Izquierdo* and other Ninth Circuit reinstatement issues, see §VI of this advisory.

## **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.<sup>12</sup> Notably, an individual need not be physically present in the United States to file a petition for review. That is, a person can file a petition for review challenging a reinstatement order even after it has been executed and the person has been physically deported.

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, and usually should, 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.<sup>13</sup>

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<sup>12</sup> *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *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); *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002); *Castro-Cortez et al v. INS*, 239 F.3d 1037, 1043-44 (9th Cir. 2001); *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).

<sup>13</sup> 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 interview or by referral to an immigration judge for a withholding application. Therefore, out of an abundance of caution, one

**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 from considering petitions for review in the court of appeals under INA §242(a)(2)(C) (due to certain criminal convictions) may nonetheless review a reinstatement order through a petition for review if the petition for review raises a question of law or constitutional issue. *See* INA §242(a)(2)(D), added by § 106(a) of the REAL ID Act of 2005.<sup>14</sup>

**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 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.<sup>15</sup> Some courts invoked the statute based on justifiable reliance on a statute or court decision.<sup>16</sup> Other courts ordered transfer to preserve review that would otherwise be time barred for failure to file a timely petition for review<sup>17</sup> or to prevent undue delay.<sup>18</sup>

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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.

<sup>14</sup> Pub. L. 109-13, 119 Stat. 231 (May 11, 2005).

<sup>15</sup> Although the REAL ID Act eliminated district court jurisdiction to review removal orders through habeas corpus actions, 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.”

<sup>16</sup> *See Castro-Cortez v. INS*, 239 F.3d 1037, 1046-1047 (9th Cir. 2001) (transferring habeas action seeking review of a reinstatement order to court of appeals where “petitioners had good reason to believe that direct review was not available and that a habeas corpus petition was their only avenue to secure judicial review”).

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

### III. CHALLENGING THE PRIOR ORDER (UNDERLYING THE REINSTATEMENT ORDER)

**Following the enactment of the REAL ID Act, do the federal courts have jurisdiction to consider a challenge to the prior order underlying a reinstatement 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. The post-REAL ID law on whether and where a federal court may consider a challenge to the legality of a prior order is developing. To date, two circuits have addressed the issue. *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006); *Ochoa-Carrillo v. Gonzales*, 446 F.3d 781 (8th Cir. 2006) *cert. filed*, \_\_ U.S. \_\_ Case No. 05-1567 (June 8, 2006).

Petitioners may simultaneously move the agency to reopen or reconsider the prior order. We are aware of the potential legal obstacles to obtaining administrative review of a prior executed order,<sup>19</sup> however, both Board of Immigration Appeals (BIA) precedent decisions and federal courts of appeals have recognized that these obstacles should not apply in certain cases, for example, where the basis of the order has been nullified, where the order was unlawfully executed, and/or where the person was deprived of a meaningful opportunity to obtain federal court review in the first proceeding.<sup>20</sup>

**Prior to the enactment of the REAL ID Act, was the purported bar to review of the prior order in INA §241(a)(5) absolute, or, could some prior orders be reviewed in habeas proceedings in district court?**

Prior to the REAL ID Act and with little or no analysis, several courts stated that they could not review a prior order on petition for review of a reinstatement order.<sup>21</sup> Only the Fourth and Ninth

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<sup>18</sup> 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 to court of appeals), at 16 (retransferring case to the district court for further proceedings on habeas challenge to detention); *Cruz v. Ridge*, 383 F.3d 62, 65 (2d Cir. 2004) (discussing jurisdiction to review transfer order in reinstatement case).

<sup>19</sup> See e.g. 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (barring motions to reopen after departure from the country).

<sup>20</sup> See n.24, *infra*. And see *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) (permitting collateral attack on a final order of exclusion or deportation in a subsequent proceeding upon a showing that the prior order resulted in a gross miscarriage of justice); *Lara v. Trominiski*, 216 F.3d 487, 436 (5th Cir. 2000) (affirming use of the “gross miscarriage of justice” standard in collateral attacks).

<sup>21</sup> *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-*

Circuits had addressed whether the bar also precluded habeas corpus review when an individual alleged a colorable constitutional claim that he was denied judicial review in the first proceeding. *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). Both courts held that such individuals may obtain habeas review of the prior order.<sup>22</sup> Applying the rationale of *INS v. St. Cyr*, 533 U.S. 289 (2001) in the reinstatement context, these courts reasoned that it would raise a serious constitutional question if *all* review of the prior order were barred. Thus, the Fourth and Ninth Circuits interpreted the purported bar to review in INA §241(a)(5) to preclude only direct review in the courts of appeals, not habeas corpus review.<sup>23</sup>

### **Does the REAL ID Act impact collateral review of the prior order?**

Yes, AILF believes REAL ID should have a favorable impact on collateral review. As of the date of this advisory, only two circuits have issued published decisions on this issue.

Section 106(a) of the REAL ID Act added new INA §242(a)(2)(D), which permits 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. INA §241(a)(5) purports to eliminate judicial review of a prior order of removal after the order has been executed and the person has unlawfully reentered. The provision clearly states “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 §242(a)(2)(D) should permit review of constitutional claims and legal challenges to prior removal orders.

In *Ramirez-Molina v. Ziglar*, 436 F.3d 508 (5th Cir. 2006), the Fifth Circuit adopted this rationale. The court 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.

Although the Eighth Circuit has also addressed the issue of collateral review post-REAL ID, it did not consider the argument adopted by the Fifth Circuit. *Ochoa-Carrillo v. Gonzales*, 446 F.3d 781 (8th Cir. 2006) *cert. filed*, \_\_\_ U.S. \_\_\_ Case No. 05-1567 (June 8, 2006). In this case,

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*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).

<sup>22</sup> *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).

<sup>23</sup> *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).

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.

**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 in reinstatement cases 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, at least one court of appeals 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. Oct. 20, 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, in a footnote, 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.

Thus, if the agency denies reconsideration or reopening, a court of appeals could review and reverse the decision.

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

The three most common types of removal orders issued by DHS officers are reinstatement orders, administrative removal orders under INA §238(b) and expedited removal orders under INA §235(b). The regulations at 8 C.F.R. §103.5 govern motions to reopen or reconsider these decisions.

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 has already 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). At least one court has held that these regulations do not apply where the underlying basis of the order has been nullified or the order was unlawfully executed.<sup>24</sup> AILF also believes that these regulations are ultra vires to the motion to reopen statute and is interested in working with attorneys raising this issue. Please bring cases to the attention of AILF by emailing the AILF’s Litigation Clearinghouse at [clearinghouse@ailf.org](mailto:clearinghouse@ailf.org).

### **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.

### **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 also can try to convince a consular officer that

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<sup>24</sup> *See, e.g. Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977) (order not legally executed); *Wiedersperg v. INS*, 896 F.2d 1179, 1181 (9th Cir. 1990) (conviction which formed the basis of deportation order vacated); and *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981) (conviction which formed the basis of deportation order later set aside).

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. 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 for unlawful orders.

#### **IV. “RETROACTIVE” APPLICATION OF INA §241(a)(5)**

##### **Were noncitizens subject to “reinstatement” prior to §241(a)(5)’s April 1, 1997 effective date?**

Yes, but the *only* individuals subject to reinstatement under former INA §242(f) 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)?**

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

The current reinstatement provision substantively differs from its predecessor provision. By eliminating the requirement that the prior order must have been based on criminal, security or terrorist grounds, the new provision expands the scope of individuals subject to reinstatement proceedings. In addition, the new provision purports to broaden 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. \_\_\_, 2006 U.S. LEXIS 4892 (June 22, 2006), the Supreme Court held that §241(a)(5) may be applied to an individual who reentered the U.S. before April 1, 1997 and who did not take any affirmative steps to legalize their unlawful status in the United States before that date (the date §241(a)(5) took effect). 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).

Importantly, the Court expressly declined to decide whether the provision can be applied retroactively to someone who took affirmative steps to legalize their status, 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).

### **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. 2006 U.S. LEXIS 4892 at \*17. Next, the Court concluded that application of traditional statutory construction rules failed to indicate whether Congress intended the provision to apply retroactively or prospectively. 2006 U.S. LEXIS 4892 at \*17-\*22. In reaching this conclusion, the Court rejected petitioner's contention that Congress' elimination of a "before-or-after clause" in the predecessor reinstatement statute evidenced its intention that the statute apply prospectively, that is, only to individuals who reentered after the enactment date. The Court found that clause applied to the prior deportation or departure, not the subsequently reentry. The "better inference" for the clause's elimination, the Court said, was that retention of the clause would have been "academic." 2006 U.S. LEXIS 4892 at \*18. In addition, citing to various provisions of IIRIRA evidencing prospective and retrospective application, the Court concluded that it was "just too hard to infer any clear intention at any level of generality from the fact of retiring the old before-or-after language from what is now §241(a)(5)." 2006 U.S. LEXIS 4892 at \*22.

Thus, 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...." 2006 U.S. LEXIS 4892 at \*26. 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. 2006 U.S. LEXIS 4892 at \*26. 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) was enacted, his conduct was not completed prior to the change in law.

The Court also emphasized that, upon IIRIRA's September 1996 enactment, the petitioner had six months in which he could have left the United States before §241(a)(5) took effect (on April 1997). 2006 U.S. LEXIS 4892 at \*26.

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

Footnote 4 of the *Fernandez-Vargas* decision states that "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 should pursue these claims and cite to footnote 4 for the authority to do so.

**Does the Court’s analysis in *Fernandez-Vargas* impact its analysis and conclusion in *St. Cyr*?**

No. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court held that IIRIRA’s repeal of §212(c) relief could not be applied retroactively. The court reasoned that retroactive application would have an “obvious and severe” and hence impermissible effect because noncitizens who pleaded guilty to criminal offenses prior to the change in law gave up their right to a jury trial under the assumption that they were eligible for relief from deportation. *St. Cyr*, 533 U.S. at 321-22, 324. In reaching this conclusion, the Court did not require proof of actual reliance on the availability of §212(c) relief.

The *Fernandez-Vargas* Court’s discussion of *St. Cyr* is limited to identifying the conduct to which §241(a)(5) applies. The Court contrasted the petitioner’s ongoing pre-IIRIRA and post-IIRIRA conduct of remaining in the United States illegally with the pre-enactment conduct of the petitioner in *St. Cyr*. “*St. Cyr*’s agreement for a *quid pro quo* and his plea were entirely past, and there was no question of undoing them, but the ‘transaction or consideration’ on which §241(a)(5) turns is different,” the Court concluded. The difference, it reasoned, was that, although the petitioner’s illegal presence in the United States started before IIRIRA’s enactment, it continued after IIRIRA’s enactment.

Thus, because the *Fernandez-Vargas* Court concluded that there was no completed pre-enactment conduct on which petitioner could base a retroactivity claim, the *Fernandez-Vargas* decision did not address whether the retroactive application of §241(a)(5) had retroactive effect. Thus, the decision does not impact *St. Cyr*’s retroactivity analysis or its conclusion.

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

Yes, the decision overturns the Sixth Circuit’s decision in *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001) and the Ninth Circuit’s decision in *Castro-Cortez et al. v. INS*, 239 F.3d 1037(9th Cir. 2001). Both these courts had held that Congress did not intend for §241(a)(5) to apply to individuals who reentered before April 1, 1997 and thus did not address whether the provision would have retroactive effect. *But see* discussion regarding *Bejjani* and *Castro-Cortez* below.

In addition, the decision may have overturned a favorable decision in the Third Circuit. Prior to *Fernandez-Vargas*, the Third Circuit held that §241(a)(5) could not be applied retroactively to someone who could have avoided a deportation order if they were eligible for voluntary departure before April 1, 1997.<sup>25</sup> The Court in *Fernandez-Vargas* suggests that a petitioner must take “some action” towards legalizing status to prevail on a retroactivity claim. 2006 U.S. LEXIS 4892 at \*26, n. 10.

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<sup>25</sup> *Dinnall v. Gonzales*, 421 F.3d 247 (3d Cir. 2005).

**Before the *Fernandez-Vargas* decision, several circuits had held that §241(a)(5) does not apply retroactively a person who applied for adjustment of status prior to April 1, 1997. Are these cases still good law?**

Yes, AILF believes these decisions are still good law. There are several places in the *Fernandez-Vargas* decision where the Court expressly notes that the petitioner's situation is different from a petitioner would took some action to legalize their status before the change in law.<sup>26</sup> Thus, AILF believes that the following decisions involving petitioners who applied for adjustment of status before April 1, 1997 should remain good law:

*Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003);  
*Faiz-Mohammed v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); and  
*Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004).

*See also 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).

AILF is interested in working with attorneys who are litigating this issue. Please bring cases to the attention of AILF by emailing Trina Realmuto at [trina\\_realmuto@sunrise.ch](mailto:trina_realmuto@sunrise.ch).

**What about cases where the person filed an immigrant visa petition (I-130), labor certification, or I-212 waiver application before the change in law?**

Prior to the *Fernandez-Vargas* decision, the courts were divided on this issue. *Compare Lopez-Flores v. DHS*, 376 F.3d 793 (8th Cir. 2004) (holding that §241(a)(5) cannot be applied retroactively to an individual who filed a labor certification application before April 1, 1997 which was not approved until 2001) *with Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005) (holding that the filing of an immigrant visa petition before April 1, 1997 is not sufficient to render §241(a)(5) impermissibly retroactive because an immigrant visa petition “is not the equivalent of an adjustment of status application and is not the sort of ‘completed transaction’ that gives rise to vested rights or settled expectations for purposes of the presumption against retroactivity”).

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<sup>26</sup> *See, .e.g. Fernandez-Vargas*, 2006 U.S. LEXIS 4892 at \*8 (limiting holding to the “continuing violator of the INA now before us.”); \*13, 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”); \*26, 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”); at \*27-\*28 & 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); at \*31 (concluding “that §241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas.....”). Emphasis added.

In a footnote in *Fernandez-Vargas*, the Supreme Court distinguished Petitioner Fernandez-Vargas, who did nothing to pursue his claims to relief before the change in law, from petitioners who took “some action” to “elevate [a claim to relief] above the level of hope.” 2006 U.S. LEXIS 4892 at \*26, n.10. “Some action” arguably includes applying for an immigrant visa petition (I-130), labor certification, or I-212 waiver application.

Thus, people who took “some action” towards legalizing their immigration status prior to April 1, 1997 should continue to challenge the retroactive application of §241(a)(5). AILF is interested in working with attorneys who are litigating this issue. Please bring cases to the attention of AILF by emailing Trina Realmuto at [trina\\_realmuto@sunrise.ch](mailto:trina_realmuto@sunrise.ch).

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

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 (for example, because the prior order is unlawful) or if reinstatement would have an impermissible retroactive effect (for example, if applied to a person who took steps to legalize his or her immigration status before April 1, 1997). Thus, practitioners may want to oppose termination in this situation.

In addition, an immigration judge can 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 that the petitioner was subject to reinstatement (*i.e.* had reentered illegally after deportation) and nonetheless choose to initiate removal proceedings under INA §240, rather than reinstatement proceedings under INA §241(a)(5). 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 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.

## V. DUE PROCESS CONSIDERATIONS

### What are the due process concerns in the reinstatement process?

*Lack of a full and fair hearing with an impartial adjudicator, including lack of opportunity to present and cross-examine evidence and an inability to develop an adequate administrative record (for federal court review).* Under 8 C.F.R. §241.8, a noncitizen has no right to a hearing before an impartial immigration judge. Instead, the regulation vests full, unfettered authority and discretion in non-lawyer DHS personnel to determine whether a noncitizen is subject to INA §241(a)(5).

*Right to counsel issues, including lack of access to counsel during the reinstatement process and lack of notice to existing counsel.* DHS actions and inactions routinely interfere with access to counsel during the often short time between issuance and execution of the reinstatement order. Even if the individual is represented by counsel, DHS may fail to notify counsel of the intent to reinstate a prior order and/or fail to serve the reinstatement order on counsel in violation of the regulations at 8 C.F.R. §292.5. Thus, noncitizens and their attorneys often have little or no advance notice of DHS' reinstatement determination.

*Lack of a meaningful opportunity to contest the reinstatement determination.* Although the regulations require an opportunity to make a statement contesting the reinstatement determination, there is little substantive value to this exercise. The notice the DHS official gives is written in English only. As translation is not required, individuals may not understand the charges against them. Indeed, the statement is made to the DHS official who has already "determined" that the person is subject to INA §241(a)(5). Moreover, the officer must only "consider" whether the statement warrants reconsideration of the determination but is not under any obligation to investigate or allow the person to develop the information conveyed in the statement. In addition, the reinstatement order form does not mention 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.

The Ninth Circuit's decision *Castro-Cortez v. INS*, 239 F.3d 1037, 1047-50 (9th Cir. 2001) contains the most detailed discussion of the "serious" due process problems outlined above. The First, Sixth and Eighth circuits also have expressed similar doubts about the constitutionality of the reinstatement procedures.<sup>27</sup>

Several courts have upheld the reinstatement procedures in cases where the petitioner was unable to show that he or she was actually and specifically prejudiced by the alleged due process

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<sup>27</sup> *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). *But see Ochoa-Carrillo v. Gonzales*, 437 F.3d 842 (8th Cir. 2006).

violation.<sup>28</sup> That is, most courts will require petitioners to make at least a colorable claim that they were deprived of a statutory right (for example, the opportunity to apply for relief or the opportunity to seek judicial review) and/or would not have been subject to reinstatement had their due process rights not been violated. Petitioners who alleged that they are not subject to INA §241(a)(5) by challenging the existence (or, possibly, the legality) of the prior order, departure, or reentry may 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). The court said that the use of inked fingerprints was inherently reliable and "nothing in the regulation bars an alien from requesting copies of the agency's fingerprint evidence and subjecting that evidence to examination by an independent expert." *Ochoa-Carrillo*, 437 F.3d at 847.

Notably, consistent with the canon of constitutional avoidance, if a petitioner raises both a statutory or non-constitutional challenge and a due process challenge to a reinstatement order, presumptively courts will rule on the statutory or non-constitutional claim before reaching the due process issue.<sup>29</sup>

## VI. REINSTATEMENT IN THE NINTH CIRCUIT

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

On November 18, 2004, the Ninth Circuit held that only immigration judges can determine whether an individual is removable under INA §241(a)(5). Specifically, the court found that regulation at 8 C.F.R. §241.8 conflicts with INA §240(a), which requires immigration judges to determine removability. *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004). Notably, the petitioner in *Morales-Izquierdo* also challenged the prior *in absentia* deportation order being reinstated. Because the court vacated the reinstatement order based on its unlawful issuance by an immigration officer, the court did not address petitioner's argument that the underlying deportation order was unlawful.

The government subsequently sought *en banc* rehearing of that decision. The court granted rehearing and withdrew the decision on September 12, 2005. *Morales-Izquierdo v. Gonzales*, 423 F.3d 118 (Sept. 12, 2005). Following *en banc* briefing in light of the enactment of the

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<sup>28</sup> See, e.g. *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).

<sup>29</sup> See e.g. *Castro-Cortez et al. v. INS*, 239 F.3d 1037 (9th Cir. 2001). *Accord Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001) (requiring case transfer to district court to resolve genuine issue of fact regarding citizenship claim made by individual subject to reinstatement under §241(a)(5)).

REAL ID Act of 2005 and oral argument, the court stayed *en banc* proceedings. 432 F.3d 1112 (Jan. 5, 2006). Following argument, the court ordered supplemental briefing. Petitioner and *Amicus Curiae* (AILF and AILA) filed a joint brief in response to the court's order in mid-March 2006.

A decision by the *en banc* court could issue anytime. We expect the decision to address who may issue reinstatement orders: immigration judges and/or immigration officers. If the court were to find that immigration officers may issue reinstatement orders, the court should then address petitioner's claim that his underlying deportation order is unlawful. If the court reaches this issue, it will likely address the court's jurisdiction to review the underlying deportation order and could also address the appropriate forum for resolution of factual disputes regarding the order.

### **What did the court hold in *Perez-Gonzales*?**

In *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the court limited the universe of people subject to reinstatement when it held that adjustment of status applicants who filed an application for consent to reapply under 8 C.F.R. §212.2(e) (I-212 waiver) prior to a reinstatement determination (but not necessarily before their reentry) are not subject to reinstatement if the I-212 waiver is approved. Because the regulation provides that an approved I-212 waiver application operates *nunc pro tunc* to cure inadmissibility grounds premised on an illegal reentry, the court concluded that an approved waiver applicant would no longer be considered an illegal reentrant for §241(a)(5) purposes.

### **How does the *Perez-Gonzalez* decision impact individuals subject to reinstatement?**

There are many important holdings in the *Perez-Gonzalez* decision; however, the holding that most directly affects individuals subject to reinstatement is that an I-212 waiver application must be adjudicated by either DHS or the immigration judge *before* the reinstatement determination. If the waiver application is approved, the person's reentry into the United States was not illegal, the prior order of removal cannot be reinstated, and the person should be eligible for adjustment of status.

Notably, the Supreme Court's decision in *Fernandez-Vargas v. Gonzales*, *supra*, does not impact the Ninth Circuit's rationale in *Perez-Gonzales*. The Supreme Court's decision rested on retroactivity grounds and did not address the impact of filing an I-212 waiver application prior to the reinstatement determination.

## **VII. INADMISSIBILITY, I-212 WAIVERS AND THE BIA'S DECISION IN *MATTER OF TORRES-GARCIA***

### **What avenues are available to individuals who are otherwise eligible for an adjustment of status but for having reentered the country unlawfully following a removal order?**

AILF and ASISTA have jointly issued a practice advisory entitled "Applying for Adjustment of Status After Reentering the United States Without Being Admitted: I-212s, 245(i) and VAWA 2005." The advisory details the law on this issue in light of the BIA's decision of *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) and suggests arguments for challenging that decision, which AILF believes was wrongly decided.

The advisory is located on AILF's website at [http://www.ailf.org/lac/vawa\\_2005.pdf](http://www.ailf.org/lac/vawa_2005.pdf).

### **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?**

A person applying for a visa abroad must establish that they are admissible. If the person was deported based on a reinstatement order, they may be inadmissible under INA §212(a)(9)(C)(i)(II). Importantly, the Department of State has interpreted this provision as *only* applying to reentries after April 1, 1997.<sup>30</sup> 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 seemingly cannot apply for a waiver of inadmissibility unless 10 years have elapsed since the date of last departure from the United States.

Individuals who are applying for immigrant visas from 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 for unlawful orders.

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<sup>30</sup> *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 Circuit Court Reinstatement Decisions**

### **Supreme Court**

*Fernandez-Vargas v. Gonzales*, 547 U.S. \_\_\_ (June 22, 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) (non-substantive)

### **Third Circuit**

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

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

### **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)

### **Sixth Circuit**

*Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001)

*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)

## **Eighth Circuit**

*Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002)  
*Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 327-328 (8th Cir. 2003)  
*Lopez v. Heinauer*, 332 F.3d 507, 510-11 (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)  
*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)  
*Arreola-Arreola v. Ashcroft*, 383 F.3d 956 (9th Cir. 2004)  
*Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) *reh'g en banc granted and decision withdrawn sub nom. Morales-Izquierdo v. Gonzales*, 423 F.3d 118 (Sept. 12, 2005), *en banc proceedings stayed*, 432 F.3d 1112 (Jan. 5, 2006).

## **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. \_\_\_ (June 22, 2006).  
*Berum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004)

## **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)