NATIONAL IMMIGRATION PROJECT

Lawyers for the Movement

Challenges of Return After Deportation

I. Introduction[1]

Permanent exile from one's home and loved ones has historically been considered one of the harshest penalties a person can endure.[2] Deportation should not always be the equivalent of permanent banishment. But in practice, individuals removed (deported) from the United States face enormous legal and practical barriers to being able to return and rejoin their families and communities.[3] These barriers convert deportation into a prolonged, if not lifetime, exile from the United States.

This report provides an overview of the significant—often impossible—hurdles faced by deported individuals who seek return under the current legal regime.[4]

II. Background on the Problem

Since 2003, the United States government has deported more than 6 million people.[5] While some of these cases involve recently arrived individuals at or near the border, many of these deportations are of long-term residents[6] of the United States, who have built families and communities in the country.[7] Long-term residents are often subject to deportation as a result of criminal legal system contact: an

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[1] This report was authored by Megan Hauptman, Bernstein Fellow at the National Immigration Project (NIPNLG) (October 2023). Many thanks to Michelle Méndez and Ann Garcia at NIPNLG and Heidi Altman and Nayna Gupta at the National Immigrant Justice Center (NIJC) for their thoughtful edits and suggestions.

[2] *See Fong Yue Ting v. United* States, 149 U.S. 698, 730 (1892) (Fields, J., dissenting) ("As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted."); *Bridges v. Wixton*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss of all that makes life worth living.").

[3] Contemporary U.S. immigration law uses the term "removal" to refer to the act of forcible deportation pursuant to an order of removal. For purposes of this report, the author will primarily use the term "deportation" to refer to this act and its consequences.

[4] The descriptions of practical hurdles throughout this report are based on case evaluations and interviews with deported individuals and reports from immigration attorneys and advocates.

[5] Department of Homeland Security, Table 39, 2021 Yearbook of Immigration Statistics, available at (DHS conducted 6,006,405 removals from 2003-2021).

[6] For purposes of this report, long-term residents are defined as individuals who have settled in the United States and built lives and families with the plan of remaining in the United States. This definition encompasses individuals who hold lawful permanent resident (LPR) status as well as individuals who are undocumented or have a less durable form of immigration status, such as Deferred Action for Childhood Arrivals (DACA).

[7] Based on historical data collected and analyzed by Transactional Records Access Clearinghouse (TRAC), interior removals on average historically made up slightly more than half of the overall number of removals (compared to border removals—defined as cases where CBP made the original arrest). *See* TRAC, Historical Data: Immigration and Customs Enforcement Removals.

arrest or conviction leads to an alert to Immigration and Customs Enforcement (ICE), which leads to ICE placing the individual in removal proceedings.[8]

The severity of the U.S. immigration system and its increasing entanglement with the criminal legal system over the past three decades means that many long-term residents with criminal convictions are left with no avenue to fight deportation, despite decades of residency, family ties, and other humanitarian concerns. This results in deportations that are patently unjust and disproportionate to the underlying transgression—separating families, breaking up communities, and at times resulting in the deportation of individuals to places where they fear imminent harm. And an overburdened immigration system with limited judicial review of removal orders also leads to deportations that are legally wrongful—including cases where individuals were not in fact removable as charged or were erroneously denied opportunities to apply for relief.[9]

Despite its punitive effects, deportation has long been classified as a civil penalty, not criminal punishment—a classification that affects what rights attach in removal proceedings and what remedies are available to challenge a deportation.[10] In practice, deportation—exile away from home and community—is experienced as a severe punishment. Individuals ordered removed based on a criminal conviction generally cannot be deported until they have completed their sentence of incarceration, meaning that deportation functions, in practice, as a double punishment for an individual who has already served their time in prison.[11] And long-term residents deported based on a civil immigration violation alone experience immigration detention and deportation as punishment, while being afforded none of the procedural or substantive protections that accompany criminal charges.

After deportation, individuals are stranded with few avenues to ever return to the United States. There are significant limitations on individuals' ability to appeal or challenge a wrongful or unjust removal order after deportation. ICE prosecutors can exercise their prosecutorial discretion to assist individuals unjustly or wrongfully removed to overcome stringent procedural bars—but in practice, ICE prosecutors are reluctant to exercise discretion or employ this discretion inconsistently.

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[8] In FY 2020, 92% of the individuals removed by ICE had criminal convictions or pending criminal charges. *See* U.S. Immigration and Customs Enforcement, Fiscal Year 2020 Enforcement and Removal Operations Report at 4.

[9] *See* NIJC, Chance to Come Home Campaign (2023); Chance to Come Home White Paper (2021) (highlighting cases of individuals unjustly or wrongfully deported).

[10] *See Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *see also* Peter Markowitz, *Deportation is Different*, 13 J. Const. Law. 1299 1308-1325 (2011).

[11] 8 U.S.C. § 1231(a)(4)(A).

The few individuals who successfully appeal or reopen their removal orders have no guaranteed right to return to the United States. Rather, individuals who prevail on an appeal or motion to reopen then face a new challenge in physically returning to the United States, as the existing ICE policy and process for seeking return is confusing, inconsistent, and inadequate in its coverage.

And individuals who are not able to return through an appeal or reopening of their original removal order but rather seek to return with a new immigrant visa face a complex morass of inadmissibility grounds, including punitive reentry bars, and must contend with inconsistent and unreviewable consular adjudications.

III. Legal Landscape

The current harsh and inflexible deportation system (and its corresponding limitations on return) can in large part be traced to a pair of laws passed in 1996: the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) (hereinafter "the 1996 laws"). This report addresses only a limited set of provisions and effects of the 1996 laws.

The 1996 laws were the capstone of a decade of increasingly harsh immigration legislation, in which Congress expanded the criminal grounds that could lead to deportation,[12] removed mechanisms meant to protect long-term residents from deportation, and stripped immigration judges of their discretion to waive deportation based on a noncitizen's ties and equities.[13] The 1996 laws also lengthened and added additional reentry bars, which are discussed in Sections V.B.-C.

In the wake of the 1996 laws, lawful permanent residents (LPRs) who are convicted of a large swathe of crimes are subjected to removal proceedings and automatic detention, and are often left with no options to challenge their deportation on the basis of hardship—no matter how many years they

[12] *See* Walter Ewing, Daniel Martínez, Rubén Rumbaut, *The Criminalization of Immigration in the United States*, AM. IMM. COUNCIL 13-14 (Jul. 2015); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime & Sovereign Power*, 56 AM. U. L. REV. 367, 384 (2006). Notably, in the 1988 Anti-Drug Abuse Act, Congress first added a new category of crimes for which noncitizens could be subject deportation: "aggravated felonies." Stumpf, *Crimmigration Crisis,* at 383. Subsequent legislation expanded the definition of what crimes can be considered aggravated felonies and added additional criminal grounds of removal. *Id.* In 1996, with AEDPA, Congress made a single criminal conviction of "moral turpitude" a deportable offense and IIRIRA shortened the sentence for an offense to be considered an "aggravated felony" to one year. *Id.* at 383-84.

[13] *See* Alison Parker, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy,* Human Rights Watch, 13-14, 25-30 (2007).

have lived in the United States or the strength of their family and community ties.[14] The 1996 laws also limited access to an important form of relief for long-term residents without lawful permanent resident status but with strong equities and family ties to the United States.[15] In the post-1996 landscape, it is much easier for the government to establish a basis for deportation of long-term residents and much more difficult—if not impossible—for individuals to challenge their deportation.

These laws also added to the highly complex nature of immigration adjudications—adjudications that individuals face with no right to court-appointed counsel if they cannot afford an attorney. Noncitizens are often left to confront an opaque and complex mazelike system alone, placing them at a significant disadvantage in identifying narrow potential opportunities for relief from deportation where they exist.

IV. Judicial & Administrative Review of Removal Orders After Deportation

A. Judicial Review After Deportation

One of the goals of the 1996 laws was to encourage speedier deportations and prevent dilatory tactics to prolong appeals and avoid deportation.[16] Prior to 1996, a noncitizen seeking judicial review of a final removal order affirmed by the Board of Immigration Appeals (BIA) could file a petition for review (PFR) with the applicable Court of Appeals and would receive an automatic stay of removal while the PFR was pending.[17] This automatic stay provision meant that noncitizens were able to remain in the country until their PFR had been adjudicated.[18] But this automatic stay provision was accompanied by a departure bar on judicial review – the federal courts of appeals could not review a removal order of an individual once they physically deported the country.[19]

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[14] LRPs with a conviction for a so-called "aggravated felony"—a term that encompasses an exceedingly wide range of offenses, including some misdemeanor convictions—are removable and ineligible for almost all forms of relief, including LPR cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3).

[15] IIRIRA changed the non-LPR cancellation standard from extreme hardship to individual to exceptional & extremely unusual hardship to a USC relative, limiting the ability of non-LPRs to seek relief from deportation because of hardship. 8 U.S.C. § 1229b(b)(1)(D).

[16] *See* Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality & the Significance of Departure*, 33 U. Haw. L. R. 139, 171 (2011).

[17] *Id.*

[18] *Id.* In a precursor to the 1996 laws, Congress removed the automatic stay protection for those with aggravated felony convictions in 1996. *See* Immigration Act of 1990 § 513(a), Pub. L. No. 101-649, 101 Stat. 4978.

[19] Rosenbloom, *Remedies,* at 169-70 (this departure bar was in place from 1961 to 1996).

IIRIRA inverted this statutory scheme by lifting the judicial departure bar and removing the automatic stay provision while a PFR was pending. After 1996, individuals could be deported while their PFR was pending, but they were statutorily entitled to continued judicial review even after deportation.[20] Further, IIRIRA encouraged speedy deportations by mandating that the government effectuate removals within 90 days of a final removal order.[21]

Under the post-1996 scheme, individuals theoretically maintain the right to continue litigating a pending PFR even after deportation. In practice, the guarantee of post-departure PFR adjudication can serve as an empty promise. First, in cases where an individual is seeking a fear-based form of protection, the deportation pending judicial review subjects them to the feared harms that serve as the basis for their appeal—which may include torture or death. Second, deportation can result in individuals being sent to places in which they have no connections, home, or means of supporting themselves, which means many individuals may struggle to maintain regular contact with a lawyer (if they have one) or otherwise stay appraised of developments in their appeal—which may result in a missed deadline and the dismissal of the appeal. Finally, where the appeal is remanded for further fact-finding, it can be extremely difficult to gather and develop the evidence needed to prevail on remand from abroad.

1. Individuals Who Prevail on a PFR Often Struggle to Return to the United States

Even in the small number of cases where individuals prevail on a PFR after deportation, many of these individuals are unable to return and are stranded abroad after winning their appeal. This difficulty is due to ICE's inadequate return policy, which has significant gaps in coverage and issues in implementation.

For those who prevail on a PFR, they must submit a request to ICE Enforcement and Removal Operations (ERO) for assistance in facilitating their return.[22] ICE's limited return policy—ICE Directive 11061.1—reflects a long history of government intransigence on the issue of returning deporting individuals.

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[20] *Nken v. Holder*, 556 U.S.418, 424 (2009).

[21] INA § 241 (a)(a)(A), 8 U.S.C. § 1231(a)(1)(A)(2006). This provision was added by IIRIRA section 305(a)(3).

[22] ICE, FAQ: Facilitating Return for Lawfully Removed Aliens, https://www.ice.gov/remove/facilitating-return (last updated Jan. 17, 2023).

In 2009, the Solicitor General misrepresented to the Supreme Court in *Nken v. Holder* that ICE had an effective policy in place to return noncitizens who prevailed on PFRs to the United States.[23] The Court relied on this representation in finding that there was no categorical irreparable harm to deporting an individual while their PFR was pending—because that person could be afforded effective relief by the facilitation of their return.[24] In fact, ICE had no return policy in place at the time it made this representation to the Supreme Court, a fact that was revealed only after extensive FOIA litigation.[25]

In 2012, following this FOIA litigation, ICE issued Directive 11061.1 (the "Return Directive"), which provides that ICE will facilitate the return of individuals who prevail on PFRs where the (a) noncitizen is restored to LPR status by the PFR decision; or (b) if the noncitizen's presence is deemed "necessary" for continued administrative removal proceedings.[26] Unfortunately, in adjudicating requests for return from people who are not restored to LPR status, ICE ERO often unreasonably finds that an individual's presence is not "necessary" in their reopened removal proceedings, even where the individual's testimony is central to their claim to relief, where the individual cannot access or develop necessary evidence from abroad, and/or where the individual cannot easily participate in a virtual hearing.[27]

B. Motions to Reopen and Reconsider

For individuals deported without a PFR—or whose PFR is denied—there remains a limited legal recourse to challenge the basis for their removal: a motion to reopen or reconsider. The Immigration

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[23] *Nken v. Holder*, 556 U.S. 418, 435 (2009).

[24] *Id.*

[25] Michael R. Dreeben, Deputy Solicitor General, Letter to William Suter, Clerk at 4 (Apr. 24, 2012) (acknowledging misrepresentations were made about the existence of a return policy in the *Nken* litigation); NYU Immigrant Rights Clinic, *Victory Denied: After Winning on Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad* 19 Bender's Immigration Bulletin 1061, 1065-66 (2014).

[26] ICE Directive 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (Feb. 24, 2012). The ICE Return Directive also provides that, if, after the case is remanded to the Executive Office for Immigration Review (EOIR), EOIR or DHS grant relief to the noncitizen "allowing him or her to reside in the United States lawfully," ICE will at that point facilitate the noncitizen's return to the United States. *Id.* This requires individuals to participate in and prevail on removal proceedings from abroad, which presents various difficulties described in Sections IV.A and IV.B.4.

[27] For an additional discussion of the issues with the return policy and its implementation for those who prevail on PFRs, see generally NYU Immigrant Rights Clinic, *Victory Denied: After Winning on Appeal, An Inadequate Return Policy Leaves Immigrants Stranded Abroad, infra* n. 24. In the almost ten years since this report documenting flaws and oversights in the return policy was published, advocates continued to recount similarly frustrating experiences seeking return for deported clients after successful PFRs.

and Nationality Act (INA) guarantees noncitizens ordered removed the statutory right to file a motion to reopen or reconsider their removal proceedings.[28] These post-final-order motions are important safeguards that allow individuals to challenge egregious legal errors and raise claims of ineffective assistance of counsel that led to their unlawful removal.[29] These motions also allow a deported individuals to seek reopening where post-removal changes in law or circumstances invalidate the basis for their removal order or render them newly eligible for relief.[30] Despite the INA's guarantee of the right to file a motion to reopen or reconsider—even after removal—deported individuals face significant procedural barriers to prevailing on and benefitting from such motions.

There are two types of motions to reopen or reconsider: statutory and regulatory. Statutory motions are motions authorized by the INA itself and are subject to time and number limitations, which will be discussed in the next section.[31] In addition to statutory reopening, immigration judges and the BIA maintain a regulatory *sua sponte* reopening power, in which the adjudicator can exercise its power to reopen proceedings "at any time."[32] However, *sua sponte* reopening is only available in "exceptional situations," adjudicators have significant discretion to deny such motions, and judicial review of denials is limited.[33] In the context of deported individuals, access to *sua sponte* reopening is further restricted by the application of the post-departure bar, which is discussed *infra* in Section IV.B.2.

1. Time & Number Limitations

The INA imposes a short statutory filing deadline for motions to reopen and reconsider. Generally, individuals are limited to one motion to reconsider, to be filed within 30 days of the entry of the removal order, and one motion to reopen, to be filed within 90 days of the removal order.[34] There are

[28] This right was codified in the Immigration and Nationality Act (INA) with the enactment of IIRIRA in 1996. *See* 8 U.S.C. 1229a(c)(7).

[29] *See Kucana v. Holder,* 558 U.S. 233, 242 (2010) (internal citations omitted) ("A motion to reopen is an 'important safeguard' intended to ensure a proper and lawful disposition of immigration proceedings.")

[30] For instance, a motion to reopen or reconsider provides a vehicle to challenge a removal order where a later Supreme Court or circuit court decision holds that the conviction that led to removal is not in fact deportable offense, or does not bar a noncitizen from certain forms of relief. A motion to reopen also allow for challenges to removal orders where an individual secures post-conviction relief and vacates the conviction that was the basis for the removal order.

[31] *See also* NIPNLG, Practice Advisory: Post-Departure Motions to Reopen and Reconsider at 6-7 (Sept. 2023).

[32] *See* 8 C.F.R. §§ 1003.2(a) (BIA); 1003.23(b)(1) (immigration court).

[33] NIPNLG, Practice Advisory: Post-Departure Motions to Reopen and Reconsider at 8-9.

[34] 8 U.S.C. § 1229(c)(6); (c)(7).

various statutory exceptions to these limitations, including in the case of changed country conditions and where an order was issued *in absentia*.[35]

Deported individuals often do not become of the defect in their removal proceedings, or any relevant changes in law or circumstances, until long after their removal order is final. As a result, most individuals filing a post-deportation motion to reopen or reconsider will not fall within the applicable filing deadline, and some may have previously filed a motion to reopen or reconsider on a different basis. Filing a successive motion or filing outside the statutory deadline can result in denial of the motion without consideration on the merits.

To avoid summary dismissal based on filing outside the statutory time or number limitations, an individual can show they are entitled to equitable tolling of the time or number limitations. Equitable tolling requires an individual to establish that they (a) diligently pursued their rights and (b) some extraordinary circumstance prevented timely filing.[36] Many courts are not generous with their interpretation of what circumstances merit equitable tolling, resulting in procedural dismissals of motions that are otherwise meritorious and compelling.[37] Alternatively, an individual filing outside the statutory period can pursue *sua sponte* reopening, but, in many circuits, *sua sponte* reopening is still barred by the post-departure bar.

2. The Post-Departure Bar

For many years, individuals who had already been deported were prevented from filing motions to reopen because of the so-called "post-departure bar" regulation. The post-departure bar refers to two federal regulations that purport to strip immigration judges and the BIA of jurisdiction to adjudicate motions to reopen filed by individuals who have been removed or voluntarily departed the country after a removal order was issued.[38] Immigration judges and the BIA invoked this regulatory bar to deny deported noncitizens' motions to reopen without any consideration of the merits of the motion.

However, since 2011, federal courts have consistently invalidated the post-departure in the context of statutory motions to reopen as contrary to congressional intent in codifying the right to a motion

[35] NIPNLG, Practice Advisory: Post-Departure Motions to Reopen and Reconsider at 6-7.

[36] *See, e.g., Holland v. Florida,* 560 U.S. 631, 649 (2010); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 345 (5th Cir. 2016).

[37] *See, e.g., Gonzalez Hernandez v. Garland*, 9 F.4th 278 (5th Cir. 2021); *Lawrence v. Lynch,* 826 F.3d 198 (4th Cir. 2016).

[38] *See* 8 C.F.R. §§ 1003.2(c) (BIA); 1003.23(b)(1) (immigration court). For additional discussion of the history of the post-departure bar, see NIPNLG, Practice Advisory: Post-Departure Motions to Reopen and Reconsider at 10-11.

to reopen without geographic limitation.[39] Only one circuit—the Eighth Circuit—has not invalidated the post-departure bar for statutory motions.[40]

However, the BIA and federal courts have generally upheld the post-departure bar in the context of *sua sponte* reopening.[41] As discussed in Section IV.B, *supra, sua sponte* reopening allows agency adjudicators to reopen cases without adhering to the timing or numerical strictures required for a statutory motion to reopen. Thus, deported individuals who are filing untimely motions to reopen cannot rely on the immigration judge or BIA to exercise their *sua sponte* authority to reopen, even where truly exceptional situations are present.

More recently, federal courts have begun to strike down the post-departure bar even in the context of *sua sponte* reopening, holding that the regulation is not ambiguous and the post-departure bar does not limit *sua sponte* reopening.[42] However, at the time of the writing of this report, only two federal circuits (Ninth and Tenth) have invalidated the post-departure bar in the context of *sua sponte* reopening, leaving deported individuals in other circuits without this option.[43]

3. Joint Motions to Reopen

There is another option for noncitizens to pursue untimely but meritorious motions to reopen or reconsider: filing a joint motion in conjunction with ICE prosecutors. A motion to reopen agreed to and jointly filed by all parties is not subject to the time and numerical limitations,[44] and immigration judges and the BIA generally grant joint motions.[45] Filing a joint motion thus allows individuals to avoid procedural bars and facilitates the granting of reopening on the merits, making joint motions a powerful and important tool for securing relief for wrongfully or unjustly deported individuals.

In practice, advocates report varied experiences with seeking joint motions to reopen for deported individuals. The availability of a joint motion to reopen depends upon the current presidential administration's prosecutorial discretion policy and the local ICE Office of the Principal Legal Advisor

[39] For a discussion of the caselaw invaliding the post-departure bar, see NIPNLG, Post-Departure Motions to Reopen and Reconsider at 10-27.

[40] *Id.* at 12.

[41] *Id.* at 24-27.

[42] *Id.* at 13-14.

[43] *Id.*

[44] 8 CFR § 1003.23(b)(4)(iv) (IJ); 8 CFR § 1003.2(c)(3)(iii) (BIA).

[45] *See Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (stating that the parties' "agreement on an issue or proper course of action should, in most instances, be determinative").

(OPLA)'s office's willingness to exercise prosecutorial discretion. Some advocates have had success with these requests and have then been able to easily reopen their client's cases to obtain relief. However, in many cases, these requests will sit with local ICE OPLA offices for months with no response. ICE OPLA's denials of such requests are often cursory, with little to no reasoning offered. And advocates report a few instances in which ICE OPLA offices have invoked the post-departure bar as preventing to ICE joining the motion to reopen—a conclusion that is not supported by the text of the regulation, caselaw, or past ICE OPLA practice. Unfortunately, there is no centralized or clear process to seek review of a denial of a request for a joint motion to reopen.

4. Obtaining Relief After a Motion to Reopen

Even the deported individuals that overcome all the above hurdles to prevail on a motion to reopen are often not able to pursue and obtain the immigration relief for which they are presumptively eligible. To prevail on the merits of a motion to reopen, an individual must provide material evidence that was not available and could not have been discovered or presented at their prior hearing.[46] In most cases, an individual must also demonstrate *prima facie* eligibility for the relief sought.[47] Immigration judges and the BIA generally only grant motions to reopen where the movant has demonstrated a reasonable likelihood of success on the underlying application for relief.[48] These are difficult standards to meet—if an immigration judge or the BIA grants a motion to reopen, it generally indicates that the individual has made a strong case that they are not removable or are eligible for a form of relief from removal.

But the granting of a motion to reopen is only the beginning of an individual's legal odyssey. Once removal proceedings have been reopened, the individual must litigate their eligibility for whatever relief they seek—which requires them to participate in the reopened removal proceedings.[49] Generally, individuals seek to return to the United States to participate in their reopened proceedings so that they can access evidence in support of their application for relief, prepare for proceedings with their attorney, and benefit from the support of their family and community.

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[46] *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

[47] *Id.*

[48] *Matter of L-O-G-*, 21 I&N Dec. 413, 420 (BIA 1996); *see also Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1182-83 (9th Cir. 2023).

[49] In a limited set of cases, individuals previously in LPR status can move to reopen and terminate proceedings on the basis that are not removable—which restores these individuals to LPR status and removes the need for continued removal proceedings. Even individuals in this position have sometimes struggled to physically return to the United States because of ICE's lack of return policy, as described in the following section.

a) ICE Has No Return Policy for Individuals Who Prevail on Motions to Reopen

Obtaining physical return to participate in reopened removal proceedings is easier said than done. ICE does not currently have any policy in place to facilitate the return individuals who prevail on a motion to reopen. The ICE Return Directive purports to provide for the return of individuals who prevail on a PFR only.[50] The directive does not contemplate the facilitation of return for any individuals who prevail on a motion to reopen before the immigration court or BIA. This distinction is illogical and arbitrary, and wholly fails to account for the fact that individuals have a statutory right to file a motion to reopen from outside the country.

In cases where a movant was previously in LPR status, an order reopening proceedings restores the individual to the LPR status they held previously, and should allow that individual to return to the U.S. as an LPR while proceedings are pending.[51] However, in practice, many individuals in this posture do not have a valid LPR card in their possession and have struggled to obtain proof of restored status or travel documents to allow them to board a plane and/or enter the country.[52]

In many cases, ICE ERO has denied requests to facilitate return of individuals who prevail on reopening under the Return Directive, on the basis that the return directive does not cover any individuals who prevail on motions to reopen.[53] In rejecting these requests, ICE ERO has disclaimed any responsibility for ensuring the return of any individuals who prevail on a motion to reopen. ICE has not released any policy to assist individuals in returning after motions to reopen, nor have ICE offices communicated to advocates whether there is any alternative process for these individuals to otherwise seek return.

Advocates have been left to experiment and muddle through this process, rather than being able to rely on the agency for a clear and consistent policy. In a few cases, individuals who have prevailed

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[50] ICE Directive 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens (Feb. 24, 2012).

[51] *See* 8 C.F.R. § 1001.1(p) (LPR status terminates only upon entry of a final administrative order of removal); *Hernandez de Anderson v. Gonzales,* 497 F.3d 927 (9th Cir. 2007) ("Even where there are grounds to seek deportation or removal, a lawful permanent resident is lawfully present in the United States until a final deportation or removal order is entered.").

[52] Further, individuals who have successfully reopened their removal orders but who still have underlying convictions may face additional barriers to re-entering the country based on bars to admissibility.

[53] ICE's behavior and representations across these cases is not consistent. In a handful of cases reported by advocates, ICE facilitated the return of individuals who have prevailed on motions to reopen under the Return Directive, implicitly acknowledging that the Return Directive may properly be invoked by individuals after a motion to reopen. Often, ICE agrees to facilitate return only after significant advocacy efforts and, in some cases, federal court litigation.

on motions to reopen have later affirmatively applied for and been granted humanitarian parole, either through ICE or Customs and Border Protection (CBP), allowing these individuals to return for their reopened removal proceedings.[54] In other cases, ICE or CBP has rejected or never adjudicated applications for humanitarian parole for individuals who have prevailed on motions to reopen.

ICE's unwillingness to return individuals after successful motions to reopen—and instead requiring individuals to participate in removal proceedings from abroad—severely prejudices these individuals, places them at a significant disadvantage, and affects the outcome of these cases. ICE's recalcitrance prevents individuals from participating fully in their reopened removal proceeding by limiting their ability to meet and communicate with legal counsel, gather evidence, appear in court, and present in-person testimony. Additionally, many deported individuals actively face persecution in their country of removal, struggle with poverty and access to resources, and are separated from their family support system—all factors that impact their ability to participate in their case, as well as their general safety and well-being. Finally, certain types of immigration relief available in reopened proceedings *require* that the application be physically present in the United States to apply and/or be granted such relief.[55] In these cases, ICE's unwillingness to facilitate return actively prevents individuals from applying for and being granted relief for which they are otherwise eligible.

b) ICE Prosecutors Abuse Prosecutorial Discretion to Obtain Dismissal of Removal Proceedings After Reopening

In some cases, ICE prosecutors have added an additional complication to this process by filing unilateral motions to dismiss the reopened removal proceedings based on their prosecutorial discretion—with the reason for dismissal being that the individual is not physically present in the United States to participate in said proceedings. In these cases, the reason the individual is still outside the country is ICE ERO's unwillingness to facilitate return under the current policy. Where the immigration judge grants dismissal—often without a full understanding of how ICE itself has prevented the individual from returning to participate in proceedings—said individual is prevented

[54] This includes both individuals who have applied for humanitarian parole through ICE, as well as individuals who have physically presented at the land border and requested parole through Customs and Border Protection (CBP). Both ICE and CBP have broad discretionary authority to parole individuals into the country for "urgent humanitarian reasons or significant public benefit," including individuals that may be otherwise barred from entering because of prior removal orders or other bars to admissibility. *See* INA § 212(d)(5)(A).

[55] For instance, asylum requires that a noncitizen be "physically present in the United States" or at a port of entry to apply. 8 U.S.C. § 1158(a). Similarly, adjustment of status—which is also available in removal proceedings—requires physical presence in the United States. *See* 8 C.F.R. § 245.1(a).

from pursuing any forms of relief that are only available while in removal proceedings, including cancellation of removal.[56] Additionally, the dismissal of removal proceedings complicates individuals' ability to seek return under ICE's Return Directive, as return under the directive—to the extent the directive is even applied to those who prevail on a motion to reopen—is predicated on a necessity to participate in continued removal proceedings. By simultaneously refusing to return individuals and seeking unilateral dismissal, ICE impedes individuals who have won reopening—not an easy feat—from being able to benefit from their motion to reopen and prevent individuals from accessing immigration relief for which they are otherwise eligible.

V. The Visa System and Bars to Family Reunification

The prior sections discuss the potential avenues to return—and challenges faced—for individuals who can identify and assert a legal error or injustice in their underlying removal orders. However, many deported individuals do not have strong arguments under current law for challenging their underlying removal order and instead may wait for many years and seek to return through a new visa. In some cases, individuals who prevail on motions to reopen may be prevented from physically returning to the United States by ICE's limited return policy and may be forced to seek a new visa even where they have successfully challenged their initial removal order.

Many individuals who are deported believe that they can and will be able to apply to return to the United States after a prescribed period has passed. This understanding is a reasonable one, given that federal immigration law prescribes a certain number of years after which a person is ostensibly permitted to apply to return to the United States post-deportation.[57] People often form life plans around the perceived ability to apply to return at a future point in time. This is, unfortunately, not always an option, even where an individual has a family member to sponsor them for a new immigrant visa (green card). There are several common and overlapping reasons why deported individuals cannot easily reapply to return to the United States based on a valid immigrant petition by a family member. [58]

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[56] *See* 8 C.F.R. § 1240.20 (cancellation of removal only available in removal proceedings).

[57] *See* 8 U.S.C. § 1182(a)(9)(A).

[58] Alternatively, individuals can seek an immigrant visa through sponsorship by an employer or through the diversity visa process. *See* 8 U.S.C. § 1153(b); (c). In some cases, individuals who have been the victim of a crime or domestic abuse in the United States may be eligible to pursue specific visas to return to the United States. *See* 8 U.S.C. § 1101(a)(15)(U) (providing for visas for victims of certain crimes who assisted law enforcement) (U visa); 8 U.S.C. § 1154 (certain family members of abusive U.S. citizens and LPRs may self-petition for an immigrant visa) (VAWA self-petition). The specific processes and requirements to apply for these types of visas are outside the scope of this report. Generally, the admissibility bars discussed in the following section also apply to individuals seeking return through these visa processes, though there are

Incomplete Information

If an individual is ordered removed, ICE is supposed to provide the individual with a "Warning to Alien Ordered Removed or Deported" (I-294), which informs an individual that they are barred from returning to the United States for 5, 10, or 20 years—or for their entire lifetime. This is often the only information about return after deportation that individuals receive. As a result, individuals use this warning to plan for when they can apply to return and rejoin family. But the I-294 only accounts for one set of potential bars to return (the removal order related bars at 8 U.S.C. § 1182(a)(9)(A)), leading individuals to mistakenly believe that if they simply wait out the listed ineligibility period, they will then be eligible to reapply for admission. It is only when individuals go through a consular interview for a new immigrant visa that they learn that they are barred from returning on other grounds—for instance, because of the conviction that led to their deportation.

A. Visa availability

First, an individual must have a qualifying family member to sponsor them for a new visa: a U.S. citizen or LPR spouse or parent, U.S. citizen child over 21, or a U.S. citizen sibling. For some people, this is the end of the road—they don't have a family member with the appropriate status to sponsor them, and thus are not able to pursue a new visa. And if an individual does not have a U.S. citizen spouse or U.S. citizen child over the age of 21, the wait time to receive a new green card through another family member can stretch for more than a decade.

This is only the first of many hurdles. Formerly deported individuals who have a family member who can sponsor them for a visa must then confront a complex web of inadmissibility bars that may render them ineligible to ever return to the United States. The following sections discuss some of the bars that frequently prevent deported individuals from obtaining a new immigrant visa, though there are additional grounds on which a consular official can make a finding of inadmissibility and deny an individual's application.

B. Reentry bars

A removal order strips an individual of any previously held lawful status and mandates physical removal. An executed removal order also imposes a reentry bar—a bar on lawful return to the United

special exceptions and waivers of inadmissibility available for deported individuals who qualify for a U visa or VAWA self-petition. *See* National Immigration Women's Advocacy Project (NIWAP) et al, Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases (Dec. 26, 2022).

States for a period of years. Most often, the reentry bar is for 10 years, though individuals with certain criminal convictions or repeat unauthorized entry into the United States face a lifetime reentry bar. These reentry bars serve as an enduring penalty attendant to deportation and a significant barrier to individuals returning to the United States after deportation.[59]

5 years (but can request a waiver)	**10 years** (but can request a waiver)	**20 years** (but can request a waiver)	**Permanently ineligible** (but can request a waiver)	**Permanently ineligible** (but can request a waiver after 10 years outside the U.S.)
Individual was put into expedited removal proceedings at the border, near the border, or at a seaport or airport; OR Individual was a lawful permanent resident with a criminal conviction, and they were put in removal proceedings when they returned from a trip abroad.	Individual was ordered removed by an Immigration Judge and were deported OR left the country after removal order was issued.	Individual has been removed from the U.S. more than once.	Individual was ordered removed from the U.S. because they were convicted of an aggravated felony (but they can request a waiver).	Individual was deported and then reentered or tried to reenter the U.S. without permission; OR Individual reentered or tried to reenter the U. S. after previously having been in the U.S. unlawfully for a total of more than one year (unlawful presence bar).

Deported individuals who wish to try to return to the United States but are still subject to one of the above reentry bars can apply for "consent to reapply"—essentially a type of waiver that allows

[59] A form of reentry bar has existed in U.S. immigration law since 1917, when Congress first imposed a one-year, waivable reentry bar on individuals deported under the Immigration Act. *See* Michael Wishnie, *Immigration Law & the Proportionality Requirement*, UC IRVINE L. REV 415, 431 (2011). Over the past century, Congress has amended and expanded these reentry bars. *Id.* at 431-32. Most recently, with IIRIRA, Congress expanded the default reentry bar from five years to ten years after deportation, added a twenty-year bar for repeat removals, and expanded the reentry bar for those convicted of aggravated felonies from 20 years to a lifetime bar. *Id.* at 432-33. *Compare* 8 U.S.C. § 1182(a)(9)(ii) (1996) *with* 8 U.S.C. § 1182(a)(6)(A) (1994). IIRIRA also added bars to reentry based on prior unlawful presence, which are discussed in the following section. *Id.* at 433-434.

individuals to avoid being subject to an inadmissibility ground based on a prior removal order. In certain cases (column 5 above), an individual must first spend 10 years outside the country before they can file an application for consent to reapply. The decision to grant "consent to reapply" lies entirely in the discretion of United States Citizenship and Immigration Services (USCIS).[60]

C. Unlawful Presence & Immigration Offense Bars

In addition to the reentry bars based on a prior removal order, individuals who leave the United States after a period of unlawful presence are subject to a separate bar to return of 3 years or 10 years.[61] These bars are triggered by the individual leaving the United States after the period of lawful presence—not the removal order itself—and function independently from the above-described reentry bars. To return prior to the lapse of the unlawful presence bar, an individual must apply for a waiver and demonstrate extreme hardship to a U.S. citizen or LPR spouse or parent—a difficult standard to meet.[62]

Additionally, individuals who have lived in the United States previously may trigger other inadmissibility bars based on immigration offenses. Any individual who was previously in removal proceedings and failed to attend a hearing is barred from obtaining a new immigrant visa for five years.[63] Anyone who has ever made a material misrepresentation to authorities to procure an immigration benefit is presumptively barred from ever receiving a new visa.[64] And anyone who has ever made a false claim to U.S. citizenship to obtain a government benefit is permanently barred from ever returning to the United States on an immigrant visa—with no possibility for waiver.[65]

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[60] The available data indicates that USCIS is significantly more likely to grant consent to reapply where an individual does not have a prior aggravated felony conviction or multiple prior removals. *See* U.S. Department of State, Table XIX, Immigrant and Nonimmigrant Visa Ineligibilities for FY 2022 at 2.

[61] 8 U.S.C. § 1182(a)(9)(B). There is also a lifetime bar on reentry based on unlawful presence, where an individual was unlawfully present for more than 1 year and subsequently reenters or attempts to reenter the United States. 8 U.S.C. § (a)(9)(C). The lifetime bar on reentry based on unlawful presence and subsequent return is reflected in the chart on the previous page, as the process to overcome that bar (requesting consent to reapply after 10 years) is analogous to the process to overcome the reentry bars based on prior removal orders.

[62] 8 U.S.C. § 1182(a)(9)(B)(v).

[63] 8 U.S.C. § 1182(a)(6)(B).

[64] 8 U.S.C. § 1182(a)(6)(C)(i). A waiver is available for this ground upon a showing of extreme hardship to the individual or qualified family members. 8 U.S.C. § 1182(i).

[65] 8 U.S.C. § 1182(a)(6)(C)(ii).

D. Criminal Bars

Individuals who are deported based on a criminal conviction and seek to reapply for a new immigrant visa to return the United State must also confront criminal bars to inadmissibility that can separately render them ineligible to return, even if they have served out their reentry and/or unlawful presence bars. If found to be subject to a criminal bar of inadmissibility, an individual must demonstrate that they are eligible for and merit a waiver of the applicable ground of inadmissibility to be able to receive a new visa. To receive a waiver, individuals generally must be able to establish extreme hardship to certain U.S. citizen or LPR family members or wait at least 15 years after the commission of the crime in question to apply for a waiver.[66] And certain former lawful permanent residents subject to criminal bars on return cannot apply for or benefit from this waiver process.[67]

Certain criminal bars to removal cannot be waived under current law and thus serve to enforce a lifetime banishment – even where an individual otherwise qualifies for a new immigrant visa. This is the case where an individual has a **controlled substance conviction—**even for a minor possession offense.[68] There is also a lifetime, nonwaivable bar where a consular official determines that there is **reason to believe** an individual has been involved in illicit trafficking of any controlled substance.[69] This vague ground for inadmissibility has been applied expansively by consular officials to create a permanent bar to return for individuals with any indicia of prior transport or dealing in controlled substances. Consular officials may find an individual permanently inadmissible on this ground based on charged criminal conduct for which the individual was never convicted.

[66] 8 U.S.C. § 1182(h).

[67] Former LPRs are not eligible for waivers of any criminal bars (commonly referred to as 212(h) waivers) if they have either a) been convicted of a crime classified as an aggravated felony after an admission to the U.S. as an LPR or if b) they did not lawfully continuously reside in the United States for 7 years before removal proceedings were initiated. 8 U.S.C. § 1182(h).

[68] 8 U.S.C. §§ 1182(a)(2)(A)(ii); 1182(h) (there is a limited exception for a single offense of simple possession of 30 grams or less of marijuana).

[69] 8 U.S.C. § 1182(a)(2)(C)(i).

The Long Life of a Criminal Conviction

Faced with a criminal bar, some individuals seeking return may seek to have the conviction in question vacated or pardoned. Unfortunately, this route has proved frustrating for many. Under current law, even a full pardon of a criminal conviction does not function to undo convictions for purposes of inadmissibility—so a pardon will not help an individual with a prior conviction become eligible for a new immigrant visa. A vacatur based on prejudicial constitutional error (for instance, failure of defense counsel to advise of immigration consequences) in the underlying criminal proceeding should erase the conviction for purposes of admissibility for a new visa. However, in practice advocates report that at least one consulate has erroneously applied criminal bars of inadmissibility based on vacated convictions.

E. Consular Processing Challenges in Practice

Requiring deported individuals to seek new immigrant visas through consular processing is not a functional or adequate avenue for most individuals to successfully return to the United States. Once a consular official has made an inadmissibility finding, the lack of a direct appeal process and doctrine of consular nonreviewability make it is exceedingly hard to obtain substantive review of the decision, even where the determination that the bar applies is clearly erroneous. For instance, if a consular official applies a nonwaivable criminal bar where the individual's underlying conviction has been vacated, there is no means to directly appeal such a decision, and a collateral lawsuit challenging the denial will likely be denied on the basis that courts lack jurisdiction to review such decisions under the doctrine of consular nonreviewability.[70]

Second, the practical challenges to overcoming inadmissibility bars—especially multiple bars—are significant. Each bar to inadmissibility runs separately from each other, meaning that to successfully obtain a new visa for return, the individual must wait out any time-based bar or demonstrate eligibility for a waiver for *each* waivable ground of inadmissibility.

As an example, imagine a deported individual who lived in the United States without status for decades before being deported based on a low-level shoplifting conviction. This individual would

[70] See *Kerry v. Din*, 576 U.S. 86 (2015) (plurality opinion); *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) ("The [consular reviewability] doctrine holds that a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise."); *Matushkina v. Nielsen*, 877 F.3d 289, 294 (7th Cir. 2017) ("The doctrine bars judicial review of visa decisions made by consular officials abroad.")

have a 10-year reentry bar, a 10-year unlawful presence bar, and a likely a lifetime bar on reentry based on a conviction for a crime involving moral turpitude. To be able to obtain a new immigrant visa through their U.S. citizen spouse or child, this individual would need to wait out the 10-year reentry and unlawful presence bars or apply for and be granted two separate waivers to be able to return earlier (each with a significant filing fee).[71] Even if the individual waited 10 years before applying for a new visa, they would still need to apply for a waiver (and make the required hardship or rehabilitation showing) to overcome their criminal bar to admissibility. These waiver processes are expensive and the granting of a waiver and/or consent to reapply lies entirely in the discretion of USCIS, though limited avenues exist to seek appeal of a negative waiver decision.

VI. Conclusion & Policy Recommendations

Long-term residents of the United States who are deported based on an immigration or criminal violation should be able to challenge unjust or wrongful deportations and should not be *de facto* permanently barred from returning to the United States. But, as detailed in the previous sections, deported individuals who seek to return to the United States through a legal challenge to their removal order or through a new visa face significant and often insurmountable hurdles that in practice prevent most of these individuals from ever returning and reuniting with their families and communities. Immigration authorities must consider the complex, compounding interplay of these barriers in adjudicating requests for discretion in individual cases and in implementing policies to make it easier for individuals who were unjustly or wrongfully deported to return.

Administrative: There are several policies that the Department of Homeland Security (DHS) and Executive Office of Immigration Review (EOIR) could administratively adopt without congressional action:

- **DHS should establish a centralized and independent Office of Removal Order Review (ORROR),** as proposed by the National Immigrant Justice Center in their **Chance to Come Home white paper.** A centralized post-deportation office—in which officers are empowered to positively exercise their discretion to remedy unjust or wrongful deportations—would help mitigate the compounding effect of many of the systemic barriers described in this report.

[71] As of the time of publication of this report, the filing fees for consent to reapply (I-212) and for waivers of inadmissibility (I-601) are each $930.

- **DHS should expand the existing Return Directive to require that ICE facilitate the return of *all* individuals who prevail on either a PFR or a motion to reopen or reconsider after removal.** The current directive is inadequate to secure the return of many individuals who prevail on PFRs, as ICE ERO often exercises its discretion to unreasonably find that an individual's presence is not "necessary" in their reopened removal proceedings. Further, the current directive arbitrarily and unreasonably fails to include provisions for the return of individuals who have prevailed on motions to reopen or reconsider before an immigration judge or the BIA.

- **EOIR should eliminate the regulatory post-departure bar for motions to reopen or reconsider.** Federal courts have overwhelmingly found the regulatory post-departure bar invalid in the context of both statutory motions and have begun to find the bar invalid even in the context of *sua sponte* reopening. Despite this positive trend, the post-departure bar still creates a significant barrier for deported individuals seeking *sua sponte* reopening in many circuits and individuals seeking statutory reopening in the Eighth Circuit. The Executive Office of Immigration Review (EOIR) should implement regulations to eliminate the post-departure bar entirely.[72]

Legislative: Congress should pass the **New Way Forward Act**, which would repeal the harshest aspects of the 1996 immigration laws that established a harmful entanglement between the criminal and immigration legal systems. The New Way Forward Act also establishes a process and exemptions to procedural bars for those unjustly or wrongfully deported under excessively harsh immigration laws to apply for relief and return home.

[72] In 2020, EOIR itself recognized that the post-departure bar regulations may be invalid after IIRIRA and issued a notice of proposed rulemaking to remove the bar from the regulation. *See* EOIR, Notice of Proposed Rulemaking: Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 Fed. Reg. 75942, 75945, 75955 (Nov. 27, 2020).