MOTIONS WITH THE BIA

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I. Introduction

The Board of Immigration Appeals (BIA or the Board) is the appellate administrative body for immigration cases. When there is an appeal pending before the BIA, it can consider requests for action on the case. Even after the BIA issues a final decision on the appeal, it can consider two types of motions - motions to reconsider and motions to reopen.

This advisory is intended to provide an overview of the most common types of motions filed with the BIA, including practical tips on how to prepare a motion and how to determine whether a motion to remand, reconsider, or reopen is appropriate in specific situations. The majority of this advisory focuses on motions to reopen, which can be an important tool to get a second chance for those facing a final order of removal.

Practitioners should consult the BIA's Practice Manual to ensure all filings are in compliance with the BIA's procedural rules. You can access the BIA's Practice Manual at: https://www.justice.gov/eoir/board-immigration-appeals-2. Chapter 5 of the Practice Manual covers the subject of motions before the BIA.

II. When Can the BIA Consider a Motion?

The BIA can consider a motion only if: (1) an appeal is pending in the case; or (2) an appeal has already been decided by the Board, and the respondent[1] or the Department of Homeland Security (DHS) has filed a motion to reconsider or a motion to reopen. At any time, the Board can also act on its own on a case over which it has jurisdiction, which is called a *sua sponte* decision (a decision to act on its own motion).

III. Who May File a Motion with the BIA?

Only a party to a proceeding can file a motion with the BIA. The respondent(s) or DHS are the only parties that can file a motion. Third parties, such as family members of the respondent, cannot file a motion with the BIA unless they are also parties to the proceeding. Of course, representatives that have entered an appearance on behalf of the respondent can file a motion on behalf of their client.

IV. Types of BIA Motions

The purpose of any motion before the BIA is to make a request for specific action on a pending appeal or a case the BIA has already ruled on. Where an appeal is pending, there is no limit to the types of motions the Board can consider. Generally, a party may seek any number of actions on a case, from seeking withdrawal of counsel to correcting an error in a prior filing. The most common types of motions in cases actively pending before the Board are requests to: remand a matter to the Immigration Court based on new evidence; extend briefing deadlines; and amend or supplement prior filings.

Where the Board has already ruled on an appeal, the only motions it will entertain are motions to reconsider and motions to reopen. Once those motions are filed and pending, the Board can consider additional motions limited to the pending proceeding such as requests for stays of removal and requests to amend the motion with supplemental arguments or evidence.

A. Motions While an Appeal is Pending with the BIA

The most common types of motions while an appeal is pending with the Board are motions to remand and motions to extend briefing deadlines. Also discussed below, although much less commonly filed, are motions to accept new evidence or take administrative notice of new evidence.

1. Motion to Remand

A motion to remand is appropriate where you seek to return jurisdiction to the immigration judge (IJ) either because there is new evidence that has come to light or the respondent has become newly eligible for relief that she was not eligible for when her proceedings were pending in Immigration Court.

Motions to remand are subject to the same substantive requirements as motions to reopen,[2] see Motions to Reopen, section IV.B.2., below. So as with motions to reopen, a motion to remand must be accompanied by the new evidence or application for relief, and an explanation as to why the accompanying documents are material and were previously unavailable.

A motion to remand should be clearly labeled "Motion to Remand." At the outset, it should provide a description of the evidence attached to it, along with an explanation of why an IJ should consider the new evidence and why it was previously unavailable. Typically, where the materiality and previously unavailable requirements are met, the Board will grant a motion to remand.

When the Board denies a motion to remand, it is often based on a finding that the respondent should have discovered the evidence earlier by exercising a higher level of diligence. It is crucial that you provide a strong explanation for why the evidence was not previously available. In almost all cases, the evidence should include a detailed declaration from the respondent as to when and how the new evidence was discovered and why it could not have been discovered at an earlier stage of the proceeding. If the motion is based on new eligibility for relief, such as the approval of a family petition, the explanation should include the steps the respondent took leading up to the approval and why such eligibility could not have been established earlier.

Although the substantive requirements for a motion to remand are identical to those of a motion to reopen, a motion to remand is always preferable compared to a motion to reopen. This is because unlike motions to

reopen, motions to remand are not subject to time and numerical limitations. It eliminates the need to prove timeliness and avoids using up a respondent's one-time shot at a motion to reopen. If a need later arises for a motion to reopen, a respondent will generally be numerically barred if she previously filed a motion to reopen instead of a motion to remand. Thus, acting quickly with a motion to remand when new evidence arises during a pending appeal is an important part of effectively advocating for your client.

2. Motion to Extend Briefing Deadline

A common motion before the Board is a motion to extend a briefing deadline. As a default, the Board gives the appealing party 21 days from the date it issues a briefing schedule to file a brief.[3] It gives the opposing party 21 days from that to file its response brief. In detained cases, the briefing deadline for both parties is simultaneously set for 21 days from the date of issuance of the briefing schedule, with 14 days granted to the respondent after that to file a reply brief.

Practitioners should be careful relying on briefing extensions under the Administration's current policies. In the past, practitioners would presume the Board would grant one 21-day extension to file a brief, if requested in a motion. The BIA Practice Manual contained language stating, "[i]t is the Board's policy to grant one briefing extension per case, if requested in a timely fashion." On June 7, 2019, EOIR removed this language. **The updated language in the policy manual now states that "extension requests are not favored."** Additionally, EOIR added language establishing that the BIA does not grant second briefing extension requests and they "are only granted in rare circumstances."[4]. EOIR reiterated that briefing extensions are not favored in a policy memorandum issued on October 1, 2019, addressing case processing at the Board:

> "In the interest of fairness and the efficient use of administrative resources, extension requests [of briefing schedules] are not favored." Board of Immigration Appeals Practice Manual, § 4.7(c)(i). Because extension requests are not favored, they should not be granted as a matter of course, and there is no automatic entitlement to an extension of the briefing schedule by either party. Extension requests filed the same day as a brief is due are particularly disfavored and should be granted only in the most compelling of circumstances.[5]

Motions for an extension of time must be filed before the original deadline. If an appealing party's extension request is granted, the opposing party will also automatically be granted a 21-day extension from the new deadline to file its brief. The Board's policy is to grant extension requests in 21-day increments and only one extension request for each party except in "rare circumstances."[6]

The BIA's Practice Manual requires that extension requests be labeled "Briefing Extension Request" and state when the brief is due, the reason for requesting an extension, a statement that the party (or the legal representative) has exercised due diligence to meet the current deadline, and that the party will meet a revised deadline.[7]

The original brief deadline remains in effect unless and until the Board grants the extension request. Should it become necessary to file a brief after the imposed deadline, the motion should be styled as a "Motion to Accept Late-Filed Brief." A brief must be filed with such a motion and the manual indicates such a motion will rarely be entertained.[8]

3. Motion to Accept New Evidence or Take Administrative Notice (Rarely Granted)

Generally, the Board reviews a decision of the IJ and does so based on the record that was before the IJ at the time of making the decision. The Board has a policy of not accepting new evidence for the first time on appeal.[9] If a party submits new evidence, which the Board deems as material and previously unavailable, it will treat the request to consider the new evidence as a motion to remand. But in rare circumstances, the Board will take notice of the new evidence in deciding the appeal.

The Board will, for example, consider new and material evidence regarding country conditions as reflected in "official documents" such as State Department reports. The Board will also take administrative notice of "commonly known facts not appearing in the record."[10]

B. Motions After a BIA Decision

1. Motion to Reconsider

A motion to reconsider can be filed if the Board made a factual or legal error or if a change in law has occurred since the Board's decision such that it could cause the Board to change its decision. Unlike a motion to reopen (discussed below), you cannot submit new evidence or state new facts with a motion to reconsider.

A motion to reconsider filed by a respondent must be filed within 30 days of the Board's entry of a removal order and the respondent can file only one motion to reconsider a decision.[11] There are no exceptions to the time and numerical limits on motions to reconsider. Although a party may file a motion to reconsider the denial of a motion to reopen, a party may not file a motion to reconsider the denial of a motion to reconsider.[12] The Board may also reconsider proceedings at any time on its own initiative.[13]

2. Motion to Reopen

a. What are the basic requirements of a motion to reopen?

A motion to reopen (MTR) must state material and previously unavailable facts.[14] It must be supported by affidavits and other evidentiary material, including new applications for relief, if applicable. The BIA has held that a party seeking reopening of proceedings bears a "heavy burden" of demonstrating that if their motion to reopen were granted, the new evidence *would change the outcome of the case*.[15]

PRACTICE TIP: Facts presented in affidavits supporting a motion to reopen must be accepted as true unless "inherently unbelievable."[16] The MTR should include, at least briefly, an argument that your client's claims are not "inherently unbelievable" and must be accepted as true for purposes of adjudicating the motion.

Some common examples of scenarios that give rise to motions to reopen are a noncitizen's recent marriage to a U.S. citizen, changes in country conditions that establish or boost a claim for asylum, the vacating of a criminal conviction, and discovery of prior ineffective assistance of counsel.

b. When does the BIA have authority to accept and rule on an MTR?

An MTR can be filed with the BIA only if the BIA issued the final administrative order of removal.[17] Thus, MTRs are filed with the Board only in cases that were first appealed to the Board and the Board decided the appeal.[18] If the client never appealed the case to the Board, the MTR should be filed with the IJ. If the client or DHS appealed the IJ's decision and the BIA entered an order of removal, the MTR should be filed with the BIA.

c. Are there time or numerical limitations to motions to reopen and are there any exceptions?

With specific exceptions discussed below, an MTR filed by a respondent must be filed within 90 days of the Board's order of removal; and must be the first motion to reopen filed by the respondent.[19] Even when these requirements are met, the decision whether to grant an MTR is discretionary.[20]

The statute and regulations specify the following exceptions to the time and numerical limitations for MTRs:

- **Eligibility for asylum or withholding of removal based on changed country conditions.** The respondent must prove that the evidence (1) is material; and (2) was not available and could not have been discovered or presented at proceedings before the IJ. Such a motion can be filed at any time and the numerical limit does not apply.[21]

- **Battered spouses, children, and parents seeking relief as self-petitioners under the Violence Against Women Act (VAWA) or through VAWA cancellation of removal.** Such VAWA eligibility-based motions can be filed within one year of the final order of removal, as long as the applicant is physically present in the U.S.[22] The one-year time limit may be waived in cases of extraordinary circumstances or extreme hardship to the non-citizen's child. The numerical bar does not apply.[23]

- **Jointly filed MTR by the respondent and DHS.** There are no time or numerical limits for jointly filed MTRs.[24]

- ***Sua sponte* MTR.** The BIA may reopen proceedings on its own motion at any time as long as it still was the last administrative body to issue a decision. Neither time nor numerical limitations apply to *sua sponte* MTRs.[25]

There are also similar time and numerical exceptions for MTRs of *in absentia* removal, deportation, or exclusion orders. But such motions must be filed with the IJ who entered the *in absentia* order, not with the BIA.[26]

Where a motion to reopen is filed outside of the 90-day deadline, you must identify one or more of the above exceptions that apply to your MTR. Practitioners can also argue under the doctrine of equitable tolling that an MTR is timely, despite being filed beyond the 90-day timeframe. This is often the argument made in cases where you are arguing that the prior attorney's error resulted in the delay.

Practice Tip: The various grounds for reopening can be combined to argue multiple or alternate theories for reopening. You should argue as many grounds for reopening as apply to the facts of your case.

d. What if my client has been deported or voluntarily left the United States after a final order of removal, can they still file a motion to reopen?

The regulations bar individuals who have departed the United States from filing an MTR.[27] The BIA has long held that the departure bar is a limitation on its jurisdiction.[28] In 2009, however, the BIA held that that immigration judges have jurisdiction to review motions filed by individuals outside the United States where the MTR is based on an in absentia order that resulted from lack of notice.[29]

Also, ten out of eleven circuit courts have found that the departure bar is unlawful when it is applied to a timely motion to reopen.[30] If your client has been deported within 90 days of the Board's decision, the departure bar should not apply in the vast majority of cases. But if your client has been deported or departed voluntarily sometime after the 90 days elapsed and then tries to file an MTR, it would be difficult to argue an exception to the departure bar. Practitioners can explore the possibility of federal court litigation in specific circumstances, such as in cases of Constitutional or legal error, particularly where there is a U.S. citizen or permanent resident suffering hardship. An MTR in such situations, however, will very likely be denied by the Board for lack of jurisdiction.

e. What are the requirements for an MTR based on eligibility for asylum due to changed circumstances?

In the context of MTRs based on eligibility for asylum or withholding of removal (under the Immigration and Nationality Act or the Convention Against Torture), the BIA has stated that it will reopen proceedings if the non-citizen demonstrates materially changed circumstances in his or her homeland or place of last habitual residence, *such that the record demonstrates a reasonable likelihood of success on the merits of the application*.[31] Changed *personal* circumstances do not qualify for the purposes of a late-filed motion to reopen, but they may be considered in conjunction with changed country conditions.[32]

A motion based on changed circumstances must contain:

- A complete description of the new facts that comprise those circumstances;
- A description of how those circumstances affect the party's eligibility for relief;
- Evidence that country conditions have materially worsened such that the respondent is newly eligible for asylum and withholding of removal. That is, although they were not eligible at the time of their removal proceedings, they are presently eligible. Evidence of changed country conditions includes background country conditions evidence demonstrating the worsening of conditions and expert or personal affidavits detailing the changed circumstances; and
- Compelling evidence that the respondent is deserving of a positive exercise of discretion.[33]

The Board will "compare the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below."[34] Therefore, practitioners should focus on presenting arguments and evidence demonstrating a significant *change* in country conditions, which demonstrates a reasonable likelihood of success on the merits of the application.[35]

f. What if my client needs a new hearing or other remedy based on ineffective assistance by prior counsel?

In 1988, the BIA published its decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), in which it established a procedural and substantive framework for MTRs based on ineffective assistance of counsel (IAC). It recognized that IAC occurring during deportation proceedings may violate a respondent's due process right to a fundamentally fair hearing, thus giving rise to a basis for reopening the proceedings. *Matter of Lozada* standards remain in effect and are binding on immigration courts and the BIA when adjudicating motions to reopen or remand based on ineffective assistance of counsel.

The procedural requirements for motions to reopen that are based on IAC are in addition to the general requirements provided for by statute and regulations, as outlined above. The procedural requirements under *Matter of Lozada* are:

1. An affidavit by the respondent attesting to the relevant facts, including a statement of the agreement between the respondent and the attorney regarding the respondent's representation.

2. Proof that the respondent informed counsel of the IAC allegations and gave counsel an opportunity to respond. Any response from counsel should be included with the motion or if received after the motion is filed, should be filed as a supplement to the motion if it remains pending.

3. The motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

The procedural requirements as established by *Matter of Lozada* are rarely exempted and are generally stringently applied. Therefore, practitioners should strictly comply with the requirements to the maximum extent it is possible.

Under *Matter of* Lozada, a motion to reopen based on ineffective assistance of counsel must, in substance, establish:

1. Counsel's performance was ineffective such that respondent was prevented from reasonably presenting his case.

2. Counsel's performance caused prejudice to the respondent.[36]

<u>What does ineffective assistance mean?</u>

Ineffective or deficient performance by counsel is established by showing that "competent counsel would have acted otherwise."[37] Some examples of ineffective assistance of counsel are:

- Failure to properly advise a client regarding a hearing date or advising a client not to attend a scheduled hearing in immigration court.[38]

- Failure to submit relevant or sufficient evidence.[39]

- Failure to pursue a form of relief that a client is *prima facie* eligible for.[40]

- Admissions on behalf of a client or waiving the right to appeal, without any apparent tactical advantage.[41]
- Failure to file a timely Notice of Appeal or appeal brief.[42]
- Pressuring a client to accept voluntary departure under threat of counsel's withdrawal.[43]
- Failure to take action to ensure client remained eligible for relief.[44]

Note on Ineffective Assistance by Non-Counsel. There are primarily three scenarios in which an individual may file a motion to reopen based on the ineffective assistance of a non-attorney:

- Ineffective assistance by a BIA-accredited representative.[45]
- A non-attorney working as an agent or employee of an attorney, who in turn provided deficient representation. In these situations, the ineffective assistance claim should be filed against the supervising attorney(s) of such agent or employee.[46]
- A non-attorney who purposefully or negligently held himself or herself out to be an attorney, and the client relied on that misrepresentation.[47]

How can you prove prejudice?

In addition to showing that counsel's performance was deficient or ineffective, a respondent must further show that she was prejudiced by counsel's performance. The primary exception to the requirement of showing prejudice is where counsel's performance resulted in the entry of an *in absentia* removal order. In such cases, prejudice is presumed.[48]

The prejudice standards differ somewhat between circuits, but generally involve consideration of whether there is a "reasonable likelihood" or "reasonable probability" that the result of the proceedings would have been different but for counsel's performance.[49]

In general, given that many motions to reopen based on ineffective assistance fail because the individual cannot establish prejudice, practitioners should specify the ways in which their client was prejudiced by former counsel's performance.

g. What if my client missed the 90-day MTR deadline or used up their one MTR because of IAC by former counsel?

Equitable tolling may be available to respondents who can show that IAC resulted in their failure to comply with the time and numerical bars for MTRs. The BIA has stated that there are no exceptions to the time and numerical limitations, other than that explicitly provided by statute or regulation.[50] However, under the doctrine of equitable tolling, a non-jurisdictional deadline, such as the motion to reopen deadline, may be extended where the claimant has exercised diligence in exercising his rights, but extraordinary circumstances were responsible for his failure to make a timely filing.[51] While the Board has not published a decision regarding the validity of equitable tolling as applied to motions to reopen, all circuits, with the exception of the First Circuit, have recognized the application of equitable tolling for reopening based on ineffective assistance of counsel.[52]

To equitably toll the motion to reopen deadline, the moving party must prove that:

- he or she exercised diligence in pursuing reopening; and
- the delay was due to extraordinary circumstances, most commonly ineffective assistance of prior counsel.

Proving that an individual exercised due diligence is extremely "fact-intensive and case-specific," thus requiring the presentation of facts, including a declaration from the respondent and corroborating witnesses regarding the precise timeline of when and how the respondent discovered the ineffective assistance, *and* when and how he or she went about filing the motion to reopen after discovering the ineffective assistance.[53]

The question of whether extraordinary circumstances prevented the timely filing of a motion to reopen is factually intertwined with the issue underlying the merits of the motion to reopen—whether the respondent was prejudiced by ineffective assistance of counsel. Therefore, the individual must comply with the procedural and substantive requirements under *Lozada*, in order for equitable tolling to apply.

h. If equitable tolling based on IAC is allowed in a case, how much time does the respondent have to file the MTR?

Circuits are split with respect to the effect of equitable tolling. A 2014 Supreme Court decision noted that a litigant "pauses the running of, or 'tolls,'" the relevant statute of limitations by diligently pursuing his rights in an appropriate circumstance.[54] In line with this decision, some courts of appeals recognize that equitable tolling essentially "stops the clock" on the filing deadline.[55] Several other courts expressly reject that proposition and provide noncitizens with only "some additional time" following the discovery of ineffective assistance or another extraordinary circumstance.[56] As a result, even where equitable tolling may be available, motions to reopen should be filed as promptly as possible.

i. What are the requirements for joint and sua sponte MTRs?

Clients who are eligible for relief from removal, but have an old removal order entered against them, regularly approach practitioners for advice. For example, an individual may have a five-year old removal order, but has just now become eligible to adjust status based on an approved family petition. In cases where the statutory deadline for an MTR has passed and no exception to the deadline applies, a joint MTR or s*ua sponte* MTR may be your client's only option.

WARNING! Because clients filing joint or *sua sponte* MTRs have a final order of removal, practitioners must thoroughly review the risks and benefits of exposing the client to ICE. It is extremely important to be aware of DHS' current policy on enforcement priorities, as they have significantly fluctuated with each Presidential election. On January 25, 2017, Donald Trump issued an Executive Order stating that *any* person with a final order of removal is an enforcement priority.[57] The enforcement priorities and how they are being implemented locally in your area are key considerations in determining whether a joint or *sua sponte* MTR is a good option for your client.

Joint MTRs

MTRs that have been "agreed upon by all parties and are jointly filed," are not subject to the time and numerical limitations.[58] Joint MTRs are most common in scenarios where an individual with a removal order becomes newly eligible for adjustment of status, but the 90-day MTR deadline has passed.

The first step in filing a joint MTR is, of course, convincing the ICE Chief Counsel's office to join in the motion. Because joining a motion to reopen is discretionary, practitioners seeking to file a joint motion with DHS should prepare evidence and arguments supporting a positive exercise of discretion. Various ICE Chief Counsels' offices may differ as to the procedure they prefer when counsel is seeking to file a joint motion. Generally, a request should include proof of eligibility for adjustment of status or other relief you will be seeking, documentary evidence demonstrating that your client merits a favorable exercise of discretion, and a copy of the *Joint Motion to Reopen* for DHS counsel to sign with the attached proposed order and the entire packet you will be filing with the MTR.

If ICE joins your MTR, there is a high likelihood that the BIA will grant it. While they are not required to grant jointly-filed motions, the BIA has not been known to deny jointly-filed MTRs.

Sua sponte MTRs

Immigration judges and the BIA have *sua sponte* authority to decide cases.[59] A *sua sponte* MTR is often the last recourse for a client with a final order of removal, who does not meet the time and numerical requirements for an MTR and who is unable to obtain agreement from ICE to file a joint MTR. *Sua sponte* MTRs can be filed at any time and are entirely discretionary.

Note that *sua sponte* requests to reopen may not be used as a general cure for filing defects or to otherwise circumvent the regulations, even when enforcing the regulations may result in hardship to the respondent or his family members.[60] The BIA will not grant an MTR based on its *sua sponte* authority unless the respondent proves an "exceptional situation."[61] So in addition to relevant evidence regarding the respondent's eligibility for relief or other evidence establishing the basis of the MTR, it should include significant evidence demonstrating positive equities.

PRACTICE TIP: Any time you are claiming an exception to the time or numerical limitations of MTRs or arguing for equitable tolling, it is a good idea to alternatively seek sua sponte reopening. Even if the IJ or BIA reject the other bases for reopening, they would still have authority to sua sponte reopen proceedings.

j. How do I establish in an MTR that a client is deserving of a positive exercise of discretion?

The decision whether to grant an MTR is ultimately discretionary.[62]

While the BIA has wide-ranging authority in exercising their discretionary authority in the context of motions to reopen, it may not rely on irrelevant factors.[63]

The following are common discretionary considerations in the context of MTRs:

- Criminal history: recency, seriousness, and number of offenses

- Respondent's prior immigration violations[64]
- Length of residence in the U.S.
- Extent and strength of family ties in the U.S., particularly to U.S. citizens and LPRs
- Business ties in the U.S., particularly extent of business success
- History of income tax filings
- Community service and involvement, i.e., church activities, donations, volunteering for charities
- Respondent's diligence in resolving his immigration issues and filing the MTR
- Conditions in Respondent's native country, related to past experiences or prospective harm or hardships to Respondent and family members if forced to return, i.e., fear of physical harm, lack of family ties in the country, lack of economic opportunities, etc.

V. Knowing Whether to File a Motion to Reopen, Remand, or Reconsider

A motion to reopen is appropriate where material and previously unavailable evidence arises *after* the final order of removal was entered by the BIA.

If granted, a motion to reopen revives the respondent's removal, deportation, or exclusion proceedings for all purposes, unless explicitly limited in its scope. Therefore, a respondent whose proceedings have been reopened is not limited to presenting the claim on which the MTR was based. This leaves open the respondent's ability to contest removability or apply for additional forms of relief, once proceedings are reopened.

If removal proceedings are still pending, a motion to reopen is not appropriate. A motion for remand is a motion made to the BIA *before it has issued its decision*. For example, if your client becomes eligible for adjustment of status while her BIA appeal is pending, and you want the case sent back to the immigration court for an adjustment hearing, you file a motion for remand. This is similar to a motion to reopen, except that since there is no final BIA decision in the case, you don't need to reopen it; instead you ask the BIA to send it back (remand it) to the IJ to consider new evidence. There is no fee for filing a motion for remand and it is not subject to the time and numerical bars applicable to motions to reopen, as discussed above. If proceedings are still pending before an IJ when the new facts arise, practitioners should make every effort to introduce the new evidence while proceedings are pending before the IJ. This eliminates the need for a motion to reopen or remand. In addition, it will be more difficult to show that facts that arose during the proceedings before the IJ qualify as new and previously unavailable.

By contrast, motions to reconsider are based on mistakes of law or fact committed by the IJ or BIA. They argue that based on the *existing* factual record, the adjudicator made a mistake in the decision. A motion to reconsider can also be based on a change in the law if it shows a prior application of the law was incorrect. A motion to reconsider is not a way to submit new evidence.

VI. How to Prepare and File a Motion with the BIA

Motions should contain a clear title, such as "Respondent's Motion to Reopen," and also contain the names and A numbers of each respondent.[65] If the respondent is detained, the cover page of the motion should clearly be labeled "Detained" in the upper right-hand corner and highlighted. The substance of the motion should clearly and specifically state the grounds on which it is based and identify the relief or remedy sought.

Motions must be made in writing and be signed by the respondent or legal representative. If the representative's Notice of Appearance (EOIR-27) is not already on file with the Board (or if a removal order has already been entered in the case), advocates should ensure it is submitted with the motion. At the end of the motion should be a proof of service, just like any other submission to the Board.[66]

With motions to reopen or reconsider, there must be proof of payment of the $110 fee (which is typically paid at the local USCIS office). A copy of the underlying BIA decision should be submitted with a motion to reconsider or reopen.

Motions must be accompanied by evidence since statements made in the motion by counsel are not considered to be supporting evidence. Typically, procedural motions such as for additional time to submit a brief should be accompanied by a simple affidavit by counsel establishing the facts in support of the motion, i.e., a high caseload, vacation, sickness, etc. Motions to reopen or remand would typically contain an evidence packet, almost always including at least an affidavit by the respondent and other witnesses, applications for relief, and documents proving legal eligibility and positive equities

Note that the BIA's Practice Manual contains the Board's preference on the order in which documents accompanying a motion are submitted.[67]

End Notes

[1] This advisory's reference to "respondent" is a general reference to the non-governmental party (noncitizen) in the proceeding since the most common cases before the BIA arise from removal proceedings. In other types of cases, such as an appeal of a family petition, there is no "respondent." See 8 CFR § 1003.1(b). This advisory is primarily relevant to cases arising from removal proceedings.

[2] *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

[3] BIA Practice Manual, Ch. 4.7(a).

[4] See BIA Practice Manual Ch. 4.7(c)(i)(A), (c)(i)(B).

[5] EOIR Memorandum, "Case Processing at the Board of Immigration Appeals," (Oct. 1, 2019).

[6] BIA Practice Manual, Ch. 4.7(c).

[7] BIA Practice Manual, Ch. 4.7(c).

[8] BIA Practice Manual, Ch. 4.7(d).

[9] BIA Practice Manual, Ch. 4.8(b).

[10] BIA Practice Manual, Ch. 4.8 (b).

[11] 8 C.F.R. § 1003.2(b)(1). The time and numerical limitations do not apply to DHS motions. Motions filed prior to July 31, 1996 do not count toward the one-motion limit.

[12] 8 C.F.R. § 1003.2(b)(2).

[13] 8 C.F.R. § 1003.2(a).

[14] INA § 240(c)(7)(B); 8 CFR § 1003.2(c). Practitioners are encouraged to consult the Motion to Reopen chapter in ILRC's Removal Defense Manual for a more detailed discussion of motions to reopen. The Manual is available for purchase at www.ilrc.org/defending-immigrants-in-immigration-court.

[15] *Matter of Coelho*, 20 I&N Dec. 464, 472-73 (BIA 1992).

[16] *INS v. Abudu*, 485 U.S. 94 (1988) ("[F]or purposes of the limited screening function of motions to reopen, the BIA must draw all reasonable inferences in favor of the alien unless the evidence presented is inherently unbelievable.").

[17] 8 CFR §§ 1003.2, 1003.23.

[18] If an MTR is filed with the BIA while an appeal is still pending, the BIA will construe the MTR as a motion to remand.

[19] The time and numerical limitations for motions to reopen do not apply to DHS motions. 8 CFR 1003.23(b)(1).

[20] *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007).

[21] INA § 240(c)(7)(C)(ii); 8 CFR § 1003.2(c)(3)(ii), § 1003.23(b)(4)(i).

[22] INA § 240(c)(7)(C)(iv).

[23] INA § 240(c)(7)(A).

[24] CFR § 1003.2(c)(3)(iii); § 1003.23(b)(4)(iv).

[25] 8 CFR § 1003.23(b)(1); § 1003.2(a).

[26] INA § 240(b)(5)(C); 8 CFR §§ 1003.2(c)(3), 1003.23(b)(4).

[27] 8 CFR § 1003.2(d). See also 8 CFR § 1003.23(b)(1).

[28] See *Matter of G-B-*, 6 I&N Dec. 159 (BIA 1954); *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008).

[29] *Matter of Bulnes*, 25 I&N Dec. 57, 58-60 (BIA 2009).

[30] While there is no published decision regarding the legal validity of filing a *sua sponte* MTR after removal has occurred, the plain language of the regulations strongly support that argument. The regulations bar a motion to reopen "made by or on behalf of a person who is the subject of exclusion, deportation or removal proceedings subsequent to his or her departure from the United States." 8 CFR § 1003.23(b). However, this limitation does not apply, based upon the regulation's plain language, to an IJ's or the BIA's independent *sua sponte* authority to reopen/reconsider cases. Arguably, an immigration judge or the BIA acts "on his or her own motion" and not "on behalf" of a noncitizen. *Matter of L-V-K-*, 22 I&N Dec. 976 (BIA 1999) (discussing *sua sponte* authority to reopen on BIA's own motion as distinct from adjudication of a noncitizen's motion).

[31] *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 955-56 (BIA 1999).

[32] See *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006) (MTR denied where it was based on birth of second child, which caused fear of forced sterilization, because no change in country conditions showed an increased risk to the respondent due to birth of the second child). However, in *Chandra v. Holder*, 751 F.3d 1034 (9th Cir. 2014), the court held that the "BIA committed legal error insofar as it determined that [petitioner]'s post-removal conversion to Christianity rendered him ineligible to file an untimely motion under the changed conditions exception." The court explained that the regulations do not prohibit "a motion to reopen based on evidence of changed country conditions that are relevant in light of the petitioner's changed circumstances."

[33] 8 CFR §§ 1003.2(c)(3)(ii); BIA Practice Manual, Ch. 5.6(e)(i).

[34] *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007).

[35] *Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 955-56 (BIA 1999).

[36] At least two circuits have applied a diligence requirement to MTRs based on IAC. See *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008); *Maatougui v. Holder*, 738 F.3d 1230 (10th Cir. 2013). In these cases, the courts affirmed the BIA's denial of motions to reopen because the respondents filed their ineffective assistance claims after the BIA's final order of removal, even though the ineffective assistance occurred during the proceedings before the immigration judge. Most circuits, however, have not validated this additional requirement. Nevertheless, regardless of the circuit you are in, it is a good idea to demonstrate diligence through every step of the process, since the lack of diligence could certainly form a basis for denying the motion on discretionary grounds.

[37] *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004); see also *Fadiga v. Att'y Gen.*, 488 F.3d 142, 157 (3rd Cir. 2007); *Rabiu v. INS*, 41 F.3d 879, 882 (2nd Cir. 1994); *Paul v. INS*, 521 F.2d 194, 199 (5th Cir. 1975). However, "subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen." *Matter of B-B-*, 22 I&N Dec. 309, 310 (BIA 1998).

[38] *Aris v. Musakey*, 517 F.3d 595, 599-601 (2nd Cir. 2008); *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 801-03 (5th Cir. 2007); *Fong Yang Lo v. Ashcroft*, 341 F.3d 934 (9th Cir. 2003); *Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (BIA 1996).

[39] *Habib v. Lynch*, 787 F.3d 826, 832 (7th Cir. 2015); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008); *N'Diom v. Gonzales*, 442 F.3d 494, 496, 499 (6th Cir. 2006); *Kay v. Ashcroft*, 387 F.3d 664, 676 (7th Cir. 2004).

[40] *Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013); *Sanchez v. Keisler*, 505 F.3d 641, 648 (7th Cir. 2007); *Figeroa v. INS*, 886 F.2d 76, 77, 79 (4th Cir. 1989); *Rabiu v. INS*, 41 F.3d 879, 883 (2nd Cir. 1994).

[41] *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920-21 (9th Cir. 2015); *Mai v. Gonzales*, 473 F.3d 162, 166-67 (5th Cir. 2006).

[42] *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004); *Esposito v. INS*, 987 F.2d 108, 111 (2nd Cir. 1993). In cases where counsel missed a Notice of Appeal deadline, the motion would request reopening and reissuance of the decision based on ineffective assistance of former counsel. Once the decision is reissued, the respondent would gain another 30 days to file an appeal.

[43] *Nehad v. Mukasey*, 535 F.3d 962, 967-72 (9th Cir. 2008).

[44] *Singh v. Holder*, 658 F.3d 879, 885-86 (9th Cir. 2011).

[45] *Matter of Zmijewska*, 24 I&N Dec. 87, 94-95 (BIA 2007).

[46] *Aris v. Mukasey*, 517 F.3d 595, 601 (2nd Cir. 2008); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897 (9th Cir. 2003).

[47] *Avagyan v. Holder*, 646 F.3d 672, 681 (9th Cir. 2011).

[48] *Matter of Grijalva*, 21 I&N Dec. 472, 474 n.2 (BIA 1996).

[49] See *Contreras v. Att'y Gen.*, 665 F.3d 578, 584 (3rd Cir. 2012); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2004); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008) (holding that prejudice requires showing that deficient performance "may have affected the outcome of the proceedings," and noncitizen "need only show plausible grounds for relief") (quotations omitted); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994) ("[P]roving prejudice requires the Petitioner to make a prima facie showing that had the application been filed, he would have been entitled to relief from deportation …"); but see *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) ("[A noncitizen] must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States").

[50] *Matter of A-A-*, 22 I&N Dec. 140, 143-44 (BIA 1998).

[51] *Holland v. Florida*, 560 U.S. 631, 649 (2010).

[52] *Iavorski v. INS*, 232 F.3d 124, 129-33 (2nd Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398, 404-06 (3rd Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Ortega-Marroquin*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187-93 (9th Cir. 2001) (*en banc*); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (*en banc*).

[53] *Avagyan v. Holder*, 646 F.3d 672, 679, 682 n.9 (9th Cir. 2011) (requiring "assess[ment of] the reasonableness of petitioner's actions in the context of his or her particular circumstances," rather than some "magic period of time"); see also *Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (noting that "the mere passage of time—even a lot of time—before [a noncitizen] files a motion to reopen does not necessarily mean she was not diligent" because "the analysis ultimately depends on all of the facts of the case, not just the chronological ones"). As one court held, "the test for equitable tolling … is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier." *Pervaiz*, 405 F.3d at 490. As a result, the periods of time over which courts find noncitizens diligent vary widely. *Compare Borges*, 402 F.3d at 407 (finding due diligence where motion was filed four years after deadline); *Gaberov v. Mukasey*, 516 F.3d 590, 596-97 (7th Cir. 2008) (same); *Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) (finding no due diligence where motion was filed 16 days after deadline).

[54] *Lozano v. Montoyo Alvarez*, 134 S. Ct. 1224 (2014).

[55] *Socop-Gonzalez*, 272 F.3d at 1194-96; see also *Mezo*, 615 F.3d at 622 (noting that "[t]he clock would start again when [the noncitizen] discovered [the former attorney's] fraudulence").

[56] *Rashid v. Mukasey*, 533 F.3d 127, 131 (2d Cir. 2008); see also *Yuan Gao v. Mukasey*, 519 F.3d 376, 378-79 (7th Cir. 2008).

[57] *Enhancing Public Safety in the Interior of the United States*, E.O. 13768 (Jan 25, 2017), 82 FR 8799.

[58] 8 CFR § 1003.23(b)(4)(iv).

[59] 8 CFR §§ 1003.2(a), 1003.23(b)(1).

[60] *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

[61] *Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000); *see also Menendez-Gonzalez v. Barr*, 929 F.3d 1113 (9th Cir. 2019) (BIA had authority to grant *sua sponte* MTR that was based on the vacatur of a criminal conviction but it did not err in making a discretionary finding that the respondent had not established exceptional reasons to reopen).

[62] The only scenario where an MTR may not be discretionary is where it's an MTR filed with an immigration judge based on lack of notice of proceedings. *See Matter of G-Y-R-*, 12 I&N Dec. 181 (BIA 2001).

[63] *Virk v. INS*, 295 F.3d 1055, 1060-61 (9th Cir. 2002) (improper for BIA to rely on an unrelated section of the INA and petitioner's wife's misconduct); *Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) (improper for BIA to rely on misconduct of petitioner's father).

[64] In addition to the history of how and why the respondent entered the United States, the Board may consider the respondent's compliance with immigration orders after his arrival in the U.S. The Board may negatively exercise its discretion under the "fugitive disentitlement doctrine," which is normally applied in criminal contexts, where the respondent has engaged in "deliberate flouting of the immigration laws." *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985) (applying "fugitive disentitlement doctrine" where respondents failed to comply with voluntary departure order, and failed to report to legacy INS upon request, but instead filed a motion to reopen to reinstate the voluntary departure order, while deliberately remaining out of reach of immigration enforcement officers). See also, *Martin v. Mukasey*, 517 F.3d 1201, 1207 (10th Cir. 2008); *Giri v. Keisler*, 507 F.3d 833, 835 (5th Cir. 2007); *Hassan v. Gonzales*, 484 F.3d 513, 516 (8th Cir. 2007); *Garcia-Flores v. Gonzales*, 477 F.3d 439, 441-42 (6th Cir. 2007); *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 730 (7th Cir. 2004); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003); *Bar-Levy v. Immigration & Naturalization Serv.*, 990 F.2d 33, 34 (2nd Cir. 1993); *Arana v. U.S. INS*, 673 F.2d 75, 77 (3rd Cir. 1982) (*per curiam*).

[65] BIA Practice Manual, Ch. 5.2

[66] BIA Practice Manual, Ch. 3.2

[67] BIA Practice Manual, 3.3(c)(i)(B)

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