Practice Advisory[1]

The Basics of Motions to Reopen EOIR-Issued Removal Orders

April 25, 2022

This practice advisory provides a basic overview of motions to reopen removal orders issued by the Executive Office for Immigration Review (EOIR), which consists of immigration courts throughout the country and the Board of Immigration Appeals (BIA), located in Falls Church, Virginia. The advisory also provides basic information about how to seek a stay in conjunction with the filing of a motion to reopen.[2]

1. What is a motion to reopen?

A motion to reopen is an important statutory mechanism for people who have been ordered removed. *See* 8 U.S.C. § 1229a(c)(7). It allows these individuals to ask either the immigration judge (IJ) or the BIA to consider material and previously unavailable evidence and vacate the existing order. *See* 8 C.F.R. §§ 1003.2(c); 1003.23(b)(3). When an IJ or the BIA reopens a case, the existing removal order is vacated. *Nken v. Holder*, 556 U.S. 418, 429 n.1 (2009).

In addition to the general reopening statute at 8 U.S.C. § 1229a(c)(7), there are two other statutory provisions addressing specific bases for motions to reopen: (1) 8 U.S.C. § 1229a(c)(7)(C)(ii), governing motions to apply for fear-based protection based on changed country conditions and (2) 8 U.S.C. § 1229a(c)(7)(C)(iv), governing special rule motions for qualifying survivors of domestic violence.

The Supreme Court recognizes that a "motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)). Noncitizens have a *statutory right* to file one motion to reopen their case. *See Reyes Mata v. Lynch*, 576 U.S. 143, 145 (2015); *Dada*, 554 U.S. at 4-5.

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[1] This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. The authors of this practice advisory are Trina Realmuto and Kristin Macleod-Ball. The advisory was first issued on February 7, 2018.

[2] This advisory does not address reopening of removal orders issued by the Department of Homeland Security (DHS).

Although they are not the focus of this practice advisory, an individual also can seek to vacate an existing order based on errors or law or fact in a previous decision, through a related but distinct mechanism, a motion to reconsider. *See* 8 U.S.C. § 1229a(c)(6). Many of the rules governing motions to reopen also apply to motions to reconsider. In addition, under a separate statutory provision, individuals who were ordered removed *in absentia* can seek rescission of the order and reopening if they did not receive proper notice or failed to appear for a hearing in immigration court based on exceptional circumstances. *See* 8 U.S.C. § 1229a(b)(5)(C).

2. Are the current versions of the motion regulations available online?

EOIR's regulations regarding motions to reopen and motions to reconsider are set forth at 8 C.F.R. §§ 1003.2 (motions to the BIA) and 1003.23 (motions to an immigration court). Generally, current versions should be available online.

However, as of April 2022, the versions of the motion regulations posted by most sources online, including paid services, are incorrect because they reflect (unlawful) changes made to the regulations in December 2020 that a district court later enjoined.[3] Accordingly, practitioners are advised to use the regulations in effect prior to January 15, 2021. Practitioners may wish to consult a paper copy of the regulations from 2020 to review the text currently in effect.[4]

3. What are some grounds for filing a motion to reopen under the general reopening statute?

The statute requires motions to reopen to "state the new facts that will be proven at a hearing if the motion is granted" and include "affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(7). The regulations require that the "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. §§ 1003.2(c); 1003.23(b)(3) (same). In addition to motions based on changed country conditions or special rule motions for certain survivors of domestic abuse, common grounds for reopening include:

- ineffective assistance of prior counsel which prejudiced the case;[5] and

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[3] In December 2020, EOIR purported to make sweeping changes to the regulations through issuance of a final rule. See EOIR, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (2020). However, a district court issued a nationwide injunction enjoining the rule. *Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919 (N.D. Cal. 2021).

[4] For 8 C.F.R. § 1003.2, the correct version of the regulation begins: "The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2(a) (2020). The stayed version, which is not currently in effect but is posted in most online sources, begins: "The Board may at any time reopen or reconsider a case in which it has rendered a decision on its own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service."

[5] Ineffective assistance of counsel claims are addressed in the Council's Practice Advisory, Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases.

- arguments that an individual is not/was not deportable as charged or is eligible for relief based on, i.e.:
    - newly vacated convictions,[6]
    - changes in personal circumstances that impact eligibility for relief,
    - violations during the underlying proceeding that effected ability to challenge removability or apply for relief, or
    - subsequently issued case law that affects removability or eligibility for relief.

Importantly, if an individual seeks reopening to apply for relief from removal, the motion must include the relief application and supporting documents and should demonstrate that the person is prima facie eligible for the relief sought. 8 C.F.R. §§ 1003.2(c)(1); 1003.23(b)(3).

4. What are the deadlines for filing motions to reopen?

General deadline: Generally, the IJ or the BIA must receive the motion to reopen within 90 days of the final removal order. *See* 8 U.S.C. § 1229a(c)(7)(C)(i).[7] Significantly, however, the IJ or the BIA may adjudicate a motion to reopen as a statutory motion even if it is filed more than 90 days after entry of the removal order upon a showing that the deadline merits equitable tolling.

Equitable tolling is a principle that entitles litigants to an extension of non-jurisdictional filing deadlines if they act diligently in pursuing their rights but are nonetheless prevented from timely filing by some extraordinary circumstance. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631 (2010). Although the BIA has not addressed whether the motion to reopen deadline is subject to tolling, every court of appeals to have done so in a published decision has found that tolling applies.[8] The standard for and case law addressing equitable tolling claims vary by circuit. Some courts apply variations of the Supreme Court equitable tolling test to requests to toll the motion to reopen deadline. *See, e.g.*, *Kuusk*, 732 F.3d 302. In general, equitable tolling claims should be supported by evidence of the circumstances that prevented timely filing (for example, ineffective

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[6] Note that, in March 2022, the BIA requested amicus briefing on what factors it should consider when considering an untimely motion to reopen that is predicated on the vacatur of a criminal conviction.

[7] Different deadlines apply to motions to rescind in absentia removal orders: there is no deadline for motions based on lack of proper notice, and the deadline for exceptional circumstance motions is 180 days. 8 U.S.C. § 1229a(b)(5)(C).

[8] *See 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); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc) (overruled in part on other grounds by *Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc)); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc). While the First Circuit has yet to rule on the issue, it found "notabl[e]" that "every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen." *Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013).

assistance of counsel, fraud, or agency malfeasance)[9] and evidence that the individual pursued their case with reasonable diligence. Declarations explaining why an individual did not pursue reopening earlier and his or her efforts after discovering the basis for reopening are helpful. In many cases, attorneys can attest in a declaration to informing an individual of the right to seek reopening and/or the basis for reopening for the first time and to their client's desire to pursue reopening.[10]

Changed country conditions: There is no deadline for filing a motion to reopen to apply for fear-based protection based on changed country conditions. 8 U.S.C. § 1229a(c)(7)(C)(ii).

Domestic violence: A motion to reopen filed by certain battered spouses, children, or parents of abusive U.S. citizens or lawful permanent residents must be filed within one year of the final removal order, although this deadline is waivable upon a showing of extraordinary circumstances or extreme hardship to the movant's child. 8 U.S.C. § 1229a(c)(7)(C)(iv).

Other bases: By regulation, an IJ or the BIA can reopen a removal order sua sponte at any time. *See* 8 C.F.R. §§ 1003.2(a) (BIA); 1003.23(b)(1) (IJ). However, requests for sua sponte reopening are subject to certain limitations regarding judicial review and application of 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1) (the departure bar regulations), *see infra* at n.16, that generally are not applicable to statutory motions. Therefore, whenever possible, attorneys are advised to seek sua sponte reopening in the alternative to a statutory basis for reopening.

DHS motions: A jointly filed motion agreed upon by the movant and DHS is not limited in time. 8 C.F.R. §§ 1003.2(c)(3)(iii) (BIA); 1003.23(b)(4)(iv) (IJ). In addition, motions to reopen removal proceedings that are filed by DHS with the immigration court are not limited in time. 8 C.F.R. § 1003.23(b)(1).[11]

5. Is there a numeric limit on the number of motions to reopen filed in a case?

The statute provides that a person may file one motion to reopen and contains an exception to this limitation for motions based on domestic violence. 8 U.S.C. § 1229a(c)(7)(A). Motions filed before September 30, 1996 do not count toward the one-motion limit.[12] Several courts of appeals have recognized that the one-motion rule also is subject to equitable tolling.[13]

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[9] Ineffective assistance of counsel claims require proof of compliance with the procedural requirements laid out in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

[10] Some courts have held that the one motion limit also is subject to tolling. *See infra* Question 5.

[11] Note, however, that DHS is subject to the motion to reopen deadline in deportation or exclusion cases, *unless* the motion is based on fraud in the original proceeding or a crime that would support termination of asylum. 8 C.F.R. §§ 1003.2(c)(3)(iv) (BIA); 1003.23(b)(1) (IJ).

[12] Although not in the regulations, EOIR acknowledges that the one-motion limit cannot apply to motions filed before Congress codified this rule. Immig. Ct. Practice Manual Ch. 5.7(e)(5); BIA Practice Manual Ch. 5.6(e)(5). Any other interpretation would be impermissibly retroactive.

[13] *See Jin Bo Zhao v. INS*, 452 F.3d 154, 158-59 (2d Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223-26 (9th Cir. 2002).

In addition, a jointly-filed motion agreed upon by the movant and DHS is not limited in number. 8 C.F.R. §§ 1003.2(c)(3)(iii) (BIA); 1003.23(b)(4)(iv) (IJ). Motions to reopen removal proceedings that are filed by DHS with the immigration court also are not limited in number. 8 C.F.R. § 1003.23(b)(1).[14]

6. What happens if there is more than one basis for the motion?

Often, individuals have more than one basis upon which to seek reopening. For example, there may be changed conditions in their country of origin, and they may have an argument that they were not deportable as charged or are newly eligible for relief based on a change in law, vacated conviction, or changed personal circumstances.

In this situation, attorneys need not select one basis for reopening; rather, they may include all bases in one motion. In general, the argument section of a motion to reopen should begin with the strongest basis for reopening and seeking reopening sua sponte as an alternative.

In the scenario described above, for example, the motion could argue that reopening is warranted: (1) first, based on the changed country conditions statute; (2) in the alternative, based on the general reopening statute (with an equitable tolling argument if more than 90 days have passed since entry of the final order of removal); and (3) as a second alternative, based on the sua sponte reopening regulation.

Unless and until the IJ or BIA adjudicates the motion, attorneys should supplement an existing motion with additional bases for reopening and/or subsequently acquired evidence.

7. Where is a motion to reopen filed and what should it include?

In general, a motion to reopen is filed either with the immigration court or the BIA, depending on which entity last had contact with the case. *See, e.g.*, BIA Practice Manual Ch. 5.2(a), 5.6(a). For example, if an IJ ordered the individual removed and he or she did not appeal, the motion must be filed with the immigration court. If the individual previously appealed the IJ's removal order to the BIA (or filed a petition for review of the BIA's decision which was never remanded back to an immigration court), the motion must be filed with the BIA. If the individual's administrative appeal is still before the BIA and there is a viable basis to seek reopening, the motion must be filed with the BIA. In this situation, the BIA may treat the motion to reopen as a motion to remand and may consolidate it with the underlying appeal. 8 C.F.R. § 1003.2(c)(4). Similarly, if the individual has a petition for review pending, the motion to reopen must be filed with the BIA but note that the court of appeals will lose jurisdiction over the pending petition for review if the BIA grants reopening as there will no longer be a final order for the court to review.

Some exceptions to the general rule include motions to reopen filed: (a) after the BIA already has remanded the case to the IJ; and (b) in cases where the BIA dismissed the appeal for lack of jurisdiction or because it was untimely. *See Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974);

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[14] Note, however, that DHS is subject to one-motion limit in deportation or exclusion cases, *unless* the motion is based on fraud in the original proceeding or a crime that would support termination of asylum. 8 C.F.R. §§ 1003.2(c)(3)(iv) (BIA); 1003.23(b)(1) (IJ).

Matter of Lopez, 22 I&N Dec. 16 (BIA 1998); BIA Practice Manual Ch. 5.2(a). In these situations, the proper venue for a motion to reopen generally lies with the immigration court.

A motion to reopen should include:

- A cover letter (to the IJ or BIA);
- An entry of appearance: Form EOIR-27 (BIA); Form EOIR-28 (IJ);
- A motion, which includes all possible legal bases for reopening and all new facts that would be established in reopened proceedings:
    - The motion should include an introduction, a statement of facts and of the case, a section outlining the standard for reopening, legal arguments (addressing all bases for reopening and any equitable tolling claim and demonstrating prima facie eligibility for relief), and a conclusion stating the relief requested.
    - The motion must state whether the order has been or is the subject of any judicial proceeding and whether the subject of the order has been or is the subject of any criminal proceeding. If so, the motion must provide additional information and/or include a statement from the movant regarding that proceeding. 8 C.F.R. §§ 1003.2(e); 1003.23(b)(1)(i).
- An exhibit list and exhibits, including:
    - A copy of the existing removal order of which reopening is sought;
    - Any application for relief that would be sought in reopened proceedings, along with any supporting documents, 8 C.F.R. §§ 1003.2(c)(1); 1003.23(b)(3);
    - Evidence of compliance with *Matter of Lozada*, 19 I&N Dec. 637, if making an ineffective assistance of counsel claim, *see supra* n.5 and 9;
    - Evidence to support equitable tolling of the filing deadline, including evidence of the extraordinary circumstances that prevented timely filing (e.g., vacated conviction) and diligence (e.g., affidavits from the individual and current counsel);
- If seeking reopening from an immigration court, a proposed order;
- A filing fee or fee waiver application (Form EOIR-26A for the BIA), unless the only form of relief sought in reopened proceedings is asylum, withholding of removal or CAT protection or termination of proceedings, *see* 8 C.F.R. §§ 1003.8(a), 1003.24(b), 1103.7(b)(2); and
- A certificate of service.

8. How long does DHS have to respond to a motion to reopen?

If the motion is filed with the BIA, DHS has 13 days from service of the motion to file an opposition. 8 C.F.R. § 1003.2(g)(3). If the motion is filed with an IJ, by regulation, the IJ may set and extend time limits for replies. 8 C.F.R. § 1003.23(b)(1)(iv). Both regulations provide that "[a] motion shall be deemed unopposed unless a timely response is made." 8 C.F.R. §§ 1003.2(g)(3); 1003.23(b)(1)(iv).

If DHS does not timely file an opposition, the movant should file a statement notifying the IJ or BIA that DHS has not opposed and that the motion, therefore, should be deemed unopposed. If DHS files a late opposition (which should be accompanied by a motion to accept the late filing),

the movant should oppose the motion to accept the late-filed opposition and consider filing a reply to the opposition as soon as practicable.

9. Does the regulatory departure bar apply to motions to reopen?

By regulation, EOIR purports to bar motions to reopen or reconsider by individuals who have departed the United States after being the subject of removal proceedings, claiming it lacks authority to review any such motion. *See* 8 C.F.R. §§ 1003.2(d) (BIA), 1003.23(b)(1) (immigration court). However, all circuit courts to have considered the issue have invalidated the departure bar as to statutory motions.[15]

EOIR has continued to apply the departure bar to regulatory motions—i.e., requests that the immigration court or BIA exercise its authority to reopen sua sponte. *See Matter of Armendarez-Mendez*, 24 I&N Dec. 646 (BIA 2008). Some courts have affirmed the BIA's power to do so. *See, e.g.*, *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *Desai v. Att'y Gen.*, 695 F.3d 267 (3d Cir. 2012).

However, more recently, at least two courts have found that applying the departure bar to sua sponte reopening is unlawful. *See Rubalcaba v. Garland*, 998 F.3d 1031 (9th Cir. 2021); *Reyes-Vargas v. Barr*, 958 F.3d 1295 (10th Cir. 2020). These courts found that, after the Supreme Court clarified the standard for agency interpretation of regulations in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), deference to the agency's interpretation of the departure bar was inappropriate given the plain language of the regulation. Practitioners may wish to argue that other courts, including those that previously deferred to the BIA's interpretation of the departure bar regulations, should find the departure bar unlawful in light of *Kisor*.

Practitioners with cases involving challenges to the departure bar in federal court—especially those in the Eighth Circuit, the only court of appeals that has yet to rule on the validity of the departure bar with respect to a statutory motion—are encouraged to contact the authors of this advisory at trina@immigrationlitigation.org or kristin@immigrationlitigation.org.

10. Can the IJ or BIA deny statutory motions to reopen in the exercise of discretion?

Historically, the Supreme Court and courts of appeals have considered IJs and the BIA to have "broad discretion" over motions to reopen and have reviewed them under an abuse of discretion standard. *See Kucana v. Holder*, 558 U.S. 233, 242 (2010). When much of the initial case law governing motions to reopen developed, such motions were regulatory.

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[15] *See Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. U.S. Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012). The Eighth Circuit has not yet ruled on the issue in a published decision. *See Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011) (remanding a case involving the departure bar on other grounds).

Through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress, for the first time, codified the right to file a motion to reopen. In so doing, Congress "transform[ed]" the motion to reopen process, and thus "took a significant degree of discretion out of the agency's hands and vested a statutory right in the noncitizen." *Perez Santana v. Holder*, 731 F.3d 50, 58-59 (1st Cir. 2013) (citing cases). Although the prior regulations stated that reopening was discretionary and Congress adopted many of the regulatory provisions into the new motion to reopen statute, Congress omitted any language expressly granting EOIR authority to deny motions solely in an exercise of discretion.

In reviewing this new statutory right, the Supreme Court held in *Dada v. Mukasey*, "[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition" of immigration proceedings. 554 U.S. 1, 18 (2008).[16]

Taken together, Congress' codification of motions to reopen and the Supreme Court's interpretation of the motion to reopen statute as intended to ensure "a proper and lawful disposition" of removal proceedings suggests that practitioners now can argue that IJs and the Board must confine their substantive review of statutory motions to reopen to the propriety and legality of the earlier removal proceeding in light of new and previously unavailable evidence.

However, since Congress codified motions to reopen, few courts have considered whether IJs and the BIA continue to have discretion over motions to reopen, including those seeking reopening to obtain termination or nondiscretionary relief. Rather, most continue to rely on case law that pre-dates codification and/or the regulatory language providing simply that the BIA has discretion to grant or deny a motion (even if the party has made a prima facie case for relief). 8 C.F.R. §§ 1003.2(a) (BIA); 1003.23(b)(3) (IJ).

These regulations, however, arguably conflict with congressional intent to divest the agency of discretionary authority over statutory motions to reopen. As such, they may be challenged under the test set forth in *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Chevron* requires courts to consider, first, if Congress has made clear its intent by examining the plain meaning of the statute and, if necessary, employing traditional rules of statutory construction. If Congress's intent is clear, this intent governs. *Id.* Second, only if congressional intent cannot be discerned, a court must consider whether the agency interpretation is a reasonable construction of the statute. *Id.*

Practitioners could argue that denials of statutory motions to reopen based on broad discretionary grounds conflict with Congress' intent to eliminate such discretion over motions to reopen.[17] The plain language of the motion to reopen statute, 8 U.S.C. § 1229a(c)(7), contains no such

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[16] *See also Kucana*, 558 U.S. at 242 (reaffirming that a motion to reopen is an "important safeguard").

[17] However, the agency retains discretion over statutory findings that are contingent upon a favorable exercise of such discretion. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v). Denials of motions to reopen based on purely procedural grounds also do not generally involve the exercise of agency discretion.

discretionary component.[18] Moreover, Congress's use of expressly discretionary authority elsewhere in the Act, *see e.g.*, 8 U.S.C. §§ 1158(b)(2)(A)(v); 1255(a); 1229b(b)(2)(D); 1182(h)-(i), and its omission of such language in the motion reopen statute further evidences its intent to eliminate broad discretion in the adjudication of motions to reopen.

Moreover, practitioners could argue that, even if Congress' intent to divest the agency of discretion over statutory motions to reopen was unclear, the regulations constitute an unreasonable construction of the statute. The purpose of a motion to reopen is to correct errors in a removal proceeding that affected the lawfulness and propriety of the outcome in that proceeding. The agency cannot deny statutory motions to reopen where the lawfulness and propriety of the outcome is not contingent upon a favorable exercise of discretion.[19]

Individuals challenging the agency's exercise of broad discretion to deny a *statutory* motion to reopen may contact the authors of this practice advisory at trina@immigrationlitigation.org or kristin@immigrationlitigation.org.

11. Will filing a motion to reopen automatically stay deportation?

An individual with an existing removal order who is facing imminent deportation likely will want to try to stop the deportation as well as challenge the prior order. However, in general, filing a motion to reopen with an IJ or the BIA does not *automatically* stay deportation. 8 C.F.R. §§ 1003.2(f) (BIA); 1003.23(b)(1)(v) (IJ). Deportation is automatically stayed by filing a motion only in two instances: (1) while a motion to rescind an in absentia removal or deportation proceeding is pending at the immigration court, *see* 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. §§ 1003.23(b)(4)(ii) (removal proceedings); 1003.23(b)(4)(iii)(C) (deportation proceedings), and (2) while a motion filed by a qualified battered spouse, child or parent pursuant to 8 U.S.C. § 1229a (c)(7)(C)(iv) is pending.

In all other circumstances, ICE is legally obligated to stay deportation only if the person affirmatively filed a motion for a stay *and* either an IJ or the BIA granted the motion. *See* BIA Practice Manual Ch. 6.3; Immig. Ct. Practice Manual Ch. 8.3.

Notably, the BIA will not consider a stay motion unless the movant's case is before the BIA—which generally means that it is accompanied by a motion to reopen or reconsider or such a motion is already pending. BIA Practice Manual Ch. 6.3(c)(1)(A); Immig. Ct. Practice Manual Ch. 8.3(c)(1)(A) (providing same rule for immigration courts). Furthermore, the BIA or immigration court generally will not immediately adjudicate a stay motion unless deportation is

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[18] *See supra*; *see also Kucana*, 558 U.S. at 838 ("Congress did not codify the regulation delegating to the BIA discretion to grant or deny motions to reopen."). To the extent that the Court in *Kucana* assumed that Congress left discretion to the agency, that assumption was not briefed or argued by the parties, did not implicate the holding of the case, and should be considered *dicta*.

[19] Some types of statutory findings—for example, removability or eligibility for relief for having an aggravated felony conviction or crime involving moral turpitude, or motions based on non-discretionary forms of protection such as withholding of removal or CAT—lack any discretionary component.

imminent (i.e., at a maximum, within 3 business days). *See* BIA Practice Manual Ch. 6.3(c)(2)(A); Immig. Ct. Practice Manual Ch. 8.3(c)(2)(A).

There are many ways in which immigration court and BIA stay practice can and does go wrong, resulting in the deportation of people with meritorious reopening claims without adjudication of their motions. Even when a stay is granted, DHS sometimes violates the order and unlawfully deports a person while a stay is in place.[20] Although not legally obligated to do so, if an IJ or the BIA issues a stay order, or a stay is automatic upon the filing of a motion, attorneys may wish to inform DHS that the stay is in place and seek assurance that DHS will not carry out the deportation.

All courts of appeals but the Eighth Circuit have held that IJs and the BIA continue to have jurisdiction to adjudicate a statutory motion to reopen even if the person seeking reopening is outside the United States, including following the denial of a stay motion.[21] However, any decision granting a motion to reopen may ring hollow if DHS already has deported the person to a country where he or she faces persecution.

12. What is the review standard for a motion to stay removal to the immigration court or BIA?

Unfortunately, the BIA has not promulgated any review standard for adjudicating a stay of removal by precedential opinion, practice manual, or other guidance, and no regulation addresses the issue. The lack of a review standard is a source of great confusion among the immigration bar, leaving attorneys and individuals seeking a stay pro se to guess what factors may warrant granting a stay.

Despite the absence of a standard, Ijs and the BIA presumably are more inclined to grant stay motions that demonstrate the merits of the motion to reopen and the gravity of the prospective harm deportation would cause.[22] Accordingly, attorneys should make best efforts to file substantive motions to reopen in conjunction with stay requests. If that is not possible due to urgent circumstances, attorneys should file skeletal motions, explain the urgent circumstances, and indicate that they will supplement the motion as soon as practicable. Attorneys filing emergency motions under such circumstances may consider alternatively asking the IJ or BIA to issue a temporary stay until they can supplement the motion.

Stay motions may include support letters from family members, friends, employers, and community members or other documents as attachments.

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[20] In some circuits, deportation in violation of a stay of removal can serve as the basis of a damages claim under the Federal Tort Claims Act. *Compare Arce v. United States*, 899 F.3d 796 (9th Cir. 2018) (recognizing viability of claim) *with Silva v. United States*, 866 F.3d 938 (8th Cir. 2017) (affirming dismissal of claim based on lack of jurisdiction).

[21] *See supra* Question 9.

[22] Sample motions to stay removal filed in conjunction with a motion to reopen are available on the practice advisory page of NILA's website.

13. What happens if the IJ or the BIA denies a stay motion but the motion to reopen remains pending?

Attorneys have reported that the BIA frequently denies stay motions but takes no action on the accompanying motion to reopen for significant periods of time. In so doing, the BIA essentially prevents the person from pursuing the traditional course of adjudication prior to deportation, namely, seeking a judicial stay of removal from the courts of appeals in conjunction with a petition for review of the motion to reopen decision. The court of appeals' jurisdiction over a petition for review is predicated on the existence of a final removal order, which includes a final decision by the BIA denying a motion to reopen. 8 U.S.C. § 1252(a)(1); *see also* 8 U.S.C. § 1252(b)(6). If the BIA denies a stay but does not adjudicate the motion, no such order exists, and so courts of appeals generally do not find that they have jurisdiction over a petition for review of a BIA denial of a motion for a stay. *See, e.g*., *Shaboyan v. Holder*, 652 F.3d 988, 989-90 (9th Cir. 2011); *Casillas v. Holder*, 656 F.3d 273, 274 (6th Cir. 2011). Courts of appeals also are unable to adjudicate requests for judicial stays of removal absent a related petition for review.

In the event an IJ or the BIA denies a stay motion without adjudicating the motion to reopen, attorneys should consider filing a motion to reconsider the stay denial.

Attorneys contemplating district court actions are advised that the jurisdictional issues are complex and implicate the judicial review provisions at 8 U.S.C. § 1252. *See, e.g.*, *Tazu v. Att'y Gen*., 975 F.3d 292 (3d Cir. 2020); *Rauda v. Jennings*, 8 F.4th 1050 (9th Cir. 2021). Attorneys considering such actions are welcome to contact NILA through its strategic assistance program prior to any filing.

14. If the immigration judge or BIA denies the motion to reopen, can a federal court review that decision?

If an IJ denies a motion to reopen, a person first must appeal the denial to the BIA.
If the BIA denies a motion to reopen, the decision is reviewable through the filing of a petition for review with the court of appeals with jurisdiction over the location in which the immigration judge completed the underlying proceedings. 8 U.S.C. § 1252(b)(2). Any petition for review of a decision denying reopening "shall be consolidated with" any petition for review seeking review of the underlying decision. 8 U.S.C. § 1252(b)(6).[23]

Where the denial is of a request for the Board to reopen sua sponte under the regulations, the issue of judicial review is more complex. Courts generally have held that such discretionary determinations are not subject to review, because there is no law for the courts to apply. However, at least seven courts have recognized an exception to that rule—courts can review decisions not to reopen sua sponte for legal or constitutional errors underlying the decisions. *See Thompson v. Barr*, 959 F.3d 476, 484 (1st Cir. 2020); *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009); *Pllumi v. Att 'y Gen.*, 642 F.3d 155, 160 (3d Cir. 2011);); *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 355 (5th Cir. 2018); *Zambrano-Reyes v. Holder*, 725 F. 3d 744, 751 (7th

[23] For more information, see the Council's Practice Advisory, How to File a Petition for Review.

Cir. 2013); *Bonilla v. Lynch*, 840 F.3d 575, 588-89 (9th Cir. 2016); *Reyes-Vargas v. Barr*, 958 F.3d 1295, 1300 (10th Cir. 2020).

However, three other courts have found that even review of legal and/or constitutional questions is barred. *See Vue v. Barr*, 953 F.3d 1054, 1057-58 (8th Cir. 2020) (finding no review over legal claims but recognizing that courts retain jurisdiction over colorable constitutional claims); *Butka v. U.S. Att'y Gen.*, 827 F.3d 1278, 1285-86 (11th Cir. 2016) (finding no review over legal claims but leaving open the question of jurisdiction over constitutional claims); *Rais v. Holder*, 768 F.3d 453, 464 (6th Cir. 2014) (finding that courts lack jurisdiction over legal and constitutional claims).

15. What is the standard under which the courts of appeals should review a motion to reopen denial?

Generally, courts employ an "abuse of discretion" standard when reviewing denials of motions to reopen.[24] Importantly, however, even within the context of a motion to reopen denial, courts must review legal and constitutional questions *de novo*.[25]

Many decisions emphasizing the disfavored, discretionary nature of motions to reopen rely on Supreme Court decisions, including *INS v. Doherty*, 502 U.S. 314 (1992) and *INS v. Abudu*, 485 U.S. 94 (1988).[26] These decisions, however, pre-date the creation of a statutory right to file a motion to reopen. Accordingly, *Abudu* and *Doherty* address only motions to reopen permitted by agency regulations—they were decided prior to Congress' codification of the right to file a motion to reopen through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). *See supra* Question 10.

However, even employing a deferential abuse of discretion standard, courts have found that the BIA erred in failing to reopen removal proceedings. For example, the BIA abuses its discretion when it fails to reopen "without a rational explanation, inexplicably departs from established policies, or rests its decision on an impermissible basis such as invidious discrimination against a particular race or group." *Trujillo Diaz*, 880 F.3d at 248.[27] Similarly, the BIA abuses its discretion when it ignores relevant arguments or evidence[28] or otherwise makes a decision that is

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[24] *See, e.g.*, *Inestroza-Antonelli*, 954 F.3d 813, 815 (5th Cir. 2020); *Preçetaj v. Sessions*, 907 F.3d 453, 457 (6th Cir. 2018); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016); *Aponte v. Holder*, 610 F.3d 1, 4 (1st Cir. 2010); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 153 (3d Cir. 2007).

[25] *See, e.g.*, *Inestroza-Antonelli*, 954 F.3d at 815; *Preçetaj*, 907 F.3d at 457; *Bonilla*, 840 F.3d at 581; *Solis-Chavez v. Holder*, 662 F.3d 462, 466 (7th Cir. 2011); *Luna v. Holder*, 637 F.3d 85, 102 (2d Cir. 2011); *Aponte*, 610 F.3d at 4; *Fadiga*, 488 F.3d at 153-54.

[26] *See, e.g.*, *Trujillo Diaz v. Sessions*, 880 F.3d 244, 249 (6th Cir. 2018) (quoting *Doherty* and *Abudu*); *Maatougui v. Holder*, 738 F.3d 1230, 1239 (10th Cir. 2013) (quoting *Abudu*); *Alizoti v. Gonzales*, 477 F.3d 448, 451 (6th Cir. 2007) (quoting *Doherty*).

[27] *See also id.* at 253; *Preçetaj*, 907 F.3d at 457; *Ruiz-Turcios v. U.S. Att'y Gen.*, 717 F.3d 847, 849 n.2 (11th Cir. 2013); *Aponte*, 610 F.3d at 8; *Mohammed v. Gonzales*, 400 F.3d 785, 792-93 (9th Cir. 2005); *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 97 (2d Cir. 2001).

[28] *See, e.g.*, *Inestroza-Antonelli*, 954 F.3d at 818; *Avagyan v. Holder*, 646 F.3d 672, 681-82

"arbitrary, irrational, or contrary to law." *Rranci v. Att'y Gen.*, 540 F.3d 165, 171, 177 (3d Cir. 2008).

16. Is a motion to reopen or reconsider required for exhaustion purposes?

Under 8 U.S.C. § 1252(d)(1), a circuit court of appeals may review a final removal order provided the petitioner has exhausted all administrative remedies that are available to "as of right." Whether this provision is properly treated as jurisdictional, as some courts have held,[29] is beyond the scope of this advisory. Relevant here, however, is that some circuits require the filing of a motion to reconsider or reopen in order to exhaust certain types of claims prior to federal court review.

For example, where petitioners want to argue that the BIA engaged in impermissible fact finding, some circuits require that they first file a timely motion to the BIA seeking reconsideration or reopening on that basis, to give the agency notice and an opportunity to correct its own errors. *See*, *e.g.*, *Omari v. Holder*, 562 F.3d 314, 318-21 (5th Cir. 2009); *Sidabutar v. Gonzales*, 503 F. 3d 1116, 1122 (10th Cir. 2007). The First Circuit has held that claims of impermissible fact finding must be exhausted through a motion to reconsider "when the BIA makes finding of disputed issues of fact concerning legal claims that the IJ did not consider in the first instance" but that a motion is not required where the petitioner claims the BIA failed to apply the correct legal standard. *See Barros v. Garland*, No. 21-1335, _ F.4th _, 2022 WL 1153851, at *6 (1st Cir. 2022) (distinguishing *Hua Wan v. Holder*, 776 F.3d 52 (1st Cir. 2015)). If a court requires the filing and adjudication of a motion, and no such motion was filed, it will not treat the claim as exhausted.

The Fifth Circuit further requires that "where the BIA's decision itself results in a new issue and the BIA has an available and adequate means for addressing that issue, a party must first bring it to the BIA's attention through a motion for reconsideration" in order to comply with the statutory exhaustion requirement. *Omari*, 562 F.3d at 320; *see also Martinez-Guevara v. Garland*, 27 F.4th 353, 360 (5th Cir. 2022).

In sum, where a petitioner intends to raise a claim that the BIA did not have the opportunity to consider, practitioners are advised to research applicable circuit law. Even if the BIA had an opportunity to consider an issue because the BIA raised it in its decision in the first instance, it may be advisable to file a timely motion to reconsider to prevent the circuit court from finding that the claim has not been exhausted and, therefore, is unreviewable.

17. Does filing a petition for review of the denial of a motion to reopen automatically stay deportation?

No. Any petition for review challenging the denial of a motion to reopen does not automatically

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(9th Cir. 2011); *Mekhael v. Mukasey*, 509 F.3d 326, 327-28 (7th Cir. 2007); *Song Jin Wu v. INS*, 436 F.3d 157, 163-64 (2d Cir. 2006).

[29] *See, e.g.*, *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 62-63 (1st Cir. 2013); *Omari v. Holder*, 562 F.3d 314, 318-19 (5th Cir. 2009); *Sidabutar v. Gonzales*, 503 F. 3d 1116, 1122 (10th Cir. 2007).

stay removal from the United States. 8 U.S.C. § 1252(b)(3). However, the courts of appeals may issue a judicial stay of removal to prevent DHS from deporting a person during the pendency of the petition before the court.[30]

The factors for requesting a stay of removal from the courts of appeals (in conjunction with filing a petition for review of a removal order) are set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009). Under this standard, the court of appeals considers the following four factors: "(1) whether the stay applicant has made a strong showing that he/she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.*[31]

[30] Some circuit courts provide for an automatic stay following the filing of a stay motion with the court, either for a brief period of time or until the stay motion is adjudicated. *See, e.g.*, First Cir. Local Rule 18.0; *In re Immigration Petitions*, 702 F.3d 160, 162 (2d Cir. 2012); Third Circuit Standing Order Regarding Immigration Cases (Aug. 5, 2015); Fourth Circuit Standing Order 19-01 (Oct. 21, 2019); Ninth Circuit General Order 6.4(c).

[31] For a fuller discussion of judicial stays and the *Nken* factors, see the Council's Practice Advisory, Seeking a Judicial Stay of Removal in the Court of Appeals.