

Motions Involving Jurisdictional Issues

2012 Paralegal Training Program
Elise Manuel

Purpose of this Training

- Summarize the main categories of Motions cases that Paralegals adjudicate
- Discuss Jurisdictional limitations on motions and which categories of cases falling within exceptions to those limitations are adjudicated by Paralegals and when they will be referred for attorney adjudication
- Tell you where you can find materials, samples, and information to assist you in adjudicating Motion cases

Paralegal Responsibility

- After the Clerk's Office staff refers cases to the Paralegals (on green sheet), the Paralegal reviews and determines if the case should be referred to an attorney
- Paralegals also find cases while Screening that fall within the categories of cases they may adjudicate
- Paralegals draft many straightforward orders in motions cases involving Jurisdictional issues, plus stay orders where a detained alien's motion is pending and deportation or removal is imminent
- Paralegals refer Motion cases that are not appropriate for PL adjudication to attorneys for adjudication

Categories of Motion Cases Paralegals may Adjudicate

- Motions to Reissue
- Joint Motions to Reopen
- Motions to Reopen/Terminate based on grant of status by DHS
- Motions to Reconsider Dismissal of Appeal for Lack of Jurisdiction
- Untimely Motions to Reconsider/Reopen
- Withdrawn Motions – Departure Bar issues
- Lost Alien

Where Can You Find Sample Language & Resources?

- s:/Panel 3 Sample Orders
- s:/WPDOCS/JPANEL.BNK
 - J-Panel Forms
 - J-Panel Orders & Checklists
 - J-Panel Training Materials
 - Warning: these are in the process of being updated, so try to check if the forms/materials are recent

General Motions Time & Number Limits

- **Motions to Reconsider** – 30-day time limit and only one may be filed
 - **section 240(c)(6) of the INA** (applies to Removal cases)
 - **8 C.F.R. § 1003.2(b)(2)** (applies to deportation, exclusion, removal)
 - Couple of things to be aware of:
 - If Board's decision was issued prior to July 1, 1996, the deadline for a motion to reconsider was July 31, 1996
 - The regulations refer to "any given decision" of the Board rather than the final order of removal, so the Board has allowed aliens to file for reconsideration of any order
- **Motions to Reopen** – 90-day time limit and only one may be filed:
 - **section 240(c)(7) of the INA** (applies to Removal cases)
 - **8 C.F.R. § 1003.2(c)(2)** (applies to deportation, exclusion, removal)
 - Couple of things to be aware of:
 - If Board's decision was issued prior to July, 1996, the deadline for a motion to reopen was September 30, 1996
 - The time/number limits for motions to reopen always run from the final administrative order, not necessarily from date of last Board decision (esp. where Board's decision relates to IJ denial of a MTR below)

Other General Considerations

- Motions are often entitled something other than what they are in substance
 - e.g. the motion may be entitled one to Reconsider, but submits new evidence to show new facts; thus, the motion is in the nature of a motion to Reopen
 - must treat the motion as what “it says it is” and what “it really is.”
- Analysis of a Motion is not subject to the limitation on fact-finding found in 8 C.F.R. § 1003.1(d)(3)(iv), which applies only to fact-finding in the course of deciding an appeal.

Motions to Refer to Attorneys - Exempt from Ordinary Deadlines or Subject to Different Deadlines

- In absentia cases
- Equitable Tolling/Ineffective Assistance of Counsel
- Special Act Cases – VAWA, NACARA, LIFE Act, 245(i), special 212(c)
- Sua sponte requests (most)
- Motions to Admin Close after final order issued

MOTIONS THAT PARALEGALS ADJUDICATE

Motions to Reissue

- These are motions to reissue a prior Board decision
- PL may handle whether it is timely or untimely
- They are not provided for by statute or regulation, but we have always recognized them and essentially treat them as a motion to reopen for the purpose of reissuing the decision
- An alien most often requests reissuance of a decision of the Board if there is a claim that it was not received. They may request reissuance so that the 30-day period for filing a Circuit Court petition for review restarts, or so that the period of VD begins again.

Which ones are Adjudicated by Paralegals?

- Paralegals process the vast majority of Motions to Reissue, where the record/evidence clearly shows error by the Board in serving the Board's decision.
- Motions that are not straightforward or do not clearly reflect a Board error are generally referred to J&M attorneys for adjudication

Factual Scenarios Where we Ordinarily Grant Motion to Reissue

- **Error in serving the Board decision**
 - Sent to wrong address of alien/attorney
 - A change of address or EOIR-27 may have not been associated with ROP before mailing decision
 - The address may have been incomplete/erroneous
- **Use Sample Order 07H**
 - Take care to include appropriate VD language if there was a VD order in the initial decision

Cases that will Generally be Referred for Attorney Adjudication

- **Claim representative failed to advise of Board's decision** - Since the A.G.'s decision in Compean II – Compean, Bangaly, and J-E-C-, 25 I&N Dec. 1 (A.G. 2009) - the Board must consider these ineffective assistance of counsel claims in our discretion
- **Claim non-receipt/notice of Board decision where record shows we properly mailed to address of record and the decision was not returned to Board** - whether we grant may depend on the Circuit and what evidence of non-receipt has been presented by alien/attorney (for example, attorney affidavit may be persuasive, but a vague letter from the alien may not)

Processing Reissued Decisions

- **Reissue order is on buff paper - must attach a photocopy (white paper) of the decision that is being reissued to the order**
- **This ensures that the proper decision is attached (should not expect C.O. staff to make that determination, esp. in cases where there are multiple Board decisions)**
- **Put note in “Instructions to Docket” to include attached decision with signed order**
- **Decision Code = “OTH”**

Joint Motions to Reopen

- This is a category of Untimely Motions to Reopen that falls within an exception set forth in the federal regulations. 8 C.F.R. § 1003.2(c)(3)(iii).
- Despite time and number limits, this section allows a motion to reopen that is “[a]greed upon by all parties and jointly filed.” *Id.*
- Use Sample Order 27E - generally no modification
- BUT - if the parties request termination instead of remand, should modify order to terminate the proceedings instead of remanding to Immigration Court
- May see motions relating to DHS exercise of prosecutory discretion, and there should be guidance on processing these cases soon.

Things to Verify

- Although a motion may be called a “Joint Motion” it is not always what it says it is:
 - Has a DHS attorney signed the joint motion?
 - if not, has the DHS filed a response to the motion stating that it “joins” in the motion?
 - The DHS may file a separate statement/signature stating that it joins in the motion to reopen, but a non-opposition to the motion to reopen is not sufficient to render an ordinary motion to reopen a “Joint Motion” and exempt it from the time limits
- If the motion does not contain all requirements for a joint motion, do not process with a short joint motion order, but refer to an attorney for further review.

Motions to Reopen and Terminate based on grant of status by DHS

- These Motions may be Timely or Untimely
- These may also sometimes come in as joint motions, which will be granted, but we include termination language (instead of remanding)
- Common categories:
 - **I-730 granted**, and alien granted asylee status – even though this is a temporary status, it usually becomes permanent
 - **LPR status granted through adjustment** – this most often arises where an “arriving alien” has been able to pursue adjustment of status with USCIS even though there is an outstanding order of removal

What to Look For

- Evidence that the claimed status has been granted:
 - Copy of USCIS approval of I-730
 - Copy of USCIS notice of approval of adjustment of status (I-485) or copy of LPR card (“green card”)
- Whether DHS is unopposed
- Use Form Termination Order (language approved by J&M Board Members)
 - May soon add Panel 3 Sample Order
 - In the meantime, use form language in orders found at <s:/wpdocs/JPanel.Bnk/J-Panel Orders & checklists/motions>

Motions to Reconsider/Reopen Dismissal of Appeal for “Lack of Jurisdiction”

- These are usually Timely Motions Most often, alien requests reconsideration of dismissal of Appeal as Untimely
 - May also relate to dismissal as Waived
 - May also relate to dismissal as Withdrawn
- Sample Orders 39 and 39B-D – **Warning:** these are in the process of being updated, but in the meantime reference to “lack of jurisdiction” should be changed
 - We should specify the particular basis of dismissal (untimely, waived, etc.)

If the Motion Does Not Challenge the Reason for Dismissal

- Sample Order 39
- This order is used where the alien files a motion after the Board dismisses the appeal as Untimely/Waived/Withdrawn, but is not challenging that finding (usually just asks for a new form of relief)
- This order can be used whether the motion is timely or untimely

Insertions/Modifications to Sample Order 39

- Insert the date of the Board's order
- Change "for lack of jurisdiction" (lines 1&5) to reflect the specific basis for dismissing the appeal. For example:
 - "dismissed the appeal as untimely/waived/etc"
 - "prior determination that the appeal was untimely/withdrawn/etc"

If the Motion Challenges the Dismissal, But Unpersuasive

- Sample Order 39B
- This order is used where the alien does challenge the Board's dismissal of the appeal as Untimely/Waived/Withdrawn, but does not present arguments/evidence that persuade the Board we should have considered the appeal
- The more extensive the evidence or arguments, the more likely the motion should be referred to an attorney for consideration

Motion Challenges Board's Dismissal as Untimely and Evidence Shows it was Timely

- Sample Order 39C – Interim Order Vacating the Board's Untimely Dismissal and Reinstating the Appeal
- This order is used when the alien challenges the dismissal as untimely and has evidence that the NOA was actually received by the Board by the due date:
 - May show that the due date was calculated incorrectly by the Board
 - May present evidence (e.g. FedEx printout) showing that C.O. signed for the NOA on or before the due date, but for whatever reason the C.O. did not date-stamp it on that date

Motion Challenges Board's Dismissal as Untimely/Waived/Withdrawn and Persuades to take on Certification

- Sample Order 39D - Interim Order Vacating the Board's Dismissal and Accepting Appeal by Certification and Reinstating Appeal
- This order is used when the alien challenges the Board's dismissal of the appeal as untimely without considering circumstances that might warrant consideration of the appeal on certification
 - E.g. where the alien mailed the appeal by overnight delivery, but it was delivered a day or two late – in light of the guidance after the *Irigoyen-Briones* decision in the 9th Circuit, we will likely be granting these types of motions in these circumstances

Attorney Referral

- Where a motion to reconsider challenges dismissal of appeal as waived (and raises a claim that any waiver was not knowing and intelligent) or dismissal of appeal as withdrawn (especially if based on removal), these motions should be referred to an attorney for adjudication
- Challenges to Untimely dismissals may also involve more complex issues that warrant referral for Attorney adjudication

Untimely &/or Number-Barred Motions

- Paralegals may draft orders in Untimely Motion cases that are fairly straightforward
 - Motions to Reconsider
 - But, careful to consider which Board decision the motion relates to before concluding it is time- or number-barred
 - Motions to Reopen
 - Motions for forms of relief falling within no exception (e.g. adjustment/cancellation)
 - Motions for asylum/withholding based on changed country conditions (CCC) – usually where little/no evidence submitted

Motions to Reconsider

- Unlike for Motions to Reopen, neither the statute nor the regulation contains an exception to the time or number limits for motions to reconsider
- However, the regulations allow a motion to reconsider “any given decision” of the Board, so even if the alien has previously filed a MTReconsider a prior Board decision, the current MTReconsider will not be number-barred, and will be timely if filed within 30 days of the decision the alien seeks to challenge

Untimely Reconsider Orders

- Sample Order 11A – Use this order where it is a straightforward Untimely MTReconsider and there is no reason to refer to an attorney
 - Only include optional due date language if the motion is not very late (i.e. filed within a month or so of the due date)
- Sample Order 11A with additional language re: MTReopen also Untimely
 - If new evidence is submitted with the motion AND that aspect of the motion was also filed late (outside 90-day limit for MTReopen), use this version

Number-Barred Reconsider Order

- Sample Order 09
- This order is only used when the alien has filed another MTRReconsider the same Board decision that he/she previously challenged through a MTRReconsider
- If a prior MTRReconsider challenged a different order, do not use this order

Attorney Referral

- Things to look out for in deciding to refer a MTRReconsider to Attorney for review:
 - if it is not clear which Board order the alien is challenging
 - if there are extensive legal arguments
 - if the alien is alleging that a change of law warrants reconsideration sua sponte under 8 C.F.R. § 1003.2(a)
 - if the alien may have set forth an error of fact or law in the Board's decision that could warrant sua sponte reconsideration

Motions to Reopen

- The Paralegals primarily handle two areas of Untimely &/or Number-Barred Motions to Reopen:
 - Motions for forms of relief falling within no exception (e.g. adjustment/cancellation)
 - Motions for asylum/withholding based on changed country conditions (CCC) – usually where little/no evidence submitted

“No Exception” Motions

- Main forms of relief that fall within no exception to the time & number limits are:
 - Adjustment of Status based on pending/approved Visa Petition
 - Cancellation of Removal
- Review carefully to see if there is a request to reopen sua sponte
- Aliens often submit a very-untimely motion to reopen with new evidence that they are now eligible for a new form of relief or that new evidence would change the decision regarding a prior application – these motions do not fall within any exception to the time and number limits and will ordinarily be denied, UNLESS there are indications that sua sponte reopening is warranted

Untimely MTRreopen Order

- Use Sample Order 10A2 (Can use 10C Combo order if the motion is both UT and #-barred)
- Fill in date of Board's final order
 - Double-check to make sure the Board's order was not the dismissal of an Appeal of IJ-MTR because it will be the IJ order that is final order → should refer to attorney in those cases
- Use optional due date language if only month or so late
- Generally want to use the first optional insert language where alien articulates a form of relief that does not fall within an exception – it lets the parties & any reviewing court know we fully considered the motion

Number-Barred MTRreopen Order

- Sample Order 10B is not used very often
- Generally only use where this is the 4th or more MTRreopen **AND** where an exception does not need to be discussed
 - For example, if this is the alien's 8th motion to reopen, but he/she claims changed country conditions, we probably need at least a minimal discussion of whether the evidence is sufficient to bring the motion within the exception → usually refer to attorney

Address Sua Sponte Requests

- Where an alien is just asking for sua sponte reopening as a “catch-all” argument because the motion does not otherwise meet the requirements for reopening, the Paralegal may address this request.
- Must include language in the order acknowledging the sua sponte request but explaining why we will not exercise our discretion in this case → see optional language in Sample Order 10A2

Sua sponte authority

- **8 C.F.R. § 1003.2(a)** - The Board on its own motion may reopen or reconsider any case in which it has rendered a decision
- The Board’s sua sponte authority is discretionary and is not technically an “exception” to the time & number limits
- Our discretion is broad

Generally limited to Exceptional Circumstances

- If alien demonstrates new eligibility for relief, but does not otherwise fall within any exception to the time or number limits applicable to motions to reopen, the Board may consider reopening sua sponte
- *Matter of J-J*, 21 I&N Dec. 976 (BIA 1997), the Board held that power to reopen or reconsider cases on its own motion is “limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship.”

Mere Fact of Becoming Eligible for Relief After Final Order Not Enough

- **Board will not generally reopen sua sponte in the absence of exceptional circumstances**
 - This often arises where an alien subsequently becomes the beneficiary of an approved immigrant visa petition (or the priority date for a VP becomes current at a later date) & seeks adjustment
 - Board Members may consider the particular circumstances of the alien’s situation, such as evidence of a serious health condition or substantial hardships that may be exceptional

If not Eligible, Board will not Exercise Sua Sponte discretion

- If review of the motion/record reveals that the alien is not statutorily eligible for the relief he/she seeks → This may not be a simple determination, and case may need to be referred to Attorney
- Will not even reach the question of whether there are exceptional circumstances that might otherwise warrant exercising our discretion to reopen sua sponte, if no relief could be sought upon reopening

Attorney Referral

- Any case where it is not clear if the alien is eligible for the relief sought, or if it is not clear if circumstances alleged should be considered “exceptional”
- Any case where the alien is alleging that sua sponte reopening is warranted based on a change in law. *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999).
- Any case where the alien presents evidence that a conviction has been vacated such that sua sponte reopening is warranted.
- Cases where the alien seeks relief over which the Board does not have Jurisdiction (e.g. adjustment by “arriving aliens” or aliens who have applications for U-visa or V-visa pending with USCIS)

Change Country Conditions UT Motions

- This is an exception to both the time and the number limits under the statute and the regulations:
 - **Section 240(c)(7)(C)(ii) of the Act** – refers to changed country conditions arising in the country of nationality
 - **8 C.F.R. § 1003.2(c)(3)(ii)** – refers to changed circumstances arising in the country of nationality
 - For all intents and purposes, this is the same standard, and the change must have arisen in the country of nationality

Which CCC cases do Paralegals Adjudicate?

- Sample Order 10D
- Paralegals draft orders primarily in cases:
 - Where no evidence has been submitted
 - Where very little evidence has been submitted
 - Where the evidence is old, duplicative, or cumulative
 - The alien only vaguely alleges changed conditions

CAT language

- Review the motion carefully to make sure you address any CAT claim if it is raised (even if just claim will be “tortured”)
- CAT applications are not mentioned in the exception, but the Board Members will consider whether, “to the extent” a CAT claim could fall within the exception, the evidence shows that it does

Attorney Referral

- Generally will refer UTMTR-CCC cases for attorney adjudication if:
 - The alien submits any significant “evidence”
 - The evidence, even if minimal, appears to demonstrate changed conditions in the country at issue

Withdrawn Motions Handled by Paralegals

- Paralegals may still draft orders in cases where an alien or his/her representative has affirmatively submitted a written request to withdraw the motion
- Use Sample Order 03A
- This order cites 8 C.F.R. § 1003.4 (which applies to Appeals) because there is no section of the regulations that relates to withdrawal of motions, except by departure

Attorney Referral – Departure Issues

- **Refer all Motion cases where the alien has departed the U.S. to Attorneys for review**
- **8 C.F.R. § 1003.2(d)** precludes an alien who has departed the U.S. from filing a motion to reopen, and the departure of an alien after filing a motion will constitute a withdrawal of the motion
 - BUT, many Circuit Courts have issued decisions addressing the validity of this regulation → see Departure Bar Outline
- Even if an alien indicates he/she departed voluntarily, but has not specifically requested that his/her motion be withdrawn, you should refer for attorney review
- Do NOT use sample orders 03B, 03C, or 03D

Lost Alien Orders

- Paralegals draft Lost Alien orders both in Appeal case and Motion cases
- If there is no address where we can serve a decision, this order will be issued
- Sample Order 06 → BE CAREFUL to use the Motion Version (with MOTION in caption)

**** The foregoing presentation is intended for internal Board use only, is intended to be used merely as a training tool, and is not intended to represent official policy of the Department of Justice or the Board of Immigration Appeals**