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Reinstatement of Removal Orders: An Introduction

Federal immigration laws establish removal processes for different categories of aliens who do not meet requirements governing their entry or continued presence in the United States. Many removable aliens found in the interior of the country are subject to "formal" removal proceedings under 8 U.S.C. § 1229a. 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. However, there is a streamlined "reinstatement of removal" process for certain aliens who unlawfully reenter the United States after being removed and who encounter federal immigration law enforcement—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 framework for reinstatement of removal orders.

Statutory Framework and Implementation

An alien ordered removed from the United States is generally barred from reentering the country for a specified period (five or 10 years for different categories of aliens, 20 years for aliens removed two or more times, and a permanent bar for aliens convicted of aggravated felonies). An alien who unlawfully reenters the country after being removed from (or having departed voluntarily from) the United States under an order of removal and who encounters federal immigration law enforcement upon reentry is subject to the current reinstatement of removal process. This process was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and is governed by 8 U.S.C. § 1231(a)(5). For such an alien, 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 is irrespective of how long the alien has lived in this country.

The Supreme Court has held that 8 U.S.C. § 1231(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. Some lower courts have ruled that § 1231(a)(5) does not apply to aliens who reentered and tried to legalize their immigration status *before* that date.

Department of Homeland Security (DHS) regulations (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. Finally, the officer must confirm that the alien unlawfully reentered the United States. If the officer concludes that the alien's prior removal order is subject to reinstatement, 8 U.S.C. § 1231(a)(5) requires the alien's removal under the reinstated order, and the alien has no right to an administrative hearing before an IJ. However, other administrative proceedings and administrative and federal court review may be available.

For other administrative avenues, most courts have interpreted 8 U.S.C. § 1231(a)(5) as barring an alien from seeking to reopen the prior removal proceedings to challenge the reinstated order and seek relief from removal. The U.S. Court of Appeals for the Ninth Circuit has held that an alien may file a motion to reopen to rescind a prior order of removal if the prior order was entered *in absentia* and the alien establishes a lack of notice.

Exceptions to Reinstatement of Removal

Generally, an alien whose removal order is reinstated 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. There are exceptions to this rule.

Reasonable Fear Determinations

An alien subject to reinstatement of a prior removal order and 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), DHS conducts an interview to determine whether the alien has a "reasonable fear" of persecution or torture. A reasonable fear screening evaluates whether an alien might qualify for withholding of removal or 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. The reasonable fear screening does not fully assess an alien's withholding of removal or CAT claims—it assesses only whether the claims 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 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.

An alien found by DHS 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 removal, and there are no further administrative appeals. If the IJ finds that 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 and the Nicaraguan Adjustment and Central American Relief Act, a small (and decreasing) number of long-term residents from certain countries may adjust to lawful permanent resident (LPR) status. A DHS regulation (8 C.F.R. § 241.8) instructs 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, aliens who are 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. Governing regulations 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 8 U.S.C. § 1226(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.

Section 1231(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 § 1226(a), the statute provides for no bond hearings. However, given the "serious constitutional concerns" raised by indefinite detention, the Supreme Court has construed § 1231(a) as having an implicit, temporal limitation of six months after the order of removal if there is no significant likelihood of the alien's removal in the reasonably foreseeable future.

In deciding whether detention of an alien subject to a reinstated removal order and who is placed in withholding-only proceedings is governed by Section 1231(a) or 1226(a), the Supreme Court held that 8 U.S.C. § 1231(a) governs because such aliens have already been ordered removed and their removal orders are administratively final. The Court reasoned that 8 U.S.C. § 1226(a)'s discretionary detention provisions do not apply, because the withholding-only proceedings do not determine "whether the alien is to be removed" but whether the alien's removal to a particular country (but not necessarily a third country) should be withheld.

Additionally, the Supreme Court has held that 8 U.S.C. § 1231(a) does not require bond hearings after prolonged periods (i.e., six months) of detention in which the government must prove that an alien poses a flight or safety risk. Although the Court had previously restricted the length of detention of most aliens awaiting removal under § 1231(a), the Court declined to read any further limitations or procedural safeguards into the statute.

Therefore, an alien with a reinstated removal order is subject to the detention provisions of 8 U.S.C. § 1231(a) and has no statutory right to bond hearings pending the outcome of those proceedings.

Judicial Review of Reinstated Orders

Under 8 U.S.C. § 1252(b)(1), an alien may petition for review within 30 days of a "final order of removal." Courts have generally treated a reinstatement order as an "order of removal" subject to judicial review. Courts have disagreed over *when* a reinstatement order is "final" for purposes of the 30-day petition for review deadline. Some courts have held that the 30-day period always begins on the date the removal order is reinstated, even if the alien is later placed in withholding-only proceedings. Other courts have held that the 30-day period does not begin until the withholding-only proceedings are completed at the agency level.

Section 1231(a)(5) generally bars judicial review of the merits of the underlying removal order that was reinstated. Thus, judicial review in reinstatement of removal cases is typically limited to the *reinstated order* itself (e.g., whether the alien was previously ordered removed and had unlawfully reentered), the determination that the alien failed to show a reasonable fear of persecution or torture, or (if the alien is placed in withholding-only proceedings) the denial of withholding of removal and CAT protection.

An exception exists under 8 U.S.C. § 1252(a)(2)(D) to review challenges to reinstated removal orders that raise questions of law or constitutional claims. Some courts have applied this exception to allow collateral challenges to the underlying removal orders during review of a reinstatement order if the alien shows a "gross miscarriage of justice" (e.g., the original removal order lacked a valid legal basis). While courts generally require petitions under this exception to be filed within 30 days of the *underlying removal order*, the Ninth Circuit has held that the challenge to the underlying removal order may be raised in a timely petition for review challenging the reinstatement order.

Courts have held that the jurisdictional framework preserved by § 1252(a)(2)(D) does not apply to challenges to reinstated *expedited* removal orders.

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