



Practice Advisory: Reinstatement of Removal and Immigrant Survivors¹ **June 2024**

Immigration practitioners may encounter immigrant survivors who are subject to, or have already experienced, a summary procedure called “reinstatement of removal.” Many practitioners wonder what this means for an immigrant survivor’s eligibility for survivor-based relief such as U and T nonimmigrant status and VAWA Self-Petitions. Sections I through IV of this practice advisory will explore the effects of reinstatement on eligibility for survivor-based relief. Section V will identify intervention points for practitioners representing survivors who are subject to reinstatement or have reinstated removal orders. It will also describe effective advocacy strategies for survivors in various postures of pending or approved petitions for relief.

I. Overview of Reinstatement of Removal

Reinstatement of removal allows noncitizens to be removed from the United States with very little due process. The reinstatement statute is found at INA § 241(a)(5), and the reinstatement regulations are found at 8 C.F.R. § 241.8. The reinstatement statute states that noncitizens who have “reentered the United States illegally” after removal or after departing voluntarily under an order of removal are subject to reinstatement.² A reinstated removal order “is not subject to being reopened or reviewed,” the noncitizen is ineligible for and “may not apply for relief” under the INA, and the noncitizen “shall be removed.”³ In other words, if a person was ordered removed, departed the U.S., and then returned without permission, ICE could decide to reinstate the prior order, leading to removal without an opportunity to apply for relief under the INA.

This practice advisory addresses reinstatement in the context of survivor-based relief. Those seeking more general information on reinstatement may consult a [Practice](#)

¹ Copyright 2024, ASISTA Immigration Assistance. This advisory was authored by Kelly Byrne, Staff Attorney, with input from Senior Staff Attorney Rebecca Eissenova, Legal and Policy Director Cristina Velez, and Staff Attorney Lia Ocasio. We are also grateful for the assistance of Erika Gonzalez and Carson Osberg from the Coalition to Abolish Slavery and Trafficking (“CAST”). This advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client’s case. Content is current as of date of writing. It is your responsibility to ensure content is up to date.

² See INA § 241(a)(5)

³ *Id.*

[Advisory](#) co-authored by the American Immigration Council and the National Immigration Project (hereinafter “AIC/NIPNLG advisory”).⁴

II. Reinstatement and immigrant survivor relief

Given the language of the reinstatement statute, practitioners may be understandably concerned that survivors with reinstatement orders are ineligible for survivor-based relief under the INA. However, the Administrative Appeals Office (“AAO”) held in a 2017 unpublished decision that noncitizens with reinstated removal orders are eligible for U nonimmigrant status.⁵ The AAO reasoned that U petitioners’ eligibility for waiver of the INA § 212(a)(9)(C)(i)(II) “permanent bar” ground of inadmissibility (reentry or attempt without admission after prior removal) demonstrates Congress contemplated that USCIS may grant U nonimmigrant status to noncitizens who entered without permission after removal, but are otherwise eligible for U nonimmigrant status.⁶ Similar logic indicates that T nonimmigrant status should also be available to immigrant survivors with reinstatement orders, since T nonimmigrant applicants are similarly eligible for a waiver of the permanent bar.⁷ OVW LAV, STOP, or ELSI grantees who receive an RFE, NOID, or denial of U or T nonimmigrant status based on reinstatement may contact ASISTA for free technical assistance.

VAWA Self-Petitioners are eligible for VAWA-based adjustment of status if they are *subject to* reinstatement, as long as ICE has not reinstated their removal orders and they are eligible for a waiver of the permanent bar.⁸ Unless the VAWA Self-Petitioner has spent the requisite five, ten, or twenty years outside the U.S. after their order of removal, to adjust they must also “waive” the underlying removal order by filing Form I-212 concurrently with Form I-601.⁹ The I-601 waiver eliminates inadmissibility under the “permanent bar” and the I-212 eliminates inadmissibility based on departure after a prior removal order. There is no bar to relief under the INA because ICE has not reinstated

⁴ See American Immigration Council and National Immigration Project, Practice Advisory, *Reinstatement of Removal* (May 23, 2019), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf. Copyright © American Immigration Council. Reprinted with permission.

⁵ *Matter of A-L-* (AAO Jan. 12, 2017), available at https://www.uscis.gov/sites/default/files/err/D14%20-%20Application%20for%20U%20Nonimmigrant%20Status/Decisions_Issued_in_2017/JAN122017_01D14101.pdf. Accord *Matter of J-R-F-M-* (AAO Aug. 8, 2017) (unpublished), available at https://www.uscis.gov/sites/default/files/err/D14%20-%20Application%20for%20U%20Nonimmigrant%20Status/Decisions_Issued_in_2017/AUG082017_01D14101.pdf.

⁶ See *id.* at *3.

⁷ See INA § 212(d)(3) and (d)(13).

⁸ See, e.g., *Matter of _____*, A 097 XXX XXX (Feb. 4, 2013) (unpublished) available at <https://asistahelp.org/wp-content/uploads/2018/11/AAO-Grants-VAWA-212a9C-and-I212.pdf>; accord Memorandum from Michael Aytes, Acting Deputy Director, USCIS, to USCIS Leadership, “Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement under Section 241(a)(5) of the Immigration and Nationality Act in light of *Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007).

⁹ An approval of Form I-212 grants permission to reapply for admission after a prior removal and is not formally a waiver. However, the permission to reapply for admission functions similarly to a waiver of the INA § 212(a)(9)(A) ground of inadmissibility for departure after a removal order.

the removal order. This Advisory will discuss this process in more detail, and ASISTA strongly encourages practitioners to contact us for technical assistance in these cases.

III. What if the survivor’s subsequent entry was procedurally regular?

The reinstatement statute requires an entry without permission after a noncitizen’s removal or voluntary departure while under a removal order.¹⁰ Therefore, it seems intuitive that a subsequent *procedurally regular* entry – akin to the “wave-through” entry in *Matter of Quilantan*¹¹– should *not* subject the noncitizen to reinstatement. Unfortunately, some circuits have rejected this argument.¹² For example, the US Court of Appeals for the Ninth Circuit held in an *en banc* decision that a procedurally regular entry after removal still allows reinstatement if the noncitizen was inadmissible at the time of entry.¹³ Practitioners should always check their circuit law to see whether a procedural regularity argument is a viable way to contest a Notice of Intent to Reinstatement an immigrant survivor’s removal order, as noncitizens who receive such notices have the *right to contest a determination that a subsequent entry was without permission*.¹⁴ All that said, reinstatement is a fast process. It is likely that the only opportunity to make a procedural regularity argument before the execution of the reinstatement order is shortly after ICE serves the survivor with the Notice of Intent to Reinstatement. Even if the practitioner makes the argument, it may still be difficult to win. It may also be possible to challenge a reinstatement order in a federal circuit court of appeals. Such challenges are beyond the scope of this advisory, but practitioners who are interested in learning more should review the [AIC/NIPNLG advisory](#).¹⁵

IV. Is reinstatement mandatory?

Reinstatement is not mandatory. *Perez Guzman v. Lynch* held “The reinstatement of a prior removal order is neither ‘automatic’ nor ‘obligatory,’ and the Attorney General has discretion not to reinstate an individual’s earlier removal order and instead place him in ordinary removal proceedings.”¹⁶ *Villa-Anguiano v. Holder* further held: “Even though an [noncitizen] is not *entitled* to a hearing before an immigration judge on the issue of

¹⁰ INA § 241(a)(5)

¹¹ *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010)

¹² See American Immigration Council and National Immigration Project, Practice Advisory, *Reinstatement of Removal* (May 23, 2019), at 16-17, available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf. Copyright © American Immigration Council. Reprinted with permission.

¹³ *Tomczyk v. Garland*, 25 F. 4th 638, 642 (9th Cir. 2021).

¹⁴ See 8 C.F.R. § 241.8(a)(3) and (b) (as part of the reinstatement determination, the immigration officers must determine whether the noncitizen “unlawfully” reentered the United States. A noncitizen has the right to contest a reinstatement determination orally or in writing. Since an “unlawful” entry determination is a necessary portion of the pre-reinstatement determination, the noncitizen can contest the determination that a subsequent entry was unlawful).

¹⁵ See American Immigration Council and National Immigration Project, Practice Advisory, *Reinstatement of Removal* (May 23, 2019), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf. Copyright © American Immigration Council. Reprinted with permission.

¹⁶ *Perez Guzman v. Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016)

reinstatement of a prior removal order, nothing in [8 U.S.C. § 1231\(a\)\(5\)](#) or its implementing regulations deprives the agency of discretion to afford an [noncitizen] a new plenary removal hearing.”¹⁷

Prosecutorial discretion, which the Ninth Circuit Court of Appeals has repeatedly held is available in the reinstatement process, is a longstanding and deep-seated authority of the Executive Branch.¹⁸ The Executive’s prosecutorial discretion authority is a consistent theme in current Department of Homeland Security (“DHS”) guidance, including the immigration enforcement priorities memo (“Mayorkas Memo”), which states “It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders.”¹⁹ The memo on prosecutorial discretion for ICE Office of the Principal Legal Advisor (“OPLA”) attorneys (“Doyle Memo”) states “Prosecutorial discretion is an indispensable feature of any functioning legal system...[OPLA attorneys] are both authorized by law and expected to exercise discretion...at all stages of the enforcement process.”²⁰ A decision not to reinstate a prior order, or not to execute an existing reinstatement order, are quintessential examples of prosecutorial discretion that DHS may exercise.

The Supreme Court’s 2023 decision in *United States v. Texas* further reinforces the Executive’s authority to exercise prosecutorial discretion.²¹ The Court held “The principle of enforcement discretion over arrests and prosecutions extends to the immigration context” and “the Executive Branch also retains discretion over whether to remove a noncitizen from the United States.”²² In doing so, the Court cited *Arizona v. United States*, 567 U.S. 387, 396 (2012), which held “Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”

Taken together, circuit and Supreme Court precedent and current DHS guidance authorize DHS to not reinstate a removal order or execute a reinstatement order. Such prosecutorial discretion authority is “deep-rooted,”²³ and ASISTA encourages practitioners to cite to current DHS prosecutorial discretion guidance when advocating for immigrant survivors who are subject to reinstatement or have reinstated removal orders.

¹⁷ *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013)

¹⁸ See, e.g., *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“...the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”) (citing *Confiscation Cases*, 7 Wall. 454 (1869) and *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)).

¹⁹ Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>, at 2.

²⁰ Kerry E. Doyle, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (April 3, 2022), available at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf, at 1-2.

²¹ *United States v. Texas*, 143 S. Ct. 1964 (2023)

²² *Id.* at 1971-72.

²³ *Id.* at 1973.

V. Intervention points for immigrant survivors who are subject to reinstatement or have reinstated removal orders

There are various points where practitioners can advocate on behalf of immigrant survivors in the reinstatement context. This Advisory will identify these intervention points and provide practice tips for each.

i. The immigrant survivor is subject to reinstatement, but has not had contact with ICE

Practitioners may encounter immigrant survivors who are subject to reinstatement but do not have reinstated removal orders. Immigrant survivors who entered the United States without permission after a prior removal (including an expedited removal) are subject to reinstatement. A Freedom of Information Act (“FOIA”) request may be necessary to determine whether an immigrant survivor is subject to reinstatement.

It is a best practice to prepare a Form I-246 stay of removal for a survivor who is subject to reinstatement, to be filed *only if* they have contact with ICE.²⁴ The stay should document any form of survivor-based relief that is pending and request the survivor’s removal be stayed until USCIS has made a final adjudication of their pending relief application and all appeals are exhausted.²⁵ Practitioners should attach evidence of positive equities to the stay, such as a statement from the survivor, birth certificates of U.S. Citizen children, and evidence of taxes paid, volunteer work, community involvement, and victim services or medical treatment the survivor receives in the United States. If the survivor has a criminal history, the stay packet should contain evidence of mitigating factors. Since the I-246 form edition changes occasionally, practitioners should check periodically to ensure that their clients’ I-246 forms are up-to-date. Practitioners should encourage survivors who are paying their own I-246 filing fees to give the practitioner a money order from the Post Office, as these money orders do not expire and time is of the essence when filing a stay.

The practitioner should advise the survivor of their rights during ICE interactions and ensure that the survivor has copies of the practitioner’s business card and any receipt notices. When advising immigrant survivors of their rights, practitioners may wish to consult the [Know Your Rights Toolkit](#) from the Immigrant Legal Resource Center (“ILRC”) and share it with their client as a starting point.²⁶ Crucially, the practitioner should advise the survivor that they have the right to express a (truthful) fear of return to their country of origin if they have contact with ICE.²⁷

²⁴ Practitioners should consult local colleagues on whether their local ICE Enforcement and Removal Operations (“ERO”) office requires or accepts Form I-246 and the degree of documentation the ERO office requires, since ASISTA has heard that ERO offices differ in practices surrounding stays in general.

²⁵ See also INA § 237(d) (providing for discretionary stays of removal for survivors with prima facie approvable T or U applications).

²⁶ *Know Your Rights Toolkit*, IMMIGRANT LEGAL RESOURCE CENTER (June 19, 2019), <https://www.ilrc.org/resources/community/know-your-rights-toolkit>.

²⁷ See 8 C.F.R. § 241.8(e).

ii. The immigrant survivor is subject to reinstatement and ICE has taken the survivor into custody

While current ICE guidance discourages enforcement action against immigrant survivors,²⁸ ICE may still detain immigrant survivors, or another jurisdiction may transfer the survivor to ICE custody following a criminal legal system encounter. A transfer is especially possible if the immigrant survivor is in a jurisdiction where local law enforcement has an agreement with ICE to perform certain immigration officer functions under INA § 287(g). If a practitioner learns that ICE has detained an immigrant survivor who is subject to reinstatement, the practitioner should immediately file the survivor's Form I-246 stay of removal in accordance with the filing instructions. If no such form has been prepared, the practitioner should inform the ICE Field Office detaining the survivor of their intention to file the form and provide ICE with copies of receipts and discretionary evidence currently in their possession to informally request more time.

Immediately after filing the stay of removal, the practitioner should contact their local ICE Enforcement and Removal Operations ("ERO") office to urge them to grant the stay.²⁹ Practitioners should cite to the ICE Victim Centered Approach Directive ("the Directive"), released in August 2021, which states "ICE will refrain from taking enforcement actions against" immigrant survivors with pending survivor-based cases that have not yet had a negative determination.³⁰ The Directive has highly favorable language regarding stays of removal. Specifically, it states "Except where exceptional circumstances exist, or if USCIS has administratively closed a case for failure of the applicant to prosecute the application, a noncitizen with a pending victim-based application or petition who is subject to an administratively final removal order *should generally be issued a stay of removal.*" (emphasis added).³¹ Thus, unless a survivor with a pending victim-based case meets the definition of "exceptional circumstances" – which include only "national security concerns" or "an articulable risk of death, violence, or physical harm to any person"³²– they should receive a stay of removal. A survivor being subject to reinstatement is not an exception to the stay policy.³³ Any particularly compelling positive equities should feature prominently in the practitioner's advocacy with ICE ERO. In addition, if the survivor has a T nonimmigrant application pending, the practitioner should emphasize that USCIS cannot approve T nonimmigrant status for a noncitizen who is outside the United States.³⁴

²⁸ See *Using a Victim-Centered Approach with Noncitizen Crime Victims: Questions and Answers*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Aug. 8, 2023) (hereinafter "Victim-Centered Approach Questions and Answers"), <https://www.ice.gov/factsheets/using-victim-centered-approach-with-noncitizen-crime-victims>, U.S. Immigration and Customs Enforcement, Directive 11005.3, *Using a Victim-Centered Approach with Noncitizen Crime Victims* (Aug. 10, 2021) (hereinafter "Victim-Centered Directive"), available at <https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf>.

²⁹ Field office contact information can be found [here](#).

³⁰ See *Victim-Centered Approach Questions and Answers*, *supra* note 28.

³¹ *Victim-Centered Directive*, *supra* note 28, at 8.

³² *Id.* at 3.

³³ See *id.* at 8.

³⁴ See INA § 101(a)(15)(T)(i)(II) (a T nonimmigrant status applicant must be "*physically present* in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking...") (emphasis added).

In addition, the Directive has an expansive definition of “enforcement action”, which “includes, but is not limited to” many actions that place a noncitizen on the path to removal.³⁵ Practitioners may argue that a decision to reinstate a prior removal order *is* an enforcement action, since it is a decision to “enforce” a particular provision of the immigration laws, has similar consequences to the other enforcement actions listed in the Directive (it places the noncitizen on the path to removal), and the Directive’s list of enforcement actions is non-exhaustive. Thus, the practitioner should argue that ICE policy instructs ICE not to reinstate a prior removal order for an immigrant survivor with a pending survivor-based immigration petition, as long as there has not been a negative determination on that petition.

If ICE ERO is uncooperative, practitioners may consider using [ICE’s case review process](#). ICE has stated that noncitizens may use the process if they believe they should not be subject to immigration enforcement, including because they are not a priority under the Mayorkas Memo.³⁶ Many immigrant survivors are not priorities under the Mayorkas Memo, and the Directive is an *additional* reason to argue that the survivor should not be subject to immigration enforcement. When initiating the case review process, the practitioner should emphasize that time is of the essence. Practitioners may initiate the case review process by contacting their local ICE field office Senior Reviewing Officer. ASISTA encourages practitioners to contact us for technical assistance if the case review process is not fruitful, as we may be able to elevate certain stay requests beyond the local office.

iii. ICE has already reinstated the survivor’s removal order and detained the survivor

If the immigrant survivor is in ICE custody and has a reinstated removal order, they are in imminent danger of removal. In these cases, practitioners should immediately file a stay and then contact their local ERO office, followed by the ICE case review process. Notably, the existence of a reinstatement order is not an exception to the favorable policy detailed earlier in this Advisory.³⁷ Practitioners should emphasize this fact when contacting ERO. They should also emphasize that removing an immigrant survivor pursuant to a reinstatement order *is* “[e]xecut[ion] of a final order of removal”, which is one of the enforcement actions the Directive instructs ICE *not* to take while a victim-based immigration case is pending, barring exceptional circumstances.³⁸

³⁵ See *Victim-Centered Directive*, *supra* note 28, at 3.

³⁶ *Contact ICE About Detention Conditions or Request a Case Review*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (updated Sept. 1, 2023), <https://www.ice.gov/ICEcasereview>. The Mayorkas Memo states that the following noncitizens are priorities for immigration enforcement: noncitizens who are threats to national security, public safety, who “are apprehended at the border or port of entry while attempting to unlawfully enter the United States”, or are found in the interior after unlawfully entering the United States after November 1, 2020. See Mayorkas Memo, *supra* note 19, at 3-4. However, a noncitizen may present mitigating factors “that militate in favor of declining enforcement action”, even if they are otherwise an enforcement priority. See *id.* Crime victimization and eligibility for humanitarian immigration relief are two particularly relevant mitigating factors. *Id.* at 3.

³⁷ See *Victim-Centered Directive*, *supra* note 28, at 8.

³⁸ See *id.* at 2-3.

Thus, it appears that the Directive generally instructs ICE not to execute a removal order for an immigrant survivor with a pending victim-based case.

Since the survivor has an *existing* reinstatement order, it is critical for practitioners to highlight particularly compelling positive equities in their advocacy with ERO and to make the arguments about unavailability of T nonimmigrant status that are mentioned earlier in this Advisory, if applicable. ASISTA also encourages practitioners to initiate the ICE case review process if ERO is uncooperative, and to immediately contact us for technical assistance. If the survivor has not yet filed for survivor-based immigration relief for which they are eligible, they may consider filing for relief as soon as possible. A pending petition for survivor-based relief offers the survivor an added degree of protection under ICE policy.³⁹

iv. The immigrant survivor is subject to reinstatement and has a VAWA adjustment interview at a USCIS field office

ASISTA strongly encourages practitioners to accompany VAWA adjustment clients who are subject to reinstatement to their USCIS field office interviews, as there is a chance that USCIS may contact ICE to meet the survivor at the interview. Before the interview, the practitioner should prepare a strong cover letter containing arguments on the immigrant survivor's eligibility for VAWA-based adjustment despite being subject to reinstatement. ASISTA also strongly encourages the practitioner to contact us for technical assistance *before* the interview, so we can alert our contacts at USCIS headquarters about the survivor's situation and urge that the survivor not be reinstated.

Only certain VAWA adjustment applicants can preempt or avoid reinstatement: applicants who are eligible for the VAWA waiver of INA § 212(a)(9)(C)(i)(II) ("permanent bar"), combined with an I-212 Application to Reapply for Admission, *or* who are eligible for a standalone I-212 or I-601. Even if the immigrant survivor meets this criteria, it may still be risky to proceed with the VAWA adjustment. This may be especially true if the immigrant survivor lives in a border region, as practitioners have advised ASISTA that removal procedures occur much faster in these regions than in other parts of the country. In these jurisdictions, an ICE officer may be waiting at the USCIS interview to serve a reinstatement order and take the survivor into custody for removal. In all cases, it is the survivor's decision whether to proceed with adjustment.

If the survivor decides to proceed with adjustment, the best practice is for the cover letter to contain the following arguments. First, VAWA-based adjustment applicants who are subject to reinstatement are still eligible for adjustment if they are eligible for a waiver of INA § 212(a)(9)(C)(i)(II) on Form I-601 and for an I-212 to

³⁹ See generally *Victim-Centered Directive*, *supra* note 28.

address the prior removal order. Survivors who are eligible for an I-601 and I-212 are eligible for adjustment because the I-601 waives inadmissibility of the unlawful re-entry post-order (and any other waivable inadmissibility ground), and, although it is not formally a waiver, the I-212's grant of permission to reapply for admission after removal effectively "waives" the prior removal order that is the other necessary predicate for reinstatement.⁴⁰ Meanwhile, if the prior order has not actually been reinstated, there is nothing to prevent the approval of adjustment.

Second, Congress has contemplated USCIS granting I-212s for VAWA Self-Petitioners. Specifically, the Violence Against Women Act of 2005 states "The Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an [noncitizen]'s reapplication for admission after a previous order of removal, deportation, or exclusion" and that "[i]t is the sense of Congress that the officials described...should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994."⁴¹ The Act does not say that reinstatement is an exception to the "sense of Congress."⁴²

In addition, a practitioner may be able to fend off reinstatement with a standalone I-212 in the rare instance when a VAWA Self-Petitioner not subject to the permanent bar is subject to reinstatement, as long as the survivor has no other grounds of inadmissibility or is eligible for a waiver of all grounds. This category includes immigrant survivors who are subject to reinstatement based on subsequent "wave-through" entries but who are nevertheless not subject to the permanent bar because they did not reenter "without being admitted", as INA § 212(a)(9)(C)(i)(II) requires.⁴³ There also may be instances where the survivor only needs an I-601. Specifically, no I-212 is necessary if the survivor spent five to twenty years outside the U.S. after the removal order (the amount of time the survivor must have been outside the U.S. depends on the type of removal order and whether the survivor has multiple removal orders). Both I-601 waivers and I-212s are discretionary forms of relief, so it is critical to include evidence of both eligibility *and* positive equities.

If the USCIS officer appears inclined to refer the survivor to ICE during the interview, the practitioner should immediately ask to speak to a supervisor. If the survivor is remanded to ICE custody, the practitioner should immediately file an I-246 stay of removal, contact their local ERO office, and urge them to grant the stay using

⁴⁰ Cf. *De Soto v. Lynch*, 824 F.3d 822, 829 (9th Cir. 2016) ("If the [noncitizen] were to be successful in her appeal, the receipt of an I-212 waiver would allow her to avoid application of the reinstatement provision.")

⁴¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3058 (Jan. 5, 2006).

⁴² See *id.*

⁴³ See *Matter of Quilantan*, 25 I&N Dec. at 287, 293 (term "admission" in INA §§ 101(a)(13), 212(a)(6)(A)(i), and 245(a) includes an entry in which the noncitizen presented themselves for inspection, as long as there was no false claim to U.S. Citizenship). The Supreme Court has held that similar statutory language should be interpreted similarly. See *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428 (1973) ("The similarity of language in § 718 and § 204(b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*." (italics in original)). Thus, the term "admitted" should be interpreted similarly in INA 212(a)(9)(C)(i)(II) to its interpretation in *Matter of Quilantan*.

the arguments outlined earlier in this Advisory. The practitioner should also immediately contact ASISTA for technical assistance.

VI. Reopening an immigrant survivor's reinstatement order

Practitioners can reopen reinstatement orders under 8 CFR § 103.5(a)(2). Reopening under § 103.5(a)(2) requires “new facts” that will “be supported by affidavits or other documentary evidence.”⁴⁴ Often, the new fact will be the survivor’s eligibility for survivor-based immigration relief, which may not have been known or established at the time of the reinstatement order. The reopening regulation has a 30-day deadline⁴⁵, so any motion to reopen a survivor’s reinstatement will likely be filed late. DHS may accept a late motion to reopen if the practitioner can show that “the delay was reasonable and was beyond the control of the applicant or petitioner.”⁴⁶ The effects of abuse, including mental health consequences; poverty; and lack of social assistance may be good arguments for filing a late motion to reopen. Since these motions are discretionary, it is critical that to submit substantial evidence of positive equities. The regulatory process to reopen a *reinstatement* order is highly complex and will not always succeed. There are many factors to consider before proceeding. ASISTA strongly encourages practitioners to contact the [National Immigration Litigation Alliance \(“NILA”\)](#) for assistance with this process.

According to the reinstatement statute, if an order of removal has been reinstated, a practitioner cannot reopen the *underlying removal order* until the reinstatement order is vacated.⁴⁷ However, the US Court of Appeals for the Ninth Circuit recently held that the bar on reopening is “non-jurisdictional” and may be “forfeited” if not raised by the government.⁴⁸

VII. Effect of a U or T nonimmigrant status approval on a prior reinstatement order

The regulations state that DHS removal orders are “canceled by operation of law” when DHS approves a T or U nonimmigrant application.⁴⁹ Since a reinstatement order is a DHS order, a reinstatement order is canceled by operation of law when DHS

⁴⁴ 8 C.F.R. § 103.5(a)(2).

⁴⁵ 8 C.F.R. § 103.5(a)(1)(i).

⁴⁶ 8 C.F.R. § 103.5(a)(1)(i).

⁴⁷ INA § 241(a)(5). The AIC/NIPNLG advisory states that it may be possible to reopen an underlying DHS-issued order that is the basis for a reinstatement order, but also states that such reopening may be barred by the reinstatement statute. See American Immigration Council and National Immigration Project, Practice Advisory, *Reinstatement of Removal* (May 23, 2019), at p. 25-26, available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf. Copyright © American Immigration Council. Reprinted with permission.

⁴⁸ *Suate-Orellana v. Garland*, No. 19-72446, at *12, *16 (9th Cir. May 7, 2024). For more information, please see National Immigration Litigation Alliance, Practice Alert, *Construing the Reopening Limitation in the Reinstatement Statute* (May 31, 2024), available at <https://immigrationlitigation.org/wp-content/uploads/2024/05/24.05.31-Suate-Orellana-Alert.pdf>.

⁴⁹ 8 C.F.R. § 214.11(d)(9)(i) (T nonimmigrants), 8 C.F.R. § 214.14(c)(5)(i) (U principal) and (f)(6) (U derivative).

approves a T or U nonimmigrant application. DHS removal orders are “canceled by operation of law” for both principal and derivative U nonimmigrants.⁵⁰ For T nonimmigrants, the reading of the regulatory language suggests that DHS-issued removal orders are considered canceled by operation of law in both the derivative and principal context. This interpretation has been consistently upheld by DHS. While the language regarding automatic cancellation by operation of law is primarily found in the section addressing eligibility requirements for principal applicants, subsection (d) is not specifically limited to T principals; rather, it refers to “applications for T nonimmigrant status” in general. It’s also worth noting that the language of (d)(9)(i), which contains the “canceled by operation of law” provision, only refers to “applicants” and not specifically to “T-1 applicants.”⁵¹

The “canceled by operation of law” provisions both ensure that the survivor cannot be removed pursuant to the reinstatement order and that the survivor can reopen the underlying removal order that was initially reinstated. This is because the predicate condition for barring the reopening of the underlying removal order—the reinstatement order⁵²—no longer exists, since the reinstatement order has been canceled by operation of law. A motion to reopen the underlying removal order is necessary before applying for adjustment of status if the order was issued *in absentia*, is 10 years old or less, and meets other requirements.⁵³ A motion to reopen an EOIR removal order is also generally necessary to avoid problems with Customs and Border Protection (“CBP”) if the survivor wishes to travel abroad as an LPR, or if the survivor wishes to naturalize.⁵⁴

Conclusion

Reinstatement of removal is a summary process that places noncitizens on a fast track to removal with very little due process. Reinstatement is not mandatory.⁵⁵ ICE has discretion to decide whether to reinstate a removal order. Practitioners may request prosecutorial discretion for immigrant survivors who are subject to reinstatement or who have reinstated removal orders. In addition, survivors with reinstatement orders may be eligible for U or T nonimmigrant status. ASISTA encourages practitioners to stay updated on their circuit law and to contact ASISTA or NILA for technical assistance with reinstatement questions.

⁵⁰ See 8 C.F.R. § 214.11(d)(9)(i), 8 C.F.R. § 214.14(c)(5)(i), and (f)(6).

⁵¹ Credit to CAST Training and Technical Assistance team for assisting in the interpretation of this regulatory section.

⁵² Cf. INA § 241(a)(5)

⁵³ INA § 240(b)(7)

⁵⁴ USCIS denies a naturalization application if the applicant “has been subject to a final order of removal” from an Immigration Judge, unless the order has been vacated or other limited circumstances are present. See 12 USCIS-PM D.2(F)(1). If a post-departure motion to reopen is necessary, practitioners should consider consulting the following: National Immigration Project, Practice Advisory, *Post-Departure Motions to Reopen and Reconsider* (July 11, 2023), available at <https://nipnlq.org/work/resources/practice-advisory-post-departure-motions-reopen-and-reconsider>.

⁵⁵ See *Perez Guzman v. Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016), *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013).

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