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Reinstatement of Removal: An Introduction

The Immigration and Nationality Act (INA) establishes removal processes for different categories of non-U.S. nationals (aliens) who do not meet requirements governing their entry or continued presence in the United States. Most removable aliens found in the interior of the country are subject to "formal" removal proceedings under INA § 240. Aliens in these proceedings have certain procedural guarantees including the right to appear at a hearing before an immigration judge (IJ), to pursue relief from removal, and to appeal an adverse decision. But the INA sets forth a streamlined "reinstatement of removal" process for certain aliens who unlawfully reenter the United States after being removed—a process that accounts for a considerable number of the removals of aliens found in the interior of the United States. This In Focus provides a brief introduction to the reinstatement of removal framework.

Statutory Framework and Implementation

An alien ordered removed from the United States is generally barred from reentering the country for a specified period (5 or 10 years for different categories of first-time removals; 20 years for those removed two or more times; and a permanent bar for those convicted of an aggravated felony). The current reinstatement of removal process, created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is codified in INA § 241(a)(5), and applies to those aliens who unlawfully reenter the country after being removed from (or having departed voluntarily from) the United States under an order of removal. For those aliens, the prior order "is reinstated from its original date and is not subject to being reopened or reviewed." The alien "is not eligible and may not apply for any relief" from removal, and "shall be removed under the prior order at any time after the reentry." These rules apply regardless of whether the alien is apprehended at the border or in the interior of the United States, and irrespective of how long the alien has lived in this country.

The Supreme Court has held that INA § 241(a)(5) may be applied even if an alien unlawfully reentered the United States before the statute's effective date (April 1, 1997), if the alien chose to remain unlawfully in the country after that date. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). But some lower courts have ruled that § 241(a)(5) does not apply to aliens who reentered and tried to legalize their immigration status *before* that date. *See e.g., Ixcot v. Holder*, 646 F.3d 1202 (9th Cir. 2011).

Department of Homeland Security (DHS) regulations codified at 8 C.F.R. §§ 208.31 and 241.8 set forth certain procedures in reinstatement cases. First, the examining immigration officer must determine that the alien has a prior order of removal. Second, the officer must verify that the alien was previously removed (or voluntarily departed) from the United States under that order. And third, the officer must confirm that the alien unlawfully reentered the United States. If the officer concludes that the alien is subject to reinstatement, INA § 241(a)(5) requires the alien's removal under the reinstated order, and the alien has no right to an administrative hearing before an IJ though, as discussed below, federal court review may be available.

Most courts have interpreted INA § 241(a)(5) as barring the reopening of the alien's prior removal proceedings to challenge the reinstated order and seek relief from removal. *See e.g., Rodriguez-Saragosa v. Sessions*, 904 F.3d 349 (5th Cir. 2018). But the U.S. Court of Appeals for the Ninth Circuit has held that an alien may file a motion to reopen, seeking to rescind a prior order of removal, if it had been entered *in absentia* based on the alien's failure to appear at a hearing and the alien had not received notice of that hearing. *Miller v. Sessions*, 889 F.3d 998 (9th Cir 2018).

Exceptions to Reinstatement of Removal

Generally, an alien subject to reinstatement is removed from the United States without a hearing or any review of the reinstated removal order, and the alien may not pursue any relief from removal. But there are certain exceptions.

Reasonable Fear Determinations

An alien subject to reinstatement who expresses a fear of returning to the country of removal is entitled to administrative review of that claim before removal. Under DHS regulations, 8 C.F.R. §§ 208.31 and 241.8, the examining officer shall refer the alien for an interview with an asylum officer to determine whether the alien has a "reasonable fear" of persecution or torture. A reasonable fear screening evaluates whether an alien might qualify for two forms of relief: withholding of removal and protection under the Convention Against Torture (CAT). The "reasonable fear" standard is stricter than the "credible fear" standard used to determine whether certain aliens arriving at ports of entry and recent, first-time unlawful entrants placed in expedited removal proceedings might qualify for asylum.

Unlike asylum, which provides an alien with a permanent legal foothold in the United States, withholding of removal and CAT protection only bar removal to the country where the alien fears persecution or torture (but not necessarily to an alternate country), and afford no pathway to lawful permanent resident (LPR) status or citizenship. The reasonable fear screening does not fully assess an alien's withholding of removal or CAT claims, but only whether they are viable enough to warrant more thorough review.

An alien who shows a reasonable fear of persecution or torture is referred to an IJ for consideration of withholding

of removal and CAT protection *only* ("withholding-only proceedings"). The alien may appeal the IJ's decision on those applications to the Board of Immigration Appeals (BIA). Most courts have held that the alien may not seek asylum or other forms of relief in these proceedings. *See e.g.*, *R-S-C v. Sessions*, 869 F.3d 1176 (10th Cir. 2017).

An alien found not to have a reasonable fear may request an IJ's review of that determination. If the IJ concurs with that finding, the alien is subject to reinstatement and there is no administrative appeal. But if the IJ finds the alien has a reasonable fear, the alien may pursue withholding and CAT protection, and appeal any adverse decision to the BIA.

Applicants for Certain Discretionary Benefits

Under the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA) and the Nicaraguan Adjustment and Central American Relief Act (NACARA), a small (and decreasing) number of long-term residents from certain countries may adjust to LPR status. DHS regulations, codified at 8 C.F.R. § 241.8, instruct that, if an alien subject to reinstatement has applied for adjustment of status under these laws, the prior removal order may not be reinstated "unless and until a final decision to deny the application for adjustment has been made." If the alien's application is granted, the reinstated removal order "shall be rendered moot."

Additionally, alien victims of human trafficking or certain criminal activity who qualify for "T" or "U" nonimmigrant status, and aliens eligible to adjust to LPR status under the Violence Against Women Act, are arguably exempt from reinstatement of removal. Such aliens can seek waivers of most grounds of inadmissibility, including those that apply to unlawful reentrants who have been ordered removed. And 8 C.F.R. §§ 214.11 and 214.14 instruct that, if a T or U status applicant has an order of removal issued by DHS (e.g., a reinstated order of removal), the order is "deemed canceled by operation of law" upon approval of status.

Detention of Aliens Subject to Reinstatement of Removal

Under INA § 236(a), detention by immigration authorities of an alien "pending a decision on whether the alien is to be removed" is generally discretionary, unless the alien is subject to mandatory detention (e.g., aliens convicted of specified crimes). If detained, the alien may request an IJ's review of DHS's custody determination at a bond hearing and potentially secure release from custody.

INA § 241(a), by contrast, governs the detention of an alien who is subject to a final order of removal, and requires the alien's detention during a 90-day "removal period" after the order becomes final. The statute permits the continued detention of some aliens whose removal cannot be effectuated in the 90-day period (e.g., those who are "unlikely to comply with the order of removal" if released), subject to periodic custody review. Unlike § 236(a), the statute provides for no bond hearings. But given the "serious constitutional concerns" raised by indefinite detention, the Supreme Court has construed § 241(a) as having an implicit, temporal limitation of six months post-order of removal if there is no significant likelihood of the alien's removal in the reasonably foreseeable future. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

In DHS's view, detention in reinstatement cases, including during withholding-only proceedings, is governed by § 241(a) because the alien has already been ordered removed. Thus, the agency argues, aliens in reinstatement are subject to the 90-day mandatory detention period (triggered upon reinstatement of the prior removal order) and potentially may remain detained beyond that period. The Third and Ninth Circuits have agreed with DHS's interpretation, but citing *Zadvydas*, have ruled that aliens detained post-order of removal are entitled to bond hearings after prolonged periods of detention. *Guerrero-Sanchez v. Warden York Co. Prison*, 905 F.3d 208 (3d Cir. 2018); *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2018).

Conversely, the Second and Fourth Circuits hold that § 236(a) governs the detention of aliens in reinstatement who are placed in withholding-only proceedings because, in the courts' view, they are technically still in proceedings to determine whether they are "to be removed," and their removal orders are not final. These Circuits have thus held that aliens are entitled to bond hearings *at any time* in withholding-only proceedings. *Guzman-Chavez v. Hott*, 940 F.3d 867 (4th Cir. 2019); *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016). The Supreme Court has granted the government's petition to review the Fourth Circuit's decision, enabling the Court to resolve the circuit conflict over DHS's detention authority in reinstatement cases.

Judicial Review

Under INA § 242(b), an alien may petition for review within 30 days of a reinstatement order in the federal appellate court for the judicial circuit where the reinstatement was issued. The court's review is typically limited to the legality of the *reinstatement order* (e.g., whether the alien was previously ordered removed). An alien may also challenge a negative reasonable fear finding or (if placed in withholding-only proceedings) the denial of withholding of removal and CAT protection. Reviewing courts have held that the reinstatement order is not final for purposes of the 30-day petition for review deadline until the reasonable fear or withholding-only proceedings are completed at the agency level. *See e.g.*, *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015).

INA § 241(a)(5) generally bars judicial review of the merits of the underlying removal order being reinstated. But INA § 242(a)(2)(D) permits review of challenges to reinstated removal orders that raise questions of law or constitutional claims. *See e.g.*, *Villegas de la Paz v. Holder*, 640 F.3d 650 (6th Cir. 2010). Most courts require petitions challenging reinstated removal orders to be filed within 30 days of the *underlying removal order*, not the order reinstating that order. *See e.g.*, *Luna-Garcia de Garcia v. Barr*, 921 F.3d 559 (5th Cir. 2019); *but see Vega-Anguiano v. Barr*, 982 F.3d 502 (9th Cir. 2020) (holding that challenge to removal order may be raised in a timely challenge to reinstatement order). Courts have also held that the jurisdictional framework preserved by § 242(a)(2)(D) does not apply to challenges to reinstated *expedited* removal orders. *See, e.g.*, *Garcia de Rincon v. DHS*, 539 F.3d 1133 (9th Cir. 2008).

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