

REINSTATEMENT OF REMOVAL
FROM *RAMIREZ-MOLINA* TO
RAMIREZ-MEJIA:

The More Things Change the
More They Stay the Same

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THE BASICS

INA Section 241(a)(5)
8 USC Section 1231(a)(5)

INA Section 241(a)(5)

(5) Reinstatement of removal orders against aliens illegally reentering. – If the Attorney General finds that an alien 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 alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Reinstatement Regulations

- Under 8 CFR Section 241.8, an immigration officer must establish three things in order to determine if an alien is subject to reinstatement of removal:
 1. Existence of a prior order against the alien.
 2. The identity of the alien.
 3. Whether the alien unlawfully reentered the United States.

8 CFR Section 241.8(a)(1)

(1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.

8 CFR Section 241.8(a)(2)

(2) The identity of the alien, *i.e.*, whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

8 CFR Section 241.8(a)(3)

(3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

What Is An Illegal Reentry?

Even procedurally regular entries have been determined to be “illegal” reentries by the courts.

FOR EXAMPLE:

- Entry with photo-change passport.
- Entry with facially valid documents obtained through fraud.
- *Matter of Quilantan* entries.

Notice Requirement

If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination. 8 CFR Section 241.8(b).

Reinstatement of the Order

Once an officer has determined that the alien is subject to reinstatement, the alien shall be removed.

EXCEPTIONS

- Applicants for benefits under section 902 of HRIFA or sections 202 or 203 of NACARA.
 - If the alien has applied for adjustment of status under either program, the reinstatement provisions shall not apply.
 - The prior order cannot be reinstated until a final decision is made to deny the adjustment of status application.
 - If the adjustment application is granted, the prior order is rendered moot.

EXCEPTIONS

- Applicants for Withholding of Removal.
 - If the alien expresses a fear of returning to the country to which removal has been ordered, they will be referred to an asylum officer for a “reasonable fear” interview.
 - If a reasonable fear of persecution or torture is established, the alien will be placed in “withholding only” proceedings.

PROCEDURAL CHALLENGES

Reinstatement Provisions Survive Constitutional Scrutiny

Reinstatement Procedures Are Traditionally Upheld By Courts

- Allowing a DHS officer to determine applicability of reinstatement provisions is not a due process violation.
- Application of reinstatement provisions to aliens who were removed and reentered before IIRIRA is permissible.
- Termination of removal proceedings to reinstate a prior order is permissible.
- Barring an alien from collaterally attacking the underlying removal order is not a due process violation.

SUBSTANTIVE CHALLENGES

Constitutional Claims or Questions of Law

Who Can Review the Prior Order?

- The BIA has no jurisdiction to review the decision to reinstate a prior order. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998). *
- Federal Courts of Appeal in every circuit have found they have jurisdiction to review reinstatement orders in the context of a Petition for Review.

*The BIA retains jurisdiction to review a prior order of removal in subsequent removal proceedings if Respondent can demonstrate a gross miscarriage of justice in the prior proceedings. *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966); *Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967).

Authority for Review

INA Section 242(a)(2)(D) provides for judicial review of constitutional claims and questions of law.

Review in the Fifth Circuit

“...in the context of a reinstatement decision, we can review the underlying removal order only if [the alien] establishes that there was a gross miscarriage of justice in the initial proceedings.” *Ramirez-Molina v. Ziglar*, 463 F.3d 508 at 514 (5th Cir. 2006).

“...reinstatement of [the alien]’s previous deportation order is a final order of the INS. A fair interpretation of § 242 grants this court the authority to review the lawfulness of the reinstatement order.” *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002)

Gross Miscarriage of Justice

- The 5th Circuit has never published a case in which a gross miscarriage of justice was established.
- The standard is jurisdictional.
- The standard cannot be met unless the alien has exhausted all administrative remedies.
- Failure to contest removability in the initial proceedings and failure to appeal will preclude an alien from establishing that a gross miscarriage of justice occurred.

Establishing a Gross Miscarriage of Justice

- There are two BIA cases in which a gross miscarriage of justice was found to have occurred in the initial proceedings:
 - *Matter of Malone* - the removal order was the result of a charge that should not have been sustained at the time of the initial removal hearing.
 - *Matter of Farinas* - the law at the time of the initial removal hearing would have supported the order of removal, but subsequent changes in the law prior to the actual deportation made it so the order would not have withstood judicial attack.

The Law As It Existed

- A determination of whether an order was lawful at the time of its entry or at the time of its execution, the BIA and Courts of Appeal (relying on language from *Matter of Malone*) look to the judicial and administrative decisions existing at the time of the original proceeding.
- The practical effect of this analysis is that changes in judicial interpretation of the law generally don't "retroactively" create a gross miscarriage of justice.

Reinstatement as a Final Order

- Review of the reinstatement decision is essentially the same as review of a final order of removal.
- The provisions of INA Section 242(b)(4) define the scope of review.

INA Section 242(b)(4)

(4) Scope and standard for review. – Except as provided by paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 208(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

Anderson v. Napolitano

When the administrative record shows that the DHS officer made a determination based on the evidence before them, the Court is “bound to hold this finding conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. While nothing in the administrative record supports the Department's finding, nothing introduced before the Department or on appeal contradicts it either. Without some affirmative evidence undermining this finding, our hands are tied.” *Anderson v. Napolitano*, 611 F.3d 275 at 279 (5th. Cir. 2010).

RECENT CASE LAW

Ramirez-Mejia v. Lynch

Ramirez-Mejia v. Lynch (5th Cir., 2015)

- The Court found that an alien subject to reinstatement cannot apply for asylum.
- Being paroled into the US to attend her “withholding only” removal proceedings did not render Ramirez-Mejia eligible for asylum.
- The Court found that all relief is barred under the statute and there is no exception for asylum.
- The Court also affirmed the denial of CAT relief.