Practice Alert[1]

Construing the Reopening Limitation in the Reinstatement Statute

May 31, 2024

Since 1997, statutory motions to reconsider or reopen have provided noncitizens with a crucial opportunity to present an immigration court or the Board of Immigration Appeals (BIA) with the opportunity to correct legal or factual errors and to consider previously unavailable evidence, information, and arguments after they have been ordered removed. *See* 8 U.S.C. § 1229a(c)(6), (c)(7); 8 C.F.R. § 1002.3 (BIA); 8 C.F.R. § 1002.23 (immigration court).

These important statutory and regulatory mechanisms have been curtailed for noncitizens against whom the Department of Homeland Security (DHS) has issued a reinstatement order pursuant to 8 U.S.C. § 1231(a)(5). That statute provides:

> If the Attorney General finds that [a noncitizen] has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and *is not subject to being reopened* or reviewed, the [noncitizen] is not eligible and may not apply for any relief under this Act, and the [noncitizen] shall be removed under the prior order at any time after the reentry.

Id. (emphasis added). Immigration judges, the BIA, and some circuit courts have interpreted the reopening limitation (the language in italics) as stripping the agency of jurisdiction to review motions to reopen or reconsider removal orders that DHS has reinstated.[2] Critically, however, these cases all pre-date *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023). In that case, the Supreme Court held that the Immigration and Nationality Act's exhaustion provision, 8 U.S.C. § 1252(d)(1), is not jurisdictional, because a statutory rule can only be treated as jurisdictional "if Congress clearly states that it is." *Id.* at 416 (quoting *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 203 (2022)); *see also id*. at 416-23.

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[2] *See*, *e.g., Sanchez-Gonzalez v. Garland*, 4 F.4th 411, 414-15 (6th Cir. 2021); *Rodriguez-Saragosa*, 904 F.3d 349, 354-55 (5th Cir. 2018); *Cordova-Soto v. Holder*, 732 F.3d 789, 793-96 (7th Cir. 2013); *Gutierrez-Gutierrez v. Garland*, 991 F.3d 990, 994 (8th Cir. 2021); *Padilla Cuenca v. Barr*, 956 F.3d 1079 (9th Cir. 2020); *Alfaro-Garcia v. U.S. Att'y Gen.*, 981 F.3d 978, 981-83 (11th Cir. 2020); *cf. Garcia Sarmiento v. Garland*, 45 F.4th 560, 564 (1st Cir. 2022).

On May 7, 2024, the Ninth Circuit held that the reopening limitation is a non-jurisdictional claim-processing rule and that its earlier cases to the contrary were "clearly irreconcilable" with *Santos-Zacaria*. *See Suate-Orellana v. Garland*, 101 F.4th 624, 2024 WL 2004951, at *6 (9th Cir. 2024).[3] The court applied the "clear statement" test required by *Santos-Zacaria* and the cases on which it relied. The court found that § 1231(a)(5) lacks jurisdictional language (in contrast to other provisions) and declined to read the reopening limitation as necessarily jurisdictional simply because it uses the word "review." *Id*. at *5-6.

The *Suate-Orellana* Court further held, because non-jurisdictional rules are subject to waiver and forfeiture, DHS forfeits application of § 1231(a)(5)'s reopening limitation if it does not timely raise it. *See id.* at *7. Where DHS has forfeited or waived its application by failing to raise in response to a motion, IJs and the BIA should address the merits of the motion.

Even if DHS did *not* waive or forfeit the reopening limitation before the agency, the analysis does not end because waiver and forfeiture are not the only available types of equitable exceptions to nonjurisdictional rules. In this situation, noncitizens can argue that reopening limitation is subject to a gross miscarriage of justice exception. This is the standard the BIA has employed for decades when conducting collateral review of a reinstated prior order. *See Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967); *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966); *Matter of Roman*, 19 I&N Dec. 855 (BIA 1988).

Suate-Orellana is binding unless or until overruled by an en banc court or the Supreme Court. The Justice Department has until June 21, 2024, to petition for en banc rehearing and until August 5, 2024, to petition for a writ of certiorari.

Accompanying this practice alert are downloadable Word versions of template motions that practitioners can use to raise *Suate-Orellana* to the immigration court or BIA in Ninth Circuit cases governed by *Suate-Orellana*.

- **Template Ninth Circuit Motion to Reconsider the Denial of Motion to Reopen or Reconsider Based on the Reopening Limitation at 8 U.S.C. § 1231(a)(5)** – arguing that the IJ/BIA erred by previously denying a motion to reopen or reconsider for lack of jurisdiction based on the reopening limitation in § 1231(a)(5). Ideally, this motion should be filed within 30 days of the *Suate-Orellana* decision, i.e., June 6, 2024.

- **Template Ninth Circuit Motion to Reopen EOIR-Issued Removal Order that Has Been Reinstated Under 8 U.S.C. § 1231(a)(5)** – arguing that the IJ/BIA has jurisdiction to review new evidence that was previously unavailable at the time of the prior removal proceeding (even though the order has been reinstated). Ideally, this motion should be filed within 90 days of the *Suate-Orellana* decision, i.e., August 5, 2024.

[3] *Suate-Orellana* was litigated by the New York University School of Law Immigrant Rights Clinic, and the National Immigration Litigation Alliance filed an amicus brief arguing that the reopening limitation was a claim-processing rule and that the reopening limitation does not apply to motions to reconsider.

These motions are Ninth-Circuit specific but can be modified for filing in cases outside of the Ninth Circuit.

Note that § 1231(a)(5)'s reopening limitation should not apply to noncitizens who seek reconsideration of an order that has been reinstated based on an error or law or fact because its plain language applies *only* to motions to reopen. Motions to reconsider are distinct procedural vehicles filed for a different purpose and governed by a different statute with different standards. The court did not reach this issue in *Suate-Orellana*. 2024 WL 2004951, at *7 n.8

Practitioners should raise *Suate-Orellana* in cases involving relevant motions that are pending before the agency or the courts of appeals. *See* BIA Practice Manual, Ch. 4.6(g)(1) (addressing Statement of New Legal Authorities); Federal Rule of Appellate Procedure 28(j) (addressing citation of supplemental authorities).

Finally, if the IJ or BIA ultimately reopens the prior order on which the reinstatement order is based, the reinstatement order should fall like "a house of cards" because "none of the reinstatements is legally any stronger than the original order." *United States v. Arias-Ordonez*, 597 F.3d 972, 978 (9th Cir. 2010); *see also Nken v. Holder*, 556 U.S. 418, 429 n.1 (2009) ("[A] determination that the BIA should have granted Nken's motion to reopen would necessarily extinguish the finality of the removal order.").

Have Questions?

In addition to this practice alert and template motions, which are publicly available on the practice advisories page of our website, the National Immigration Litigation Alliance provides strategic assistance to NILA members on reopening and reconsideration of prior orders that have been reinstated. To join NILA, please go to the strategic assistance page of our website. Current NILA members are welcome to email Trina Realmuto, trina@immigrationlitigation.org, and/or Kristin Macleod-Ball, kristin@immigrationlitigation.org.