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PRACTICE ADVISORY[*]
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MATTER OF ABDELGHANY: IMPLICATIONS FOR LPRs SEEKING § 212(c) RELIEF

INTRODUCTION

In a long-awaited precedent decision issued on February 28, the Board of Immigration Appeals (Board or BIA) has withdrawn from its "comparable grounds" rule and the distinction between convictions based on pleas and trials for the purposes of eligibility for § 212(c) relief. *Matter of Abdelghany,* 26 I&N Dec. 254 (BIA 2014). Although issued after many immigrants were improperly denied § 212(c) relief, this favorable decision brings Board precedent in line with the Supreme Court's decisions in *Judulang v. Holder, Vartelas v. Holder,* and *INS v. St. Cyr*. The decision broadens the availability of § 212(c) relief for lawful permanent residents (LPR) currently in removal proceedings with plea agreements and convictions preceding the enactment of Antiterrorism and Effective Death Penalty Act of 1996 **(**AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and provides grounds for seeking reopening of past removal orders involving such individuals.

This practice advisory describes: (1) the Board's holding in *Matter of Abdelghany*; (2) its impact on various LPRs seeking § 212(c) relief; and (3) steps that lawyers (or immigrants themselves) should take immediately to take advantage of its benefits, including in already concluded proceedings. Accompanying this advisory is a sample Motion to Reconsider to the BIA in light of *Matter of Abdelghany*. The motion is available as a separate, downloadable document in Word format to allow attorneys to modify it, as necessary.

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 This Advisory was written by Sejal Zota and Manny Vargas. The authors gratefully acknowledge the helpful contributions of Dan Kesselbrenner and Trina Realmuto.

This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

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I. THE BOARD'S HOLDING IN *MATTER OF ABDELGHANY*

A. Background

Until repealed in 1996, § 212(c) of the Immigration and Nationality Act (INA) permitted the Attorney General to grant discretionary relief to an excludable/inadmissible[1] immigrant, if the immigrant had a lawful unrelinquished domicile in the United States for at least seven years before temporarily leaving the country and if the immigrant was not inadmissible on one of two specified grounds. *See* INA § 212(c) (1994 ed.). By its terms, § 212(c) applied only in exclusion proceedings, but the BIA extended it decades ago to deportation proceedings as well. *See Matter of Silva,* 16 I& N Dec. 26 (1976).

Although Congress first restricted and then eliminated § 212(c) relief in 1996,[2] the Supreme Court in *INS v. St. Cyr* determined that § 212(c) relief remains available to an immigrant whose removal is based on a guilty plea agreement before the waiver's repeal. 533 U.S. 289, 326 (2001). In implementing *St. Cyr*, the Executive Office for Immigration Review

[1] With the passage of IIRIRA, the former grounds of "exclusion" came to be identified as grounds of "inadmissibility."

[2] In 1996, AEDPA eliminated § 212(c) relief for LPRs who were *deportable* based on convictions for a broad set of offenses. *See* Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (effective Apr. 24, 1996). Less than 1 year after AEDPA went into effect, Congress repealed section 212(c) in its entirety. *See* IIRIRA, Div. C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (effective Apr. 1, 1997).

(EOIR) in 2004 issued regulations making § 212(c) relief unavailable to immigrants convicted after trial, on the theory that such individuals cannot demonstrate detrimental reliance on the potential availability of section 212(c) relief.[3] In *Vartelas v. Holder*, however, in ruling on the retroactive impact of another IIRIRA amendment, the Supreme Court held that reliance on prior law is not required to find that a new law has impermissible retroactive effect. 132 S. Ct. 1479, 1491 (2012).

A separate restriction on available § 212(c) relief came in 2005, with the Board's announcement of the "comparable grounds" test, holding that LPRs charged with deportability do not have a right to seek § 212(c) relief unless the charged ground of deportation is "substantially equivalent" to a ground of inadmissibility. *Matter of Blake*, 23 I&N Dec. 722, 729 (BIA 2005); *Matter of Brieva*, 23 I&N Dec. 766, 773 (BIA 2005). In both cases, the LPR had been charged under an aggravated felony ground, as "sexual abuse of a minor" (Blake) and "crime of violence" (Brieva). The Board concluded that neither of these aggravated felony deportation categories had a comparable ground of inadmissibility so as to permit the LPR to apply for § 212(c) relief under the statutory counterpart rule set forth in 8 C.F.R. § 1212.3(f)(5). *Id*.

In 2011, in *Judulang v. Holder*, the Supreme Court unanimously rejected as "arbitrary and capricious" the Board's "comparable grounds" approach. 132 S. Ct. 476, 485 (2011). The Court explained that "by hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner." *Id*. at 484. The Court remanded to the Board to bring its interpretation of § 212(c) relief in line with the Court's decision. *Id*. at 490.

Two years later, the Board answered the Court's mandate in *Matter of Abdelghany,* which had been pending at the time of the *Judulang* decision. It presented a case in which the immigration judge found the respondent removable for a conviction of an aggravated felony under INA § 101(a)(43)(E)(i) & (U), based on a 1995 arson conviction. The immigration judge denied § 212(c) relief because the aggravated felony ground did not have a comparable ground of inadmissibility, as required by 8 C.F.R. § 1212.3(f)(5) and as applied in *Matter of Blake* and *Matter of Brieva*. On February 28, 2014, however, the Board reversed.

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[3] *See* 69 Fed. Reg. at 57,828, 57,835 (codified at 8 C.F.R. § 1212.3(h)). In *St. Cyr*, the Supreme Court reasoned that "IIRIRA's elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations" and was thereby impermissible. *INS v. St. Cyr,* 533 U.S. at 321. Based on the *St. Cyr* Court's focus on the contractual nature of plea agreements, some courts had concluded that the AEDPA and IIRIRA amendments have no impermissible retroactive effect on individuals who were convicted of deportable offenses *after trial*. *See Matter of Abdelghany*, 26 I&N Dec. at 267 (citing cases).

B. Holding of *Abdelghany*

The Board used this decision as a vehicle to adopt a uniform nationwide rule for § 212(c) relief eligibility consistent with the Supreme Court's decisions in *Judulang v. Holder*, *Vartelas v. Holder*, and *INS v. St. Cyr*.

- First, the Board overruled both *Matter of Blake* and *Matter of Brieva* and 8 C.F.R. § 1212.3(f)(5). It also overruled those cases excluding from 212(c) relief LPRs whose convictions did not trigger inadmissibility, such as firearm convictions.[4] The Board reasoned that consistent with *Judulang*, this rule "places inadmissible and deportable lawful permanent residents on a truly level playing field while disregarding mechanical distinctions that arise from the statutory structure and that bear no relation either to deportable aliens' fitness to remain in this country or to the overall purposes of the immigration laws." *Matter of Abdelghany*, 26 I&N Dec. at 265. Under *Abdelghany*, a noncitizen may apply for § 212(c) relief in removal proceedings to waive a ground of deportability, including firearm convictions, even if there is no substantially equivalent ground of inadmissibility.

- Second, although Mr. Abdelghany had been convicted by guilty plea, the decision eliminated the distinction between convictions based on pleas and trials for the purposes of § 212(c) eligibility, and thereby abrogated the regulatory prohibition in 8 C.F.R. § 1212.3(h) against granting § 212(c) relief to immigrants convicted after trial. In doing so, the Board pointed to the Supreme Court's decisions in *INS v. St. Cyr*, 533 U.S. at 326, prohibiting retroactive application of AEDPA and IIRIRA's amendments to § 212(c), and *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012), clarifying that the presumption against retroactive application of statutes does not require a showing of detrimental reliance:

  > Moreover, we conclude that a lawful permanent resident convicted after trial need not demonstrate that he acted or could have acted … in reliance on the availability of section 212(c) relief when structuring his conduct. All that is required under *St. Cyr* and *Vartelas* is a showing that the AEDPA or IIRIRA amendments attached a "new disability" to pleas or convictions occurring before their effective dates.

  Matter of Abdelghany, 26 I&N Dec. at 268-69. Under *Abdelghany*, an LPR may apply for § 212(c) relief in removal or deportation proceedings without regard to whether the relevant conviction resulted from a plea agreement or a trial.

- Third, the Board held that an LPR who is presently deportable or removable based on a pre-IIRIRA plea or conviction is eligible for § 212(c) relief, even if the individual was not deportable under the law in effect at the time of the conviction. *Matter of Abdelghany*, 26 I&N Dec. at 271-72. Under *Abdelghany*, an LPR may apply for § 212(c) relief in removal or

[4] *See, e.g., Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979) (finding § 212(c) ineligibility for a firearm possession offense because the offense did not come within the grounds of excludability as a crime involving moral turpitude), *aff'd*, 624 F.2d 191 (9th Cir. 1980); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991).

deportation proceedings without regard to whether he or she was removable or deportable under the law in effect when the conviction was entered.

The Board found that Mr. Abdelghany satisfied the test and remanded his case for an adjudication on the merits of the § 212(c) application. *Matter of Abdelghany*, 26 I&N Dec. at 273.

II. LPRS NOW ELIGIBLE TO SEEK § 212(C) RELIEF

This section outlines the law, after *Matter of Abdelghany*, for when a lawful permanent resident may seek § 212(c) relief from removal or deportation based on a pre-April 1, 1997 plea agreement or trial conviction, depending on the date of the plea agreement/conviction.[5]

A. LPRs removable or deportable based on a plea agreement or trial conviction that occurred *before November 29, 1990*

Prior to November 29, 1990, the effective date of the Immigration Act of 1990 (IMMACT), the INA provided that a lawful permanent resident immigrant could seek § 212(c) relief if the immigrant had accrued 7 consecutive years of lawful unrelinquished domicile in the United States. The only substantive limitation was that such an immigrant could *not* waive certain grounds of excludability relating to national security or to former persecutors in Nazi Europe.[6] But, then, under IMMACT, § 212(c) relief was made inapplicable to an immigrant convicted of one or more aggravated felonies for which the immigrant had served a term of imprisonment of at least 5 years.[7]

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[5] In cases where an applicant for relief was convicted by plea, it is the date of the plea agreement that governs. The date of the plea agreement is the date that the plea agreement was agreed to by the parties. *See* 8 C.F.R. § 1212.3(h). In addition, although not acknowledged in *Matter of Abdelghany*, an immigrant whose plea agreement/conviction occurred after the relevant amendment restricting § 212(c) relief, but whose underlying conduct preceded the amendment, may be able to argue that the law on the date of the conduct governs. *See Vartelas v. Holder*, 132 S. Ct. at 1490 (describing as "doubly flawed" the reasoning of courts that had rejected, based on a lack of reliance, arguments against retroactive application of new immigration laws enacted after the date of the criminal conduct at issue); *see also* Practice Advisory -- *Vartelas v. Holder*: Implications for LPRs Who Take Brief Trips Abroad and Other Potential Favorable Impacts (April 5, 2012), posted at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Vartelas_Practice_Advisory.pdf.

[6] *See* former INA section 212(c) (1990) (omitting these grounds when listing INA section 212(a) excludability grounds waivable under the provision).

[7] *See* section 511 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Sta. 4978, as amended by section 306(a)(10) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733.

Even before *Matter of Abdelghany*, however, the federal government had recognized that this IMMACT aggravated felony five-years-served prohibition should not apply to any aggravated felony conviction resulting from a plea agreement made before November 29, 1990.[8] *Matter of Abdelghany* now rules that this prohibition should also not apply to any aggravated felony conviction resulting from a trial where the conviction was entered before November 29, 1990. *Matter of Abdelghany* also rules that the *Blake/Brieva* comparable grounds rule no longer applies so that § 212(c) relief is available regardless of whether the charged removal or deportation ground is deemed to have a substantially equivalent ground of excludability/inadmissibility. Thus, the only restriction that should apply to immigrants with pre-November 29, 1990 plea agreements/convictions are the original limited bars for waiving certain grounds of inadmissibility relating to national security or former persecutors in Nazi Europe.

B. LPRs removable or deportable based on a plea agreement or trial conviction that occurred *on or after November 29, 1990 but before April 24, 1996*

Under AEDPA, enacted on April 24, 1996, § 212(c) relief was made further inapplicable to an immigrant deportable by reason of having committed any aggravated felony (regardless of time served), a controlled substance offense, certain firearm offenses, or two or more crimes involving moral turpitude committed within five years of entry for which the sentence of imprisonment was one year or longer.[9]

Even before *Matter of Abdelghany*, however, the federal government had recognized that the AEDPA criminal bars should not apply to any conviction resulting from a plea agreement made before April 24, 1996.[10] *Matter of Abdelghany* now rules that this prohibition should also not apply to any aggravated felony conviction resulting from a trial where the conviction was entered before April 24, 1996. *Matter of Abdelghany* also rules that the *Blake/Brieva* comparable grounds rule no longer applies so that § 212(c) relief is available regardless of whether the charged removal or deportation ground is deemed to have a substantially equivalent ground of excludability/inadmissibility.

But to a plea agreement/conviction on or after November 29, 1990, the government will apply the pre-existing IMMACT bar on § 212(c) relief of one or more aggravated felonies for which the immigrant has served a term of imprisonment of at least 5 years.[11] The government will also apply the already existing bars for immigrants subject to certain

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[8] *See* 8 C.F.R. § 1212.3(f)(4)(ii); *see also Toia v. Fasano,* 334 F.3d 917, 919-21 (9th Cir. 2003).

[9] *See* section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[10] *See* 8 C.F.R. § 1212.3(h)(1); *see also INS v. St. Cyr,* 533 U.S. 289 (2001).

[11] If the immigrant did not serve the five years in a single term of imprisonment, there is support for arguing that the IMMACT five-years-served bar does not apply. *See, e.g., Paulino-Jimenez v. INS*, 279 F.Supp.2d 313 (S.D.N.Y. 2003); *Toledo-Hernandez v. Ashcroft,* 280 F.Supp.2d 112 (S.D.N.Y. 2003).

grounds of excludability/inadmissibility relating to national security and former persecutors in Nazi Europe, as well as a new bar for international child abductors added in 1991.[12]

C. LPRs removable or deportable based on a plea agreement or trial conviction that occurred *on or after April 24, 1996 but before April 1, 1997*

As explained earlier, under IIRIRA, which became generally effective on April 1, 1997, the former § 212(c) waiver provision was repealed entirely.

Even before *Matter of Abdelghany*, however, the federal government had recognized that the IIRIRA repeal should not apply to any conviction resulting from a plea agreement made on or between April 24, 1996 and April 1, 1997.[13] *Matter of Abdelghany* now rules that the repeal should also not apply to any conviction resulting from a trial where the conviction was entered before April 1, 1997. *Matter of Abdelghany* also rules that the *Blake/Brieva* comparable grounds rule no longer applies so that § 212(c) relief is available regardless of whether the charged removal or deportation ground is deemed to have a substantially equivalent ground of excludability/inadmissibility.

But the government will apply the pre-existing AEDPA criminal bars on § 212(c) relief to a plea agreement/conviction on or after April 24, 1996 making an immigrant deportable for any aggravated felony, controlled substance offense, certain firearm offenses, or two or more crimes involving moral turpitude committed within five years of entry for which the sentence of imprisonment was one year or longer.[14] The government will also apply the previously existing bars for immigrants subject to certain grounds of inadmissibility relating to national security, former persecutors in Nazi Europe, and international child abductors.[15]

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[12] *See* 8 C.F.R. § 1212.3(f)(3); *see also* former INA section 212(c) (1994) (prohibiting relief for those excludable under then INA sections 212(a)(3) and (9)(C)). The new § 212(c) bar for international child abductors was added, and made effective as if included in IMMACT, by sections 307(b) and 310 of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733.

[13] *See* 8 C.F.R. § 1212.3(h)(2); *see also INS v. St. Cyr,* 533 U.S. 289.

[14] *See* 8 C.F.R. § 1212.3(h)(2). Note, however, that the AEDPA bars do not apply to immigrants who are in exclusion proceedings initiated before April 1, 1997, *see Matter of Fuentes-Campos,* 21 I&N Dec. 905 (BIA 1997), and arguably, by extension, to those who are in removal proceedings initiated after April 1, 1997 where the removal proceedings are based on inadmissibility charges relating to a pre-April 1, 1997 conviction. The AEDPA bars also do not apply to those who are in deportation proceedings initiated before April 24, 1996. *See* 8 C.F.R. § 1212.3(g).

[15] *See* 8 C.F.R. § 1212.3(f)(3).

III. SUGGESTED STRATEGIES FOR LPRS IN PROCEEDINGS OR WHO WERE PREVIOUSLY DENIED § 212(C) RELIEF

This section offers strategies to consider for LPRs whose cases are affected by *Matter of Abdelghany*. Accompanying this advisory (as a separate document) is a sample Motion to Reconsider that provides additional guidance in implementing the strategies discussed below.

A. LPRs in pending removal cases

Individuals who are in removal proceedings (either before the immigration court or on appeal at the BIA) may request § 212(c) relief under *Matter of Abdelghany*. If the case is on appeal at the BIA, the LPR may want to file a motion to remand to the immigration court for a § 212(c) hearing. By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

B. LPRs with final orders pending

Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand to the Board under *Matter of Abdelghany*. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, the opening brief and/or the reply brief should address *Matter of Abdelghany*. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Matter of Abdelghany* and its relevance to the case.

Denied Petition for Review. If the court of appeals already denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the mandate. If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. Through the motion, the person should ask the court to reconsider its prior decision in light of *Matter of Abdelghany* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Matter of Abdelghany*.

Administrative Motion to Reconsider. Regardless whether an individual sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the Board or the immigration court (whichever entity last had jurisdiction over the case).[16] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* INA §§ 240(c)(6)(B) and

[16] There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* INA § 240(c)(6)(C).

240(c)(7)(C)(i); *see also* 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision).[17] If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Matter of Abdelghany*, i.e., by March 30, 2014 or by May 29, 2014, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Matter of Abdelghany* and argue that the filing deadline was equitably tolled until the Board issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.[18]

C. LPRs who are outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS should facilitate the petitioner's return to the United States.[19]

Noncitizens outside the United States may file administrative motions notwithstanding the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), if removal proceedings were conducted within any judicial circuit, with the exception of removal proceedings conducted in the Eighth Circuit.[20] If filing a motion to reconsider or reopen in the Eighth Circuit, the BIA

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[17] One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction).

[18] Note, however, that courts of appeals have held that they lack jurisdiction to review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Mosere v. Mukasey*, 552 F.3d 397 (4th Cir. 2009); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

[19] For more information about returning to the United States after prevailing in court or on an administrative motion, see the practice advisory, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (December 21, 2012) at http://nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Return_to_US_After_Successful_Petition_for_Review_or_%20Motion%20(12-21-2012).pdf.

[20] Although the BIA interprets the departure bar regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the Eighth Circuit,

or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation involved statutory (not *sua sponte*) motions to reopen or reconsider. In those cases, the courts found the regulation is unlawful either because it conflicts with the motion to reopen or reconsider statute or because it impermissibly contracts the BIA's jurisdiction. Thus, whenever possible, counsel should make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., that the motion is timely filed or that the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Counsel should consider arguing that the statutory deadline should be equitably tolled due to errors outside the noncitizen's control that are discovered with diligence (i.e., based on the agency's malfeasance in misconstruing the law) or ineffective assistance of counsel. If the person did not appeal her or his case to the Board or circuit court, counsel may wish to include a declaration from the person explaining the reason, including lack of knowledge about the petition for review process or inability to afford counsel. Counsel should also review the record to determine whether the immigration judge, DHS counsel, or prior counsel led the noncitizen to believe that any further appeals would be futile.

Significantly for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See*, *e.g.*, *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009). In addition, as stated above (see n.18, *supra*), most courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.[21]

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nipnlg.org or Beth Werlin at bwerlin@immcouncil.org.

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which has not decided the issue) have invalidated the bar. *See Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

[21] For additional information on the departure bar regulations, see the practice advisory, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (Nov. 30, 2013) at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Departure%20Bar%20PA%2011-20-13.pdf