



*Practice Advisory: Post-Conviction Relief Motions to Reopen*¹
June 24, 2022

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I. Introduction

Noncitizens with final orders of removal based on criminal convictions may be able to vacate the conviction or obtain subject matter modifications or amendments to criminal sentences that rendered them removable or ineligible for relief.² Noncitizens who obtain qualifying post-conviction relief that eliminates the grounds of removability or renders them eligible for discretionary relief should consider filing a motion to reopen with the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA). By granting a motion to reopen, the immigration court vacates the removal order and puts a noncitizen back into proceedings. Once in reopened proceedings, the respondent may seek termination or apply for relief from removal. An approved motion to reopen may also allow noncitizens who have been removed from the United States the opportunity to return. Therefore, motions to reopen are an essential tool and safeguard for noncitizens who have secured post-conviction relief following a final administrative order of removal.

This practice advisory discusses motion to reopen strategies for noncitizens who have successfully obtained qualifying post-conviction relief. Section II distinguishes among motions to reopen, motions to remand, motions to reconsider, and motions to terminate. Section III provides an overview of motions to reopen. Section IV outlines the evidentiary requirements of motions to reopen. Section V summarizes exceptions to motions to reopen time and number limitations, including joint motions to reopen, equitable tolling, and sua sponte authority. Section VI addresses the impact of the post-departure bar on post-conviction relief motions to reopen, and section VII addresses the effect of a reinstatement of prior removal order on post-conviction relief motions to reopen.

II. Comparing Motions to Reopen, Remand, Reconsider, and Terminate

Before discussing motions to reopen in more detail, it is important to identify the common motions-based strategies that may apply to noncitizens who obtain qualifying post-conviction relief, the differences among these strategies, and how they interact. Ultimately, the procedural posture of a case is an important factor in determining which motions-based strategy applies to a particular case.

A motion to reopen is appropriate if material and previously unavailable evidence arose *after* the Immigration Judge (IJ) or Board of Immigration Appeals (BIA) entered a final order of removal.³ For example, a motion to reopen would present evidence of material post-conviction

² See *Matter of Pickering*, 23 I&N Dec. 621, 625 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006) (setting forth the test for determining whether a State court's order vacating a respondent's conviction renders that conviction invalid for purposes of INA § 101(a)(48)); *Matter of Thomas and Thompson*, 27 I&N Dec. 674, 680 (A.G. 2019) (holding that state vacatur orders will have legal effect for purposes of section 101(a)(48)(B) if "they are based on a procedural or substantive defect in the underlying criminal proceeding, but not if they are based on reasons unrelated to the merits, such as rehabilitation or immigration hardship."); *Matter of Dingus*, 28 I&N Dec. 529 (BIA 2022) (applying the test set forth in *Matter of Pickering* for vacatur to subject matter modifications or amendments to criminal convictions). This practice advisory refers to outcomes that render a conviction invalid for purposes of INA § 101(a)(48) as "qualifying post-conviction" relief.

³ If no appeal is filed with the BIA, the IJ decision is the final administrative decision; if an appeal is filed, the BIA's decision is the final agency decision. INA § 101(a)(47)(B).

relief that arose since the last hearing before the IJ. However, if removal proceedings are pending before the BIA, a motion to remand is appropriate. A motion to remand asks the BIA to send the case back to the IJ to consider relief from removal based on the material and previously unavailable evidence.⁴

Motions to remand are preferable to motions to reopen. Unlike a motion to reopen, a motion to remand does not require a filing fee and is not subject to strict time and numerical bars.⁵ Therefore, practitioners should preserve the opportunity to pursue a motion to remand instead of limiting a case to a motion to reopen strategy. Practitioners can preserve the respondent's ability to file a motion to remand by timely appealing the IJ's removal order to the BIA while pursuing post-conviction relief and, hopefully, obtaining post-conviction relief before the BIA rules on the appeal.

A motion to reconsider seeks a new determination based on alleged errors of law or fact committed by the IJ or the BIA.⁶ Given the purpose of a motion to reconsider, practitioners may file a motion to reconsider at various stages of the removal proceedings. For example, if the noncitizen obtains qualifying post-conviction relief before the final order of removal, and the IJ or the BIA erred in failing to recognize the vacatur or modification, a motion to reconsider may be appropriate. Or, if a change in the law occurs after the IJ or the BIA issues a removal order, the practitioner could file a motion to reconsider arguing that the law applied by the IJ or the BIA was incorrect. However, a motion to reconsider is not the proper vehicle for submitting new evidence. Practitioners may file a motion to reconsider while removal proceedings are pending before the IJ⁷ or the BIA after a ruling on a legal issue or decision on an application for relief when two or more applications are pending; within 30 days of the IJ's final administrative order; or prior to filing the notice of appeal with the BIA.⁸ Practitioners may also file a motion to reconsider within 30 days of the BIA's decision.⁹ Note that filing a motion to reconsider neither tolls the notice of appeal deadline to the BIA nor the deadline for filing a petition for review with the U.S. courts of appeal.¹⁰

⁴ Motions to remand are adjudicated under the same standards as motions to reopen. *See Matter of Ige*, 20 I&N Dec. 880, 884 (BIA 1994).

⁵ *See* 8 CFR § 1003.23 (Immigration Court); 8 CFR § 1003.2 (BIA).

⁶ *See* 8 CFR § 1003.23 (Immigration Court); 8 CFR § 1003.2 (BIA).

⁷ Filing an appeal to the BIA strips the IJ of jurisdiction. Therefore, practitioners must be strategic regarding the timing of the motion to reconsider to the IJ versus the timing of filing the Notice of Appeal to the BIA.

⁸ 8 CFR § 1003.23(b)(1).

⁹ 8 CFR § 1003.2(b)(2).

¹⁰ The 30-day deadline for filing a petition for review is jurisdictional and mandatory and not subject to equitable tolling. *Stone v. INS*, 514 U.S. 386, 405 (1995). In contrast, several U.S. courts of appeals have held that the 30-day deadline for filing a Notice to Appeal to the BIA is mandatory but not jurisdictional. *See, e.g., Attipoe v. Barr*, 945 F.3d 76, 78–80 (2d Cir. 2019) (finding that the appeal deadline is a claim-processing rule amenable to equitable tolling); *Boch-Saban v. Garland*, 30 F.4th 411, 413–14 (5th Cir. 2022) (holding that the 30-day BIA appeal filing rule is non-jurisdictional and subject to equitable tolling); *Liadov v. Mukasey*, 518 F.3d 1003, 1009 (8th Cir. 2008) (holding that the Attorney General has discretion as to whether to require a mandatory time limit); *Irigoyen–Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011) (finding discretion in time limit since it is in purview of the agency, not jurisdictional); *Huerta v. Gonzalez*, 443 F.3d 753, 755–56 (10th Cir. 2006) (holding that the BIA has jurisdiction and authority to accept late filings because timeline is not jurisdictional).

A motion to terminate proceedings requests that the IJ or the BIA terminate proceedings because the noncitizen is no longer subject to any ground of removability.¹¹ If granted, the noncitizen recaptures whatever immigration status they lost due to the conviction. For example, if a lawful permanent resident obtains post-conviction relief that eliminates the only charge of removability, the practitioner would file a motion to terminate. Practitioners may file a motion to terminate proceedings as a stand-alone motion, or coupled with a motion to reopen, with either the IJ or the BIA. If the proceedings are pending before the IJ or the BIA, the practitioner would file a stand-alone motion to terminate with either the IJ or the BIA. However, if the IJ or the BIA has entered a final order of removal, the practitioner would consider a motion to reopen and terminate with either the IJ or the BIA. If the IJ or the BIA grants the motion to reopen and a motion to terminate,¹² the removal order is vacated, and the noncitizen recaptures their lawful permanent resident status.¹³

III. Overview of Motions to Reopen

A motion to reopen (MTR) is a request to the IJ or to the BIA to reopen proceedings in which a final administrative order has already been entered.¹⁴ A motion to reopen seeks a fresh determination based on newly discovered facts or a change in the noncitizen's circumstances since the time of their last hearing in immigration court.¹⁵

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created a statutory basis for motions to reopen filed on or after April 1, 1997.¹⁶ Prior to IIRIRA, motions to reopen were merely an opportunity provided by regulation and subject to the adjudicator's broad discretionary authority.¹⁷ When motions to reopen became a statutory provision rather than merely a regulatory opportunity, the INA guaranteed "to each [noncitizen] the right to file" a motion to reopen.¹⁸ The U.S. Supreme Court has stressed that statutory motions to reopen are an

¹¹ 8 CFR § 1240.12(c); *Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) ("If the DHS meets its burden, the [i]mmigration [j]udge should issue an order of removal; if it cannot, the [i]mmigration [j]udge should terminate proceedings.").

¹² Because EOIR has signaled that it will reject compound motions, practitioners should file two separate motions concurrently to avoid rejection. See EOIR Policy Manual, 5.4 (last updated Dec. 30, 2020), <https://www.justice.gov/eoir/eoir-policy-manual/5/4> ("Parties are strongly discouraged from filing compound motions, which are motions that combine two separate requests.").

¹³ If the IJ or the BIA reopens but does not terminate the removal proceedings for a lawful permanent resident, this restores lawful permanent resident status until the IJ issues a new final order of removal or, if the LPR appeals the IJ removal order, until the BIA affirms the removal order. See *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982) (holding that a lawful permanent resident retains such status until the entry of a final administrative order of removal). See also *Bonilla v. Lynch*, 840 F.3d 575, 589–90 (9th Cir. 2016) (noting that were the BIA to grant a former LPR petitioner's motion to reopen, "his previous deportation proceedings would be reinstated and he would be restored to the lawful permanent resident status he held then, unless and until the new proceedings close without granting relief.").

¹⁴ See 8 CFR § 1241.1 (explaining when an order of removal becomes final under INA § 240). An MTR must be filed in the immigration court or the BIA, depending on which adjudicator last issued the order of removal. 8 CFR §§ 1003.2, 1003.23. As such, if a noncitizen failed to appeal an IJ's removal order to the BIA, the MTR should be filed with the IJ. If the noncitizen or DHS appealed the IJ's decision and the BIA affirmed the order of removal, the MTR should be filed with the BIA.

¹⁵ INA § 240(c)(7)(B); 8 CFR § 1003.2(c).

¹⁶ Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

¹⁷ See 8 C.F.R. §§ 3.2 and 3.23.

¹⁸ *Dada v. Mukasey*, 554 U.S. 1, 15 (2008).

“important safeguard” intended “to ensure a proper and lawful disposition” of immigration proceedings.¹⁹

While noncitizens have the right to file a motion to reopen, they must comply with strict procedural requirements.²⁰ The motion to reopen must “state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.”²¹ The new evidence must be material, and must have been unavailable or unable to have been discovered or presented at the former hearing.²² If the motion to reopen is based on eligibility for relief, it must include an application for relief, and the noncitizen bears the burden of establishing prima facie eligibility for the relief sought.²³

A. *Establishing Prima Facie Eligibility*

The BIA has issued two published decisions, *Matter of Coelho*²⁴ and *Matter of L-O-G-*,²⁵ that are instructive in determining if the noncitizen has met the burden of establishing prima facie eligibility for relief. In *Matter of Coelho*, the BIA held that the noncitizen bears a “heavy burden” of proving that new evidence would likely change the result if proceedings were reopened; while in *Matter of L-O-G-*, the BIA held that the noncitizen must only present evidence that indicates a “reasonable likelihood of success on the merits.” *Matter of Coelho* and *Matter of L-O-G-* involved two very different respondents and facts. Note also that the BIA issued *Matter of Coelho* prior to IIRIRA and *Matter of L-O-G-* after IIRIRA.

In *Matter of Coelho*, the respondent was a lawful permanent resident who faced deportation proceedings following a conviction for conspiracy to possess with intent to distribute cocaine. Mr. Coelho qualified for a 212(c) waiver, but the IJ denied the waiver as a matter of discretion because Mr. Coelho did not demonstrate either rehabilitation or other factors to merit a favorable exercise of discretion. Mr. Coelho appealed the decision and, while the appeal was pending, filed a motion to remand to present additional evidence proving his complete rehabilitation.²⁶ The BIA denied the motion to remand, holding that a discretionary grant of a motion to remand is not warranted unless the respondent meets a “heavy burden” and presents evidence of such a nature that “the [BIA] is satisfied that if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.”²⁷

¹⁹ *Dada*, 554 U.S. at 18.

²⁰ INA § 240(c)(7); formerly codified at INA § 240(c)(6) and (5).

²¹ INA § 240(c)(7)(B).

²² 8 CFR § 1003.23 (IJ motions); 8 CFR § 1003.2 (BIA motions).

²³ 8 CFR § 1003.2(a). *See also, Tadevosyan v. Holder*, 743 F.3d 1250, 1254–55 (9th Cir. 2014) (“A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation.’ But the BIA does ‘not require[] a conclusive showing that, assuming the facts alleged to be true, eligibility for relief has been established.’” (internal citations omitted)).

²⁴ *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

²⁵ *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996).

²⁶ Motions to remand are subject to the same substantive requirements as motions to reopen. *See Coelho*, 20 I&N Dec. 464.

²⁷ *Coelho*, 20 I&N Dec. at 473. This “heavy burden” standard derives from the U.S. Supreme Court of *INS v. Abudu*, 485 U.S. 94 (1988), a case decided before the INA contained a provision for motions to reopen which involved a physician who overstayed a student visa and was placed in deportation proceedings after being convicted of fraudulently obtaining narcotic drugs.

In contrast, *Matter of L-O-G-* involved a mother and her 15-year-old daughter seeking to reopen their deportation proceeding to apply—for the first time—for suspension of removal. The BIA determined that for a motion to reopen “[w]here [a noncitizen] is seeking previously unavailable relief and has not had an opportunity to present her application before the Immigration Judge, the BIA will look to whether there is sufficient evidence proffered to indicate a reasonable likelihood of success on the merits, so as to make it worthwhile to develop the issues further at a full evidentiary hearing.”²⁸ The BIA distinguished *Matter of Coelho* as a case presenting “special, adverse considerations,” such as the respondent having had the opportunity to fully present and litigate his request for discretionary relief and dilatory tactics, that therefore triggered a “heavy burden of proof.”²⁹ Notably, the BIA did not include past criminal history as an example of “special, adverse considerations.”³⁰

PRACTICE TIP: While IJs and the BIA often cite to *Matter of Coelho* when adjudicating motions to reopen, practitioners should argue in the motion to reopen that *Matter of L-O-G-* “reasonable likelihood of success on the merits” standard applies.

When post-conviction relief renders the noncitizen eligible for discretionary relief, practitioners should advocate for application of the *Matter of L-O-G-* “reasonable likelihood of success on the merits” standard to the post-conviction relief motions to reopen. Practitioners may raise several arguments in support of *Matter of L-O-G-*. First, a noncitizen seeking a motion to reopen based on post-conviction relief was likely previously ineligible for any discretionary relief. However, having secured qualifying post-conviction relief, the noncitizen is now eligible for discretionary relief for the first time. Since this is the first time that the IJ would consider this relief, it will be worthwhile for the IJ to develop the issues further at a full evidentiary hearing. Second, in *Matter of Coelho*, the BIA did not expressly include a respondent’s criminal history under “special, adverse considerations.” If the IJ or the BIA nevertheless wishes to consider criminal history under “special, adverse considerations” as a reason to apply *Matter of Coelho*, the criminal history that rendered the respondent removable no longer exists. Indeed, it would be fundamentally unfair for the IJ or the BIA to consider an overturned or vacated conviction a “special, adverse consideration” against the noncitizen given the proven substantive or procedural defects and, therefore, the unreliability of the prior conviction.³¹ Third, while the BIA in *Matter of L-O-G-* reviewed a regulatory motion to reopen filed prior to IIRIRA, the BIA issued the decision post-IIRIRA upholding a generous “reasonable likelihood of success on the merits” prima facie eligibility for relief standard that better aligns with the understanding that noncitizens have a statutory right to file one motion to reopen their case. Lastly, although considerations of delay and diligence are irrelevant outside of the equitable tolling context, practitioners should anticipate the IJ or BIA claiming that a delay in seeking post-conviction

²⁸ *L-O-G-*, 21 I&N Dec. at 420.

²⁹ *Id.* at 419-20.

³⁰ In another case with “special, adverse considerations,” the noncitizen had been granted voluntary departure, did not depart, and filed a motion to reopen to apply for suspension 9 years later. *Id.* at 420.

³¹ See, e.g., *Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (government memorandum unreliable because, among other things, it contained significant errors); *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003) (BIA’s reliance on State Department letter fundamentally unfair because letter was unreliable and untrustworthy); *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004) (“[h]ighly unreliable hearsay might raise due process problems”); *Banat v. Holder*, 557 F.3d 886 (8th Cir. 2009) (BIA’s reliance on State Department letter violated due process where letter provided no details about the investigation and contained multiple levels of hearsay).

relief was a dilatory tactic. Practitioners may preempt this claim by highlighting the impropriety of delay and diligence considerations while including evidence of the noncitizen’s efforts in seeking post-conviction relief and all the hurdles encountered during these efforts in support of an equitable tolling argument.

B. *Seeking Review by the U.S. Courts of Appeals*

If the BIA denies or dismisses a motion to reopen based on failure to establish prima facie eligibility and practitioners seek review by a U.S. court of appeals, U.S. courts of appeals apply the abuse-of-discretion standard. To succeed under the abuse-of-discretion standard, the petitioner must generally show that the BIA’s decision was “capricious, irrational, utterly without foundation in the evidence, based on legally erroneous interpretations of statutes or regulations, or based on unexplained departures from regulations or established policies.”³² This standard recognizes EOIR as having broad discretion over motions to reopen, and U.S. courts of appeals have applied this standard since prior to IIRIRA. However, like *Matter of Coelho*, this abuse of discretion standard does not align with the current statutory motion to reopen framework under which reopening is a right afforded to all noncitizens. Moreover, U.S. courts of appeals may rely on the higher standard in *Matter of Coelho* requiring that the new evidence “would likely change the result in the case” to rule that the BIA did not abuse its discretion.³³

Nonetheless, petitioners have succeeded on motions to reopen under the abuse of discretion standard. For example, in *Trujillo Diaz v. Sessions*, the Sixth Circuit found that the BIA’s denial “was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group.”³⁴ The Sixth Circuit looked at the basis articulated in the BIA’s denial of the motion to reopen—that Trujillo Diaz had not made a prima facie showing of asylum and withholding of removal eligibility because she failed to show that “she would specifically be targeted . . . due to her family membership” —and did not assume that the BIA considered factors that it failed to mention in its opinion.³⁵ Because the BIA failed to credit Trujillo Diaz’s father’s affidavit, this oversight undermined its conclusion that Trujillo Diaz had not made a prima facie showing of asylum and withholding of removal eligibility.³⁶

PRACTICE TIP: Practitioners may challenge the abuse of discretion standard and, in the alternative, argue for a deferential abuse of discretion standard that recognizes that motions to reopen became a statutory right rather than merely a regulatory opportunity through IIRIRA.³⁷

³² *Lugo-Resendez v. Lynch*, 831 F.3d 337, 340 (quotation omitted).

³³ See, e.g., *Garcia v. U.S. Atty. Gen.*, 494 F. App’x 29, 30 (11th Cir. 2012).

³⁴ *Trujillo Diaz v. Sessions*, 880 F.3d 244, 249 (6th Cir. 2018) (quoting *Allabani v. Gonzales*, 402 F.3d 668, 675 (6th Cir. 2005) (citation omitted)).

³⁵ *Id.* at 248, 251.

³⁶ *Id.* at 256.

³⁷ For example, U.S. courts of appeals decisions on motions to reopen cite to *INS v. Doherty*, 502 U.S. 314 (1992) and *INS v. Abudu*, 485 U.S. 94 (1988), but those decisions pre-date IIRIRA. For arguments on challenging the application of the abuse of discretion standard, refer to the National Immigration Litigation Alliance and American Immigration Council’s “The Basics of Motions to Reopen EOIR-Issued Removal Orders.” NILA & AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders*, Apr. 25, 2022, https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf.

Ultimately, practitioners representing noncitizens on post-conviction motions to reopen will withstand abuse of discretion review by including the best evidentiary record with the motion to reopen, discussed below.

IV. Motions to Reopen Pursuant to Post-Conviction Relief: Complying with the Evidentiary Requirements

Practitioners pursuing a motion to reopen based on qualifying post-conviction relief must ensure that the motion to reopen complies with the substantive evidentiary requirements of motions to reopen by including: 1) new, material evidence; 2) that was unavailable or could not have been discovered or presented at the former hearing; and 3) an application for immigration relief, if the motion is based on eligibility for relief.

In the post-conviction motions to reopen context, these requirements have special significance. First, a motion to reopen claiming that a criminal conviction has been overturned or vacated must include clear evidence of qualifying post-conviction relief; the mere pursuit of post-conviction relief will not suffice as new material evidence.³⁸ Qualifying post-conviction relief is a “new, material fact” that arises following the removal order.³⁹ To vacate a conviction is “to nullify or cancel; make void; invalidate.”⁴⁰ Indeed, the U.S. Supreme Court has recognized that “an invalid conviction is no conviction at all.”⁴¹ The BIA recently reiterated that a conviction is eliminated for immigration purposes if a criminal court vacated it on the basis of a procedural or substantive defect in the underlying criminal proceedings.⁴² Second, the motion to reopen must include sufficient evidence detailing the basis, substantive or procedural, for overturning or vacating the conviction.⁴³ Third, the motion to reopen should include evidence proving that, if granted, the qualifying post-conviction relief will result in either termination of the proceedings or relief from removal such as cancellation of removal, a waiver, or re-adjustment of status. The table below includes suggested evidence for practitioners to prove that the noncitizen seeking a motion to reopen based on qualifying post-conviction relief complies with the substantive evidentiary requirements of motions to reopen.

³⁸ However, strategically, a practitioner may wish to submit a timely motion to reopen with evidence of a pending qualifying post-conviction relief action and then supplement the motion later when the non-citizen obtains qualifying post-conviction relief. This scenario may arise if the criminal court has scheduled a final hearing on the motion to vacate soon after the 90-day motion to reopen deadline, the practitioner is confident that the criminal court will grant qualifying post-conviction relief, and the BIA, which takes very long to adjudicate motions to reopen, has jurisdiction over the motion to reopen.

³⁹ See INA § 240(c)(7).

⁴⁰ *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1198 (9th Cir. 2020) (quoting Black’s Law Dictionary 1782 (10th ed. 2014)); see also *United States v. Boliero*, 923 F. Supp. 2d 319, 334 (D. Mass. 2013) (explaining that a conviction underlying a removal order that is vacated due to a constitutional defect is “wiped out ab initio”).

⁴¹ *Nelson v. Colorado*, 137 S. Ct. 1249, 1256 n.10 (2017) (internal quotation marks omitted).

⁴² *Matter of Dingus*, 28 I&N Dec. 529 (BIA 2022). See also *Matter of Marroquin*, 23 I&N Dec. 705 (AG 2005); *Pickering*, 23 I&N Dec. 621.

⁴³ *Thomas and Thompson*, 27 I&N Dec. 674; *Pickering*, 23 I&N Dec. 621.

	Vacated Convictions pursuant to <i>Matter of Pickering</i>	Sentence modifications pursuant to <i>Matter of Thomas and Thompson</i>	Subject matter modifications or amendments to criminal convictions pursuant to <i>Matter of Dingus</i>
<p style="text-align: center;">Evidence of post-conviction relief</p>	<p>A copy of the NTA listing the conviction and corresponding charge of removability.</p> <p>Certified and signed copies of the vacatur order for the conviction that is listed on the NTA.</p>	<p>A copy of the NTA listing the conviction and corresponding charge of removability.</p> <p>Certified and signed copies of the sentence modification order for the conviction that is listed on the NTA.</p>	<p>A copy of the NTA listing the conviction and corresponding charge of removability.</p> <p>Certified and signed copies of the nunc pro tunc order modifying or amending the subject matter of the conviction that is listed on the NTA.</p>
<p style="text-align: center;">Evidence detailing the basis for the qualifying post-conviction relief</p>	<p>The order should clearly set forth the ground of substantive and procedural invalidity that meets the <i>Matter of Pickering</i> standard. Consider Sixth or Fifth Amendment Constitutional defects.</p> <p>If the vacated order does not identify why the state court vacated the order, include a copy of the motions filed with the court, the court minutes, the transcript of the proceedings, or anything else that sets forth the substantive or procedural invalidity.</p> <p>A copy of the state statute, rule, or procedural vehicle that allows the state court to vacate a criminal conviction for purposes of curing a procedural or substantive defect in the criminal proceedings. To comply with <i>Matter of Pickering</i>, the vacatur may not be based solely on rehabilitation or immigration hardships.</p>	<p>The order should clearly set forth that the state court has altered the sentence because of a procedural or substantive defect in the original proceeding. Consider Sixth or Fifth Amendment Constitutional defects.</p> <p>If the sentence modification order does not identify why the state court modified the sentence, include a copy of the motions filed with the court, the court minutes, the transcript of the proceedings, or anything else that sets forth the substantive or procedural invalidity.</p> <p>A copy of the state statute, rule, or procedural vehicle that allows the state court to modify a criminal sentence for purposes of curing a procedural or substantive defect in the criminal proceedings. To comply with <i>Matter of Pickering</i>, the sentence modification may not be based solely on rehabilitation or immigration hardships.</p>	<p>The order should clearly set forth the ground of substantive and procedural invalidity that meets the <i>Matter of Pickering</i> standard. Consider Sixth or Fifth Amendment Constitutional defects.</p> <p>If the nunc pro tunc order does not identify why the state court modified or amended the subject matter of the conviction, include a copy of the motions filed with the court, the court minutes, the transcript of the proceedings, or anything else that sets forth the substantive or procedural invalidity.</p> <p>A copy of the state statute, rule, or procedural vehicle that allows the state court to enter a subject matter modification or amendment for purposes of curing a procedural or substantive defect in the criminal proceedings. To comply with <i>Matter of Pickering</i>, the subject matter modification or amendment may not be based solely on rehabilitation or immigration hardships.</p>

	Vacated Convictions pursuant to <i>Matter of Pickering</i>	Sentence modifications pursuant to <i>Matter of Thomas and Thompson</i>	Subject matter modifications or amendments to criminal convictions pursuant to <i>Matter of Dingus</i>
<p style="text-align: center;">Evidence proving that, if the MTR is granted, the qualifying post-conviction relief will result in either termination of the proceedings or relief from removal such as cancellation of removal, a waiver, or re-adjustment of status</p>	<p>Termination: The NTA proves the noncitizen’s LPR status and sets forth that the vacated conviction was the ground for removability.</p> <p>If the client re-pled to an “immigration safe” disposition after the vacatur, submit a certified copy of the minute order indicating the new plea.</p> <p>If the client had other offenses triggering inadmissibility or deportability not listed on the NTA that were pre-emptively vacated to avoid an amendment to the NTA, submit certified copies of those vacatur orders as well.</p> <p>Eligibility for discretionary relief: Applications for all available relief along with supporting evidence, including a declaration from the respondent, to establish prima facie eligibility.</p>	<p>Termination: The NTA proves the noncitizen’s LPR status and sets forth that the sentence that was modified was the ground for removability.</p> <p>Eligibility for discretionary relief: Applications for all available relief along with supporting evidence, including a declaration from the respondent, to establish prima facie eligibility.</p>	<p>Termination: The NTA proves the noncitizen’s LPR status and sets forth that the underlying conviction was modified or amended as to the subject matter of the conviction and that it was the ground for removability.</p> <p>Eligibility for discretionary relief: Applications for all available relief along with supporting evidence, including a declaration from the respondent, to establish prima facie eligibility.</p>

V. Exceptions to Motions to Reopen Time and Number Limitations

Generally, a noncitizen may file only one motion to reopen and the noncitizen must file that one motion to reopen within 90 days of the date of entry of a final administrative order of removal.⁴⁴ However, exceptions to the one motion to reopen limitation and 90-day deadline exist.⁴⁵ Where a noncitizen has filed a motion to reopen in the past or will file a motion to reopen beyond the 90-day deadline, practitioners must present an exception to the one motion within 90 days. Both the INA and the regulations provide exceptions to the 90-day motion to reopen deadline:

Statutory Exceptions

- Seeking reopening to apply for asylum based on changed country conditions⁴⁶
 - MTR Filing Deadline: none
- Seeking reopening based on Violence Against Women Act (VAWA) eligibility⁴⁷
 - MTR Filing Deadline: within one year of the final removal order, but this one-year deadline may be waived in extraordinary circumstances or situations of “extreme hardship to the [noncitizen’s] child.”⁴⁸
- Equitable Tolling
 - MTR Filing Deadline: check the applicable U.S. court of appeals law,⁴⁹ but generally within a reasonable amount of time of overcoming the exceptional circumstance.

Regulatory Exceptions

- Joint motions to reopen⁵⁰
 - MTR Filing Deadline: none
- Sua sponte
 - MTR Filing Deadline: none

⁴⁴ INA § 240(c)(7)(C)(i); 8 CFR § 1003.2(c)(2); 8 CFR § 1003.23(b)(1).

⁴⁵ 8 CFR § 1003.2(c)(3); 8 CFR § 1003.23(b).

⁴⁶ INA § 240(c)(7)(C)(ii); 8 CFR § 1003.2(c)(3)(ii); 8 CFR § 1003.23(b)(4)(i). While there is no MTR filing deadline for this statutory reopening ground, practitioners should file the motion to reopen before the country conditions change again in a manner that eliminates or undermines the proposed changed country conditions argument.

⁴⁷ INA § 240(c)(7)(A), (c)(7)(C)(iv). INA § 240(c)(7)(C)(iv)(I) states that the limitation on deadlines for filing motions to reopen shall not apply “if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 204(a)(1)(A), clause (ii) or (iii) of section 204(a)(1)(B) [VAWA self-petitioners, except for parents subject to battery or extreme cruelty by U.S. citizen sons or daughters], section 240A(b)(2) [VAWA cancellation], or section 244(a)(3) (as in effect on March 31, 1997) [VAWA suspension].”

⁴⁸ INA § 240(c)(7)(C)(iv).

⁴⁹ U.S. courts of appeals vary on whether the MTR filing deadline is 90 days or a reasonable amount of time after overcoming the exceptional circumstances.

⁵⁰ 8 CFR § 1003.23(b)(4)(iv).

Practitioners should argue all relevant statutory exceptions along with the sua sponte regulatory exception in post-conviction relief motions to reopen. Generally, practitioners should consider including an equitable tolling argument along with the sua sponte ground. As a matter of strategy, however, practitioners should seek prosecutorial discretion, that is, a joint motion to reopen, from ICE OPLA before filing the motion to reopen arguing statutory and sua sponte exceptions to the 90-day deadline.⁵¹ However, waiting for ICE OPLA to respond to the PD request does not in itself toll the filing deadline.⁵²

A. *Joint Motions to Reopen*

The regulations state that motions to reopen that have been “agreed upon by all parties and are jointly filed,” are not subject to the time and numerical limitations.⁵³ A joint motion to reopen informs the IJ that the noncitizen is now eligible for a relief from removal. Ultimately, and as discussed in section II, practitioners will seek a joint motion to reopen and dismiss, a joint motion to reopen and remand, or a joint motion to reopen. A joint motion to reopen and dismiss signals to either the IJ or the BIA that the noncitizen is no longer removable thanks to qualifying post-conviction relief. A joint motion to reopen and remand instructs the BIA that the noncitizen is now eligible for a relief from removal before the IJ.

The availability of a joint motion to reopen strategy will depend on the current presidential administration’s enforcement priorities and willingness to empower ICE OPLA⁵⁴ with prosecutorial discretion as well as the success of any litigation challenging the enforcement priorities. On April 3, 2022, ICE issued new prosecutorial discretion guidance entitled, “Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion Memorandum from the Principal Legal Advisor Kerry Doyle,” [hereinafter, “Doyle Memo”] that went into effect on April 25, 2022.⁵⁵ The Doyle Memo states that OPLA attorneys should join motions to reopen.⁵⁶ The Doyle Memo instructs OPLA attorneys to generally join motions to reopen and dismiss cases where reopening and dismissal of a case would restore a noncitizen to LPR status, and they are not an enforcement priority.⁵⁷ In addition, OPLA attorneys may join motions to reopen where the purpose for reopening is to dismiss proceedings to allow the noncitizen to proceed on an application for permanent or temporary relief outside of immigration court that has not already been considered and for which the noncitizen is newly eligible.⁵⁸ Furthermore, for cases pending at a U.S. court of appeals, the Doyle Memo states that a noncitizen wishing to pursue a joint motion to reopen should approach OPLA, and OPLA “should consider any subsequent request for prosecutorial discretion

⁵¹ *Moldavchuk v. Att’y Gen. of United States*, 719 F. App’x 138, 143 (3d Cir. 2017) (“The authority to exercise prosecutorial discretion is committed exclusively to the DHS, and an alien may request prosecutorial discretion from the DHS at any stage of removal proceedings.”).

⁵² See *Valeriano v. Gonzales*, 474 F.3d 669, 673-75 (9th Cir. 2007).

⁵³ 8 CFR § 1003.23(b)(4)(iv).

⁵⁴ ICE OPLA represents DHS before EOIR proceedings.

⁵⁵ See Memorandum from Kerry E. Doyle, Principal Legal Advisor, ICE, Office of the Principal Legal Advisor (OPLA), to All OPLA Att’ys, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (April 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

⁵⁶ Doyle Memo at 10.

⁵⁷ Doyle Memo at 15.

⁵⁸ *Id.* at 14-15.

submitted by a noncitizen consistent with the parameters of this memorandum” while coordinating with DOJ’s Office of Immigration Litigation (OIL).⁵⁹ However, citing the immigration court backlog and finite DHS resources, the Doyle Memo tell OPLA to avoid joinder where doing so would lead to relitigating previously completed cases. Instead, the Doyle Memo says joinder is appropriate where it will lead to dismissal of proceedings to pursue relief before USCIS.⁶⁰

The request for a joint motion should include evidence that the noncitizen is no longer an enforcement priority under the Doyle Memo thanks to successful qualifying post-conviction relief. The Doyle Memo adopts the civil immigration priorities framework listed in the Mayorkas Memo, which includes three priority categories: 1) national security, 2) public safety, and 3) border security.⁶¹ The second priority applies to noncitizens who “pose[] a current threat to public safety, typically because of serious criminal conduct,” but “[w]hether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories.”⁶² The Doyle Memo provides a non-exhaustive list of mitigating factors, first outlined in the Mayorkas Memo, to help inform public safety assessments, which includes “whether a conviction was vacated or expunged.”⁶³ The request for a joint motion based on qualifying post-conviction relief should therefore mirror the requirements of a motion to reopen described above in section IV to prove the existence of a vacatur or expungement. The request should also include evidence that proves any of the enumerated mitigating factors and evidence that shows that the noncitizen merits a favorable exercise of discretion. Evidence that shows that the noncitizen merits a favorable exercise of discretion will be crucial to joint motion to reopen requests based on qualifying post-conviction relief that renders them eligible for a discretionary benefit. Practitioners should consider including the following types of evidence to establish that the noncitizen merits a favorable exercise of discretion:

- Prison records showing rehabilitation/good behavior
- Certificates of completion for any rehabilitation classes
- Documentation of family/birth certificates/immigration status/etc.
- Academic transcripts and educational certificates
- Work records
- Church or religious records
- Community service documents
- Leadership & business certificates
- Photographs
- Letters of support

Practitioners should submit joint motion to reopen requests to the ICE OPLA office with jurisdiction over the immigration court that entered the noncitizen’s removal order. Practitioners

⁵⁹ *Id.* at 14 n. 32.

⁶⁰ *Id.* at 15.

⁶¹ *Id.* at 2-3; Memorandum from Alejandro N. Mayorkas, Secretary, DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30. 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

⁶² *Id.* at 2.

⁶³ *Id.* at 5. After ICE OPLA issued the Doyle Memo, the BIA issued *Matter of Dingus*, 28 I&N Dec. 529 (BIA 2022). Ostensibly, subject matter modifications or amendments to criminal convictions pursuant to *Matter of Dingus* would also qualify as a mitigating factor.

should review and follow the local standard operation procedures (SOP) for the ICE OPLA office when filing the request for a joint motion to reopen.⁶⁴

The ICE OPLA office's response to the prosecutorial discretion request for a joint motion to reopen will determine the next steps. If the ICE OPLA office joins the motion to reopen, counsel for both parties should sign the agreed-upon motion. Some ICE OPLA offices prefer that the practitioner submit a proposed joint motion to reopen with the request while others prefer to draft the joint motion to reopen. Practitioners should follow the stated preference of the particular ICE OPLA office. Practitioners should clarify who will file the joint motion to reopen with the IJ⁶⁵ or the BIA, and whoever files the joint motion to reopen should do so using a service that will provide confirmation of delivery.⁶⁶ It is highly likely that the IJ or the BIA will grant a joint motion to reopen, although EOIR is not required to grant joint motions. Indeed, the presidential administration in office at the time may impact how EOIR responds to joint motions. If the ICE OPLA office declines to join the motion to reopen, practitioners must look to filing a motion to reopen arguing exceptions to the 90-day rule, such as equitable tolling and sua sponte, described below. However, if new material facts arise following the denial of prosecutorial discretion, practitioners may seek a new determination on the joint motion to reopen request, but should clearly identify the new material facts and the supporting evidence as the reason for the renewed prosecutorial discretion request.⁶⁷

B. *Equitable Tolling*

The doctrine of equitable tolling is a common law principle that extends certain deadlines. In applying equitable tolling to a deadline, the court signals that despite the missed deadline, the matter may proceed and the court retains authority to review the matter. As such, equitable tolling excuses tardiness and permits a party to invoke the right that would otherwise be lost.⁶⁸

Under equitable tolling, jurisdictional deadlines may not be extended while nonjurisdictional deadlines may be extended. Jurisdictional deadlines are those that do not permit “court[s] to consider whether certain equitable considerations warrant extending a limitations period.”⁶⁹ Courts know if they have the authority to apply equitable tolling to a case by asking “whether Congress has ‘clearly state[d]’ that the rule is jurisdictional; absent such a clear statement . . . ‘courts should treat the restriction as nonjurisdictional in character.’”⁷⁰ If Congress has not clearly stated through the statutory language, “context, and relevant historical treatment” that a rule is jurisdictional, then the rule is a nonjurisdictional deadline also known as a

⁶⁴ ICE, What is Prosecutorial Discretion (PD)?, ice.gov/about-ice/opla/prosecutorial-discretion (located under the “How to Submit a Request for PD” heading and the dropdown subheading “OPLA Field Location Map and Email Addresses”).

⁶⁵ If the IJ who signed the order of removal no longer sits at the immigration court with jurisdiction, the immigration court will assign the joint motion to a new IJ.

⁶⁶ Note that ECAS may not immediately reflect the filing of a mailed joint motion so it is important to track delivery and call the immigration court or BIA to confirm that immigration court personnel have received the motion. Even then, ECAS may refer to a joint motion to reopen as a “MTR.”

⁶⁷ Doyle Memo at 8.

⁶⁸ *Bolieiro v. Holder*, 731 F.3d 32, 39 (1st Cir. 2013).

⁶⁹ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–34 (2008).

⁷⁰ *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S.Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)).

claim-processing rule.⁷¹ A claim-processing rule promotes “the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”⁷² Filing deadlines “are quintessential claim-processing rules” that “should not be given the jurisdictional brand.”⁷³ Courts have applied equitable tolling to a variety of cases involving filing deadlines to prevent gross injustice and unfairness.⁷⁴

All U.S. courts of appeals agree that the 90-day deadline for filing motions to reopen is nonjurisdictional and therefore subject to equitable tolling, provided that the noncitizen has met the standard.⁷⁵ Some U.S. courts of appeal have also explicitly recognized that equitable tolling can be applied to the one-motion rule.⁷⁶ While the equitable tolling standard varies among U.S. court of appeals, the U.S. Supreme Court has held that a successful argument for equitable tolling requires showing that:

- (1) extraordinary circumstances prevented the noncitizen from meeting the deadline, and
- (2) the noncitizen pursued their rights diligently.⁷⁷

Equitable tolling is permitted only until the extraordinary circumstances that prevented a timely filing of the motion to reopen are “or should have been, discovered by a reasonable person in the situation.”⁷⁸ Thereafter, the noncitizen is expected to file the motion to reopen within 90 days or a reasonable amount of time after overcoming the exceptional circumstances.⁷⁹

⁷¹ *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010).

⁷² *Henderson ex rel. Henderson v. Shinseki*, 131 S.Ct. 1197, 1203 (2011).

⁷³ *Id.* at 1202–03.

⁷⁴ *See, e.g., Warfaa v. Ali*, 1 F.4th 289 (4th Cir. 2021) (finding that violence and political upheaval in Somalia constituted extraordinary circumstances which justified equitable tolling); *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (finding that extraordinary circumstances warranted equitable tolling where violence associated with civil war in El Salvador made it unsafe for plaintiffs to seek relief); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090 (9th Cir. 2005) (finding that equitable tolling appropriate where noncitizen denied effective assistance of counsel in connection with failure to file timely motion to reopen); *Haekal v. Refco, Inc.*, 198 F.3d 37 (2d Cir. 1999) (principles of fairness required that statute of limitations be deemed to have been tolled when plaintiff’s complaint was accepted for filing).

⁷⁵ *See, e.g., Lugo-Resendez*, 831 F.3d at 344; *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. Att’y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (per curiam); *Alzaarir v. Att’y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Gaberov v. Mukasey*, 516 F.3d 590, 594–597 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499–500 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001); *Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000); *see also Mata v. Lynch*, 135 S. Ct. 2150, 2155 n.3 (2015) (leaving open the possibility that the deadline can be equitably tolled). Although the First Circuit has yet to rule on the issue, it has assumed without deciding, that the ninety-day rule is subject to equitable tolling. *See Tay-Chan v. Barr*, 918 F.3d 209, 214 (1st Cir. 2019); *Gyamfi v. Whitaker*, 913 F.3d 168, 172 (1st Cir. 2019); *Neves v. Holder*, 613 F.3d 30, 36 (1st Cir. 2010).

⁷⁶ *Jin Bo Zhao v. INS*, 452 F.3d 154, 159–60 (2d Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002).

⁷⁷ *Holland v. Florida*, 560 U.S. 631, 634 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

⁷⁸ *Iavorski*, 232 F.3d at 134.

⁷⁹ *See e.g., Socop-Gonzalez*, 272 F.3d at 1196 (noting that the petitioner had 90 days after the motion to reopen deadline to file his motion to reopen pursuant to equitable tolling); *Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) (employing a reasonable amount of time standard as the deadline for filing the motion to reopen after overcoming the exceptional circumstances).

i. Extraordinary Circumstances

What circumstances qualify as extraordinary is a fact-based question related to the underlying merits of the particular motion to reopen. U.S. courts of appeal have recognized the following circumstances as extraordinary circumstances for purposes of equitable tolling:

- Physical⁸⁰ or mental illness⁸¹
- Attorney misconduct⁸²
- Misinformation from a court or government official⁸³
- Fraud⁸⁴
- New precedent establishing a change in the prevailing interpretation of a ground of removal, rendering the individual's charge of inadmissibility or deportability no longer sustainable or making the individual eligible for relief⁸⁵

Other examples of extraordinary circumstances include age, domestic violence, human trafficking, newly available protection from removal such as TPS or DACA, and post-conviction relief.⁸⁶

Practitioners should argue that obtaining qualifying post-conviction relief counts as extraordinary circumstances for equitable tolling purposes. Indeed, compared to circumstances that federal courts have expressly recognized as extraordinary, such as ineffective assistance of counsel or a change in law, a vacated conviction impacts removal proceedings as much if not more. In contrast to an ineffective assistance of immigration counsel claim, a vacated conviction signals that the respondent should have never been subject to charges of removability or should have had the opportunity to seek discretionary relief before the IJ. Although a vacated conviction prompts similar fairness concerns as a change in law, unlike a vacated conviction, a change of law communicates that the respondent was properly charged as removable or restricted from discretionary relief during the removal proceedings.

⁸⁰ See, e.g., *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005) (citing *Brown v. Parkchester South Condominiums*, 287 F.3d 58 (2d Cir.2002) and *Clark v. Runyon*, 116 F.3d 275, 277 (7th Cir.1997).

⁸¹ See, e.g., *Barrett v. Principi*, 363 F.3d 1316 (Fed.Cir.2004); *Riva v. Ficco*, 615 F.3d 35 (1st Cir. 2010); *Ata v. Scutt*, 662 F.3d 736, 744 (6th Cir. 2011).

⁸² See, e.g., *Holland*, 560 U.S. at 652.

⁸³ See, e.g., *Socop-Gonzalez*, 272 F.3d at 1184-85; *Gaberov*, 516 F.3d 590.

⁸⁴ See, e.g., *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

⁸⁵ See, e.g., *Lugo-Resendez*, 831 F.3d at 343-45. Note that courts have held that relying “on *actually binding* precedent that is subsequently reversed,” see *Menominee Indian Tribe*, 136 S. Ct. at 757 (emphasis in original), differs from relying on a lack of precedent foreclosing the legal strategy. See *Ovalles v. Rosen*, 984 F.3d 1120 (5th Cir.), cert. denied sub nom. *Ovalles v. Garland*, 142 S. Ct. 107, 211 L. Ed. 2d 30 (2021). The former accounts for exceptional circumstances, but not the latter.

⁸⁶ See, e.g., *Javier Plata-Herrera*, AXXX-XX4-825, 2019 WL 3776104, at 2 (BIA Apr. 30, 2019) (“We also find the decision of the New Mexico criminal court judge vacating and setting aside the respondent’s 2007 criminal conviction on constitutional grounds to constitute an extraordinary circumstance, supporting the conclusion that equitable tolling of the filing deadline is warranted in this case.”).

ii. Diligence

Assessing diligence necessarily includes a temporal component, which involves determining whether and when a purported extraordinary circumstance occurred and how the noncitizen acted upon learning of the extraordinary circumstances—here, the opportunity to seek qualifying post-conviction relief—and from the time of obtaining successful post-conviction relief to the filing of the motion to reopen.

Equitable tolling requires a showing of “reasonable diligence,” not “maximum feasible diligence.”⁸⁷ Reasonable diligence is measured in light of the reasonable person standard. Circumstances such as education level, lack of English fluency, lack of legal knowledge, lack of access to resources, inability to find legal counsel, mental illness, and the complexity of immigration law⁸⁸ are factors that are relevant to the reasonable diligence assessment and require asking what the reasonable person would do given these types of circumstances. For example, in *Lugo-Resendez v. Lynch*, the Fifth Circuit held that due consideration should be given “to the reality that many departed [noncitizens] are poor . . . and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions.”⁸⁹ In *Gordillo v. Holder*, the Sixth Circuit held that “it is simply irrational to expect [petitioner] to know from [a] footnote [in the IJ order] that her lawyer was ineffective in representing her” because “to expect to expect [her] to pluck [‘not timely filed’] (in a footnote no less) from the thousands of words in the order, and then divine from them that her lawyer overlooked a winning argument on her behalf, is utterly to depart from any reasonable idea of what lies within [her] control for purposes of assessing her diligence.”⁹⁰

U.S. courts of appeals assess diligence under varying standards.⁹¹ Furthermore, some U.S. courts of appeals’ decisions have interpreted reasonable diligence as being “within a reasonable time”⁹² while other courts of appeals decisions have found that reasonable diligence could have existed over the span of years.⁹³ As a result, the periods of time over which courts find noncitizens acted

⁸⁷ *Holland*, 560 U.S. at 653 (internal quotations omitted).

⁸⁸ See, e.g., *Mezo v. Holder*, 615 F.3d 616, 621 (6th Cir. 2010) (“Given the evidence that Mezo hired an attorney and was lied to by that attorney, combined with her lack of understanding of our Byzantine immigration laws, the likely cause of her delay in moving to reopen was not a lack of due diligence.”) (emphasis added). See also *Castro-O’Ryan v. U.S. Dep’t of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987).

(“With only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’ E. Hull, *Without Justice For All* 107 (1985). A lawyer is often the only person who could thread the labyrinth.”).

⁸⁹ *Lugo-Resendez*, 831 F.3d at 345.

⁹⁰ *Gordillo v. Holder*, 640 F.3d 700, 704 (6th Cir. 2011).

⁹¹ The Ninth Circuit applies three-part test focused on what a reasonable person would do. *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011). The Seventh Circuit standard requires that petitioner “could not reasonably have been expected to file earlier.” *Yusev v. Sessions*, 851 F.3d 763, 767 (7th Cir. 2017). Other U.S. courts of appeals require that the noncitizen exercise due diligence during entire tolling period – not only upon discovering error. E.g., *Molina v. Barr*, 952 F.3d 25, 30 (1st Cir. 2020); *Rashid v. Mukasey*, 553 F.3d 127 (2d Cir. 2008).

⁹² *Mejia v. Barr*, 952 F.3d 255, 259 (5th Cir. 2020) (finding that a seven-year unexplained delay between learning of a removal order and trying to undo the removal order was not reasonably diligent).

⁹³ *Lugo-Resendez*, 831 F.3d (remanding to the BIA to determine whether to equitably toll 90-day period where noncitizen filed more than eleven years after the deadline had passed); *Avagyan*, 646 F.3d at 679, 682 n.9 (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*, 640 F.3d at 705 (noting that “the mere passage of

diligently also vary widely.⁹⁴ Ultimately, the main difference between a successful and an unsuccessful showing of diligence is the factual record.

Proving that an individual exercised reasonable diligence is extremely “fact-intensive and case-specific.”⁹⁵ The best practice is to ensure that the factual record accounts for the noncitizen’s diligence under the circumstances during the entire period of time since the noncitizen’s final removal order. The factual record should include a detailed declaration from the respondent and corroborating witnesses regarding the precise timeline in the case. The declarations should document the noncitizen’s pursuit of qualifying post-conviction relief and any delays in vacating the conviction such as:

- Lack of a post-conviction public defenders’ unit and efforts to save up money to consult with a private attorney for the post-conviction relief
- Any difficulty securing counsel for post-conviction relief
- Misinformation the noncitizen may have received from attorneys regarding post-conviction relief
- Other material ineffective assistance of counsel
- Any psychological or physical disabilities that contributed to the delay
- Difficulties accessing counsel while detained or after deportation
- Receiving misinformation or lacking information about how long PCR takes in criminal court
- Delays in the court process due to the COVID-19 pandemic

PRACTICE TIP: If a state court’s criteria require demonstrating due diligence in criminal conviction vacatur proceedings,⁹⁶ practitioners should show that this requirement is identical to the equitable tolling diligence requirement for motions to reopen if seeking to rely on the state court’s finding as proof of diligence on the motion to reopen.⁹⁷

C. *Sua Sponte*

Even if the IJ or the BIA reject the other bases for reopening, they may still reopen proceedings pursuant to their *sua sponte* authority. The BIA has recognized that it may exercise its own *sua sponte* authority “to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone [do] not

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 v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005).

⁹⁴ Compare *Borges v. Gonzales*, 402 F.3d, 398, 407 (finding due diligence where motion was filed four years after deadline), and *Gaberov*, 516 F.3d at 596-97 (same), with *Yuan Gao*, 519 F.3d at 379 (finding no due diligence where motion was filed 16 days after deadline).

⁹⁵ *Avagyan*, 646 F.3d 672 at 679 .

⁹⁶ Practitioners must also use due diligence to bring forward a motion pursuant to PC 1473.7. See *People v. Figueroa Alatorre*, D077894 (Cal. Ct. App. Oct. 22, 2021) (holding that when the adverse immigration consequences predate Section 1473.7, a court assessing the timeliness of a petition must consider when the petitioner would have reason to learn about new theories of relief, and whether the Petitioner was reasonably diligent after that time).

⁹⁷ See *Chavez-Mier v. Barr*, 773 F. App’x 960, 961 (9th Cir. 2019).

preclude such action.”⁹⁸ However, the BIA has found that an IJ’s sua sponte authority should not be used as “a general cure for filing defects or to otherwise circumvent the regulations, when enforcing them might result in hardship.”⁹⁹

The BIA has characterized sua sponte authority as “an extraordinary remedy reserved for truly exceptional situations.”¹⁰⁰ Sua sponte authority is subject to the “totality of the circumstances” standard.¹⁰¹ This standard takes into consideration equities of the case, the strength of the claim for reopening, and negative factors. Strategically, practitioners can include a broad range of facts under the sua sponte ground because the “totality of the circumstances” standard ultimately provides an avenue to humanize the noncitizen.¹⁰²

The following are common discretionary considerations in the context of post-conviction motions to reopen:

- Criminal convictions that remain, if any, following qualifying post-conviction relief
- Length of residence in the United States
- Extent and strength of family ties in the United States, particularly to U.S. citizens and LPRs
- Business ties in the United States or other significant contributions to the U.S. economy
- History of income tax filings
- Community service and involvement, i.e., church activities, donations, volunteering for charities
- Conditions in the noncitizen’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.
- Respondent’s prior immigration violations, if any¹⁰³

⁹⁸ *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997).

⁹⁹ *Matter of J–J–*, 21 I&N Dec. 976, 984 (BIA 1997).

¹⁰⁰ *Matter of G–D–*, 22 I&N Dec. 1132, 1134 (BIA 1999).

¹⁰¹ *Matter of Miranda-Cordiero*, 27 I&N Dec. 551, 554 (BIA 2019) (“Whether proceedings should be reopened sua sponte is a discretionary determination to be made based on the totality of the circumstances presented in each case.”).

¹⁰² *Matter of X-G-W-*, 22 I. & N. Dec. 71, 73 (BIA 1998) (finding that the “the Board retains limited discretionary powers under the regulations to reopen or reconsider cases sua sponte in unique situations where it would serve the interests of justice”).

¹⁰³ In addition to the history of how and why the respondent entered the United States, the IJ and the BIA may consider the respondent’s compliance with immigration orders after his arrival in the U.S. The BIA 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 entitlement 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 (2d Cir. 1993); *Arana v. U.S. INS*, 673 F.2d 75, 77 (3d Cir. 1982) (per curiam).

Furthermore, when a change in law benefits a noncitizen by erasing the ground of removability, the BIA has found that a fundamental change in the law also qualifies as an exceptional situation that merits the BIA's use of sua sponte authority.¹⁰⁴

PRACTICE TIP: Practitioners should analogize qualifying post-conviction relief to a change in law whenever possible given the BIA's recognition that a change in law qualifies as an exceptional circumstance meriting an exercise of sua sponte authority.

VI. The Impact of the Post-Departure Bar on Post-Conviction Relief Motions to Reopen

Deported noncitizens may face additional legal barriers to seeking reopening because of the post-departure bar. The regulations state that a motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States.¹⁰⁵ This regulatory authority, known as the post-departure bar, prevents the BIA or IJ's authority to consider reopening where a non-citizen has previously left the country during removal proceedings or after being ordered removed. While the BIA has interpreted the bar to apply to both timely and sua sponte motions to reopen,¹⁰⁶ all U.S. courts of appeals that have addressed this issue have declined to apply the post-departure bar to statutory motions to reopen.¹⁰⁷

Following the U.S. Supreme Court decision of *Kisor v. Wilkie*,¹⁰⁸ momentum has arisen to strike down the post-departure bar in the context of sua sponte motions to reopen. In *Kisor*, the Court clarified how to evaluate an agency's interpretation of their own regulations. Before *Kisor*, federal courts generally evaluated an agency's interpretation of its own regulations using the "deferential standard" of *Auer v. Robbins*, under which an agency's interpretation was "controlling unless plainly erroneous or inconsistent with the regulation."¹⁰⁹ However, the Court held that *Auer* deference applies solely to an agency's interpretation of its own ambiguous

¹⁰⁴ *X-G-W-*, 22 I&N Dec. at 74; *G-D-*, 22 I&N Dec. at 1132.

¹⁰⁵ 8 CFR § 1003.2(d) (motions filed with the BIA) and 8 CFR § 1003.23(b)(1) (motions filed with the IJ). Note that the post-departure bar does not appear in the statutes codifying motions to reopen. See 8 USC § 1229a(c)(7), INA § 240(c)(7). Courts have held that this statutory right cannot be infringed upon by the post-departure bar regulation.

¹⁰⁶ See *Matter of Almandarez-Mendez*, 24 I&N Dec. 646 (BIA 2008).

¹⁰⁷ The First, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have held that the regulatory departure bar clearly conflicts with the statute, and therefore fails at step one of *Chevron*. See *Toor v. Lynch*, 789 F.3d 1055, 1057 (9th Cir. 2015); *Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Prestol Espinal v. Atty. 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); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Lin v. U.S. Atty. Gen.*, 681 F.3d 1236 (11th Cir. 2012). The Second, Sixth, and Seventh Circuits have held that the BIA's application of the regulatory departure bar as a jurisdictional rule is an impermissible contraction of its own jurisdiction. See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010). The Eighth Circuit has not yet decided the validity of the regulatory departure bar. See *Ortega-Marroquin v. Holder*, 640 F.3d 814, 820 (8th Cir. 2011).

¹⁰⁸ *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

¹⁰⁹ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

regulation and, even then, only in narrow circumstances.¹¹⁰ Application of the *Kisor* framework has resulted in courts giving less deference to EOIR’s interpretation of its own regulations.¹¹¹

Applying *Kisor*, the Ninth and Tenth Circuits found that the regulatory departure bar cannot apply to bar an IJ from reopening proceedings sua sponte.¹¹² Both the Ninth and Tenth Circuits did not extend deference to the BIA’s *Armendarez-Mendez* decision, and instead found that the regulation’s text, structure, history, and purpose are not genuinely ambiguous.¹¹³ Rather, the plain language of 8 CFR § 1003.23(b)(1)¹¹⁴ makes clear that an IJ or BIA’s discretion to reopen a case on their own motion is not limited by the fact that a noncitizen has previously been removed or has departed the United States. No other courts of appeals have considered the post-departure bar in the sua sponte reopening context since *Kisor*.¹¹⁵

Noncitizens who were removed from the United States and obtained qualifying post-conviction relief should consider filing a motion to reopen based on any applicable statutory exception such as equitable tolling and sua sponte authority if outside of the 90 day-deadline. While those within the Ninth and Tenth Circuits may rely on favorable precedent, those outside of these jurisdictions should preserve the issue for review while acknowledging controlling law. However, if the noncitizen has re-entered the United States unlawfully following removal, they may be subject to reinstatement of the removal order, as discussed below.

VII. The Effect of a Reinstatement of Prior Removal Order on Post-Conviction Relief Motions to Reopen

The INA states that noncitizens who reenter the United States unlawfully after being removed or departing voluntarily under a removal order face reinstatement of the prior order¹¹⁶ from its

¹¹⁰ *Kisor*, 139 S.Ct. at 2415-18.

¹¹¹ See *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019) (holding that the regulations unambiguously provided EOIR with general authority to administratively close cases); *Gonzalez v. Garland*, 16 F.4th 131, 134 (4th Cir. 2021) (holding that the Attorney General’s determination that IJs lacked authority to terminate removal proceedings was not entitled to *Auer* deference); *Mejia-Velasquez v. Garland*, 26 F.4th 193 (4th Cir. 2022) (concluding that the BIA’s reliance on *Matter of D-M-C-P-* was not entitled to deference).

¹¹² *Rubalcaba v. Garland*, 998 F.3d 1030, 1040 (9th Cir. 2021); *Reyes-Vargas v. Barr*, 958 F.3d 1295, 1302-03 (10th Cir. 2020).

¹¹³ *Rubalcaba*, 998 F.3d at 1040; *Reyes-Vargas*, 958 F.3d at 1300.

¹¹⁴ Note that 85 Fed. Reg. 81,588, 81,655 (Dec. 16, 2020) intended to limit the instances in which an IJ may exercise sua sponte reopening authority, but has since been enjoined until further court order and is no longer in effect. See *Centro Legal de la Raza, v. Exec. Off. For Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021). Practitioners should be aware that online sources may not reflect the current, enjoined status of this regulation.

¹¹⁵ While the Second and Fifth Circuits reached the opposite conclusion with regard to sua sponte motions to reopen, those decisions did not have the benefit of *Kisor*. See *Zhang v. Holder*, 617 F.3d 650, 660–65 (2d Cir.2010); *Ovalles v. Holder*, 577 F.3d 288, 295–96 (5th Cir. 2009). The Third Circuit reached the same result in *Desai v. Attorney General*, adopting the Second Circuit’s analysis from *Zhang*. See 695 F.3d 267, 270–71 (3d Cir. 2012) (citing *Zhang*, 617 F.3d at 665). Post-*Kisor*, the Third Circuit has called this approach into question. See *Ovalle v. Att’y Gen.*, 791 F. App’x 333, 336 (3d Cir. 2019) (“That reasoning ... does not survive the Supreme Court’s recent decision in *Kisor*.”).

¹¹⁶ Note, however, that DHS does not always reinstate the order and, where DHS has failed to reinstate the prior order, practitioners should consider arguing that the reinstatement bar does not apply.

original date and that the reinstated order “is not subject to being reopened or reviewed.”¹¹⁷ Several U.S. courts of appeals have ruled that the statute forecloses reopening of reinstated removal orders.¹¹⁸ The Fifth Circuit has even held that this bar on reopening forecloses sua sponte reopening by EOIR.¹¹⁹ Although in the petition for review context some U.S. courts of appeals recognize a “gross miscarriage of justice” in the initial removal proceedings exception that allows review of the underlying order of removal,¹²⁰ U.S. courts of appeals have not extended this exception into the INA § 241(a)(5) context given the plain language of the statute.¹²¹ Therefore, noncitizens who were removed from the United States, re-entered the United States unlawfully, and whose prior orders have been reinstated will generally lack motion to reopen options.¹²² However, noncitizens in this procedural posture should consider other options such as seeking to reopen the reinstatement order under 8 CFR § 103.5¹²³ or, in compelling cases, seeking prosecutorial discretion from DHS in the form of cancellation of the reinstated order of removal and placement into INA § 240 removal proceedings.

VIII. Conclusion

It is not easy for noncitizens to obtain qualifying post-conviction relief. Noncitizens with final orders of removal who secure qualifying post-conviction relief must additionally contend with the motion to reopen maze before the IJ or the BIA. Navigating this path is challenging, as it is laden with various procedural landmines, substantive demands, and ticking clocks, all described in this practice advisory. Accordingly, noncitizens need competent immigration counsel to ensure that their hard-fought efforts securing qualifying post-conviction relief will ultimately lead an IJ or the BIA to either reopen and terminate the removal proceedings or reopen the removal proceedings so that they may pursue relief from removal.

¹¹⁷ INA § 241(a)(5). In 1996, Congress expanded the scope of noncitizens subject to reinstatement of removal from “only a limited class of illegal reentrants” to “all [noncitizen] entrants” who unlawfully reentered the United States. Congress also limited the opportunity for noncitizens to seek reopening or review of the prior orders. Note that the reinstatement applies to motions to reopen, but does not apply to motions to reconsider.

¹¹⁸ See *Tarango-Delgado v. Garland*, 19 F.4th 1233, 1240 (10th Cir. 2021); *Sanchez-Gonzalez v. Garland*, 4 F.4th 411, 415 (6th Cir. 2021); *Gutierrez-Gutierrez v. Garland*, 991 F.3d 990, 994 (8th Cir. 2021); *Cuenca v. Barr*, 956 F.3d 1079, 1084 (9th Cir. 2020); *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 354 (5th Cir. 2018); *Cordova-Soto v. Holder*, 732 F.3d 789, 794 (7th Cir. 2013).

¹¹⁹ *Rodriguez Saragosa*, 904 F.3d at 355.

¹²⁰ *Vega-Anguiano v. Barr*, 982 F.3d 542, 547 (9th Cir. 2019) (stating that a gross miscarriage of justice occurs “when a deportation or removal order had no valid legal basis at the time of its issuance *or* at the time of its execution”); *Debeato v. Att’y Gen. of U.S.*, 505 F.3d 231, 235 (3d Cir. 2007) (requiring a “gross miscarriage of justice” as “a prerequisite to relief”); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 514 (5th Cir. 2006) (requiring a “gross miscarriage of justice” as a jurisdictional requirement for a collateral attack on a removal order).

¹²¹ See *Tarango-Delgado v. Garland*, 19 F.4th 1233, 1240 (10th Cir. 2021); *Sanchez-Gonzalez*, 4 F.4th at 415.

¹²² *But see Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018) (holding that the reinstatement bar does not apply to motions to rescind in absentia orders based on lack of notice which can be filed “at any time”).

¹²³ Practitioners should also consult American Immigration Council & NIPNLG, *Reinstatement of Removal Practice Advisory*, May 23, 2029, https://www.americanimmigrationcouncil.org/practice_advisory/reinstatement-removal.