REOPENING EXCLUSION, DEPORTATION, AND REMOVAL ORDERS

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INTRODUCTION AND SCOPE OF ARTICLE

After the passage of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996[1] (IIRAIRA), it has become painfully clear to many practitioners that deportation or removal from the United States can virtually eliminate a foreign national's ability to legally re-enter the United States. Pursuant to INA §212(a)(9) three-, ten-, and twenty-year bars against entry into the United States can be imposed, with a limited ability to apply for a waiver. Section 243 of the INA allows the government to pursue criminal prosecution if the alien fails or refuses to present him- or herself for removal. Thus, it is important for the practitioner to consider every possibility of reopening the exclusion, deportation, or removal order to allow the alien to pursue available relief and remain in the United States. The purpose of this article is to identify and analyze the avenues that govern the area of reopening deportation or removal orders. Specifically, it examines exceptions to the filing deadlines for pre-IIRAIRA deportation and exclusion proceedings and IIRAIRA-based removal proceedings.

Reopening a Removal or Deportation Order Before the Immigration Court

On April 28, 1996, the Attorney General, pursuant to a 1990 Congressional mandate, issued 8 CFR, §§3.2 and 3.23 (now 1003.2 and 1003.23), a regulation concerning motions to reopen that became effective on July 1, 1996.[2] Section 1003.23 (regarding motions to reopen and reconsider before an immigration court) states:

> a party may file *one* motion to reconsider and *one* motion to reopen proceedings. A motion to reconsider must be filed within *30 days* from the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within *90 days* from the date of entry of a final administrative order of removal, deportation, or exclusion, or before September 30, 1996, whichever is later.[3]

Despite reference to "a party," the time and numerical limits do not apply to motions made by the government.[4]

There are several exceptions to the limitations of §1003.23(b)(1). 8 CFR §1003.23(b)(4)(i) allows time and numeric exceptions for asylum, withholding of removal, and Convention Against Torture (CAT) applicants. As long as the motion is based on changed country conditions, evidence of which was not known nor available at the prior proceeding, all time and numerical limits are waived.

Reopening an in Absentia Deportation Order

A second exception, pursuant to §1003.23(b)(4)(ii) and (iii), deals with orders entered in absentia. 8 CFR §1003.23(b)(4)(iii)(A) outlines the requirements for filing a motion to reopen an order in absentia entered in a deportation proceedings.[5] This provision states:

> An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:
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> (1) Within 180 days after the date of order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond the control of the alien (*e.g.,* serious illness of the alien or serious illness or death

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[1] Pub. L No. 104-208, effective September 30, 1996.

[2] The regulation was published in 61 Fed. Reg. 18908 (1996) and codified into 8 CFR §§3.23 and 3.2. 8 CFR §3.23 addresses motions to reopen and reconsider filed with the immigration court and 8 CFR §3.2 deals with motions filed with Board of Immigration Appeals (BIA).

[3] 8 CFR §1003.23(b)(1).

[4] *Id.*

[5] Generally, deportation proceedings were commenced sometime before April 1, 1997 against aliens. With the passage of IIRAIRA, new proceedings commenced against aliens were initiated under §240 of the INA. The proceedings were labeled removal proceedings thereby eliminating deportation and exclusion proceedings.

of an immediate relative of the alien, but not including less compelling circumstances); or

(2) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

Thus, if the alien has received notice, then he or she must move to reopen deportation proceedings under §1003.23(b)(1) within 180 days, and must prove the failure to appear was due to exceptional circumstances. In addition to the illness example given in the regulation, exceptional circumstances can include ineffective assistance of counsel.[6]

The Board has been stringent on enforcing the requirement that the motion be filed within 180 days of the entry of an order of absentia. The author litigated a case before the Board,[7] where the alien himself did not receive notice of the hearing. However, his former attorney did receive the hearing notice (the Board's majority confirmed that this constituted sufficient notice to the alien), but did not advise the client of the hearing. The alien, after learning of this fact from a subsequent deportation order, immediately filed a motion to reopen based on the claim of ineffective assistance of counsel as an exceptional circumstance per §1003.23(b)(4)(iii)(A)(i). In this case, the motion was filed 721 days after the entry order. The Board in a narrow majority, held that there is no exception to the 180 days despite the fact the record shows that the alien did not receive notice, had received ineffective assistance of counsel, and clearly had been prejudiced by it. (Dissenters argued under §1003.23(b)(4)(iii)(A)(ii) that the case fell under the lack of notice exception, which would have allowed a motion to reopen *at any time*.)

This case was appealed to the Eleventh Circuit Federal Court of Appeal which upheld the Board.[8] The Eleventh Circuit held that the 180 days deadline was mandatory and jurisdictional. However, the Ninth Circuit came to a different conclusion holding nonlawyer fraud constitutes ineffective assistance counsel and utilized equitable tolling to allow the reopening of deportation proceedings.[9] The First Circuit sided with the Ninth Circuit on a similar issue.[10] In fact, the First Circuit took issue with the Eleventh Circuit, and accused it of intellectual dishonesty by misquoting a precedent for its decision. The Court stated "The *Anin* Court's assertion that the time limit in §242B(c)(3)(A) is jurisdictional does not rest on any authority—the case cited for this proposition, *Kamara v. INS*, 149 F.3d 904, 906 (8th Cir. 1998), *says no such thing*, but merely decides, without mentioning jurisdiction or tolling, that a particular motion was time-barred." (emphasis added).[11] Thus, this issue is subject to future litigation depending on the jurisdiction the alien deportation proceedings were concluded.

More recently, in *Matter of Cruz-Garcia*,[12] the Board (following the developments it made in *Mat-*

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[6] The controlling decisions in ineffective assistance are *Matter of Grijlava*, 21 I&N Dec. 472 (BIA 1996), and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). In *Lozada*, the Board held that to make a claim of ineffective assistance counsel, the claim must be supported by:

(1) affidavit setting forth the agreement and representations by counsel;

(2) inform counsel against whom the claim is made and give counsel opportunity to respond;

(3) provide proof that a bar complaint has been filed by the governing disciplinary authorities and if not provide an explanation.

In addition, the alien has to prove that he suffered harm or prejudice by the ineffective assistance counsel.

In *Grijalva*, the Board recognized that ineffective assistance counsel constitutes an exceptional circumstance under §242(B) of the INA and required that an alien satisfied the requirements set forth in *Lozada*.

In a recent Ninth Circuit case, the court allowed for a reopening of an absentia order removal order even though the alien did not file a state bar complaint against the attorney. *See Lo v. Ashcroft*, 341 F.3d 934 (2003). The Court held that the BIA had abused its discretion by not adopting a flexible approach to the *Lozada* requirements and by not considering an affidavit supplied by the negligent attorney.

[7] *Matter of A–A–*, 22 I&N Dec. 140 (1998).

[8] *Anin v. Reno*, 188 F.3d 1278 (11th Cir. 1999)

[9] *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

[10] *Jobe v. INS*, 212 F.3d 674 (1st Cir. 2000).

[11] This decision was withdrawn after an en banc petition was filed by the government on the basis that *Jobe* was not entitled to equitable tolling since he had not been as diligent as the situation required. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. en banc, 2001). Specifically, the court cited five criteria for the invocation of the equitable tolling doctrine:

(1) a lack of actual notice of a time limit;

(2) a lack of constructive notice of a time limit;

(3) diligence in the pursuit of one's rights;

(4) an absence of prejudice to a party opponent; and

(5) the claimant's reasonableness in remaining ignorant of the time limit.

[12] 22 I&N Dec. 1155, (1999).

ter of N–B–, *infra*[13]) confirmed that reopening orders of deportation in absentia entered before June 13, 1992, prior to enactment of §242(b) of the Act, are not subject to numerical or time limitations set forth by the regulations promulgated by the Attorney General in 1996. Thus, a claim of ineffective assistance of counsel for order entered in absentia prior to June 13, 1992 is not subject to the "exceptional circumstances" standard, but instead the "reasonable cause" standard.

Reopening an in Absentia Exclusion Order

In order to file a motion to reopen an order entered in absentia in exclusion proceedings, the alien must provide evidence the he or she had reasonable cause for failure to appear.[14] The Board has interpreted this provision and held that there is *no* numerical or time limitation to filing a motion to reopen an order entered in exclusion proceedings. In *Matter of N–B–*, the Board held motions to reopen orders of exclusion based on §1003.23(b)(4)(iii)(B) were not subject to any time or numerical limitations. The Board noted:

> The regulations concerning time and numerical exceptions for motions to reopen designate a specific subsection for motions to reopen exclusion proceedings held in absentia. See 8 CFR §3.23(b)(4). In the design of these regulations, that subsection is given prominence equal to the subsection which specifies that motions to reopen deportation proceedings conducted in absentia are not bound by the general time and numerical limitations. Compare 8 CFR §3.23(b)(4)(iii)(A) with 8 CFR §3.23(b)(4)(iii)(B). The regulation at 8 CFR §3.23(b)(4)(iii)(B) appears to contain a drafting oversight and thereby fails to state explicitly whether time or numerical restrictions exist for motions to reopen exclusion proceedings conducted in absentia. Construing the existing regulatory language, we interpret this regulation as setting no time or numerical limitations on aliens who wish to reopen exclusion proceedings conducted in absentia. Therefore, in the instant case, the applicant filed her motion to reopen in a timely manner.

Thus, the immigration judge incorrectly held that there is a time limitation to filing a motion to reopen in exclusion proceedings. The Board also confirmed the "reasonable grounds" standard of §1003.23(b)(4)(ii) for failure to appear. The Board found that the record contained proof that the alien was receiving surgical treatment, and that this constituted a reasonable reason for failure to appear.

Reopening an in Absentia Removal Order

Finally, we examine the mechanism for reopening an order entered in absentia in removal proceedings. 8 CFR §1003.23(b)(4)(ii) states in pertinent:

> An order of removal entered in absentia in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after date of order of removal, if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined under section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state's custody and failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5) of the Act, no written notice of a change in time or place of proceeding shall be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act.

Litigation over this regulation has been focused on what constitutes adequate notice under §239(a)(1) or (2) of the INA. In *In re G–Y–R*,[16] the Board provided some clarification regarding what constitutes proper notice. In this case, the Service argued that there was proper notice even though the mail containing the Notice to Appear was returned by the Postal Service, because INS used an address the alien gave six years prior on an affirmative asylum application. The Service argued that there was an affirmative duty per INA §266 on the alien to inform the Service of her whereabouts. The Board held that the address does not become a §239(a)(1)(F) address unless the alien received the address change obligations and warnings that are found in the Notice to Appear. Thus, in this case, the Board held that an entry of an in absentia order of removal was improper where the record shows that

[13] *Matter of N–B–*, 22 I&N Dec. 590 (BIA 1999).

[14] *See* 8 CFR §1003.24(b)(4)(iii)(B).

[16] 23 I&N Dec. 181 (BIA 2001).

the alien did not receive notice or could not be charged with receiving the Notice to Appear.

However, the Board retreated some from its holding *In re G–Y–R*, when it issued the decision, *Matter of M–D*.[17] In this case, the Service sent via U.S. certified mail the Notice to Appear and it was returned as "unclaimed." The alien argued that he did not receive notice and that it should have been sent via regular mail, and that the use of certified mail violated his due process. The Board noted that the alien at the time the hearing in absentia was conducted resided at the address of attempted service. The Board reasoned that actual notice is not required as long as the Notice to Appear reached the correct address. Thus, the Board reasoned that the failure to receive notice was due to the failure of the alien himself or the internal workings of his household to claim the certified mail.

In another case, decided in 2002,[18] the Board focused on what constitutes a valid notice to a minor. The Board held that service of the Notice to Appear to a fourteen year old through his uncle was not proper. The Board went on to note that service on a minor will only be upheld when it is effected on the parents of the alien minor.[19]

As you can see, it is imperative that the practitioner painstakingly questions his or her clients in detail regarding their past addresses or residences, and whether they have been served the Notice to Appear. Another issue that may be raised is whether the required advisories concerning change of address have been given, and of course, the ability of the alien to understand the English language.

Other Exceptions

The final exception under §1003.23(b)(4), which is often overlooked by practitioners, is a jointly filed motion.[20] The time and numerical limitations do not apply to joint motions that are filed or agreed by all the parties. In some cases, this may be the best route if there are unusual and outstanding equities that warrant a favorable exercise of discretion.

In addition to the direct exceptions to §1003.23(b)(1), a practitioner should be mindful of exceptions that exist in other legislation. There have been several acts passed by Congress that have created other procedures and limitations regarding filing motions to reopen.[21]

Motions Before the Board of Immigration Appeals

The regulations dealing with motions to reopen and reconsider with the BIA state in pertinent part:[22]

> A motion to reconsider a decision must be filed with the Board within 30 days date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A party may file only one motion to reconsider at any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider.
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> Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened.

Exceptions to the time and numerical limitations before the Board mirror those exceptions for motions to reopen and reconsider before the immigration court. Specifically, the limitations do not apply to motions that are filed to reopen asylum, withholding, and CAT applications; reopening absentia orders; and reopening joint motion by all parties.

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[17] 23 I&N Dec. 540 (BIA 2002).

[18] *Matter of Mejia-Andino*, 23 I&N Dec. 533 (2002).

[19] Please *see Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002) wherein the Board held that service to the minor's parent with whom she was residing was adequate for an entry of an order in absentia.

[20] 8 CFR §3.23(4)(iv).

[21] *See* the Nicaraguan Adjustment and Central Relief Act (Pub. L. No. 105-100) (NACARA), Legal Immigration Family Equity Act Amendments (Pub. L. No. 106-554) (LIFE Act Amendments), and the Haitian Refugee Immigrant Fairness Act of 1988 (Pub. L. No. 105-277) (HRIFA).

[22] 8 CFR §§1003.2(b)(2), 1003.2(c)(2).

However, there is another exception that must not be overlooked. This exemption is found in 8 CFR §1003.2(a) which states in pertinent:

> The Board may at any time reopen and reconsider on its own motion any case which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board.

The Board has issued a decision in this area recognizing that it retained this discretionary power despite the changes made by the Attorney General.[23] This in fact is the last resort to justice when all else fails in the administrative arena.[24] This motion allows the alien or the Service to file a motion to reopen or reconsider despite the numerical or time limitations imposed by §1003.2. The author has utilized this provision and has been successful in reopening cases where final deportation or removal orders had been entered after several years, in which there were flaws in the record, changes in case laws, or clear misapplication of the law.

In 1996, the Board issued a decision holding that an alien who has filed a motion to reopen during the pendency of a voluntary departure order and who subsequently remains in the United States after the scheduled date of departure is statutorily ineligible for suspension of deportation pursuant to §242B(e)(2)(A) of the Act.25 The Board in this case made a literal reading of §242B(e)(2) of the INA which, in the view of the Board mandates disqualifications of certain forms of relief when there was a failure to depart other than because of exceptional circumstances, and found the immigration judge's failure to adjudicate the motion prior to the expiration of the alien's voluntary departure time does not constitute an "exceptional circumstance."

Another significant decision in the area of motions to reopen was rendered by the Board in 2002.[26] This was a landmark decision in view of the prior ruling *Matter of Arthur*.[27] This ruling allowed the immigration judge to reopen proceedings before the I-130 petition has been adjudicated. In order to prevail in this motion, the alien had to provide evidence that a visa petition was filed and accompanied by evidence that the marriage is bona fide.[28]

CONCLUSION

What is clear in the post-IIRAIRA era is the importance of reopening proceedings for an alien in view of the harsh and draconian provisions meted by current immigration law. While the Attorney General has attempted to curb the avenues of reopening deportation, exclusion, and removal proceedings with the issuance of the regulations in 1996, there are still enough cracks within the system to reopen cases that warrant a second look. There are still many issues left regarding the propriety of the 180-day deadline. It is foreseeable that the Board may be revisiting the issues of the 180-day deadline in view of the results at the federal court level. Thus, it is mandatory that the practitioner examines all aspects of the client's case in order to build a solid record before the immigration court to be possibly later litigated before the Board and the federal courts.

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[23] *See Matter of Beckford*, 22 I&N Dec. 1216 (2000) and *Matter of JJ*, 21 I&N Dec. 976 (BIA 1997).

[24] However, *see* the recent decision issued by the Seventh Circuit reaffirming that motions filed under this provision are purely discretionary and unreviewable at the federal court level. *Pilch v. Ashcroft*, 353 F.3d 585 (7th Cir. 2003).

[25] *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996).

[26] *In re Mario Eduardo Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002).

[27] *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992).

[28] The evidence that has to be submitted by the Respondent to document the marriage is set forth under the Board's decision, *Matter of Laureano*, 19 I&N Dec. (BIA 1983).