PRADAURIZAR
IMMIGRATION & NATIONALITY ATTORNEYS

Prada Urizar, PLLC
Madison Circle
3191 Coral Way, Suite 607
Miami, Florida 33145

www.pradaurizar.com

Preserving Judicial Review of Equitable Tolling Arguments in Motions to Reopen*

By Mark A. Prada and Mario R. Urizar
Prada Urizar, PLLC

October 2017

Although the BIA has not recognized equitable tolling for motions to reopen provided for in the Act, all the courts of appeals have published decisions stating otherwise.[1] In fact, tolling has been found to be permissible in other contexts as well.[2] Despite the breadth of the case law, the BIA has yet to recognize tolling in one of its published decisions, and appears to treat claims for tolling harshly. Thus, it is important to properly preserve your claim for judicial review.

The focus of this advisory is on maintaining jurisdiction when one seeks review of the BIA's denial of a tolling request based on new precedent allowing for relief from removal. This is common in the context of respondents ordered removed on criminal grounds who were not allowed to seek relief that is now available to them under current precedent. It even reaches cases where the ground of

---

[1] *Compare Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998) (holding that there are no exceptions to the strict deadlines that the Act places on motions to reopen); *with Da Silva Neves* v. *Holder*, 613 F. 3d 30 (1st Cir. 2010); *Iavorski* v. *INS*, 232 F. 3d 124 (2d Cir. 2000); *Borges* v. *Gonzales*, 402 F. 3d 398 (3d Cir. 2005); *Kuusk* v. *Holder*, 732 F. 3d 302 (4th Cir. 2013); *Lugo-Resendez v. Lynch,* 831 F.3d 337 (5th Cir. 2016); *Barry* v. *Mukasey*, 524 F. 3d 721 (6th Cir. 2008); *Pervaiz* v. *Gonzales*, 405 F. 3d 488 (7th Cir. 2005); *Hernandez-Moran* v. *Gonzales*, 408 F. 3d 496 (8th Cir. 2005); *Valeriano* v. *Gonzales*, 474 F. 3d 669 (9th Cir. 2007); *Riley* v. *INS*, 310 F. 3d 1253 (10th Cir. 2002); *Avila-Santoyo* v. *U.S. Att'y Gen.*, 713 F. 3d 1357 (11th Cir. 2013) (en banc).

[2] *See e.g.*, *Albillo–De Leon v. Gonzales,* 410 F.3d 1090, 1097 (9th Cir. 2005) (finding that a NACARA § 203(c) deadline is subject to equitable tolling); *Paniagua-Jimenez v. Gonzalez*, 158 Fed.Appx. 846 (9th Cir. 2005) (permitting tolling of deadline to appeal to BIA).

removal would not be sustained today because precedent now recognizes that the specific crime does not trigger removal.

The jurisdiction of a court of appeals on petition for review is governed by section 242 of the Act. There are many jurisdictional bars within section 242, but pertinent to these cases is the criminal alien bar. The criminal alien bar states that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [the following enumerated grounds of removal]."[3] A statutory exception to this bar exists if the petition for review seeks "review of constitutional claims or questions of law."[4]

Under this statutory scheme, criminal aliens are barred from seeking review of an issue of fact. The Office of Immigration Litigation (OIL) has been attempting to invoke the criminal alien bar by claiming that the application of equitable tolling is strictly a question of fact. Given that this issue has yet to be resolved by a precedent decision in the Fifth and Eleventh Circuits, the jurisdictions that the authors frequently practice in, the following arguments are tailored to said Circuits. Counsel are invited to refine these arguments and contact the authors with any questions or advice.

The Elements of an Equitable Tolling Claim

"Generally, equitable tolling requires a litigant to show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."[5] The Supreme Court has "expressly characterized equitable tolling's two components as 'elements,' not merely factors of indeterminate or commensurable weight."[6] "And [the Supreme Court] ha[s] treated the two requirements as distinct elements in practice, too . . . ."[7]

"The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence."[8] "The second element requires the litigant to

---

[3] INA § 242(a)(2)(C).

[4] INA § 242(a)(2)(D).

[5] *Avila-Santoyo*, 713 F.3d, at 1363 n.5 (*citing Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

[6] *Menominee Indian Tribe of Wisconsin v. United States*, 136 S.Ct. 750, 756 (2016) (*citing Pace*, 544 U.S., at 418).

[7] *Id*.

[8] *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citations and quotation marks omitted).

establish that an 'extraordinary circumstance' 'beyond his control' prevented him from complying with the applicable deadline."[9]

"[T]he doctrine of 'equitable tolling does not lend itself to bright-line rules."[10] "Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate."[11] Most importantly, in these types of cases, "the BIA should give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions."[12] "The BIA should also take care not to apply the equitable tolling standard too harshly because denying an alien the opportunity to seek cancellation of removal—when it is evident that the basis for his removal is now invalid—is a particularly serious matter."[13] "[T]he core purpose of equitable tolling is to escape the 'evils of archaic rigidity' and 'to accord all relief necessary to correct . . . particular injustices.' "[14]

Standard of Review

The standard of review for "the denial of a motion to reopen removal proceedings [is] abuse of discretion."[15] "This review is limited to determining whether the [agency] exercised its discretion in an arbitrary or capricious manner."[16] "The [agency] abuses its discretion when it issues a decision that is capricious, irrational, utterly without foundation in the evidence, based on legally erroneous interpretations of statutes and regulations, or based on unexplained departures from regulations or established policies."[17] An "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[18] "To the extent

---

[9] *Lugo-Resendez*, 831 F.3d, at 344 (*citing Menominee*, 136 S.Ct., at 756).

[10] *Id*. (citation omitted).

[11] *Id*., at 344-45 (citation omitted).

[12] *Id*., at 345.

[13] *Id*. (internal quotation marks and citation omitted).

[14] *Id*. (*citing Holland v. Florida*, 560 U.S. 631, 650 (2010)) (ellipsis in original).

[15] *Li v. U.S. Att'y Gen.*, 488 F.3d 1371, 1374 (11th Cir. 2007) (citation omitted).

[16] *Zhang v. U.S. Att'y Gen.*, 572 F.3d 1316, 1319 (11th Cir. 2009) (citation omitted).

[17] *Lugo-Resendez*, 831 F.3d, at 340 (internal quotation marks and citations omitted).

[18] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted).

that the decision of the Board [on a motion to reopen] was based on a legal determination, [a court's] review is *de novo*."[19]

A court "review[s] the IJ's and BIA's legal conclusions *de novo*.[20] Courts review the application of law to undisputed facts *de novo*.[21] Some courts refer to this type of issue as a "mixed question of law and fact"[22] to be reviewed *de novo*.[23] In most motions to reopen, no facts are in dispute. Thus, the BIA's failure to apply tolling—a legal doctrine—to undisputed facts is reviewable *de novo*. Other courts of appeals have held that the diligence inquiry for a tolling request in a motion to reopen is a mixed question of law and fact, and that such questions are to be reviewed *de novo*.[24]

---

[19] *Li*, 488 F.3d, at 1374.

[20] *Mi Ying Wu v. U.S. Att'y Gen.*, 745 F.3d 1140, 1152 (11th Cir. 2014)

[21] *Kungys v. United States*, 485 U.S. 759, 772 (1988) ("Although the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.") (citations omitted) (alteration in original); *see also Singh v. Holder*, 656 F.3d 1047, 1051 (9th Cir. 2011) (whether there are changed circumstances for purposes of the asylum one-year deadline exception is a question of law where underlying facts are undisputed); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) ("[W]e review the district court's interpretation and application of the sentencing guidelines de novo.").

[22] *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) ("[M]ixed questions of law and fact [are] questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.").

[23] *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 n.2 (11th Cir. 2001); *see also Pittman v. Sec'ty, Florida Dept. of Corrections*, __ F.3d __, 2017 WL 4216028 *7 (11th Cir. 2017) ("We review *de novo* a district court's denial of habeas relief pursuant to § 2254, as well as its legal conclusions and its resolutions of mixed questions of law and fact.") (*citing Wellons v. Warden*, 695 F.3d 1202, 1206 (11th Cir. 2012)).

[24] *Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) (diligence is a mixed question of law and fact to be reviewed *de novo*); *Rranci v. U.S. Att'y Gen.*, 540 F.3d 165, 171 (3rd Cir. 2008) ("[W]e review the BIA's legal conclusion de novo, including pure questions of law and applications of law to undisputed facts."); *Ghahremani v. Gonzales*, 498 F.3d 993, 998-99 (9th Cir. 2007) ("Where the relevant facts are undisputed, creating a mixed question of law and fact," the issue is reviewed like a question of law.); *Boakai v. Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006) (*citing Niehoff v. Maynard*, 299 F.3d 41, 47 (1st Cir. 2002) (holding that equitable tolling determinations involve a mixed question of law and fact, but only to the extent the district court's decision hinges on

Additionally, whether the BIA applied the correct standard for equitable tolling is purely a question of law.[25] Thus, it is helpful to argue that the BIA applied a maximum feasible diligence" standard as opposed to a "reasonable diligence" standard if the reasoning of the BIA appears excessively harsh. Furthermore, in some cases the BIA may not have properly treated the extraordinary circumstance and diligence inquiries as separate elements which also raises a pure question of law as to the appropriate standard for tolling.

Conclusion

Despite the attempts of OIL to construe an equitable tolling request as purely an issue of fact, there are strong arguments against this stance that will allow for jurisdiction in a court of appeals. It is important that counsel work together to preserve jurisdiction of motions to reopen that should rightfully be granted. But beware, OIL has won this point in other Circuits, thus creating a circuit split.[26]

---

factual determination, appellate review proceeds as it would for a pure question of fact)).

[25] *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003) ("[I]f the issue on appeal involves the proper application of legal principles to the facts and circumstances of the individual case at hand, our review has been *de novo."*); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990) (the agency commits legal error by applying "an improper standard"); *Arteaga v. INS*, 836 F.2d 1227, 1228 (9th Cir. 1988) ("Questions of law such as whether the BIA applied the appropriate legal standard, are reviewed de novo.").

[26] *Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016); *Sharashidze v. Mukasey*, 542 F.3d 1177, 1179 (7th Cir. 2008); *but see, supra* note 24.