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Running Away From the Regulatory Departure Bar, One Circuit at a Time, in Opposite Directions

by Josh Lunsford and Sarah Byrd

Conventional wisdom says, "never look back," and "you only get one bite at the apple." In the context of immigration law, these phrases might be used to describe the regulations known as the "departure bar." Originally promulgated in 1952, the departure bar regulation currently states:

> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 1003.2(d) (governing motions before the Board); *see also* 8 C.F.R. § 1003.23(b)(1) (governing motions before the Immigration Courts).[1]

Construing the departure bar rule as a jurisdictional limitation, the Board has consistently held "that reopening is unavailable to any alien who departs the United States after being ordered removed." *Matter of Armendarez*, 24 I&N Dec. 646, 648 (BIA 2008); *see also Matter of G- y B-*, 6 I&N Dec. 159, 159-60 (BIA 1954). However, because of circuit court disagreement and an important distinction in the context of in absentia orders, this apparently bright-line rule often does not apply in practice. Thus, whether an alien may file a motion to reopen after departing the United States may depend on where within the country the removal decision was entered.

This article will briefly summarize the relevant statutory and regulatory provisions and provide an overview of the current state of the law

with regard to the departure bar, starting with the Board's decision in *Matter of Armendarez* and then summarizing the circuit courts' analysis of the issue.

Background

Relevant Statutory and Regulatory Provisions

The departure bar was first imposed in 1952 and the current language, quoted above, is remarkably similar to the first regulatory version. *See* Immigration and Nationality Regulations, 17 Fed. Reg. 11,469, 11,475 (Dec. 19, 1952) (codified at 8 C.F.R. § 6.2); *see also Matter of Armendarez*, 24 I&N Dec. at 648. The bar prevents an alien "who is the subject of exclusion, deportation, or removal proceedings" from filing a motion to reopen or reconsider after departing from the United States, and if such a motion has been filed, it is deemed withdrawn upon an alien's subsequent departure. 8 C.F.R. § 1003.2(d); *see also* 8 C.F.R. § 1003.23(b)(1).

The origin of motions to reopen or reconsider in case law dates back to the early 20th century, with the ability to file such motions codified by regulation as early as 1941. *See Dada v. Mukasey*, 554 U.S. 1, 12 (2008); New Regulations Governing the Arrest and Deportation of Aliens, 6 Fed. Reg. 68, 71-72 (Jan. 4, 1941) (codified at 8 C.F.R. § 19.8). Aside from the addition of the departure bar in 1952, motions practice before Immigration Courts and the Board remained free of technical limitation for nearly 50 years. *See Dada*, 554 U.S. at 12-13.

However, in 1990, fearful that aliens were abusing motions practice to stall outstanding deportation orders, Congress ordered the Attorney General to issue regulations creating time and numerical limits. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 4978, 5066; *see also* 68 *Interpreter Releases* 907, 908 (No. 27, July 22, 1991). Based on this command, the Attorney General promulgated regulations proscribing a 90- and 30-day time limit for the filing of motions to reopen and motions to reconsider, respectively, and restricting aliens to filing one of each. Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900, 18,904-05, 18,908 (Apr. 29, 1996).

Five months following the new regulations, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"). Among other things, the IIRIRA codified the ability to file a motion to reopen or reconsider, "adopted the . . . numerical and time limits" previously established by regulation, and created certain evidentiary requirements. *See Dada*, 554 U.S. at 14; *see also* sections 240(c)(6), (7) of the Act, 8 U.S.C. §§ 1229a(c)(6), (7). Despite not being included as part of the statutory amendments, the Attorney General determined that the departure bar survived enactment of the IIRIRA, finding that nothing in the Act "support[ed] reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,321 (Mar. 6, 1997) (Supplementary Information).

Arguably, IIRIRA's motion to reopen or reconsider provisions adopting the numerical and time restrictions were perceived at the time to be *limitations* on the filing of such motions. *See* Edward R. Grant, *The Right To File a Motion To Reopen: An Intended Consequence of IIRIRA?*, Immigration Law Advisor, Vol. 4, No. 1, at 5 (Jan. 2010). However, this belief was quickly put to rest by two Supreme Court decisions. First, in *Dada*, the Court described motions practice as an "important safeguard," which the IIRIRA "transform[ed] . . . from a regulatory procedure to a statutory form of relief," noting that the "statutory text is plain insofar as it guarantees to each alien the right to file" one motion to reopen or reconsider. 554 U.S. at 14-15, 18. Then, in *Kucana v. Holder*, 558 U.S. 233, 249 (2010), the Court reiterated this point, describing the statutory scheme as "guaranteeing [the] right to file one motion, prescribing contents, and setting deadlines." As discussed below, the idea that the ability to file a motion to reopen or reconsider is a statutory "right" has been a key factor identified by the circuit courts when determining whether the departure bar prevents an alien from filing such motions after leaving the country.

The statutory authority for motions to reopen has led courts to distinguish between "statutory motions" and "regulatory motions." Statutory motions are those authorized under, and subject to the numerical and time restrictions set forth in, sections 240(c)(6) and (7) of the Act. A motion to reopen requesting an exercise of authority based on the regulations, rather than the statute, is a "regulatory motion." As discussed in this section, the regulatory authority relating to motions to

reopen preexisted the statute and is in some respects broader. *See also Matter of H-A-*, 22 I&N Dec. 728, 734 (BIA 1999) ("[W]hile there is now statutory authority for motions in removal cases, the authority for motions to reopen deportation proceedings is derived solely from regulations promulgated by the Attorney General."). For example, if a motion to reopen or reconsider is untimely,[2] fails to satisfy an exception to the timing requirement, or otherwise falls outside the statutory authority, the regulations permit Immigration Judges and the Board to grant motions to reopen or reconsider on their own motion (or "sua sponte"). 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1).

Board of Immigration Appeals

In *Matter of Armendarez*, the Board held that the departure bar divests it and Immigration Judges of jurisdiction over motions to reopen or reconsider filed by aliens who depart the United States after proceedings are initiated and, in doing so, dismissed two prevailing circuit court views regarding the validity of the bar.

The first was *Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007). In *Lin*, the petitioner, after being removed from the United States pursuant to an order of removal, moved for reopening in light of changed circumstances surrounding his asylum claim. *Id*. at 980-81. The Immigration Judge denied the motion based on lack of jurisdiction, and the Board affirmed on appeal. *Id*. at 981.

Resting its decision on a perceived ambiguity in the language of the regulatory provision, the Ninth Circuit found that the departure bar was applied too broadly. *Id*. at 982. Specifically, the court focused on the fact that the provision was phrased in the present tense, emphasizing that because the bar applies only to an individual who "is" the subject of proceedings, it should apply "only to a person who departs the United States *while* he or she '*is* the subject of removal . . . proceedings.'" *Id*. (first emphasis added) (quoting 8 C.F.R. § 1003.23(b)(1)). The court conceded that the regulation may have been intended to include all departures, whether before, during, or after the initiation of proceedings; however, because "the language of the regulation does not unambiguously support this result," the rule of lenity required a construction that was most favorable to the alien. *Id.* at 982. Accordingly, by leaving the country after proceedings concluded, Lin avoided application of the bar because he was not "the subject of . . . removal proceedings" at the time he departed. *Id*.; *see also Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007).

The Board rejected this reasoning. Although the regulation uses the present tense to refer to an alien who "is" the subject of proceedings, the Board explained that the context clearly indicates that the bar applies to removed aliens. *See Matter of Armendarez*, 24 I&N Dec. at 650-51. Specifically, "the filing of a motion to 'reopen' presupposes that the administrative proceedings have been 'closed' or completed." *Id*. at 651 (explaining that "the completion of proceedings is a condition precedent to the filing of a motion to reopen"). Oddly, under the *Lin* rationale, the departure bar would be interpreted to apply only to motions filed by aliens in *ongoing* proceedings. *Id*. Moreover, the departure bar pertaining to the Board would never apply under the Ninth Circuit's interpretation because an alien who departs the country while proceedings are ongoing (that is, while an appeal is pending) would be subject to automatic withdrawal of his or her petition. *Id*. at 652 (citing 8 C.F.R. § 1003.4). Noting that the *Lin* court found "ambiguity" in a regulation, not a statute, and that an agency's interpretation of its own regulations is entitled to high deference, the Board declined to follow *Lin* in any circuit, including the Ninth Circuit. *Id*. at 653.

A few months following the decision in *Lin*, the Fourth Circuit issued *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007). In that case, a divided panel of the Fourth Circuit found that the departure bar conflicted with the text and structure of the IIRIRA. *Id*. at 333. Textually, the *William* majority focused on the fact that the statute provided all "aliens" the right to file one motion to reopen or reconsider, without differentiating between those who remained in the United States after being ordered removed and those who departed. *Id*. at 332 & n.2. As the court explained, the group in which William belongs ("aliens outside the country") is a subset of the larger group of "aliens." *Id*. at 332; *see also* section 101(a)(3) of the Act, 8 U.S.C. § 1101(a)(3) (defining an "alien" as "any person not a citizen or national of the United States"). Thus, the Fourth Circuit found that the right conferred by statute is unambiguously provided to all aliens, both present and abroad. *See William*, 499 F.3d 322.

Structurally, the *William* majority focused on two aspects of IIRIRA's statutory scheme. First, by imposing certain limitations and exceptions on the right to file motions to reopen or reconsider, the court held that the

"proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Id*. at 333 (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000)) (internal quotation mark omitted). Second, the majority stressed that Congress *did* include a physical presence requirement in another part of the statute for motions to reopen filed by victims of certain forms of abuse. *Id*.; *see also* section 240(c)(7)(C)(iv)(IV) of the Act (excepting such aliens from the applicable 90-day filing deadline so long they are "physically present in the United States at the time of filing the motion"). The inference to be drawn from this was that "Congress knew how to include a requirement of physical presence [but chose not to] do so in the general provisions." *William*, 499 F.3d at 333.

This reasoning was also rejected in *Matter of Armendarez*. First, the Board dismissed the Fourth Circuit's reliance on the fact that the text of the IIRIRA fails to differentiate between aliens who are present and abroad. *See Matter of Armendarez*, 24 I&N Dec. at 655-57. The Board reasoned that the Act as a whole draws such a distinction; the structure of the immigration system assumes that physical removal from the United States alters an alien's posture under the law. *Id*. at 655-56. Furthermore, because the Act delegates authority over border security and inspection and admission of aliens to the Department of Homeland Security ("DHS"), application of the departure bar acknowledges the statutory limitations on the Board and Immigration Courts with respect to aliens abroad and further prevents a removed alien from circumventing the admission and inspection regime by filing a motion to reopen. *Id*. at 657-58. This distinction is so "deeply engrained" in the Act, the Board reasoned, that it would be improper to draw a negative inference "simply because it [was] not expressly reiterate[d]" in the motion to reopen provisions. *Id*. at 657.

Next, the Board determined that IIRIRA's statutory scheme is not as clear as the *Williams* majority portrayed. Although Congress only codified a limited portion of the regulations, the Board cautioned against making negative inferences which, "carried to their logical conclusion, would arguably invalidate the entire regulatory scheme governing motions." *Id*. at 658. Following the Fourth Circuit's line of reasoning, IIRIRA's provisions would have repealed numerous regulations authorizing the filing of various other motions—motions other than those statutorily proscribed in sections 240(c)(6) and (7) of the Act. *Matter of Armendarez*, 24 I&N Dec. at 658. Furthermore, to square the departure bar with the physical presence requirement for victims of family violence seeking reopening under section 240(c)(7)(C)(iv)(IV) of the Act, the Board considered the underlying intent in enacting the latter provision and determined that the remedial nature of this exception was so abundant that Congress added the physical presence requirement to clarify that the broad humanitarian concerns were not intended to usurp the otherwise general principle that an alien cannot seek reopening from abroad. *See id*. at 658-59. For these reasons, the Board limited the application of *William* to cases arising in the Fourth Circuit. *Id*. at 660.

In 2009, the Board held that the departure bar does not apply to aliens who depart under an in absentia order of deportation or removal and subsequently file a motion to reopen demonstrating improper notice. *Matter of Bulnes*, 25 I&N Dec. 57, 60 (BIA 2009). The Board noted that the regulations provide aliens claiming improper notice with a "robust right" to challenge an in absentia removal order "at any time." *Id*. at 59 (citing 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2)). Furthermore, the Board observed that "[a]n in absentia deportation order issued in proceedings of which the respondent had no notice is voidable from its inception and becomes a legal nullity upon its rescission." *Id*. Thus, because the jurisdictional bar to reopening presupposes the existence of an outstanding order, it does not apply where the order is voidable from its inception, as there is no "outstanding" order. *See id*. at 59-60. Therefore, the Board concluded that an alien's departure while under an in absentia order that is null and void as a result of improper notice does not bar consideration of a motion to reopen. *Id*. (noting that an Immigration Judge always has jurisdiction "to decide whether he has jurisdiction over a matter").

Circuit Courts of Appeals

First Circuit

Until recently, the departure bar applied to both statutory and regulatory motions in the First Circuit. *See Pena-Muriel v. Gonzales*, 489 F.3d 438, 441 (1st Cir. 2007). However, the circuit has since explicitly overruled it in the statutory context and refused to address it in the other.

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CIRCUIT COURT DECISIONS FOR AUGUST 2013

by John Guendelsberger

The United States courts of appeals issued 220 decisions in August 2013 in cases appealed from the Board. The courts affirmed the Board in 193 cases and reversed or remanded in 27, for an overall reversal rate of 12.3%, compared to last month's 13.3%. There were no reversals from the First, Fourth, and Eleventh Circuits.

The chart below shows the results from each circuit for August 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	11	11	0	0.0
Second	29	25	4	13.8
Third	18	17	1	5.6
Fourth	8	8	0	0.0
Fifth	17	16	1	5.9
Sixth	10	8	2	20.0
Seventh	11	6	5	45.5
Eighth	5	4	1	20.0
Ninth	100	88	12	12.0
Tenth	4	3	1	25.0
Eleventh	7	7	0	0.0
All	220	193	27	12.3

The 220 decisions included 97 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 61 direct appeals from denials of other forms of relief from removal or from findings of removal; and 62 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	97	82	15	15.5
Other Relief	61	52	9	14.8
Motions	62	59	3	4.8

The 15 reversals or remands in asylum cases involved issues related to particular social group (5 cases), level of harm for past persecution (3 cases), nexus (2 cases), Convention Against Torture (2 cases), credibility, persecutor bar, and fairness of the hearing.

The nine reversals or remands in the "other relief" category addressed derivative citizenship (two cases), application of the categorical approach (two cases), the alien smuggling ground of removal, the section 212(h) waiver, a visa petition sham marriage, abandonment of lawful permanent resident status, and reinstatement of voluntary departure.

The three motions cases involved requests to reopen to apply for asylum based on changed country conditions (two cases) and a reversal of a reopening and remand by the Board to permit the DHS to recharge additional offenses.

The chart below shows the combined numbers for the first 8 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	62	44	18	29.0
Tenth	27	22	5	18.5
Eleventh	92	75	17	18.5
Ninth	703	585	118	16.8
First	36	33	3	8.3
Second	181	166	15	8.3
Eighth	29	27	2	6.9
Third	146	137	9	6.2
Sixth	73	70	3	4.1
Fifth	95	92	3	3.2
Fourth	77	75	2	2.6
All	1521	1326	195	12.8

Last year's reversal rate at this point (January through August 2012) was 9.8%, with 1938 total decisions and 189 reversals.

The numbers by type of case on appeal for the first 8 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	738	628	110	14.9
Other Relief	386	331	55	14.2
Motions	397	367	30	7.6

CIRCUIT COURT DECISIONS FOR SEPTEMBER 2013

by John Guendelsberger

The United States courts of appeals issued 209 decisions in September 2013 in cases appealed from the Board. The courts affirmed the Board in 191 cases and reversed or remanded in 18, for an overall reversal rate of 8.6%, compared to last month's 12.3%. There were no reversals from the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for September 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	2	2	50.0
Second	51	49	2	3.9
Third	16	13	3	18.8
Fourth	17	17	0	0.0
Fifth	10	10	0	0.0
Sixth	2	2	0	0.0
Seventh	0	0	0	0.0
Eighth	2	2	0	0.0
Ninth	91	82	9	9.9
Tenth	2	2	0	0.0
Eleventh	14	12	2	14.3
All	209	191	18	8.6

The 209 decisions included 107 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 33 direct appeals from denials of other forms of relief from removal or from findings of removal; and 69 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	107	99	8	7.5
Other Relief	33	29	4	12.1
Motions	69	63	6	8.7

The eight reversals or remands in asylum cases involved credibility (two cases), changed country conditions after a showing of past persecution, humanitarian relief after a showing of past persecution, the 1-year filing bar for asylum, Convention Against Torture, and failure to consider new evidence presented after a prior remand.

The four reversals or remands in the "other relief" category addressed whether a violation of a municipal ordinance was a conviction, the amount of loss for the aggravated felony fraud ground, change of venue, and whether a false claim to citizenship barred adjustment of status.

The six motions cases involved ineffective assistance of counsel (two cases), the departure bar (two cases), rescission of an in absentia order of removal, and changed country conditions.

The chart below shows the combined numbers for the first 9 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	62	44	18	29.0
Eleventh	106	87	19	17.9
Tenth	29	24	5	17.2
Ninth	794	667	127	16.0
First	40	35	5	12.5
Third	162	150	12	7.4
Second	232	215	17	7.3
Eighth	31	29	2	6.5
Sixth	75	72	3	4.0
Fifth	105	102	3	2.9
Fourth	94	92	2	2.1
All	1730	1517	213	12.3

Last year's reversal rate at this point (January through September 2012) was 9.6%, with 2150 total decisions and 207 reversals.

The numbers by type of case on appeal for the first 9 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	845	727	118	14.0
Other Relief	419	360	59	14.1
Motions	466	430	36	7.7

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

First Circuit:

Costa v. Holder, No. 12-1485, 2013 WL 5496152 (1st Cir. Oct. 4, 2013): The First Circuit denied a petition for review of the Board's decision affirming an Immigration Judge's order removing the petitioner to Brazil. The petitioner had entered the U.S. illegally in 2003. Two years later, she volunteered to assist U.S. Immigration and Customs Enforcement ("ICE") by informing on sellers of fraudulent immigration documents. The petitioner's assistance led to the arrest of a fellow Brazilian. Soon thereafter, the petitioner and her family in Brazil received threatening calls. In addition, the petitioner's mother was visited in Brazil by the brother of the arrested individual, a policeman (accompanied by a fellow police officer), who threatened to find the petitioner upon her return. As a result, the petitioner ceased cooperating with ICE, which arrested her and sought to reinstate a prior removal order. However, she applied for withholding of removal and Convention Against Torture ("CAT") protection and was afforded a hearing before an Immigration Judge, who denied both applications. As to withholding of removal, the Immigration Judge found that the petitioner's fear was limited to threats from the arrested individual's family and it was not on account of her membership in a particular social group. The Immigration Judge additionally found that since the police who visited the petitioner's mother were acting in their personal capacities, the petitioner had not established a likelihood of facing torture "by or with the acquiescence of a government official." The Board affirmed, holding that those threatening the petitioner were motivated by a "personal vendetta," so any claimed persecution was not on account of a protected ground. Regarding the CAT claim, the Board noted that corruption existed among Brazil's police but found that, in light of the existence of a system for filing complaints (which had resulted in investigations and prosecutions), the evidence did not establish the likelihood that the petitioner would be tortured "with the consent or acquiescence of a government official." The circuit court observed that the Board has created a distinction in its precedent decisions between persecution on account of a shared characteristic and persecution whose motive is "wholly personal in nature." The court found that the evidence in this case supported the Board's conclusion that the threat of harm to the petitioner fell within the latter category. Regarding the CAT claim, the court found no basis for reversing the decision "[g]iven [its] deferential review of the Board's factual findings."

Santana v. Holder, No. 12-2270, 2013 WL 5394311 (1st Cir. Sept. 27, 2013): The First Circuit granted a petition for review challenging the Board's decision that it lacked jurisdiction to consider the petitioner's motion to reopen after his removal from the U.S. because of the post-departure bar of 8 C.F.R. § 1003.2(d). The Board relied on its precedent decision in *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). However, the court declined to grant *Chevron* deference to that decision because it did not find the statute in question (section 240(c)(7)(A)) to be sufficiently ambiguous under the first step of the *Chevron* analysis. The court noted that the statute places other limitations and requirements on the right to file a motion to reopen (such as numeric limitations, evidentiary requirements, and time deadlines), but it includes no geographic restriction on the moving party. Moreover, another section of the same statute relating to battered spouses specifically requires that the moving party be physically present in the U.S. at the time of filing. The court deduced that such language "shows that Congress knew how to impose a geographic restriction when it wanted to," lending further significance to the absence of a similar restriction in section 240(c)(7)(A). The court was not persuaded by the Government's argument that the statute's silence on this issue should be considered in light of its historical context, which indicates that Congress' focus at the time of enactment was to codify the time and number restrictions on such motions that were in the regulations.

Third Circuit:

Taveras v. Att'y Gen. of U.S., No. 12-2775, 2013 WL 5433471 (3d Cir. Oct. 1, 2013): The Third Circuit denied a petition for review of the Board's decision finding the petitioner ineligible for adjustment of status. The petitioner was convicted in 1999 of criminal possession of a controlled substance (crack cocaine) under New York law. In 2004, he was granted cancellation of removal by an Immigration Judge. In 2010, the petitioner was again placed in removal proceedings as a result of two State convictions (in 2006 and 2008) for petit larceny. He was charged with removability under section 237(a)(2)(A)(ii) of the Act for committing two or more crimes involving moral turpitude. An Immigration Judge sustained the charge of removability but granted a section 212(h) waiver for the two petit larceny convictions and adjustment of status. The Board disagreed, holding that the petitioner's earlier drug conviction rendered him ineligible for adjustment. The Board relied on its precedent decision in *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991),

in concluding that the petitioner's earlier grant of cancellation of removal had the effect of waiving only the ground of removability under which he was charged in his earlier hearing, but it did not waive the underlying basis for removability. The circuit court rejected the petitioner's argument that his drug conviction should not have been considered in his second removal proceeding. It agreed instead with the Board that the grant of cancellation of removal "merely cancelled the removal in [the petitioner's] first removal proceeding," but it did not prevent the drug conviction from being considered in connection with his waiver and adjustment applications in his second removal proceeding. The court concurred with the Fifth Circuit's view that this reading of the statute is consistent with its "plain language."

Fourth Circuit:

Garcia v. Holder, No. 12-2259, 2013 WL 5630242 (4th Cir. Oct. 16, 2013): The Fourth Circuit denied a petition for review of the Board's decision finding the petitioner ineligible for cancellation of removal. The petitioner initially entered the United States illegally in 1995 but then briefly departed in 2001 to attend his father's funeral in Mexico. Upon return, he was apprehended at the border by Government officials. Declining the option to appear before an Immigration Judge, the petitioner chose instead to voluntarily return to Mexico. He then managed to reenter the United States without inspection several days later. In 2009, the petitioner was placed in removal proceedings, where he filed an application for cancellation of removal. An Immigration Judge found him statutory ineligible for that relief, relying on *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002), in concluding that the petitioner's voluntary departure to Mexico after his apprehension in 2001 terminated his period of continuous physical presence, leaving him short of the requisite 10 years. The Immigration Judge's decision was affirmed by the Board on appeal. The circuit court noted that while section 240A(d)(2) provides that absences in excess of 90 days or of 180 days in the aggregate result in a break of continuous physical presence, the Board's holding in *Romalez* created an additional basis for terminating continuous presence. The court further noted that the Board specified that such a break in presence occurs only where a voluntary departure is made under the threat of removal, and not in cases where the alien is simply turned away at the border. In subjecting the Board's holding to *Chevron* analysis, the court found that the "breaks" included in section 240A(d)(2) did not "constitute an exhaustive list of every circumstance terminating an alien's continuous physical presence." Finding the Board's interpretation to be reasonable in light of the statute's silence on the possible acts that will terminate physical presence, the court joined eight other circuits in upholding *Romalez*.

Fifth Circuit:

Khanh Nhat Thuy Le v. Holder, No. 12-60891, 2013 WL 5493910 (5th Cir. Oct. 3, 2013): The Fifth Circuit denied a petition for review of a decision of the Board finding the petitioner ineligible to adjust her status. The petitioner had entered the United States in 1997 on a K-1 nonimmigrant fiancée visa. Upon arrival, she learned that her intended spouse was already married. However, some 5 months later, she met and married another U.S. citizen who then filed a visa petition on her behalf. Her husband subsequently became physically abusive; he was convicted of criminally assaulting her in 2002. They divorced before the petitioner's adjustment application was adjudicated. The petitioner therefore filed a self-petition under the provisions of the Violence Against Women Act ("VAWA"), which was granted. The petitioner next filed for adjustment of status, but she was found ineligible by the U.S. Citizenship and Immigration Services ("USCIS") because she had entered as a K-1 nonimmigrant but did not marry her fiancé within 90 days of arrival. The petitioner was placed in removal proceedings, where an Immigration Judge reached the same conclusion as the USCIS. The Board affirmed. The circuit court found the statutory requirement to marry within 90 days to be unambiguous and was not persuaded by the petitioner's argument that it should be excused because of the legal impossibility of her marrying the original K-1 petitioner. According to the court, that fact did not prevent the petitioner from departing the United States once she realized that the marriage would not occur. The court also found no merit to the petitioner's argument that the prohibition on adjustment is "trumped" by her status as a VAWA self-petitioner, because the statutory prohibition on adjusting is unambiguous, and it includes no such exception.

Ninth Circuit:

Rodriguez-Castellon v. Holder, No. 10-73239, 2013 WL 5716356 (9th Cir. Oct. 22, 2013): The Ninth Circuit denied a petition for review of the Board's order of removal. In 2005, the petitioner pled nolo contendere to a charge of lewd and lascivious acts upon a child (namely, having sex with a 15-year-old girl) in violation of section 288(c)(1) of the California Penal Code. In 2009, removal proceedings

were commenced against the petitioner, charging, inter alia, that he was convicted of a crime of violence under 18 U.S.C. § 16(b), which was an aggravated felony under section 101(a)(43)(F) of the Act. The Immigration Judge sustained the charge, ruling that the offense was a categorical crime of violence, and the Board agreed. The circuit court noted that a crime of violence under 18 U.S.C. § 16(b) requires that the offense be a felony that, by its nature, involves a substantial risk that physical force might be used against a person or property in its commission. The court explained that a "substantial risk" refers to that which arises in "the ordinary case," and not to violations "at the margins" (for example, kidnapping presents a substantial risk of physical force in the ordinary case, even though in a situation at the margin, an infant could be kidnapped without such a risk). Examining the California statute, the court noted that several other circuits have found that analogous State crimes present a substantial risk of physical force being used to ensure the victim's compliance. Since the California statute requires the victim to be 14 or 15 years old and the perpetrator to be at least 10 years older, the court found that such a significant difference in age increased the risk of an adult using force to prey on a younger victim. The court distinguished examples of case law raised by the petitioner in which the statutes in question covered sexual conduct between minors who were just a day short of their 18th birthday with only slightly older individuals, which could include consensual conduct between teenagers. Dismissing other examples raised by the petitioner, the court found that they involved conduct "at the margin" of the State statute, rather than violations of the statute "in the ordinary case."

BIA PRECEDENT DECISIONS

In *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013), the Board held that a child who has satisfied the requirements of former section 321(a)(3) of the Act prior to turning 18 years old has acquired United States citizenship, irrespective of whether the naturalized parent acquired custody of the child before or after naturalization.

The respondent was born in Jamaica to married parents, who divorced after his mother became a lawful permanent resident and before he turned 18. According to section 321(a)(3), a child born outside the United States of alien parents acquires citizenship upon the naturalization of the parent having legal custody when the parents have legally separated. In *Matter of Baires*, 24 I&N Dec. 467 (BIA 2008), the Board held that a child who satisfies the conditions of former section 321(a)(3) before the age of 18 has acquired United States citizenship, regardless of whether the naturalized parent obtained custody before or after the naturalization. Applying that holding to the respondent, the Board concluded that he had met the requirements for citizenship.

However, prior to the Board's decision in *Matter of Baires,* the Third Circuit Court of Appeals, under whose jurisdiction this case arises, held that a child seeking to establish derivative citizenship under section 321(a)(3) of the Act must prove that his custodial parent naturalized after a legal separation from the other parent. *Jordan v. Att'y Gen. of U.S.*, 424 F.3d 320, 220 (3d Cir. 2005). The Board noted that the Third Circuit had paraphrased former section 321(a)(3) by using "after" as a synonym for "when." Finding that the use of the term "when" in section 321(a)(3) was ambiguous, the Board concluded that its interpretation was due deference pursuant to *National Cable Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). Determining that its construction of former section 321(a)(3) in *Matter of Baires* was reasonable, the Board declined to follow *Jordan* in the Third Circuit. Accordingly, the Board sustained the appeal and terminated removal proceedings.

In *Matter of Oppedisano*, 26 I&N Dec. 202 (BIA 2013), the Board held that the offense of unlawful possession of ammunition by a convicted felon in violation of 18 U.S.C. § 922(g) is an aggravated felony as defined in section 101(a)(43)(E)(ii) of the Act.

The Immigration Judge found the respondent removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony, based on his conviction for unlawful possession of ammunition by a convicted felon. On appeal, the respondent argued that his crime was not an aggravated felony under section 101(a)(43)(E)(ii) because that provision is qualified by the parenthetical "relating to firearms offenses," which therefore restricts the aggravated felony definition to firearms offenses and excludes ammunition offenses.

First, the Board reviewed its conclusion in *Matter of Ruiz-Romero*, 22 I&N Dec. 486 (BIA 1999), that the section 101(a)(43) parentheticals generally provide a descriptive point of reference rather than limiting the range of offenses that may qualify as aggravated felonies. The Board clarified that its general assessment

of the parentheticals in *Matter of Ruiz-Romero* did not obviate the need for a section-by-section analysis of the parentheticals to determine whether the language is descriptive or limiting.

Analyzing the section 101(a)(43)(E)(ii) parenthetical through a common-sense lens and in context with other relevant Act provisions, the Board noted that "relating to" parentheticals generally are interpreted by courts to be descriptive. When Congress intends a parenthetical to be limiting, it generally uses clear and distinct language such as "except," "if," and "not including," which is absent in the term "relating to firearms." The Board also pointed out that section 101(a)(43)(E)(ii) specifically references 18 U.S.C. § 922(g), the statute under which the respondent was convicted, and other criminal provisions involving both firearms and ammunition. Further support for a determination that "relating to firearms" is descriptive, rather than limiting, is found in the integral relationship between firearms and ammunition. The Board concluded that the section 101(a)(43)(E)(ii) parenthetical is descriptive and does not exclude ammunition offenses from the aggravated felony definition.

Addressing the respondent's argument that the Immigration Judge erred by failing to apply the rule of lenity, the Board reasoned that the term "relating to firearms" was sufficiently interpreted through statutory interpretation and significant case law, so that the rule of lenity did not apply. The Board also rejected the respondent's due process challenge. The appeal was dismissed.

Running Away From the Regulatory Departure Bar *continued*

Before turning to its current approach, it is important to acknowledge the limited nature of the First Circuit's initial decision on the application of the departure bar. Although the court ultimately upheld the departure bar in *Pena-Muriel*, it only did so on the ground that the bar was not abrogated by silence when Congress repealed a comparably similar provision pertaining to judicial review. *Id.*; *see also* former section 106(c) of the Act, 8 U.S.C. § 1105a(c) (1994) (repealed 1996) ("An order of deportation . . . shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order."). The *Pena-Muriel* court, however, never addressed whether the departure bar was valid in light of IIRIRA's codification of the right to file a motion to reopen or reconsider. *See Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007) (denying rehearing en banc, explaining that "[n]ot having been asked to do so, [the panel] did not decide" this issue).

This was the precise issue before the court in *Santana v. Holder*, No. 12-2270, 2013 WL 5394311 (1st Cir. Sept. 27, 2013). Finding that the plain language of the Act clearly confers the right to file a motion to reopen or reconsider to any alien and that Congress set forth certain requirements and limitations, including the physical presence requirement for domestic violence victims, without incorporating a similar requirement for all other aliens, the court held that the departure bar regulations could not be squared with the statutory text. *See id.* at *5-7. Most notably, the court identified three pitfalls of allowing the departure bar to prevent an alien from filing a statutory motion to reopen or reconsider after departing the country.

First, the court emphasized that reading a geographic limitation into the text would either manufacture an ambiguity into the statute—a statute that otherwise clearly confers a right to all aliens—or "[e]ssentially, . . . revise the text . . . to say that '[a]n alien may file one motion to reopen proceedings . . . , *excepting other limitations that the Attorney General may prescribe*.'" *Id.* at *6 (second alteration in original). The problem with either approach, the court explained, is that the Attorney General could continue "to impose other substantive limitations on a noncitizen's right to file a motion . . . that lack any foundation in the statutory text." *Id.*

Second, the court explained that this approach to statutory interpretation would upend the legislative process. Namely, to prevent agencies from creating ambiguities in statutory text, "Congress, when enacting a new statute" would "bear the burden of addressing" every existing regulation and ruling out all possible exceptions or limitations. *Id.* at *7. This is problematic because the legislative process is founded on "the fundamental principle that regulations should interpret statutes and not the other way around." *Santana*, 2013 WL 5394311, at *7 (quoting *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (en banc) (internal quotation mark omitted).

Finally, the court found that eliminating the departure bar would permit the entire scheme of the IIRIRA to be enforced to its full effect. Since the statute

sets a deadline of 90 days from a final order of removal for both the alien to file a motion to reopen and the DHS to physically remove the alien, the departure bar creates "tension" in the statutory scheme by allowing "the [DHS] . . . to unilaterally cut short the congressionally mandated filing period," *id*. at *8 (quoting *Contreras-Bocanegra*, 678 F.3d at 817 (internal quotation marks omitted)), by removing an alien "on or before the ninety-day clock . . . to seek reopening has run," *id*. If the departure bar did not apply, this tension would disappear, because the DHS could enforce the removal order when necessary and the alien could seek relief from abroad. *Id*.; *see also id*. at *9 (dismissing discretionary stay of removal as a solution because "conditioning a statutory right on the government's grace . . . [is an] improper deviation from the statute").

In a decision issued in conjunction with *Santana*, the First Circuit refused to consider whether the departure bar was valid with respect to regulatory motions. *Bolieiro v. Holder*, No. 12-1807, 2013 WL 5394223, *4-5 (1st Cir. Sept. 27, 2013). The petitioner in *Bolieiro* sought reopening of a deportation order that was entered almost 20 years prior to her motion being filed, asking that the 90-day period be tolled or, alternatively, that sua sponte authority be exercised. *Id*. at *1-4, 6. Noting that the Board relied on the departure bar in denying both requests but failed to "make a distinction between timely and untimely motions," and in light of the fact that "[n]either the regulation nor *Matter of Armendarez* distinguishes between" statutory and regulatory motions, the First Circuit remanded the case for the Board to "articulate a more nuanced basis for rejecting" the petitioner's sua sponte[3] motion. *Id*. at *5. Unless and until the Board issues such a decision, adjudicators in the First Circuit have little guidance when attempting to apply the departure bar to regulatory motions.

Second Circuit

In the Second Circuit, adjudicators must exercise jurisdiction to consider the merits of a motion to reopen by an alien who departs or is removed from the United States, before or after filing the motion, if the motion is timely filed (or complies with a statutory exception to the time limitation) and is not numerically barred.

Albeit on somewhat different grounds, the Second Circuit addressed the departure bar in *Luna v. Holder*, 637 F.3d 85, 89 (2d Cir. 2011). The ultimate issue in *Luna* was whether the 30-day deadline for filing a petition for review of a Board decision violates the right to habeas review where a petitioner misses the deadline because the DHS enforced the removal order on or near the cut-off date. *Id*. at 87. The court held that the statutory motion to reopen process is an adequate and effective substitute for habeas review as long as it "cannot be unilaterally terminated by the Government." *Id*. at 87, 99. The validity of the regulatory departure bar was therefore at issue.

After reviewing the history of the departure bar and IIRIRA's changes to the statute, the court concluded that the departure bar regulation was invalid to the extent that it conflicts with the statute because it impermissibly contracted the agency's own jurisdiction. *Id.* at 100 (citing *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67 (2009)). The court reasoned that the provisions of the IIRIRA, collectively, conferred Immigration Courts and the Board with jurisdiction to consider any motion to reopen or reconsider (provided the other statutory requirements are met), and the court found no indication that Congress intended to limit jurisdiction or otherwise "make jurisdiction depend on the alien's presence in the United States." *Id*. at 100-01. Concluding that the departure bar "has no roots in any statutory source," the court held that it cannot be applied to a statutory motion to reopen. *Id*. at 102 (quoting *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011)) (internal quotation mark omitted).

However, the court "decline[d] to decide the validity of the departure bar regulation in every possible context." *Id*. (citation omitted). In a prior case, which the *Luna* court acknowledged, the Second Circuit held that the departure bar regulation terminates a request for which "there was no statutory basis," as when the Board exercises its regulatory authority to reopen or reconsider proceedings. *Zhang v. Holder*, 617 F.3d 650, 660-61 (2d Cir. 2010). Accordingly, adjudicators in this circuit can most likely continue to apply the departure bar to motions lacking a statutory basis. *See id*. at 662 ("[P]etitioner has not argued that the *sua sponte* power itself is inconsistent with the statute. This comes as no surprise, as there was no statutory basis for his motion.").

Third Circuit

There are two seminal cases addressing the departure bar in the Third Circuit. First, in *Prestol Espinal*

v. Attorney General of U.S., 653 F.3d 213, 218 (3d Cir. 2011), the court held that the departure bar conflicts with the statutory right provided by the IIRIRA. Like the Second Circuit, the Third Circuit found it significant that when Congress created the statutory scheme for motions to reconsider and motions to reopen, it did not codify the departure bar regulation and it repealed the post-departure bar to judicial review. *Id*. at 216. The Third Circuit described the plain language of the statute as "provid[ing] each alien with the right to file one motion to reopen and one motion to reconsider, provid[ing] time periods during which an alien is entitled to do so, and mak[ing] no exception for aliens who are no longer in this country." *Id*. at 217.

In a subsequent decision, the Third Circuit considered whether the departure bar applied to a motion to reopen based on the Board's sua sponte authority in 8 C.F.R. § 1003.2(a). *Desai v. Att'y Gen of U.S.*, 695 F.3d 267, 268-69 (3d Cir. 2012). The *Desai* court distinguished the present issue from the above decision, noting that "the concern driving our holding in *Prestol Espinal*—that the post-departure bar undermines an alien's statutory right to file one motion to reopen—does not extend to cases like this one, where neither that statutory right nor congressional intent is implicated." *Id*. at 270. Agreeing with the Second Circuit's decision in *Zhang* and citing *Matter of Armendarez* with approval, the Third Circuit held that the Board did not err in applying the departure bar to deny the motion based on lack of jurisdiction. *Id*. at 270-71 & n.2.

Accordingly, adjudicators in the Third Circuit should not apply the departure bar to statutory motions to reopen or reconsider but may apply it to an untimely or otherwise statutorily precluded motion that requests the exercise of sua sponte discretionary authority. *See id*. at 270 ("[W]e [have] invalidated the post-departure bar only in those cases where it would nullify a statutory right, *i.e.*, where a petitioner's motion to reopen falls within the statutory specifications [of sections 240(c)(6) or (7) of the Act.]").

Fourth Circuit

The Fourth Circuit was one of the first courts to weigh in on the issue. As noted above, the court's 2007 decision in *William*, 499 F.3d 329, held that the departure bar in 8 C.F.R. § 1003.2(d) conflicts with clear statutory language and is therefore invalid, and the Board, in *Matter of Armendarez*, disagreed with this reasoning and declined to apply *William* outside of the Fourth Circuit.

The Fourth Circuit revisited the issue in *Sadhvani v. Holder*, 596 F.3d 180 (4th Cir. 2009). After being removed by the DHS, Sadhvani filed a motion to reopen from abroad, requesting an opportunity to relitigate his asylum claim based on changed circumstances in his home country. *Id*. at 181-82. The Board originally granted the motion but subsequently vacated its decision, deeming the motion to be withdrawn in light of Sadhvani's removal from the United States, and the Fourth Circuit remanded the case for consideration in light of its intervening opinion in *William*. *Id*. On remand, the Board denied the motion again, this time finding that Sadhvani was ineligible for asylum because he was no longer "physically present in the United States." *Id*. (citing section 208(a)(1) of the Act, 8 U.S.C. § 1158(a)(1)). When Sadhvani petitioned for review again, the Fourth Circuit held that the Board did not abuse its discretion in denying the motion because he was removed pursuant to a valid order of removal and was therefore statutorily ineligible for asylum.[4] *See id*. at 182-83. As this case illustrates, even where the departure bar does not apply to preclude jurisdiction over a motion to reopen, an alien outside the United States may be ineligible for reopening if the motion is premised on a request to apply for a form of relief that requires physical presence in the United States.

Fifth Circuit

In two companion cases, the Fifth Circuit rejected the departure bar as it applies to both statutory motions to reconsider and reopen. *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012) (addressing motions to reconsider); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) (addressing motions to reopen). The court found that it needed go no further than *Chevron*'s first step because sections 240(c)(6) and (7) unambiguously give an alien a right to file a motion to reconsider or reopen regardless of whether they have left the United States. *Garcia-Carias*, 697 F.3d at 263. First, the court noted that the statutory language "conferring a right to file a motion to reopen plainly does not place any geographic restrictions on its exercise." *Id*. Secondly, the court found it significant that "despite codifying various limitations on an alien's right to file a motion to reopen, Congress did not codify the departure regulation." *Id*. at 262. Finally, the Fifth Circuit, like the Fourth Circuit in *William*, found support for its conclusion in Congress' use of a physical presence

requirement to limit motions to reopen filed outside of the normal deadlines by victims of domestic abuse. *See id*. at 264; *see also* section 240(c)(7)(C)(iv)(IV) of the Act.

In the Fifth Circuit, therefore, the departure regulation cannot serve as a basis for denying a statutorily authorized motion to reconsider or reopen filed by an alien who has departed the United States.

On the other hand, the Fifth Circuit allows the departure bar to divest Immigration Courts and the Board of jurisdiction over regulatory motions. *See Ovalles v. Holder*, 577 F.3d 288, 296 (5th Cir. 2009); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003); *see also Garcia-Carias*, 697 F.3d at 265 (explaining that "*Navarro-Miranda* and *Ovalles* resolved the issue of the applicability of the departure regulation to the Board's regulatory power to reopen or reconsider sua sponte").

Sixth Circuit

Like many other circuits, the Sixth Circuit views the departure bar as having "no roots in any statutory source and misapprehend[ing] the authority delegated . . . by Congress." *Pruidze*, 632 F.3d at 235. Yet, as discussed below, this holding is somewhat limited in nature.

According to the Sixth Circuit, the IIRIRA unequivocally confers Immigration Courts and the Board with jurisdiction to entertain motions to reopen filed by "an alien"— that is, "*any person* not a citizen or national of the United States." *Id*. at 237-38 (emphasis added) (quoting section 101(a)(3) of the Act). As the court explained, "this is an empowering, not a divesting, provision." *Id*. at 237-38. Moreover, by repealing the statutory departure bar that previously applied to judicial review, "[t]he only other clue provided by the [IIRIRA]" was that Congress intended to remove the "legal significance" attached to an alien's departure. *Id*. at 238. Lastly, the court found that the *Bulnes* exception to the departure bar for aliens seeking to reopen proceedings based on lack of notice is an indication that "[e]ven the Board does not buy everything it is trying to sell." *Id*. at 239 ("[I]f the Board [truly] lacks the 'adjudicatory authority' to hear motions to reopen filed by aliens who are abroad, it follows that it lacks jurisdiction to hear a subset of those motions [which claim lack of notice.]" (citation omitted)).

The holding in *Pruidze* is unambiguous: "'As a rule about subject-matter jurisdiction,' the departure bar 'is untenable.'" *Pruidze*, 632 F.3d at 238 (quoting *Marin-Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010)); *see also Gordillo v. Holder*, 640 F.3d 700, 703 (6th Cir. 2011). But whether the departure bar "is valid [as a claim-processing rule] is a different matter." *Pruidze*, 632 F.3d at 238. The court explained that on remand, "the Board . . . may wish to consider whether the departure bar is a mandatory rule," as opposed to a jurisdictional limitation. *Id*. at 239-40; *see also id*. at 238 ("What matters here is that the Board has assumed authority to interpret the regulation as a jurisdictional rule, not a mandatory rule, and we cannot ignore the difference between the two.").

An example of how the departure bar could apply as a mandatory rule (to which the holding in *Pruidze* would not apply) is if the regulations were interpreted to "always treat . . . motions [to reopen or reconsider] as withdrawn upon the alien's departure" from the United States. *Id*. at 238. Although the *Pruidze* court refused to address the validity of this interpretation, *see id*. at 240 (explaining that this is a question "for another day"), a prior decision by the Sixth Circuit casts doubt on whether it could be applied in cases involving aliens who are involuntarily removed from the United States by the DHS. *See Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) ("To allow the government to cut off Madrigal's statutory right to appeal an adverse decision, in this manner, simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process."); *see also Pruidze*, 632 F.3d at 239 (implying that *Madrigal*, which addressed the validity of the departure bar regulations pertaining to appeals before the Board, applies with equal force to motions to reopen or reconsider).

Adjudicators in the Sixth Circuit should note that it is unclear whether the reasoning in *Pruidze* applies to foreclose application of the departure bar to regulatory motions to reopen or reconsider. Albeit in an unpublished decision, the Sixth Circuit, relying on *Pruidze*, has implied that the departure bar as a jurisdictional rule may raise the same concerns with respect to sua sponte motions as it does with statutory motions. *See Lisboa v. Holder*, 436 F. App'x 545, 551 (6th Cir. 2011) ("On remand, the BIA must exercise its jurisdiction to determine whether or not to uphold the reopening, [regardless of] whether the reopening is considered to be on Lisboa's motion or sua sponte."). This is the only circuit that has suggested this outcome.

Seventh Circuit

The Seventh Circuit has also rejected the departure bar as it pertains to statutory motions to reopen or reconsider, but only after carefully, and explicitly, differentiating its rationale from that of other circuits reaching a similar conclusion. *See Marin-Rodriguez*, 612 F.3d at 592-96. With regard to those courts invalidating the departure bar as being inconsistent with the statutory right to file a motion to reopen or reconsider, the court observed that the mere existence of an entitlement (the right to file such motion) does not resolve whether a particular condition attached to that entitlement (being physically present in the United States) is proper. *Id*. at 593. Similarly, the Seventh Circuit refused to join those circuits dismissing *Matter of Armandarez* as an impermissible agency interpretation. *See id*. at 595. Instead, the Seventh Circuit's holding is limited to one principle: "[A]n administrative agency is not entitled to contract its own jurisdiction by regulations or by decisions in litigated proceedings." *Id*. at 594 (citing *Union Pacific*, 558 U.S. at 71).

However, much like the Sixth Circuit's approach discussed above, the Seventh Circuit has not dismissed the departure bar outright. As the court explained in *Marin-Rodriguez*, "The Board may well be entitled to recast its approach as one resting on a categorical exercise of discretion . . . [because it is] easy to see how a distinction could be justified as a conclusion that the Board always denies certain kinds of motions as an exercise of discretion, while entertaining others on the merits." *Id*. at 595. According to the Seventh Circuit, this would also help explain the exception established in *Matter of Bulnes* for aliens claiming lack of notice, which otherwise suggests that "the arguments an alien offers in support of reopening can affect whether the Board has subject-matter jurisdiction" over his or her motion. *Id*. (stating that it is "hard to see how" this is a determinative factor).

Eighth Circuit

The Eighth Circuit is the sole circuit that has yet to address the validity of the departure bar in the context of the statutory right to file a motion to reopen or reconsider. *See Ortega-Marroquin v. Holder*, 640 F.3d 814, 820 (8th Cir. 2011) ("[W]hether the departure bar conflicts with [section 240(c)(7) of the Act] is a hypothetical question not properly before this court."). On the other hand, the court has upheld the use of the departure bar with respect to regulatory motions to reopen or reconsider. *See id*. at 819. As it explained in *Ortega-Marroquin*, while the regulations allow for such motions to be granted sua sponte, "that authority is itself limited by the departure bar." *Id*. Accordingly, adjudicators in the Eighth Circuit should continue to apply the departure bar to both statutory and regulatory motions. *See Matter of Armendarez*, 24 I&N Dec. at 660 (stating that unless deemed invalid on statutory grounds, "the departure bar rule remains in full effect").

Ninth Circuit

Although the Board refused to defer to the Ninth Circuit's initial position in *Lin*, the current view of the Ninth Circuit provides a different framework from which the continuing validity of the departure bar must be analyzed.

In *Coyt v. Holder*, 593 F.3d 902, 907-08 (9th Cir. 2010), the Ninth Circuit held that the departure bar was invalid to the extent it prevents adjudication of a motion to reopen or reconsider filed by an alien who is forcibly removed from the United States while such motion is pending. Rather than interpreting the regulatory language narrowly, as it did in *Lin*, the *Coyt* court rested its decision on the congressional intent underlying the enactment of the IIRIRA. *See id*. at 905-07. Specifically, by expanding judicial review to cases involving aliens physically removed from the country, removing the automatic stay for aliens appealing from an order of removal, and incorporating the right to have proceedings reopened or reconsidered, the court explained that the IIRIRA marked a decisive effort by "Congress . . . to expedite the physical removal of those aliens . . . [subject to an order of removal,] while at the same time increasing the accuracy of such determinations," regardless of whether the alien is present or abroad. *Id*. at 906. Moreover, allowing the physical removal of an alien to constitute a withdrawal of a pending motion would, the Ninth Circuit concluded, "completely eviscerate the statutory right . . . provided by Congress." *Id*. at 907.

The Ninth Circuit has also extended this logic to prevent application of the departure bar where an alien is removed from the country *prior to* filing a motion to reopen or reconsider. *See Reyes-Torres v. Holder*, 645 F.3d

1073, 1077 (9th Cir. 2011) (explaining that whether an alien is removed prior to or after filing such motion "is immaterial in light of Congress's clear intent in passing IIRIRA").

One issue that remains far from clear in the Ninth Circuit is whether the departure bar applies where an alien's departure from the country was voluntary. In both *Coyt* and *Reyes-Torres*, the court's ultimate holding was that "the *physical removal* of a petitioner *by the United States* does not preclude the petitioner from pursuing a motion to reopen." *Reyes-Torres v. Holder*, 645 F.3d at 1077 (emphasis added) (quoting *Coyt*, 593 F.3d at 907) (internal quotation marks omitted). Again, this is so because "[i]t would completely eviscerate the statutory right . . . provided by Congress if the agency deems a motion [improper] . . . whenever the government physically removes the [alien.]" *Coyt*, 593 F.3d at 907. While there is some support for applying this rationale to an alien who departs the country voluntarily, *see, e.g.*, *id*. at 906 (explaining that "Congress anticipated that petitioners would be able to pursue relief after departing from the United States"), there is also support for not extending the rationale to voluntary departures, *see, e.g.*, *Dada*, 554 U.S. at 21 (explaining that an "alien has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion"). The issue remains open and the Ninth Circuit has left adjudicators with little clarity. *See, e.g.*, *Salazar v. Holder*, 435 F. App'x 652, 653 (9th Cir. 2011) (Wallace, J., dissenting) (opposing remand based on *Reyes-Torres* and *Coyt* because the petitioner made "a *volitional decision* to leave the United States").

Tenth Circuit

Until last year, the Tenth Circuit routinely upheld the departure bar because it was "inconceivable that Congress would repeal the post-departure bar, without doing or even saying anything about the 40-year history of the Attorney General incorporating such a bar in his regulations." *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1157 (10th Cir. 2009); *see also, e.g.*, *Mendiola v. Holder*, 585 F.3d 1303, 1308-10 (10th Cir. 2009). Following its initial decision, "the tide turned, and six other circuits . . . invalidated the regulation." *Contreras-Bocanegra*, 678 F.3d at 813. "Rather than stand alone in upholding the post-departure bar, [the Tenth Circuit chose] to overturn *Rosillo-Puga* and its progeny." *Id.*

In *Contreras-Bocanegra*, the court invalidated the regulatory departure bar under the first step of *Chevron*, finding that the text, structure, and "overall scheme" of the IIRIRA reflects Congress' unambiguous intent to require Immigration Courts and the Board to consider motions to reopen or reconsider "filed by all noncitizens, including those who have departed from the United States." *Id*. at 816-17. Textually, the statutory language created a right to file a motion to reopen or reconsider for any "alien," a subset of which includes aliens physically outside the boundaries of the United States. *Id*. Structurally, in codifying "every pre-IIRIRA regulatory limitation [relating to the] filing [of] a motion to reopen [or reconsider] except the post-departure bar," Congress, being "undoubtedly aware of the pre-existing regulatory post-departure bar . . . , signaled its intent that a noncitizen's physical location would not affect the statutory right" to file such a motion. *Id*. at 817. Finally, citing the Ninth Circuit's decision in *Coyt*, the Tenth Circuit concluded that the overall scheme of the IIRIRA "scuttled" the pre-existing "norm that departure ended all legal proceedings." *Contreras-Bocanegra*, 678 F.3d at 817.

For these reasons, adjudicators in the Tenth Circuit should allow "each noncitizen . . . to file one [statutory] motion to reopen [or reconsider], regardless of whether he remains in or has departed from the United States." *Id*. at 818.

It is important to note that the Tenth Circuit's two earlier decisions, despite ultimately considering whether the departure bar improperly infringes on the *statutory* right to file a motion to reopen or reconsider, were actually addressing whether the bar was valid with respect to *regulatory* motions. *See Mendiola*, 585 F.3d at 1308 ("[In *Rosillo-Puga*,] we upheld as reasonable the BIA's conclusion that the regulatory post-departure bar deprived it and an IJ of their authority to reopen sua sponte a proceeding of an alien who had departed the United States."); *Rosillo-Puga*, 580 F.3d at 1150-51. In contrast, a statutory motion was before the court in *Contreras-Bocanegra*. 678 F.3d at 813 ("Contreras . . . , from Mexico, filed a timely motion to reopen his removal proceedings . . . ."). Thus, while *Contreras-Bocanegra,* undoubtedly overrules the earlier decisions insofar as it relates to statutory motions, it remains unclear whether the Tenth Circuit will extend this logic to regulatory motions. *See Contreras-Bocanegra*, 678 F.3d at 819 (overruling *Rosillo-Puga* and *Mendiola* "[t]o the extent that [they] hold otherwise"); *see also id*. at 815 n.3.

Eleventh Circuit

As one of the last circuits to address the issue, the Eleventh Circuit "join[ed] the Third, Fourth, Ninth, and Tenth Circuits in finding that" the departure bar improperly undercuts the statutory right to file a motion to reopen or reconsider. *Jian Le Lin v. U.S. Att'y Gen.*, 681 F.3d 1236, 1238 (11th Cir. 2012). Specifically, the court observed that Congress created a right to file such motions and established certain limitations "but chose not to make a limitation based on the alien's physical location." *Id*. at 1240. Accordingly, adjudicators in the Eleventh Circuit should not apply *Matter of Armendarez* to statutory motions, but it remains unclear whether this holding will be extended to motions based solely on regulatory reopening or reconsideration authority.

Conclusion

To date, all but one circuit has invalidated the departure bar with regard to statutory motions to reopen or reconsider, either because it conflicts with the IIRIRA or it is an impermissible contraction of jurisdiction. Only one circuit has gone so far as to suggest that a similar logic applies to regulatory motions, while a number of other circuits remain undecided on this issue. The Sixth and Seventh Circuits suggest that there could be a different outcome if the Board were to "recast" its approach from a jurisdictional bar to a claim-processing rule, but the prospect of this unfolding, as well as the likely responses from the remaining circuits, is unclear. However, as one of our colleagues so aptly observed, "One may safely conclude that this is not the last we have heard on this particular issue." Grant, *supra*, at 8.

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1. In addition, 8 C.F.R. §§ 1003.3(e) and 1003.4 impose a departure bar on appeals of Immigration Judge decisions to the Board of Immigration Appeals, including appeals from judges' denials of motions to reopen or reconsider. Pursuant to these regulations, the departure of a person subject to a removal or deportation order, prior to appealing a decision in his or her case, constitutes a waiver of the right to appeal or, if appeal has already been filed, a withdrawal of the appeal. However, this article will focus on the departure bar as it relates to motions to reopen and motions to reconsider.

2. It is important to note that an apparently untimely motion to reopen based on ineffective assistance of counsel should be analyzed on its merits because it may, in fact, be timely and therefore be a statutory motion, if equitable tolling applies.

3. The First Circuit noted that the petitioner in *Boliero* attempted to invoke the statutory right to file a motion to reopen by arguing that equitable tolling should apply to the statute's 90-day deadline, an issue the court had previously declined to decide. The court observed that if equitable tolling did apply, the motion would be a statutory motion rather than a regulatory request for the exercise of sua sponte reopening authority. *Bolieiro*, 2013 WL 5394223, at *6. In making this determination, however, the First Circuit did not even acknowledge that the petitioner was appealing from an order of *deportation*, not removal. *Id*. at *1-2. The court did not explain how the IIRIRA, a provision pertaining to removal proceedings, conferred a statutory right to a petitioner in deportation proceedings. *Cf. Matter of H-A-*, 22 I&N Dec. at 734 ("[W]hile there is now statutory authority for motions in removal cases, the authority for motions to reopen deportation proceedings is derived solely from regulations promulgated by the Attorney General.").

4. The court declined to consider the denial of the motion as numerically barred because it found the Board to be correct in holding that the alien's asylum claim was barred by the statute as a result of his presence outside the country.