



National Immigration Litigation Alliance
Immigrant justice through the courts

Practice Alert¹

Protecting Judicial Review in the Fourth and Second Circuits for Noncitizens with Reinstatement or 238(b) Orders who Have Fear-Based Claims

May 9, 2024

This practice alert is intended for attorneys who are representing clients within the Fourth and Second Circuits who have reinstatement orders under INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) or administrative removal orders under INA § 238(b), 8 U.S.C. § 1228(b) and who are, or have been in, reasonable fear and/or withholding-only proceedings. It contains important information in light of *Martinez v. Garland*, 86 F.4th 561, 566-67 (4th Cir. 2023) and *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022).

In those cases, the circuit courts held that they lack jurisdiction over claims in reasonable fear or withholding-only proceedings **unless** a petition for review is filed within 30 days of the reinstatement/§ 238(b) order. The decisions mark a dramatic departure from prior precedent reviewing fear-based claims when the petition for review was filed within 30 days of the conclusion of reasonable fear or withholding-only proceedings (i.e., either an immigration judge decision affirming an asylum officer's negative reasonable fear determination or a Board of Immigration Appeals decision at the conclusion of withholding-only proceedings).

This jurisdictional issue has arisen in several circuits. In all circuits except the Second and Fourth, the courts have affirmed their prior precedents allowing for review of claims if a petition is filed within 30 days of the conclusion of fear proceedings.² NILA has filed amicus briefs and mentored attorneys in numerous cases raising the issue.³

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² See *Argueta-Hernandez v. Garland*, 87 F.4th 698, 705 (5th Cir. 2023); *Kolov v. Garland*, 78 F.4th 911, 919 (6th Cir. 2023); *F.J.A.P. v. Garland*, 94 F.4th 620 (7th Cir. 2024); *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1042 (9th Cir. 2023); *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1137 (10th Cir. 2023); *accord G.P. v. Garland*, No. 21-2002, 2023 WL 4536070 (1st Cir. July 13, 2023).

³ See, e.g., *Bhaktibhai-Patel v. Garland*, 32 F.4th 180 (2d Cir. 2022) (filed Jul. 5, 2022); *Villatoro v. Garland*, No. 21-2456 (2d Cir. filed Jul. 14, 2022); *Arostegui-Maldonado*, 75 F.4th

Fourth Circuit Cases

Filing a motion to reopen and reissue the reinstatement/§ 238(b) order is a potential pathway to more expeditious review of fear-based claims as the larger jurisdictional issues percolate and Supreme Court review is sought in select cases. On NILA's advice and using a NILA template, a NILA member within the Fourth Circuit filed such a motion asking ICE to reopen and reissue a reinstatement order with the date of the conclusion of fear proceedings. ICE reissued the order. Counsel then filed the reissued reinstatement order in the pending petition for review and filed a new (timely) petition for review. The Fourth Circuit consolidated the two petitions. We would expect the court to treat one or both the consolidated petitions as timely – either by finding that the first petition has matured/ripened or that the second petition is timely filed.

A [template motion to reopen and reissue](#) for Fourth Circuit cases accompanies this alert. If the motion is successful, reissued orders could provide a viable pathway to judicial review.

Additionally, in pending petitions for review governed by *Martinez*, counsel may wish to file a motion to hold the petition in abeyance pending the outcome of the motion to reissue and/or any petition for certiorari filed on this issue.

Second Circuit Cases

Following *Bhaktibhai-Patel*, NILA, the Office of Immigration Litigation (OIL), and organization allies (Bronx Defenders, Brooklyn Defender Services, Legal Aid Society, and Make the Road New York) worked with the Second Circuit Clerk's Office to formalize a procedure to file petitions for review outside of the 30-day window following a reinstatement or § 238(b) order, where withholding-only or reasonable fear proceedings are ongoing. The procedure requires contacting OIL before filing a petition and then stipulating to dismissal without prejudice, which allows counsel to reinstate the petition for review within 30 days of the conclusion of fear proceedings. For more information, contact NILA at info@immigrationlitigation.org and/or one of our organizational allies.

Note that due to recent developments beyond the scope of this alert, the Second Circuit is reconsidering the validity of *Bhaktibhai-Patel*. See *Order, Castejon-Paz v. Garland*, No. 22-6024 (2d Cir.), ACMS 25.1; *Order, Cerrato-Barahona v. Garland*, No. 22-6349 (2d Cir.), ACMS 22.1. On April 18, 2024, the Second Circuit held oral argument in both cases.

1132 (10th Cir. 2023) (filed Dec. 12, 2022); *G.P. v. Garland*, No. 21-2002, 2023 WL 4536070 (1st Cir. Jul. 13, 2023) (filed Mar. 15, 2023); *Alonso-Juarez v. Garland*, 80 F.4th 1039 (9th Cir. 2023) (filed Mar. 20, 2023); *Urzua Ortega v. Garland*, 97 F.4th 496 (7th Cir. 2024) (filed Jul. 26, 2023); *Canales Molina v. Garland*, No. 22-6539 (2d Cir. filed Sept. 1, 2023); *Castejon-Paz v. Garland*, No. 22-6024 (2d Cir. filed Oct. 18, 2023); *Cerrato-Barahona v. Garland*, No. 22-6349 (2d Cir. filed Oct. 18, 2023); *Inestroza-Tosta v. Att'y Gen.*, No. 22-1667 (3d Cir. filed Oct. 27, 2023); *Hernandez Cerrato v. Att'y Gen.*, No. 23-2894 (3d Cir. filed Nov. 1, 2023); *Vindel-Medina v. Att'y Gen.*, No. 22-1879 (3d Cir. filed Dec. 12, 2023); *Martinez v. Garland*, 86 F.4th 561 (4th Cir. 2023) (filed Feb. 5, 2024).