



Motions to Reopen Migrant Protection Protocols (“MPP”) Removal Orders

Practice Advisory¹
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I. Introduction

In January 2019, the U.S. government instituted the Migrant Protection Protocols (“MPP”), an unprecedented and inhumane policy that forced people seeking asylum in the United States to wait for their U.S. immigration court hearings in Mexico.² From 2019 to 2022, tens of thousands of people were subjected to MPP. Because the conditions of MPP made it nearly impossible for asylum seekers to fairly present their claims for relief, many were ordered removed.

This practice advisory discusses strategies for people who received a final order of removal under MPP and who want to reopen their immigration proceedings.³ The advisory focuses on those who wish to reopen to pursue asylum or related relief, but many suggestions apply equally to those intending to seek other forms of relief.

² This practice advisory assumes general knowledge about MPP. For an overview of MPP, see American Immigration Council (“AIC”), *The “Migrant Protection Protocols”* (Jan. 7, 2022), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols> [hereinafter “AIC MPP Report”].

³ Between January 2021 and November 2022, approximately 800 MPP cases were successfully reopened, with a roughly equal division of reopened *in absentia* removal orders and non-*in absentia* removal orders. See TRAC Immigration, *MPP (Remain in Mexico) Deportation Proceedings – Cases Reopened Since January 2021* (Nov. 2022), <https://trac.syr.edu/phptools/immigration/mpp2/>. Some of these cases were likely reopened as part of the MPP wind-down process, discussed below.

Note: because many MPP cases present unusual complexities and there is minimal directly relevant case law, many of the suggestions in this advisory have not been rigorously tested. Practitioners will need to thoroughly explore the pros and cons of any approach and conduct independent research to identify the best course of action for a client.

This advisory begins with **Section II** providing brief background on MPP. It also explains the unique way in which MPP removal orders were issued and executed, and what that means for noncitizens in various postures. **Section III** gives a general overview of the options for challenging a removal order, including direct appeal, motions to reconsider and motions to reopen, as well as motions to rescind and reopen *in absentia* removal orders.

The remaining sections delve into MPP-specific aspects of motions to reopen. **Section IV** discusses strategy considerations for seeking a joint motion to reopen with DHS or seeking *sua sponte* reopening by the immigration court or Board of Immigration Appeals (“BIA” or “Board”). Joint reopening and *sua sponte* reopening are both regulatory reopening provisions that are not subject to the general statutory deadline for filing motions to reopen—since most noncitizens with MPP removal orders are past the deadline. **Section V** discusses arguments that the statutory filing deadline should be equitably tolled.

Section VI discusses the substantive standards for reopening an MPP removal order issued at a hearing at which the noncitizen appeared. **Section VII** discusses the substantive standards for rescinding and reopening an *in absentia* removal order issued during MPP. An *in absentia* removal order is issued when a noncitizen fails to appear at an immigration court hearing.

The advisory concludes with **Section VIII**, offering practical tips for practitioners who have taken on representation of a client with an MPP removal order.

II. Overview of MPP

From January 2019 to January 2021, the U.S. government subjected approximately 70,000 people to MPP.⁴ As the government has since acknowledged, MPP “impos[ed] substantial and unjustifiable human costs on migrants who were exposed to harm while waiting in Mexico.”⁵ Dangerous conditions in northern Mexico meant that many asylum seekers were kidnapped, assaulted, threatened, and subjected to other forms of harm.⁶ Efforts to find work, housing, and

⁴ Alejandro Mayorkas, DHS Sec’y, *Explanation of the Decision to Terminate the Migrant Protection Protocols*, at 7 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf [hereinafter “October Termination Explanation”]; TRAC Immigration, *MPP (Remain in Mexico) Deportation Proceedings – All Cases* (Nov. 2022), <https://trac.syr.edu/phptools/immigration/mpp4/> [hereinafter “TRAC MPP Statistics”]. In response to an injunction issued by the U.S. District Court for the Northern District of Texas, the government implemented a second iteration of MPP from December 2021 to August 2022, as discussed below. However, the majority of MPP removal orders were issued under the first iteration of the policy.

⁵ October Termination Explanation, *supra* note 4, at 2.

⁶ Human Rights First, *Human Rights First Decries Supreme Court Decision on Cruel, Illegal “Remain in Mexico” Policy* (Aug. 25, 2021), <https://humanrightsfirst.org/library/human-rights-first-decries-supreme-court-decision-on-cruel-illegal-remain-in-mexico-policy/>.

to meet other basic needs were complicated by asylum seekers' limited rights in Mexico and the widespread discrimination they faced there.⁷

Under these conditions, it was very challenging for asylum seekers to find counsel, gather evidence, present their claims, appear for hearings, and see their immigration court cases through to completion.⁸ As a result, only 1 percent of those subjected to MPP were granted relief in those proceedings.⁹

A. Efforts to Terminate MPP

On January 20, 2021, the government suspended new enrollments in MPP.¹⁰ Shortly afterwards, the Department of Homeland Security (“DHS”) began a “winddown” process, allowing people with pending MPP cases to enter the United States to continue their claims.¹¹ DHS subsequently expanded the winddown to include noncitizens who had their cases terminated while in MPP as well as noncitizens who received *in absentia* orders of removal—though only a relatively small number of people in these categories ultimately entered through the winddown.¹² On June 1, 2021, the government formally terminated MPP.¹³

However, on August 13, 2021, the U.S. District Court for the Northern District of Texas issued a permanent nationwide injunction against the termination of MPP, directing the government to resume MPP in a decision that the Fifth Circuit affirmed.¹⁴ The Supreme Court eventually reversed the decision, in *Biden v. Texas*,¹⁵ but as a result of this litigation the government terminated the winddown and operated a second version of MPP (“MPP 2.0”) from December 6, 2021 to August 8, 2022.¹⁶ DHS enrolled more than 10,000 people in MPP 2.0. Following the termination of MPP 2.0, the government agreed to process these asylum seekers into the United States as they appeared for their hearing dates; the majority of these cases remain pending today.¹⁷ The government has made no effort to restart the winddown process for those subjected to the first iteration of MPP (“MPP 1.0”).

⁷ See, e.g., Human Rights Watch, “*We Can’t Help You Here*”: US Returns of Asylum Seekers to Mexico (July 2, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>.

⁸ See AIC MPP Report, *supra* note 2.

⁹ See TRAC MPP Statistics, *supra* note 4.

¹⁰ DHS, *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program* (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

¹¹ DHS, *DHS Announces Process to Address Individuals in Mexico with Active MPP Cases* (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>.

¹² DHS, *DHS Announces Expanded Criteria for MPP-Enrolled Individuals Who Are Eligible for Processing Into the United States* (June 23, 2021), <https://www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing>.

¹³ DHS, *Termination of the Migrant Protection Protocols Program* (June 1, 2021), https://www.dhs.gov/sites/default/files/2022-02/21_0601_termination_of_mpp_program.pdf [hereinafter “June Termination Memo”].

¹⁴ *Texas v. Biden*, 554 F. Supp. 3d. 818 (N.D. Tex. 2021), *affirmed*, 20 F.4th 928 (5th Cir. 2021).

¹⁵ 142 S. Ct. 2528 (2022).

¹⁶ See DHS, *DHS Statement on U.S. District Court’s Decision Regarding MPP* (Aug. 8, 2022), <https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp> [hereinafter “DHS Statement on District Court Decision”].

¹⁷ See TRAC MPP Statistics, *supra* note 4; see DHS Statement on District Court Decision, *supra* note 16.

B. DHS Interpretation of MPP Removal Orders

In order to evaluate the options available to clients who received removal orders during MPP, practitioners need to understand the unusual manner in which DHS views MPP removal orders. Stated broadly, DHS generally treats MPP removal orders as “unexecuted,” (*i.e.*, “not carried out”), despite viewing non-MPP removal orders issued in analogous situations to be “executed.” This distinction matters, because those with unexecuted removal orders must succeed in reopening their immigration court case in order to apply for asylum. In contrast, those who return to the United States after their removal order is executed do not need to file a motion to reopen in order to seek asylum (though if they returned unlawfully or previously had an asylum application denied they have other barriers, as described below).

We start with an explanation of how a removal order is generally executed in the non-MPP context. In regular (non-MPP) removal proceedings, an immigration judge (“IJ”) can issue a removal order during or after a hearing at which the noncitizen appears. If a noncitizen waives their right to appeal the removal order to the BIA, the removal order becomes final immediately.¹⁸ Noncitizens who do not waive appeal have 30 days to file a notice of appeal to the BIA. If they do not file an appeal during that window, their removal order becomes final when the 30-day period ends.¹⁹ If a noncitizen files an appeal, the removal order is not considered final until after the BIA dismisses the appeal. *In absentia* removal orders, issued when a noncitizen does not attend a hearing, are considered final upon issuance.²⁰

Once a removal order becomes final, DHS can execute it by physically removing the person from the United States. A removal order is also executed by operation of law if a noncitizen “ordered . . . removed . . . has left the United States,” regardless of whether the government physically removed them and regardless of the country to which they departed.²¹ U.S. immigration laws assume this general sequence: a removal order becomes final while a person is still in the United States and then the removal order is executed when the government returns the person to their country of origin or they otherwise leave the United States.

MPP turned this sequence of events on its head. As described below, removal orders for many people in MPP became final while they were *outside* the United States. And while DHS never issued a formal, public policy confirming their position, practitioners have widely reported that DHS considers people whose MPP orders of removal became final while they were in Mexico, and who never subsequently left Mexico, to have unexecuted orders of removal.²² DHS reportedly justifies this position by considering Mexico to be the functional equivalent of the United States for people who were in MPP.²³ As a practical matter, practitioners report that DHS generally presumes that all MPP removal orders were never executed (*i.e.*, presumes that a noncitizen who was in MPP never left Mexico). While the authors of this practice advisory

¹⁸ 8 CFR § 1241.1(b).

¹⁹ 8 CFR § 1241.1(c).

²⁰ 8 CFR § 1241.1(e).

²¹ INA § 101(g).

²² DHS has not clearly stated whether it only considers an MPP removal order executed when the noncitizen returns to their country of origin, or if departing Mexico for any third country will suffice to “execute” the order.

²³ This policy has been memorialized in filings made in federal district court. *E.g.*, *E.J.R.O. v. McLane*, No. SA-20-cv-1157, 2020 WL 7342664, at *4 (W.D. Tex. Dec. 14, 2020); *A.M.P.V. v. Barr*, No. 20-cv-913, 2020 WL 2079433, at *5 (D.D.C. Apr. 30, 2020).

disagree with DHS’s treatment of MPP removal orders, the practical reality is that, because DHS views these orders as unexecuted, individuals with an MPP removal order may need to file a motion to reopen before they can seek asylum and, if they are in the United States unlawfully, are at risk of summary removal without any further process.

C. Categories of MPP Cases and Potential Options

Out of the approximately 81,000 people that the U.S. government subjected to MPP 1.0 or 2.0, 52,646 people had completed their immigration court cases as of November 2022.²⁴ Most commonly, MPP cases ended with the IJ issuing an *in absentia* removal order (30,347 people), terminating proceedings (11,872 people), or entering a removal order at a hearing the noncitizen attended (5,453 people).

People who received removal orders during MPP generally fall into one of the following four categories, which impact whether DHS will consider the removal order executed or not.

| |
|--|
| In-person order of removal and waived appeal |
| <ul style="list-style-type: none">• People in this category had a final order of removal at the conclusion of their final hearing.²⁵ Generally, DHS removed these individuals to their country of origin after the hearing, thus executing the order of removal. |
| In-person order of removal and reserved appeal, but did not file appeal |
| <ul style="list-style-type: none">• People in this category were generally returned to Mexico after the hearing and given a notice to show up for an additional “hearing” on a date set after the appeal deadline. Individuals with MPP orders in this situation were typically in Mexico when their removal order became final at the expiration of the appeal deadline.²⁶ If they then reported to the designated port of entry at the appointed time, DHS would typically detain them and remove them to their country of origin, thus executing the order of removal. More commonly, such individuals did not report to the port of entry and remained in Mexico with a final order of removal. As explained above, DHS typically takes the position that these people have unexecuted orders of removal. |
| In-person order of removal and filed an appeal |
| <ul style="list-style-type: none">• People in this category had final orders of removal when the BIA dismissed their appeals.²⁷ They were frequently in Mexico when their removal order became final, |

²⁴ For the numbers cited in this section, see TRAC MPP Statistics, *supra* note 4.

²⁵ 8 CFR § 1241.1(b).

²⁶ 8 CFR § 1241.1(c).

²⁷ 8 CFR § 1241.1(a).

though some were in the United States or their country of origin.²⁸ As explained above, DHS typically takes the position that these people have unexecuted orders of removal. However, if they prove that they left Mexico, they should be considered to have executed the orders.

In absentia order of removal

- People in this category were typically in Mexico when the *in absentia* order was issued by the IJ. *In absentia* removal orders are final when issued. As explained above, DHS typically takes the position that these people have unexecuted orders of removal.

1. Consequences and Options for Noncitizens Considered to Have Executed MPP Removal Orders

As explained above, the government considers noncitizens who left Mexico after receiving a final order of removal in MPP (or who had their removal orders executed by DHS in one of the scenarios described above) to have an executed order of removal.²⁹ Practitioners should discuss with the client the implications of having an executed MPP removal order.

If the noncitizen reentered the United States unlawfully:

- DHS can reinstate the prior removal order.³⁰ If a noncitizen against whom DHS initiates the reinstatement process expresses a fear of return to their country of origin, they are entitled to a “reasonable fear interview” conducted by an asylum officer.³¹ If the asylum officer finds that the noncitizen has a reasonable fear of persecution or torture, the noncitizen will be referred to immigration court for withholding-only proceedings.³²
- If DHS has not reinstated the prior removal order, the simplest route to restart proceedings is attempting to file an affirmative asylum application with U.S. Citizenship and Immigration Services (“USCIS”). However, practitioners should be

²⁸ For example, in some cases where the noncitizen succeeded in filing a BIA appeal, DHS paroled them into the United States when they appeared at the port of entry post-filing. Practitioners report that in these cases, Mexico refused to accept the noncitizen since they had no future hearing dates set for their ongoing proceedings.

²⁹ Practitioners may wish to submit documentary evidence that the noncitizen left Mexico and should be considered to have an executed order of removal. For example, this might include travel documents, cell phone payment records, receipts for expenses incurred in the country of origin, witness statements, and the noncitizen’s sworn declaration.

³⁰ INA § 241(a)(5).

³¹ 8 CFR § 208.31.

³² 8 CFR § 208.31(a), (e). In withholding-only proceedings, noncitizens are generally limited to seeking withholding of removal and protection under the Convention Against Torture (“CAT”); there are also limitations on their ability to reopen prior proceedings. INA § 241(a)(5).

aware that doing so will alert DHS to the noncitizen’s presence and could trigger reinstatement proceedings.³³

- Noncitizens whom DHS has not placed in reinstatement proceedings who do not wish to attempt an affirmative filing with USCIS may also file a motion to reopen their case to restart proceedings in immigration court. However, as with an affirmative filing, submitting a motion to reopen may trigger reinstatement proceedings—and, as explained in the below practice pointer, some IJs may take the view that the motion to reopen is barred by statute.
- DHS may also choose to issue a new NTA for people in this category. In the rare instance when DHS actually files such an NTA with the court (rather than reinstating the MPP removal order), noncitizens in this posture should then be able to seek asylum, withholding, and CAT protection in immigration court.

Practice Pointer: Reinstatement and Motions to Reopen

Once a removal order is reinstated, the Immigration and Nationality Act (“INA”) states that it “is not subject to being reopened or reviewed.”³⁴ The plain language of the statute suggests that this prohibition on reopening only applies once DHS actually reinstates the prior removal order.

However, practitioners report that some IJs view the prohibition more broadly, relying on circuit court dicta suggesting the prohibition extends to anyone who meets the criteria for reinstatement of removal (*i.e.*, someone who has an executed order of removal who re-entered the United States without authorization), even if DHS has not initiated reinstatement proceedings.³⁵ In arguing against this overbroad interpretation, practitioners can point to the plain statutory language; the fact that this reading is grounded only in dicta, rather than binding case law;³⁶ and, for *in absentia* orders of removal, emphasize helpful case law carving out further protections for *in absentia* orders.³⁷ In multiple unpublished decisions, the BIA has reversed IJs’ rulings on this issue and concluded that the reinstatement bar does not apply unless DHS has actually reinstated the prior order.³⁸

³³ USCIS, Asylum Division, *Affirmative Asylum Procedures Manual* § III.S (most current version as of July 2023), http://louisetrauma.weebly.com/uploads/1/1/3/5/113529125/aapm_july_2023_merged.pdf [hereinafter “AAPM”].

³⁴ INA § 241(a)(5).

³⁵ See, e.g., *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 355 (5th Cir. 2018); *Cuenca v. Barr*, 956 F.3d 1079, 1085 (9th Cir. 2020).

³⁶ For example, in *Rodriguez-Saragosa* and *Cuenca*, DHS had actually put the petitioners into reinstatement proceedings. *Id.*

³⁷ See, e.g., *Mejia v. Whitaker*, 913 F.3d 482, 487 (5th Cir. 2019); *Miller v. Sessions*, 889 F.3d 998, 1002 (9th Cir. 2018).

³⁸ See, e.g., ---, AXXX XXX XXX, at 2 (BIA Jan. 13, 2021) (available [here](#)) (noting that there is “no indication on the record before us” that DHS “actually reinstated the respondent’s prior removal order, and thus precluded the respondent from filing a motion to reopen”); ---, AXXX XXX XXX, at 2 n.1 (BIA June 8, 2022) (available [here](#)); ---, AXXX XXX XXX, at 2 n.3 (BIA Dec. 23, 2021) (available [here](#)); ---, AXXX XXX XXX, at 2 n.3 (BIA Aug. 9, 2021) (available [here](#)).

If the noncitizen reentered the United States lawfully:

- DHS may not reinstate the removal orders of people who entered lawfully (*e.g.*, if they were paroled at a port of entry under a Title 42 exemption, a CBP One appointment, or “traditional” humanitarian parole) since they did not reenter illegally.
- People in this category have several options for restarting their immigration case:
 - If they did not receive a new Notice to Appear (“NTA”) in immigration court, they can file an affirmative asylum application with USCIS to restart their proceedings.³⁹
 - If they were issued a new NTA when they entered, and DHS subsequently filed the NTA with the immigration court, then the immigration court has jurisdiction over the noncitizen’s asylum application.⁴⁰
 - If they were issued a new NTA when they entered but DHS has *not* filed the NTA with the immigration court, then USCIS should accept the asylum application. USCIS will then typically issue an NTA itself and file it with the immigration court; the noncitizen would then proceed with their asylum case in immigration court.⁴¹ However, practitioners report that USCIS has not consistently complied with this process.
 - Noncitizens in this posture could also file a motion to reopen, if they do not want to proceed before USCIS for some reason or need to vacate their prior removal order.

2. Consequences and Options for Noncitizens Considered to Have Unexecuted MPP Removal Orders

As explained above, DHS will likely consider many people subjected to MPP to have unexecuted orders of removal. Practitioners should discuss with the client the implications of having an unexecuted MPP removal order.

- Noncitizens considered to have unexecuted MPP removal orders who subsequently entered the United States unlawfully are typically not subjected to reinstatement of

³⁹ See AAPM, *supra* note 33, § III.P.3.c (“[I]f the applicant left the United States after being denied asylum by EOIR and then returned, the Asylum Division may have jurisdiction to consider an affirmative asylum application filed by that applicant in the following instances: applicant was removed from or departed the United States under an order of removal . . . and subsequently made a legal entry”); see also USCIS, *Lesson Plan Overview - Mandatory Bars to Asylum and Discretion*, at 9 (Mar. 25, 2009), <https://www.aila.org/infonet/aobt-lesson-mandatory-bars-to-asylum-discretion> [hereinafter “USCIS Mandatory Bars Lesson Plan”].

⁴⁰ Practitioners should note that as more noncitizens are being given NTAs at the border that have a date and time for their initial master calendar hearing, it is increasingly common that DHS will fail to actually file the NTA with the court by that date, which often leads to dismissal for failure to prosecute. See TRAC, *Over 63,000 DHS Cases Thrown Out of Immigration Court This Year Because No NTA Was Filed* (Oct. 17, 2022), <https://trac.syr.edu/reports/699/>. Should this occur, the client would be able to affirmatively file with USCIS.

⁴¹ USCIS, *What Happens After You File Form I-589 With USCIS* (Jan. 26, 2021), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/what-happens-after-you-file-form-i-589-with-uscis>.

removal, since they have not “departed” the United States in the government’s eyes.⁴² However, noncitizens with unexecuted, final orders of removal who are present in the United States are vulnerable to summary removal. If apprehended, they have no right to a credible or reasonable fear interview.⁴³

- USCIS does not generally have jurisdiction over asylum applications filed by people with unexecuted orders of removal.⁴⁴ In order to restart their immigration proceedings, noncitizens with unexecuted MPP removal orders who have reentered the United States will often need to file a motion to reopen with the immigration court or BIA. However, there are some exceptions:
 - Unaccompanied children. USCIS has initial jurisdiction over asylum applications filed by unaccompanied children, even if they have an unexecuted removal order. Thus an individual who entered the United States as an unaccompanied child after having previously received an MPP removal order can file an asylum application with USCIS, without needing to first reopen their removal proceedings.⁴⁵
 - People issued an NTA. Some individuals with MPP removal orders were issued a new NTA when they re-entered. If DHS filed the new NTA with the immigration court, they would again be in removal proceedings without needing to reopen their case and can seek asylum in their active removal proceedings.⁴⁶

Practice Pointer: Attempting an Affirmative Filing

In some cases, particularly where the individual reentered the United States lawfully following the MPP removal order, practitioners have decided to file an affirmative asylum application with USCIS.⁴⁷ When doing so, practitioners are prepared to argue that the MPP removal order should properly be considered executed despite the fact the noncitizen never left Mexico, and that USCIS thus has jurisdiction.

⁴² See INA § 241(a)(5). However, some report that the government does sometimes put people with “unexecuted” MPP removal orders into reinstatement following an unlawful entry, so this policy is not consistently applied. Additionally, some practitioners have pushed for DHS to put clients into reinstatement of removal to obtain a reasonable fear interview and forestall imminent removal. *See, e.g., E.J.R.O.*, 2020 WL 7342664, at *2.

⁴³ A credible fear interview is a screening interview used to determine whether a noncitizen who would otherwise be subject to expedited removal should be allowed to pursue a claim for asylum and related relief in immigration court. INA § 235(b)(1)(B). As discussed above, a reasonable fear interview is a similar screening interview for noncitizens who would otherwise be subject to reinstatement of removal.

⁴⁴ See AAPM, *supra* note 33, § III.L, § III.P.3.c; 8 CFR § 208.2(b).

⁴⁵ USCIS, *Updated Service Center Operations Guidance for Accepting Forms I-589 Filed by Applicants Who May be Unaccompanied Alien Children*, at 2 (May 7, 2021), <https://www.uscis.gov/sites/default/files/document/memos/Updated-UAC-Procedures-MPP-May-2021.pdf> (noting that unaccompanied children with MPP final orders of removal should be allowed to apply affirmatively); *see ---*, AXXX XXX XXX (BIA Aug. 9, 2021) (available [here](#)) (granting joint motion to reopen MPP removal order and terminate proceedings based on USCIS grant of asylum to the respondent).

⁴⁶ Note, however, that if DHS never actually files the new NTA with the immigration court, noncitizens in this posture will be limited to the other options discussed in this section.

⁴⁷ For example, some ports of entry were willing to issue Title 42 exemptions and parole to vulnerable noncitizens despite the fact they had MPP removal orders.

The advocacy community does not yet have good information on how USCIS will be responding to these arguments, so practitioners should note that this approach is untested. However, at a minimum, attempting to affirmatively file may help preserve the one-year filing deadline and/or could trigger transfer to the immigration court for removal proceedings without needing to file a motion to reopen.

For noncitizens with removal orders who are still abroad, either in Mexico or elsewhere, the only mechanism for restarting their case is to file a motion to reopen with the immigration court or BIA.⁴⁸

III. Post-Removal Order Options Generally

This section will briefly describe the general options for challenging an IJ-issued removal order: (1) filing an appeal to the BIA; (2) filing a motion to reconsider with the IJ or BIA; (3) filing a motion to reopen with the IJ or BIA; and (4) for *in absentia* removal orders only, filing a motion to rescind and reopen the *in absentia* order with the IJ. For reasons that will be discussed below, typically the best vehicle to challenge an MPP removal order will be through a motion to reopen, or, in the case of an *in absentia* removal order, a motion to rescind and reopen. Sections IV through VII of this practice advisory will thus focus on motions to reopen and motions to rescind and reopen MPP removal orders.

A. Appealing to the BIA

The most straightforward way to challenge an IJ’s removal order is to file an appeal of the order to the BIA. If the BIA dismisses the appeal, the individual can file a petition for review (“PFR”) within 30 days of the BIA’s decision in the appropriate U.S. court of appeals.⁴⁹ To appeal an IJ’s removal order, individuals must file the notice of appeal with the BIA within 30 days of the IJ’s decision.⁵⁰ Filing an appeal triggers an automatic stay of removal while the appeal is pending with the BIA.⁵¹

Because the BIA generally strictly enforces the 30-day deadline,⁵² filing an appeal to the BIA is not a viable option for many people with MPP removal orders—since their 30-day appeal deadline has long since passed. However, there may be situations where filing a late BIA appeal of the MPP removal order is warranted, arguing that the BIA should equitably toll the 30-day deadline or accept the late appeal through the Board’s self-certification authority under 8 CFR §

⁴⁸ Practitioners should note that while noncitizens who are abroad may be able to request an appointment to present at a port of entry using CBP One, it remains uncertain how DHS will treat individuals who present at CBP One appointments with prior removal orders.

⁴⁹ INA § 242(b).

⁵⁰ 8 CFR § 1003.38(b).

⁵¹ 8 CFR § 1003.6(a). There is no automatic stay based on a pending PFR, though petitioners can file a motion for a judicial stay with the U.S. court of appeals. For more information on stays of removal, see Catholic Legal Immigration Network, Inc. (“CLINIC”), *Practice Advisory: Stays of Removal* (June 29, 2021), <https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-stays-removal>.

⁵² *Matter of Morales-Morales*, 28 I&N Dec. 714, 716 (BIA 2023) (“[W]hile we will continue to dismiss appeals that are filed outside the 30-day time limit, we acknowledge that the Board has authority to accept what are otherwise untimely appeals, and consider them timely. . . .”).

1003.1(c). In a 2023 case, the BIA held that the 30-day appeal deadline can be equitably tolled, overruling its prior precedent to the contrary.⁵³ To warrant equitable tolling of the deadline, a noncitizen must show that they have been pursuing their rights diligently, and that an extraordinary circumstance prevented timely filing, as discussed below in Section V.⁵⁴ In addition to arguing equitable tolling, practitioners could also include a request that the BIA exercise its discretionary authority to certify the appeal to itself, though a refusal to exercise discretionary self-certification authority will likely not obtain judicial review.

A late-filed BIA appeal might be worth considering in cases where, for example, the information the government gave the respondent about the appeal deadline was inaccurate or unclear, or the respondent failed to timely file an appeal due to ineffective assistance of counsel.⁵⁵ In these types of circumstances, the late-filed appeal and request for equitable tolling should include a detailed declaration from the noncitizen. A late-filed appeal may also be an option in an emergency situation where removal is imminent and where the IJ made errors of law at the individual hearing. Practitioners could also consider asking the IJ to reissue the decision if the noncitizen missed the 30-day BIA appeal window.

There may also be instances where an individual with an MPP order did appeal to the BIA and received a BIA decision dismissing their appeal more than 30 days ago—and is thus beyond the 30-day deadline for filing a PFR in the relevant U.S. court of appeals. It is possible to ask the BIA to reissue its decision to allow the 30-day PFR deadline to re-start. The BIA has discretion to reissue a decision and may do so in compelling circumstances.⁵⁶

An appeal to the BIA challenges the IJ’s decision based on the record that was before the IJ. If the respondent wishes to add additional evidence to the record, then a motion to reopen, or a motion to remand, is necessary. Motions to reopen and motions to remand have the same substantive standards, discussed in Section III.C below, but they differ procedurally. A motion to remand is filed with the BIA while a BIA appeal of an IJ merits decision is pending, whereas a motion to reopen is filed with the IJ or BIA after a final removal order has been entered.⁵⁷ Because a motion to remand is filed while a BIA appeal of an IJ’s removal order is pending (and

⁵³ *Id.* (recognizing that the regulatory 30-day appeal deadline is a claim processing rule that is subject to equitable tolling). All U.S. courts of appeal that have considered the question have concluded that the deadline can be equitably tolled. *Boch-Saban v. Garland*, 30 F.4th 411, 413 (5th Cir. 2022) (concluding that BIA appeal deadline was non-jurisdictional and subject to equitable tolling); *James v. Garland*, 16 F.4th 320, 325 (1st Cir. 2021); *Attipoe v. Barr*, 945 F.3d 76, 80-82 (2d Cir. 2019); *Irigoyen-Briones v. Holder*, 644 F.3d 943, 947-49 (9th Cir. 2011); *Liadov v. Mukasey*, 518 F.3d 1003, 1008 n.4 (8th Cir. 2008); *Huerta v. Gonzales*, 443 F.3d 753, 755-57 (10th Cir. 2006).

⁵⁴ *Morales-Morales*, 28 I&N Dec. at 717.

⁵⁵ *See id.* (“An extraordinary circumstance may include those situations where reasonable expectations about an event’s occurrence are interrupted. One example is where a party uses a guaranteed delivery service, and the service fails to fulfill its guarantee.”). Individuals asserting ineffective assistance of counsel claims must follow the requirements laid out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

⁵⁶ *See, e.g.*, Noel Henry, AXXX XXX 853 (BIA Jan. 4, 2022) (unpublished) (reissuing decision where failure to timely file PFR was due to ineffective assistance of counsel), available by purchasing a subscription to the Immigrant and Refugee Appellate Center’s Index of Unpublished Decisions of the Board of Immigration Appeals, <https://www.irac.net/unpublished/index-2/> [hereinafter “IRAC Index”].

⁵⁷ Compare 8 CFR § 1003.2(c)(4); BIA Practice Manual Ch. 5.8(a) (discussing motions to remand), with 8 CFR §§ 1003.2(c); 1003.23(b)(3) (discussing motions to reopen); see EOIR, *Shared Practice Manual Appendices*, App’x J, <https://www.justice.gov/eoir/reference-materials/general/shared-appendices> [hereinafter “EOIR Appendix J”].

there is thus not yet a final removal order), a motion to remand is not subject to the time and number limitations that restrict motions to reopen, as discussed below. A respondent may file the motion to remand at any time while the BIA appeal is pending and before the BIA issues its decision; the BIA may consider the appeal and motion to remand concurrently.

B. Filing a Motion to Reconsider

Another option to challenge a removal order is through a motion to reconsider. A motion to reconsider is appropriate when the respondent alleges that the decision contained errors of law or fact.⁵⁸ These motions do not allow for the submission of new evidence. Instead they ask the adjudicator to reconsider their decision on the existing record. A motion to reconsider must be filed within 30 days of the entry of a final removal order.⁵⁹ A respondent files the motion to reconsider with the same adjudicator who made the decision the respondent wishes to challenge—whether that be the IJ or the BIA. Unlike a BIA appeal, the filing of a motion to reconsider does not result in an automatic stay of a removal order.

Because most individuals with MPP removal orders received a final order more than 30 days ago, and because many of these individuals may wish to challenge their removal order based on facts that were not presented to the IJ, a motion to reconsider is likely not the best option for these individuals. However, practitioners should consider a motion to reconsider if the IJ or BIA decision was based on errors of fact or law. In appropriate cases, practitioners could file a motion to reconsider beyond the 30-day deadline arguing that the deadline should be equitably tolled.⁶⁰ The standards for equitable tolling are discussed below in Section V.

C. Filing a Motion to Reopen

Under INA § 240(c)(7), noncitizens have a statutory right to file one motion to reopen a final removal order.⁶¹ The Supreme Court recognizes that motions to reopen are an “important safeguard intended to ensure a proper and lawful disposition of immigration proceedings.”⁶² As with a motion to reconsider, a noncitizen files a motion to reopen with the same adjudicator who made the decision they wish to challenge—whether that be the IJ or the BIA.⁶³ Motions to reopen denied by IJs are appealable to the BIA, and BIA decisions affirming an IJ denial, or denying a motion to reopen in the first instance, are reviewable on a PFR. Unlike a BIA appeal, the filing of a motion to reopen does not result in an automatic stay of a removal order (with the exception of certain motions to rescind and reopen an *in absentia* removal order, discussed below). A motion to reopen must state “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.”⁶⁴ If the

⁵⁸ See INA § 240(c)(6); 8 CFR §§ 1003.2(b)(1), 1003.23(b)(2).

⁵⁹ *Id.*

⁶⁰ Courts considering the question have recognized that the 30-day motion to reconsider deadline may be equitably tolled. See, e.g., *Williams v. Garland*, 59 F.4th 620, 640 (4th Cir. 2023), as amended (Feb. 10, 2023); *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020); *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1270 (10th Cir. 2018).

⁶¹ If a noncitizen has already filed one motion to reopen and wishes to file a second or subsequent motion to reopen, they will need to invoke one of the exceptions to the 90-day filing deadline discussed below, which also apply to the one-motion rule.

⁶² *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (internal quotation marks omitted).

⁶³ See EOIR Appendix J, *supra* note 57.

⁶⁴ INA § 240(c)(7)(B); see also 8 CFR §§ 1003.2(c), 1003.23(b)(3).

motion to reopen is to pursue relief, the noncitizen must file the relief application and supporting documentation with the motion to reopen, and demonstrate that they are *prima facie* eligible for the relief sought.⁶⁵

Filing Deadline and Exceptions

Motions to reopen must generally be filed within 90 days of the entry of a final removal order.⁶⁶ However, there are several important exceptions to this deadline that will be relevant for people with MPP orders:⁶⁷

1. If the respondent shows they merit equitable tolling of the 90-day deadline (discussed in Section V below).
2. If a joint motion to reopen is filed by both the respondent and DHS, which has no deadline pursuant to regulation⁶⁸ (discussed in Section IV.A below).
3. If the IJ or BIA decides to reopen the case as an exercise of their discretionary *sua sponte* authority, which has no deadline pursuant to regulation⁶⁹ (discussed in Section IV.B below).
4. If the respondent files a motion to reopen to apply for asylum and related relief based on changed country conditions, for which there is no filing deadline pursuant to the statute (described in the following paragraphs).⁷⁰

Under INA § 240(c)(7)(C)(ii), there is no deadline to file a motion to reopen to apply for asylum or related relief “based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.” This material change in country conditions must have occurred between the date of the final IJ hearing and the date the motion to reopen is filed. A motion based on changed country conditions should describe the alleged changed circumstance in detail, include evidence of the changed circumstances, and explain how the changed circumstances affect the noncitizen’s eligibility for relief.⁷¹

Because motions to reopen to apply for asylum based on changed country conditions depend on case-specific evidence about changes that occurred after the immigration court hearing, rather

⁶⁵ See *id.*; see also *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996).

⁶⁶ INA § 240(c)(7)(C)(i).

⁶⁷ In addition to the items listed in the text, there is also an exception to the 90-day motion to reopen filing deadline for individuals seeking certain relief under the Violence Against Women Act (VAWA), including VAWA cancellation of removal. INA § 240(c)(7)(C)(iv). For information on VAWA cancellation, see NIPNLG & Immigrant Legal Resource Center, *Practice Advisory: VAWA Cancellation of Removal* (July 2023), <https://nipnlg.org/work/resources/vawa-cancellation-removal>.

⁶⁸ 8 CFR §§ 1003.23(b)(4)(iv), 1003.2(c)(3)(iii).

⁶⁹ 8 CFR §§ 1003.23(b)(1), 1003.2(a).

⁷⁰ INA § 240(c)(7)(C)(ii).

⁷¹ See BIA Practice Manual Ch. 5.6(e)(1); Immigration Court Practice Manual Ch. 5.7(e)(1); *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013) (stating that this type of motion to reopen must show that new evidence is “material, reflects changed country conditions arising in the country of nationality, and supports a prima facie case for a grant of asylum”).

than MPP-specific arguments, this practice advisory does not discuss them in detail. However, practitioners representing clients in need of reopening should always consider whether the facts permit including an argument for reopening based on changed country conditions. For example, in a 2022 decision, an IJ in Harlingen, Texas found that the respondents had not met the standard for equitable tolling for their untimely motion to rescind and reopen an *in absentia* MPP removal order.⁷² However, the IJ found reopening warranted based on changed country conditions for their asylum claims. The respondents had returned to El Salvador following their placement in MPP, and while in El Salvador a change in local government led to political persecution of the respondents. In support of this basis for reopening, the lead respondent provided evidence of the assaults and threats she endured as a result of her affiliation with an opposing political party.

D. Filing a Motion to Rescind and Reopen an *In Absentia* Removal Order

Separate statutory provisions govern how a noncitizen can challenge an order of removal entered *in absentia*. A respondent cannot appeal an *in absentia* order to the BIA; instead, they must file a motion to rescind and reopen (“MTRR”) the *in absentia* removal order with the IJ who issued it.⁷³ The statute authorizes an IJ to order a respondent removed *in absentia* if the respondent does not attend a removal proceeding after being provided statutorily required notice, and if DHS establishes by “clear, unequivocal, and convincing evidence” that the respondent received written notice and is removable.⁷⁴ There are several bases for seeking rescission and reopening of an *in absentia* order:

1. If the respondent did not receive statutorily required notice (there is no deadline for filing this type of MTRR).⁷⁵
2. If the respondent was in federal or state custody and the failure to appear was through no fault of the respondent (there is no deadline for filing this type of MTRR).⁷⁶
3. If the respondent shows that their failure to appear was because of “exceptional circumstances,” and files the MTRR within 180 days of the *in absentia* order’s issuance⁷⁷ or establishes that equitable tolling of the 180-day deadline is warranted.

Unlike with the filing of other motions to reopen, the filing of an MTRR based on one of the above three grounds triggers an automatic stay of removal while the motion is pending with the IJ.⁷⁸ Noncitizens can also seek rescission and reopening if DHS failed to establish removability by clear, unequivocal and convincing evidence as required by INA § 240(b)(5)(A). It is also possible to seek reopening of an *in absentia* order based on new, previously unavailable evidence pursuant to the general motion to reopen standard (and accompanying 90-day deadline),⁷⁹ through a joint motion, or by requesting that the IJ exercise their *sua sponte* authority. However, noncitizens granted reopening of an *in absentia* removal order without rescission may be barred

⁷² ----, AXXX XXX XXX (Judge Leonard, Harlingen Immigration Court, Oct. 6, 2022) (on file with authors).

⁷³ See EOIR, Immigration Court Practice Manual Ch. 5.9.

⁷⁴ INA § 240(b)(5)(A).

⁷⁵ INA § 240(b)(5)(C)(ii).

⁷⁶ *Id.*

⁷⁷ INA § 240(b)(5)(C)(i).

⁷⁸ INA § 240(b)(5)(C).

⁷⁹ See *Matter of M-S-*, 22 I&N Dec. 349, 353 (BIA 1998).

from receiving certain forms of relief, including adjustment of status, for 10 years.⁸⁰ Section VII below discusses MTRR considerations in the MPP context specifically.

IV. Joint Motions to Reopen and *Sua Sponte* Motions to Reopen in MPP Cases

Individuals with an MPP removal order may avoid the time and number bars by filing the motion to reopen jointly with DHS or by requesting that the IJ or BIA exercise their *sua sponte* authority to reopen.

A. Joint Motions to Reopen

It is generally beneficial to reach out to the Immigration and Customs Enforcement (“ICE”) Office of the Principal Legal Advisor (“OPLA”)—the attorneys who represent DHS in immigration court proceedings—to ask them to join a motion to reopen an MPP case as an exercise of prosecutorial discretion.⁸¹ Although an IJ or the BIA has the authority to deny a joint motion to reopen, BIA case law and Executive Office for Immigration Review (“EOIR”) guidance emphasizes that “where a respondent and the DHS jointly file a motion to reopen, the parties’ agreement should generally be honored and the motion granted, even if the motion is time-barred or number-barred.”⁸² September 2023 EOIR guidance further directs that “[w]here the parties have reached agreement on how a case or issue should be resolved, and no dispute thus exists with respect to the case or issue, an EOIR adjudicator’s default should be to respect the agreement and to rule in accord with it.”⁸³

As of the time of this practice advisory’s writing, OPLA had no uniform guidance about joining motions to reopen MPP removal orders. In contrast, during the expanded winddown of MPP 1.0, OPLA had a policy of generally joining motions to reopen for individuals with MPP *in absentia* removal orders.⁸⁴ Only a relatively small fraction of those with MPP 1.0 *in absentia* orders

⁸⁰ INA § 240(b)(7). This bar applies to those seeking certain specified forms of immigration relief (asylum is not among them) who received oral notice of the time and place of their removal proceedings and the consequences of failing to appear; it does not apply if the *in absentia* removal order is rescinded pursuant to INA § 240(b)(5)(C). For more about this bar, see NIPNLG & Ready to Stay, *Practice Advisory: Understanding and Overcoming Bars to Relief Triggered by a Prior Removal Order* (Feb. 13, 2023), <https://nipnlg.org/work/resources/practice-advisory-understanding-and-overcoming-bars-relief-triggered-prior-removal>.

⁸¹ OPLA maintains a webpage describing its general prosecutorial discretion policies and procedures. ICE, *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor* (July 27, 2023), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>.

⁸² Jean King, EOIR, *Migrant Protection Protocols and Motions to Reopen*, at 2 (June 24, 2021), <https://www.justice.gov/eoir/book/file/1405906/download> [hereinafter “King Memo”]; see *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (parties’ “agreement on an issue or proper course of action should, in most instances, be determinative”); see also ----, AXXX XXX XXX (BIA Jan. 4, 2022) (on file with authors) (granting *sua sponte* reopening in case where IJ had denied joint motion to reopen MPP). NIPNLG is interested in hearing about cases where an IJ denies a joint motion to reopen. We invite practitioners to email examples of such cases to mmendez@nipnlg.org and rscholtz@nipnlg.org.

⁸³ David L. Neal, EOIR Dir., *Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives*, at 3 n.4 (Sept. 28, 2023), https://www.justice.gov/d9/2023-10/dm-23-04_0.pdf.

⁸⁴ Hamed Aleaziz, *Biden Is Expanding a Plan to Bring Back Asylum-Seekers who Were Forced to Wait in Dangerous Mexican Border Towns*, BuzzFeed News (June 22, 2021),

managed to take advantage of this policy before DHS halted it in August 2021, as discussed in Section II.A above.

Now, without any uniform OPLA guidance on joining MPP motions to reopen, practitioners have reported mixed results for these requests. Sometimes OPLA denies the request, other times they agree, and sometimes they give no response at all. Factors that may increase the likelihood that OPLA joins a motion to reopen an MPP removal order include: the strength of the underlying asylum claim, eligibility for other relief such as Special Immigrant Juvenile Status (SIJS),⁸⁵ the strength of evidence of exceptional circumstances resulting in the noncitizen's failure to appear (for *in absentia* cases), and the practitioner's relationship with the local OPLA office. Practitioners have also reported favorable OPLA responses to requests to join motions to reopen in situations where the noncitizen is challenging a denied motion to reopen through a PFR in federal court, or on appeal with the BIA. Practitioners who do not receive a timely response to a request to join a motion to reopen, or who receive a denial of a request to join a motion to reopen from OPLA, can escalate the request to the Chief Counsel of the relevant OPLA office.⁸⁶

Practice Pointer: DHS's Immigration Enforcement Priorities

In advocating with OPLA to join a motion to reopen, practitioners should tailor their request in light of OPLA's prosecutorial discretion guidance, commonly referred to as the "Doyle Memo."⁸⁷ That memo states that 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 or to pursue relief in immigration court that has not already been considered and for which the noncitizen is newly eligible."⁸⁸ It implies that "relitigating previously completed cases" may be disfavored if "due process [was] availed."⁸⁹ Practitioners should thus include with the joint motion to

<https://www.buzzfeednews.com/article/hamedaleaziz/biden-asylum-seekers-mpp-mexico>. During the expanded winddown, DHS issued some noncitizens with MPP *in absentia* removal orders a notice of potential eligibility to seek joint reopening.

⁸⁵ See, e.g., ---, AXXX XXX XXX (BIA Apr. 21, 2022) (available [here](#)) (granting joint motion to reopen and dismiss where the respondent had an approved SIJS petition); ---, AXXX XXX XXX (BIA Apr. 21, 2022) (available [here](#)) (same); ---, AXXX XXX XXX (BIA Apr. 21, 2022) (available [here](#)) (granting joint motion to reopen and dismiss where the respondent had a pending SIJS petition).

⁸⁶ ICE, *OPLA Chief Counsel Contact Information*,

<https://www.ice.gov/doclib/about/offices/opla/ChiefCounselContacts.pdf> [hereinafter "OPLA Contact Information"].

⁸⁷ Kerry E. Doyle, ICE OPLA, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [hereinafter "Doyle Memo"]. The Doyle Memo is grounded in DHS Secretary Alejandro Mayorkas's memo describing DHS's priorities for immigration enforcement. Alejandro N. Mayorkas, DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>. While the Mayorkas Memo was vacated for a time due to a lawsuit filed by the states of Texas and Louisiana, in June 2023 the U.S. Supreme Court allowed for the guidance to be reinstated through its decision in *United States v. Texas*, 143 S. Ct. 1964 (2023). As of July 28, 2023, the Mayorkas and Doyle memos were fully reinstated.

⁸⁸ Doyle Memo, *supra* note 87, at 14-15.

⁸⁹ *Id.* at 15.

reopen request evidence of the client’s eligibility for the relief they are seeking (*e.g.*, asylum) and of any positive discretionary factors. Practitioners should also address why the client did not pursue the relevant relief (*e.g.* asylum) during their removal proceedings or, if they did pursue it, why due process was not availed and the client was not able to meaningfully present their case. If the client is a nonpriority for enforcement under the guidance, practitioners should also highlight this fact and provide evidence of it.⁹⁰

While practitioners will likely want to approach OPLA as a first step in seeking reopening, time spent waiting for OPLA to respond will not toll the 90-day or 180-day deadline. If a noncitizen is still within that window and OPLA has not yet responded, they should file a unilateral motion to reopen before the deadline. If the noncitizen is already past the deadline and will need to make equitable tolling arguments, they should be prepared to file a unilateral motion to reopen if OPLA does not respond to the request to join within a reasonable period.⁹¹

B. *Sua Sponte* Motions to Reopen

Like joint motions to reopen, requests to reopen *sua sponte* are authorized by regulation and avoid the statutory time and number bars on reopening.⁹² These requests essentially ask the IJ or BIA to reopen the case as an exercise of their inherent discretionary powers as adjudicators. BIA case law directs that *sua sponte* reopening is an “extraordinary remedy reserved for truly exceptional situations.”⁹³

It is wise to include a request for *sua sponte* reopening in the motion to reopen as an alternative to statutory reopening grounds. Practitioners should not rely solely on *sua sponte* grounds in their motion to reopen for several reasons, including:

- Many courts, including the Fifth Circuit, have concluded that there is no judicial review over denials of *sua sponte* motions to reopen.⁹⁴
- It is possible that an IJ or the BIA in the Fifth Circuit could apply the regulatory post-departure bar to a *sua sponte* motion to reopen an MPP removal order.⁹⁵

⁹⁰ The Doyle Memo discusses the three enforcement priority categories—national security, public safety, and border security—on pages 2-7. The latter priority includes those who were apprehended at the border or port of entry while attempting to unlawfully enter the United States after November 1, 2020, and those apprehended by DHS who unlawfully entered after that date. *Id.* at 5-6. The memo also lists examples of mitigating factors that can result in a noncitizen not being deemed an enforcement priority. *Id.* at 4-5.

⁹¹ See *Valeriano v. Gonzales*, 474 F.3d 669, 673 (9th Cir. 2007) (stating that time spent waiting for DHS to respond to a joint motion to reopen request does not establish diligence for purposes of equitable tolling).

⁹² 8 CFR § 1003.23(b)(1) (IJ may “upon his or her own motion at any time” reopen “any case in which he or she has made a decision, unless jurisdiction is vested with the [BIA]”); 8 CFR § 1003.2(a) (BIA may “at any time reopen . . . on its own motion any case in which it has rendered a decision”).

⁹³ *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999).

⁹⁴ *Mejia*, 913 F.3d at 490. The Ninth Circuit, along with several other courts, has recognized jurisdiction to review BIA decisions “denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error[.]” *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016).

⁹⁵ The regulatory post-departure bar prohibits individuals subject to removal proceedings from filing a motion to reopen or reconsider “subsequent to [their] departure from the United States.” 8 CFR § 1003.23(b)(1). Courts have invalidated this post-departure bar as to motions based on the reopening statute, but the Fifth Circuit has found that

- IJs and the BIA have broad discretion to deny *sua sponte* motions for reasons that may be impossible to overcome on judicial review (to the extent that the particular circuit recognizes any limited judicial review of *sua sponte* motions in the first place).

The *sua sponte* request can be a chance to humanize the client before the adjudicator, because practitioners can include a wide range of sympathetic facts that go beyond the statutory reopening grounds. In arguing in the alternative that *sua sponte* reopening is warranted, practitioners should highlight all of the positive factors in the client’s case, supported by documentary evidence. Practitioners could review unpublished BIA decisions granting *sua sponte* reopening to get a sense of the types of facts that have led to successful *sua sponte* reopening.⁹⁶ In response to an EOIR Freedom of Information Act request, the authors received a number of unpublished BIA decisions granting reopening of MPP removal orders, including decisions granting *sua sponte* reopening in the following circumstances:

- Where the respondent and his mother were kidnapped when they were returned to Mexico through MPP and the respondent presented persuasive evidence that the kidnapping negatively affected his mental health.⁹⁷
- Where no interpreter was present at the respondents’ master calendar hearing and they showed diligence in pursuing their case after entry of the *in absentia* removal order by filing a change of address (Form E-33), attending an ICE check-in, and filing the motion to reopen soon after learning of the *in absentia* removal order.⁹⁸
- Where the respondent contended that she missed her hearing because she had been kidnapped and that the ongoing trauma from her kidnapping complicated her attempt to remedy the missed hearing.⁹⁹

V. Equitable Tolling of Reopening Deadlines in MPP Cases

The statutory deadlines for reopening a removal order, whether issued *in absentia* or during a hearing the noncitizen attended, have passed for the majority of people with MPP removal orders. When representing clients who are outside the statutory timeframe for reopening practitioners will likely need to raise equitable tolling arguments. Both the Fifth and Ninth

it does bar *sua sponte* motions to reopen. *Ovalles v. Holder*, 577 F.3d 288, 293 (5th Cir. 2009). The Ninth Circuit, however, has concluded that “*sua sponte* reopening is not limited by the departure bar.” *Rubalcaba v. Garland*, 998 F.3d 1031, 1039 (9th Cir. 2021). There is a strong argument that this bar should not apply in the MPP context, where the “departure” from the United States was not voluntary and also was not a physical removal. EOIR appeared to recognize that *sua sponte* reopening was available in MPP cases—without no concern about the post-departure bar—in a 2021 memo about reopening MPP cases. See King Memo, *supra* note 82, at 3.

⁹⁶ The IRAC Index, *supra* note 56, catalogs a number of these decisions. As a result of a settlement reached in litigation, the BIA has also begun posting unpublished decisions; however, as of August 2023 the decisions were relatively sparse and difficult to search. See EOIR, *Reading Room*, <https://foia.eoir.justice.gov/app/ReadingRoom.aspx>.

⁹⁷ ---, AXXX XXX XXX (BIA July 2, 2021) (available [here](#)) (rescinding *in absentia* removal order).

⁹⁸ ---, AXXX XXX XXX (BIA July 2, 2021) (available [here](#)).

⁹⁹ ---, AXXX XXX XXX (BIA Aug. 9, 2021) (available [here](#)).

Circuit—the two circuits in whose jurisdiction MPP removal orders were issued—recognize that equitable tolling applies to the 90- and 180-day deadlines.¹⁰⁰

Equitable tolling “pauses the running of, or ‘tolls’ a statute of limitations when a litigant has pursued [their] rights diligently but some extraordinary circumstance prevents [them] from bringing a timely action.”¹⁰¹ Because a successful argument “tolls” (*i.e.*, stops) the deadline from running, when equitable tolling is established, the agency will consider the motion to reopen as timely filed.¹⁰²

Note: to date, the only court of appeals decision (published or unpublished) addressing a motion to reopen in an MPP case is an unpublished Fifth Circuit decision, *Miranda-Cruz v. Garland*, 2023 WL 234764 (5th Cir. Jan. 18, 2023). *Miranda-Cruz* found equitable tolling not warranted due to the lack of corroboration and the failure to explain the delay in filing that occurred after the petitioners were released by their kidnappers. Due to the limited circuit case law, the suggestions in this advisory are thus drawn from general equitable tolling case law and from review of a small number of unpublished IJ and BIA decisions in MPP reopening cases. As more cases are adjudicated, practitioners may be able to get more clarity on the best approach for MPP cases.

A. General Standards

In the **Fifth Circuit**, equitable tolling is warranted when an applicant has (1) “been pursuing [their] rights diligently” and (2) “some extraordinary circumstance stood in [their] way and prevented timely filing.”¹⁰³ The relevant circumstance must be beyond the applicant’s control.¹⁰⁴

In the **Ninth Circuit**, equitable tolling is appropriate “in situations where, despite all due diligence, [the applicant] is unable to obtain vital information bearing on the existence of the[ir] claim.”¹⁰⁵ It also applies “when a petitioner is prevented from filing because of deception, fraud,

¹⁰⁰ *Lugo-Resendez v. Lynch*, 831 F.3d 337, 343-44 (5th Cir. 2016) (holding that 90-day deadline may be equitably tolled); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001) (en banc), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582, 599 (9th Cir. 2020) (en banc) (same); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002) (applying equitable tolling analysis to 180-day deadline); *Masin-Ventura v. Garland*, 41 F.4th 482, 483-94 (5th Cir. 2022) (same). While the BIA has held that there is no statutory exception to the 180-day deadline for reopening an *in absentia* order based on ineffective assistance of counsel (a common basis for equitable tolling), its holding rests on the plain statutory language and does not consider the availability of the non-statutory relief provided by equitable tolling. *Matter of A-A-*, 22 I&N Dec. 140, 143-44 (BIA 1998). The Supreme Court confirms that equitable tolling is a widely applicable doctrine, that is to be “read into every federal statute of limitation.” *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946).

¹⁰¹ *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014).

¹⁰² *Lugo-Resendez*, 831 F.3d at 343. While this advisory is focused on equitable tolling arguments as applied to the deadline for filing to reopen, both the Ninth and Fifth Circuits have also held that the numerical limit on motions to reopen may also be equitably tolled. *Eneugwu v. Garland*, 54 F.4th 315, 319 (5th Cir. 2022); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002).

¹⁰³ *Lugo-Resendez*, 831 F.3d at 344 (internal quotation marks omitted).

¹⁰⁴ *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 256 (2016).

¹⁰⁵ *Socop-Gonzales*, 272 F.3d at 1193 (internal quotation marks omitted).

or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error.”¹⁰⁶

Importantly, both the Fifth and the Ninth Circuits require noncitizens to show only “reasonable” diligence in pursuing their rights, not “maximum feasible diligence.”¹⁰⁷

Note: while immigration cases in the Ninth Circuit often use the standards quoted above for evaluating equitable tolling cases, the Ninth Circuit has occasionally applied the standard established by the Supreme Court in *Holland v. Florida*, 560 U.S. 631 (2010)—which is the standard used by the Fifth Circuit. As discussed below, the BIA has also adopted the *Holland* formulation. Because there is no indication the Ninth Circuit intended to develop a separate standard for equitable tolling in immigration cases, practitioners in the Ninth Circuit may consider using the *Holland* formulation if it is more advantageous to the client.¹⁰⁸

The BIA also recently issued its first opinion recognizing the applicability of equitable tolling.¹⁰⁹ While the decision only considers the viability of tolling arguments for the 30-day deadline to file a notice of appeal, practitioners may argue that its principles should carry over to the motion to reopen deadlines. In its decision, the BIA adopted the *Holland* formulation.

B. Qualifying “Extraordinary Circumstances”

Both the Fifth and Ninth Circuits have repeatedly emphasized that equitable tolling is a highly fact-intensive, particularized assessment.¹¹⁰ Practitioners should thoroughly interview clients and think creatively about possible extraordinary circumstances. Since the experiences of those subjected to MPP will not often fall within the circumstances that most frequently arise in equitable tolling case law, discussed below, practitioners should not be afraid to raise novel theories. Practitioners can also rely on helpful equitable tolling analyses in non-immigration cases, as equitable tolling is a common law principle that transcends immigration law.¹¹¹

¹⁰⁶ *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003).

¹⁰⁷ *Lugo-Resendez*, 831 F.3d at 344; *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011).

¹⁰⁸ See *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801 (9th Cir. 2022) (applying the *Holland* standard); *Smith*, 953 F.3d at 595. But see *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) (denying equitable tolling argument because petitioner did not allege any claims of fraud or deceit).

¹⁰⁹ *Morales-Morales*, 28 I&N Dec. at 714.

¹¹⁰ See, e.g., *Lugo-Resendez*, 831 F.3d at 344; *Avagyan*, 646 F.3d at 679.

¹¹¹ *Lugo-Resendez*, 831 F.3d at 344; see *Smith*, 953 F.3d at 599 (example of a non-immigration case evaluating the equitable tolling standard previously applied in an immigration case); *Hernandez-Ortiz*, 32 F.4th at 801 (immigration case applying equitable tolling standard drawn from non-immigration case law).

Note: practitioners should make sure to clearly link the extraordinary circumstance with the reason for the untimely filing. Courts often deny equitable tolling when the extraordinary circumstance does not explain the delay in reopening or if the extraordinary circumstance arose subsequent to the deadline for timely filing.¹¹² (For additional discussion of the timeframe for assessing extraordinary circumstances and due diligence, see below.)

Most of the extraordinary circumstances case law in immigration cases fall into the following categories:

1. Personal Circumstances

Any personal circumstances that interfered with a noncitizen's ability to timely reopen their case are worth exploring as a basis for equitable tolling. For example, in *Masin-Ventura v. Garland*, the Fifth Circuit suggested that the circumstances around the petitioner's abusive relationship and ongoing trauma may be the basis for equitable tolling.¹¹³ Outside the immigration context, the Fifth Circuit has held that mental incompetency may be the basis for equitable tolling.¹¹⁴ In an unpublished decision, the BIA held that being detained, unable to obtain records from the prior proceeding, and having a medical condition were grounds for equitable tolling.¹¹⁵

For those in MPP, particularly those who were stranded in Mexico during the period of time for filing a motion to reopen, practitioners can highlight various impediments to a noncitizen's timely ability to seek reopening of their case. The government has acknowledged the high rates of violence against asylum seekers in Mexico, the prevalence of kidnappings, the generally unstable living conditions, and the challenges in accessing counsel or legal information.¹¹⁶ Practitioners can argue that the realities of being stranded in Mexico following the conclusion of MPP proceedings constitute an extraordinary circumstance, exacerbated by the legal uncertainties about whether the removal orders were executed or not and the prospect of a winddown that was then suddenly terminated without notice or explanation. It may also help to raise arguments that MPP was not authorized by statute, *see infra* Section VII.B, to support a claim that placement into MPP constitutes an extraordinary circumstance.¹¹⁷

When considering equitable tolling claims in MPP cases, some IJs have been skeptical of arguments that conditions in Mexico, limited knowledge of the law, or difficulty finding representation from outside the country are sufficient to establish extraordinary circumstances.¹¹⁸

¹¹² *Eneugwu v. Garland*, 54 F.4th 315, 319 (5th Cir. 2022); *Mejia v. Barr*, 952 F.3d 255, 259 (5th Cir. 2020); ----, AXXX XXX XXX (Judge Herbert, El Paso Immigration Court, Dec. 10, 2020) (on file with authors); *Miranda-Cruz*, 2023 WL 234764 at *2.

¹¹³ *Masin-Ventura*, 41 F.4th at 484.

¹¹⁴ *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999).

¹¹⁵ A-A-B-, AXXX XXX 292 (BIA Jan. 22, 2018) (unpublished), available in IRAC Index, *supra* note 56.

¹¹⁶ See October Termination Explanation, *supra* note 4, at 6-8, 11-14.

¹¹⁷ See *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *vacated on mootness grounds by Innovation Law Lab v. Mayorkas*, 5 F.4th 1099 (2021).

¹¹⁸ See, e.g., ----, AXXX XXX XXX (Judge Tijerina, San Antonio Immigration Court, Feb. 24, 2021) (on file with authors); ----, AXXX XXX XXX (Judge Leonard, Harlingen Immigration Court, Oct. 6, 2022) (on file with authors); ----, AXXX XXX XXX (Judge Herbert, El Paso Immigration Court, Dec. 10, 2020) (on file with authors).

For example, in one case, an IJ found that because the respondent was provided with EOIR’s list of pro bono legal service providers, she did not establish extraordinary circumstances based on her inability to speak English or afford a lawyer.¹¹⁹ Practitioners should provide as much detail as possible when documenting extraordinary circumstances and be aware that IJs often impose very high standards for establishing a qualifying extraordinary circumstance.¹²⁰ Corroborating evidence on this point might include reports on country conditions as well as the government’s own statements about the harms experienced by those in MPP.¹²¹ Even if the IJ is not inclined to accept the argument, making these arguments and developing a strong record will help prospects on appeal.

Practitioners should be mindful that arguments about how conditions in Mexico constitute an extraordinary circumstance may not explain any further delay in filing that occurred once the noncitizen was able to enter the United States.¹²² Practitioners may thus need to raise separate extraordinary circumstances arguments to explain any delay that occurred after the noncitizen arrived in the United States. For noncitizens who subsequently entered the United States under a grant of parole, practitioners may argue that the parole grant is a separate extraordinary circumstance explaining the delay in filing to reopen their case.¹²³ In so arguing, practitioners could point out that in receiving parole, the noncitizen had temporary permission from the government to be present in the United States and argue that they permissibly waited until the expiration of that permission to seek to reopen their case.¹²⁴ The confusion caused by DHS’s inconsistent practices in issuing NTAs at the time people were paroled in, and the delays in filing (or failure to ever file) NTAs with immigration court, discussed in Section II.C above, may also be helpful to raise if the noncitizen was led to believe their case would be restarted without needing to file a motion. These conditions may serve as both the qualifying extraordinary circumstance and be helpful for showing due diligence.¹²⁵

2. Ineffective Assistance of Counsel and Notario Fraud

One of the most common extraordinary circumstances is ineffective assistance of counsel or fraudulent representation.¹²⁶ While this basis for reopening is likely less relevant for people who were in MPP given the extremely low rates of representation, this doctrine has also been applied when noncitizens received bad advice or representation from someone claiming immigration

¹¹⁹ ----, AXXX XXX XXX (Judge Tijerina, San Antonio Immigration Court, Feb. 24, 2021) (on file with authors).

¹²⁰ ----, AXXX XXX XXX (Judge Herbert, El Paso Immigration Court, Dec. 10, 2020) (on file with authors); ----, AXXX XXX XXX (BIA Feb. 3, 2021) (on file with authors).

¹²¹ See October Termination Explanation, *supra* note 4.

¹²² See, e.g., ----, AXXX XXX XXX (Judge Leonard, Harlingen Immigration Court, Oct. 6, 2022) (on file with authors) (denying equitable tolling and finding that the extraordinary circumstance of conditions in Mexico ended when the client entered the United States).

¹²³ Cf. CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders*, at 27-28 (Oct. 14, 2020), <https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders>.

¹²⁴ Cf. 8 CFR § 1208.4(a)(5)(iv) (recognizing that being paroled into the United States, or otherwise having lawful status, may constitute an extraordinary circumstance excusing the failure to file an asylum application within one year of arrival).

¹²⁵ *Ovalles v. Rosen*, 984 F.3d 1120, 1124 (5th Cir. 2021) (“[D]ue diligence and extraordinary circumstances are related inquiries: a [noncitizen]’s due diligence is considered in light of his circumstances.”).

¹²⁶ *Singh v. Holder*, 658 F.3d 879, 884-85 (9th Cir. 2011); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002).

expertise or holding themselves out as an attorney.¹²⁷ Noncitizens who received incorrect advice about their proceedings or about the viability of reopening may be able to raise an extraordinary circumstance claim on that basis.¹²⁸ As a distinct but related line of argument, practitioners may highlight if the IJ or DHS made misleading or inaccurate statements about the viability of the noncitizen’s claim during their proceedings.

3. Change in Law

Many equitable tolling arguments turn on a change in law that makes the noncitizen newly eligible for relief, which both the Fifth and Ninth Circuits have historically accepted as a qualifying circumstance.¹²⁹ However, in a 2021 decision, *Gonzalez-Hernandez v. Garland*, 9 F.4th 278, 286 (5th Cir. 2021), the Fifth Circuit suggested that a change in law may *not* serve as an extraordinary circumstance to toll the motion to reopen deadline.¹³⁰ Given the inconsistency with previous Fifth Circuit case law accepting change-in-law arguments, practitioners may attempt to distinguish *Gonzalez-Hernandez* and rely on prior case law.

Change-in-law arguments are most likely to succeed when there has been a major change in law; incremental developments may not suffice.¹³¹ One possible line of argument for noncitizens subject to MPP is that the government’s acknowledgement of the shortcomings of MPP and decision to terminate the policy, memorialized in its October 2021 memorandum—or the subsequent implementation of the termination in August 2022, following the Supreme Court’s decision in June 2022—constitute a change in law. Any other changes in law that might affect the viability of an individual client’s case may also form the basis for a change in law argument.

C. Due Diligence

In many cases, the success of equitable tolling arguments turns on whether the noncitizen was diligent in pursuing their rights. However, the case law is not consistent or clear on how diligence should be assessed, *i.e.*, whether the noncitizen must be diligent in discovering or remedying the extraordinary circumstance, or whether they must be diligent in pursuing reopening after the extraordinary circumstance ends—or both. Relatedly, there has also been some dispute about how the statutory deadlines overlap with diligence. If the extraordinary circumstance tolls the deadline until the obstacle is removed, does a noncitizen automatically get

¹²⁷ See CGRS Case No. 43823 (granting motion to reopen MPP case based on ineffective assistance of counsel from person impersonating an attorney); see also *Iturribarria*, 321 F.3d at 897-98 (suggesting that equitable tolling applies when petitioners receive advice from people posing as attorneys); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099 (9th Cir. 2005); *Lopez v. INS*, 184 F.3d 1097, 1099-100 (9th Cir. 1999); *Fajardo*, 300 F.3d at 1022.

¹²⁸ Note that practitioners raising ineffective assistance of counsel claims will need to comply with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). For more information, see AIC, *Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases* (Jan. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_remedies_for_ineffective_assistance_of_counsel_in_immigration_cases_practice_advisory.pdf.

¹²⁹ See, e.g., *Lugo-Resendez*, 831 F.3d at 339-40 (remanding for consideration of equitable tolling argument when petitioner learned in 2014 that he was able to reopen his case, based on a change in law that occurred in 2012); *Ovalles v. Rosen*, 984 F.3d at 1123; *Lona*, 958 F.3d at 1230-31.

¹³⁰ *Gonzalez Hernandez v. Garland*, 9 F.4th 278, 286 (5th Cir. 2021) (“To allow changes of law to be addressed in motions to reopen would contravene the statute and collapse the difference between a motion to reconsider and a motion to reopen with respect to changes in law . . .”).

¹³¹ *Londono-Gonzalez v. Barr*, 978 F.3d 965, 968 (5th Cir. 2020).

90 days to file after the removal of the obstacle? Or must they establish diligence during this 90-day period also?

1. Fifth Circuit

The Fifth Circuit has only recognized that the reopening deadline may be equitably tolled since 2016. Because the court previously treated equitable tolling arguments as requests for *sua sponte* reopening, there is relatively little Fifth Circuit case law on-point.¹³² However, the court has held that when an extraordinary circumstance prevented timely filing of the motion to reopen, the deadline is tolled until the date the circumstance ends.¹³³ Under this framework, diligence is generally assessed based on the noncitizen's actions following the end of the extraordinary circumstance.¹³⁴

For example, the Fifth Circuit has evaluated diligence by looking at the noncitizen's actions during the period following:

- The date the petitioner was informed by his brother about a change in law (rather than the later date his attorney advised him of the need to file a motion to reopen).¹³⁵
- The date the petitioner, who had been in an abusive relationship that impacted her ability to participate in her immigration proceedings, retained counsel to reopen her case.¹³⁶
- The date the petitioner discovered nothing had been done on his case by his prior attorney.¹³⁷
- The date of a change in law that made the petitioner newly eligible for relief.¹³⁸

In some cases, however, the Fifth Circuit has also looked at diligence in the noncitizen's actions during the entirety of the period following the entry of the removal order.¹³⁹

2. Ninth Circuit

In 2001, the en banc Ninth Circuit held that reopening deadlines are equitably tolled until the date the applicant becomes aware of or should have become aware of the extraordinary circumstance—at which point the 90-day deadline begins to run.¹⁴⁰ In *Socop-Gonzalez v. INS*, the petitioner learned on July 7 that incorrect information given by an INS officer had resulted in an order of removal being issued against him on May 5. After finding equitable tolling warranted, the Ninth Circuit concluded that the petitioner had 90 days from his discovery of the incorrect information on July 7 to file a timely motion to reopen. Following *Socop-Gonzalez*, a number of Ninth Circuit cases applied this “stop-clock” approach to hold that petitioners had 90

¹³² *Lugo-Resendez*, 831 F.3d at 343; see, e.g., *Rodriguez-Manzano v. Holder*, 666 F.3d 948, 951-52 (5th Cir. 2012).

¹³³ *Gonzalez Hernandez*, 9 F.4th at 283-84; *Gonzalez-Cantu v. Sessions*, 866 F.3d 302, 305 (5th Cir. 2017).

¹³⁴ *Londono-Gonzalez*, 978 F.3d at 968; *Flores-Moreno v. Barr*, 971 F.3d 541, 545 n.1 (5th Cir. 2020); *Masin-Ventura*, 41 F.4th at 484.

¹³⁵ *Gonzalez Hernandez*, 9 F.4th at 284; see also *Gonzalez-Cantu*, 866 F.3d at 305.

¹³⁶ *Masin-Ventura*, 41 F.4th at 484.

¹³⁷ *Flores-Moreno*, 971 F.3d at 545.

¹³⁸ *Londono-Gonzalez*, 978 F.3d at 968.

¹³⁹ *Mejia*, 952 F.3d at 259 (denying equitable tolling because petitioner did not explain the seven-year delay between the entry of his *in absentia* removal order and his decision to argue that he never received notice, notwithstanding a more-recent change in law that made it easier for petitioner to get a visa through his wife).

¹⁴⁰ *Socop-Gonzalez*, 272 F.3d at 1198.

days to file a motion to reopen following their discovery of the extraordinary circumstance.¹⁴¹ Under this line of case law, the primary inquiry has generally been whether the petitioner acted diligently in uncovering the extraordinary circumstance.¹⁴²

However, the Ninth Circuit recently walked back the *Socop-Gonzalez* approach, again en banc. In *Smith v. Davis*, which addressed equitable tolling of the statute of limitations for filing habeas petitions, the court rejected its “stop-clock” analysis in favor of a highly fact-intensive assessment.¹⁴³ Under *Smith*, petitioners must show that they have pursued their rights diligently during the extraordinary circumstances *and* after the removal of that impediment, until the motion to reopen is filed. Since *Smith*, the court has evaluated diligence by looking at the noncitizen’s actions during the period:

- Between the issuance of the removal order and a subsequent Supreme Court decision that presented a change in law, as well as after the change in law occurred.¹⁴⁴
- Between the issuance of the removal order and petitioner’s efforts to expunge his conviction.¹⁴⁵
- Between a state criminal conviction, which eventually resulted in an order of removal, and the subsequent modification of that conviction.¹⁴⁶

Practitioners in the Ninth Circuit should thus tailor their diligence arguments towards the *Smith* analysis.

D. General Recommendations for Tolling Arguments in MPP Cases

Because of the length of time elapsed since most MPP removal orders were issued, establishing diligence is likely to be a key challenge for motions to reopen. In many cases denying equitable tolling, courts cited the lack of any explanation for periods of lengthy delay.¹⁴⁷ For example, in one case seeking to reopen an MPP removal order, the IJ found that due diligence was not established because of a perceived lack of detail about actions taken during a six-month period following the respondent’s recovery from COVID-19.¹⁴⁸

Given the uncertainties in the law regarding when diligence is measured, practitioners should prepare the record with evidence of diligence spanning from the issuance of the removal order to the filing of the motion to reopen. However, practitioners can take advantage of the ambiguity in the legal standards to argue for the most favorable articulation of the standard for their client. As

¹⁴¹ *Iturribarria*, 321 F.3d at 899 (explaining that 90-day deadline began running on the date petitioner met with new counsel and discovered fraudulent behavior of prior counsel); *Valeriano*, 474 F.3d at 673 (same); *Ghahremani v. Gonzales*, 498 F.3d 993, 1000 (9th Cir. 2007); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 826 (9th Cir. 2011); *cf. Wenqin Sun v. Mukasey*, 555 F.3d 802, 806 (9th Cir. 2009).

¹⁴² *Ghahremani*, 498 F.3d at 1000; *Singh v. Gonzales*, 491 F.3d 1090, 1096 (9th Cir. 2007); *cf. Albillo-De Leon*, 410 F.3d at 1100; *Lona*, 958 F.3d at 1232.

¹⁴³ *Smith*, 953 F.3d at 599.

¹⁴⁴ *Lona*, 958 F.3d at 1232; *see Goulart v. Garland*, 18 F.4th 653, 655 (9th Cir. 2021) (assessing diligence based on time between removal order and subsequent Supreme Court decision presenting a change in law).

¹⁴⁵ *Lara-Garcia v. Garland*, 49 F.4th 1271, 1277 (9th Cir. 2022).

¹⁴⁶ *Perez-Camacho v. Garland*, 54 F.4th 597, 607 (9th Cir. 2022).

¹⁴⁷ *Bonilla*, 840 F.3d at 583; *Flores-Moreno*, 971 F.3d at 545; *Gonzalez-Cantu*, 866 F.3d at 305.

¹⁴⁸ ----, AXXX XXX XXX (Judge Tijerina, San Antonio Immigration Court, Feb. 24, 2021) (on file with authors).

noted above, the diligence requirement is only that the noncitizen was “reasonably” diligent, not that they showed “maximum feasible diligence.”¹⁴⁹

Practitioners should think creatively and carefully document all possible evidence of diligence for clients who were in MPP, tailoring diligence arguments to the client’s individual situation.¹⁵⁰ For example, it may have been difficult for the noncitizen to quickly pursue rights if the client received false or bad advice on the viability of reopening their case that they reasonably relied on; if they did not have work authorization in the United States or Mexico or otherwise had limited finances to hire an attorney; if they were unable to make international calls from Mexico to lawyers or the courts; if the COVID-19 shutdowns impacted their case; if they were not aware a removal order had issued against them; or if their age, disability, or conditions of their time in Mexico made it difficult for them to quickly pursue relief.¹⁵¹ Many noncitizens who speak Indigenous languages encountered a language barrier that made it even more difficult to find counsel or investigate their options for reopening their case.

Practitioners can also highlight any steps taken by the client to preserve their rights; for example, if clients stayed in Mexico rather than returning to their country of origin in hopes of finding a way to continue their claim; if they took steps to try to get in touch with the immigration court or request information about their case; or, for those who have since entered the United States, if DHS issued them an NTA but never filed it with the court, creating the mistaken impression they would be able to restart their case that way. In some MPP cases, IJs have considered the respondents’ efforts to contact the immigration court or inquire about the status of their proceedings as relevant to showing diligence.¹⁵² Any pro se filings made by the client to attempt to restart their case may also help establish diligence, even if those filings were unsuccessful or procedurally defective. (Note that if there is any risk that pro se filings could be construed as a

¹⁴⁹ *Lugo-Resendez*, 831 F.3d at 344; *Avagyan*, 646 F.3d at 679.

¹⁵⁰ See *Perez-Camacho*, 54 F.4th at 606 (“In this context, a determination of [a noncitizen’s] diligence is case-specific, and turns on the reasonableness of petitioner’s actions in the context of his or her particular circumstances” (internal quotation marks omitted)); *Avagyan*, 646 F.3d at 679. It may be useful to review positive tolling case law from outside the Fifth and Ninth Circuits to identify factors establishing diligence, citing the cases as persuasive authority. See, e.g., *Williams*, 59 F.4th at 620 (Fourth Circuit case finding petitioner acted diligently in light of his financial limitations on hiring an attorney and difficulties in staying current on the law).

¹⁵¹ ---, AXXX XXX XXX (BIA Feb. 23, 2021) (available [here](#)) (finding that the “horrific experience” the respondent went through in Mexico when she was raped by a Mexican police officer qualified as an exceptional circumstance warranting equitable tolling in an MPP *in absentia* removal order case); Josue Israel Santiago, AXXX XXX 635 (BIA June 10, 2020) (unpublished), available in IRAC index, *supra* note 56 (finding diligence when noncitizen had to save money to hire an attorney and find counsel); Man A Dang, AXXX XXX 785 (BIA May 7, 2020) (unpublished), available in IRAC index, *supra* note 56 (considering noncitizen’s pro se status, existence of health issues, and unspecific “family circumstances”); J-B-M-, AXXX XXX 853 (BIA Apr. 19, 2018) (unpublished), available in IRAC index, *supra* note 56 (considering that noncitizen spoke only an Indigenous language, which implicated the fairness of her initial proceedings); Sergio Lugo-Resendez, AXXX XXX 500, 2017 WL 8787197 (BIA Dec. 28, 2017) (unpublished) (in remanded proceedings from the Fifth Circuit’s decision in *Lugo-Resendez*, granting reopening despite the fact that the respondent abandoned his attempts to reopen his case for a period of years after being told multiple times that nothing could be done); Saul Rincon-Garcia, AXXX XXX 426 (BIA Nov. 27, 2017) (unpublished), available in IRAC index, *supra* note 56 (considering noncitizen’s mental illness and limited resources).

¹⁵² ----, AXXX XXX XXX (Judge Tijerina, San Antonio Immigration Court, Feb. 24, 2021) (on file with authors); --, AXXX XXX XXX (Judge Herbert, El Paso Immigration Court, Dec. 10, 2020) (on file with authors); ----, AXXX XXX XXX (Judge Leonard, Harlingen Immigration Court, Oct. 6, 2022) (on file with authors).

motion to reopen, advocates may need to argue for equitable tolling of the numerical limits on motions to reopen as well.)

In *Lugo-Resendez v. Lynch*, the Fifth Circuit emphasized that people who are outside the United States may have a difficult time following developments in U.S. immigration law, and that language barriers and limited resources can further complicate noncitizens' efforts to understand their rights.¹⁵³ The court also noted that depriving noncitizens of the opportunity to seek relief from removal is a "particularly serious matter," and that reopening may be warranted in such a case.¹⁵⁴ On remand, the BIA ultimately agreed to reopen Mr. Lugo-Resendez's case, finding that he demonstrated due diligence. The BIA noted that (1) he had made repeated efforts to reopen his case and was repeatedly told nothing could be done for him; (2) he was unable to follow legal developments in the United States or afford regular consultations with an attorney; and (3) when he eventually did learn about the change in law that made him eligible to reopen his case, he filed his motion seeking reopening within two months.¹⁵⁵ Practitioners can highlight the presence of these factors in their client's case when arguing that reopening of an MPP removal order is necessary to allow for an application for asylum.

Practice Pointer: Avoiding Delay in Filing

Courts have cited delays between the time noncitizens retained counsel to the time a motion to reopen was filed as a basis for denying equitable tolling.¹⁵⁶ Practitioners representing clients in motions to reopen should be careful to move expeditiously in filing the motion and may need to submit a declaration themselves to explain any unusual delays or particular challenges that arose when gathering evidence, including delays in obtaining records from EOIR and other agencies that are needed to assess possible arguments.

If practitioners know that filing the motion to reopen will take a long time given available resources and their current caseload, they should consider declining representation.¹⁵⁷

Relatedly, the Ninth Circuit has held that reaching out to opposing counsel to seek a joint motion to reopen does not excuse delay in filing a unilateral motion to reopen.¹⁵⁸

¹⁵³ *Lugo-Resendez*, 831 F.3d at 345; *see also* Man A Dang, AXXX XXX 785 (BIA May 7, 2020) (unpublished), available in IRAC index, *supra* note 56; Miguel Aguilar Elias, AXXX XXX 696 (BIA May 15, 2019) (unpublished), available in IRAC index, *supra* note 56. *But see Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 845 (9th Cir. 2006) ("There is no claim that the internet and law libraries do not exist in Mexico.").

¹⁵⁴ *Lugo-Resendez*, 831 F.3d at 345.

¹⁵⁵ Sergio Lugo-Resendez, AXXX XXX 500, 2017 WL 8787197 (BIA Dec. 28, 2017) (unpublished).

¹⁵⁶ *Luna v. Holder*, 659 F.3d 753, 760-61 (9th Cir. 2011); *Masin-Ventura*, 41 F.4th at 484.

¹⁵⁷ If warranted, practitioners can also consider submitting their own affidavit explaining the reason(s) for any delay in filing and clarifying that the delay was not attributable to the client.

¹⁵⁸ *Valeriano*, 474 F.3d at 673.

VI. Meeting the Substantive Standard for Reopening Non-*In Absentia* Removal Orders in MPP Cases

A noncitizen who establishes equitable tolling will be deemed to be filing a timely motion to reopen. They will then need to establish that they meet the substantive standards for reopening their case. This section reviews MPP-specific arguments that may be relevant when presenting the merits of the motion to reopen.¹⁵⁹

The reopening standards require the noncitizen to (1) identify new facts that will be proven upon reopening, supported by affidavits or other evidence; (2) demonstrate that the new evidence is material and was not available at the time of the former hearing; and (3) establish *prima facie* eligibility for the relief sought.¹⁶⁰ Additional considerations apply when moving to reopen based on asylum or another form of discretionary relief, discussed below.

Note: as noted above in Section III.C, a separate statutory provision authorizes reopening a case at any time to apply for asylum based on changed country conditions in the noncitizen’s country of origin. Practitioners should be mindful that this is a distinct mode of reopening and that establishing changed country conditions is a higher standard than presenting evidence that was “unavailable” during the noncitizen’s final hearing. However, it is important to explore this ground if it might offer another route to reopening.

A. “Material” Evidence

In order to show that the evidence offered on reopening is material, the new evidence, when combined with the existing record, must establish a reasonable likelihood of success on the merits.¹⁶¹ To prepare arguments, practitioners should request the record of proceedings and the digital audio recording (“DAR”) of the client’s MPP proceedings to understand the bases for the prior removal order.¹⁶²

For noncitizens who **were able to file an I-589** in MPP, new evidence will be more likely deemed “material” if it responds to the specific reason asylum and related relief was denied (*e.g.*,

¹⁵⁹ For more information about the general reopening standard and arguments, see National Immigration Litigation Alliance (“NILA”) & AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Apr. 25, 2022), https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders. The Immigration Court Practice Manual and BIA Practice Manual are also helpful resources. See EOIR, *EOIR Reference Materials* (Sept. 6, 2022), <https://www.justice.gov/eoir/reference-materials>.

¹⁶⁰ INA § 240(c)(7)(B); 8 CFR §§ 1003.2(c)(1), 1003.23(b)(3).

¹⁶¹ *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996). Note that some adjudicators may be inclined to apply *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992), rather than *L-O-G-*. Practitioners can argue that when there are no “egregious factors” (*i.e.*, the noncitizen has not already had a full and fair opportunity to present the claim for relief) the BIA recognizes that the standards laid out in *L-O-G-* should apply. See *L-O-G-*, 21 I&N Dec. at 419-20. The Ninth Circuit recently clarified that *L-O-G-* rather than *Coelho* provides the appropriate standard for determining whether a respondent has shown the required *prima facie* eligibility for relief.

Fonseca-Fonseca v. Garland, --- F.4th. ---, No. 20-71977, 2023 WL 5025268, at *2 (9th Cir. Aug. 8, 2023).

¹⁶² Immigration Court Practice Manual Ch. 1.5(b)(4); see also EOIR, *Request an ROP* (Apr. 3, 2023), <https://www.justice.gov/eoir/ROPrequest>.

failure to establish nexus to a protected ground), rather than generally addressing the noncitizen's asylum claim.¹⁶³

Noncitizens who were **not able to file an I-589** in MPP may have an easier time establishing materiality, but will also need to contend with the fact that they did not file for asylum in their prior proceedings, as discussed below in Section VI.D.

Practitioners should note that the “materiality” standard is not identical to the standard used in a motion to reopen to apply for asylum based on changed country conditions, described above in Section III.C. Though there is often overlap between the evidence submitted for these two bases for reopening, materiality is a broader standard that encompasses, *e.g.*, changes in the client's personal circumstances or corroborating evidence that only recently became available.

B. “Unavailable” Evidence

In order to succeed on a motion to reopen, practitioners must establish that the evidence presented was “not available and could not have been discovered or presented at the former hearing.”¹⁶⁴ Since this regulatory standard is tied to the date of the merits hearing, any evidence that arose after that point (even before the removal order became final) may meet this standard.¹⁶⁵ For example, provided that they meet the “materiality” standard addressed above, country conditions reports issued after the final hearing date would have been previously unavailable.¹⁶⁶

Practitioners should advance arguments as to why facts or evidence that technically existed at the time of the final hearing were functionally “unavailable” to the client due to MPP, building on government statements about MPP's defects. The difficulties faced by asylum seekers in preparing and presenting asylum claims in MPP are well-documented. DHS has acknowledged that “safety and security [conditions] in Mexico” impacted people's “ability to attend and effectively participate in court proceedings.”¹⁶⁷ Relatedly, EOIR issued a memo in June 2021 that encourages reopening MPP cases based on the government's concerns about the fairness of the proceedings, directing IJs to consider “whether the parties were provided a fair opportunity to develop and present their respective cases.”¹⁶⁸ The Ninth Circuit in particular has used a flexible standard for determining availability, *e.g.*, considering whether evidence was “reasonably

¹⁶³ See, *e.g.*, *Najmabadi v. Holder*, 597 F.3d 983, 990 (9th Cir. 2010); *Zhao v. Gonzales*, 404 F.3d 295, 305 (5th Cir. 2005); *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003).

¹⁶⁴ 8 CFR § 1003.23(b)(3).

¹⁶⁵ *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005).

¹⁶⁶ See, *e.g.*, *Zhao*, 404 F.3d at 305. *But see Najmabadi*, 597 F.3d at 989.

¹⁶⁷ October Termination Explanation, *supra* note 4, at 12.

¹⁶⁸ See King Memo, *supra* note 82, at 3 (internal quotation marks omitted). In addition to these government statements, NIPNLG, CGRS, SPLC, Innovation Law Lab, and Arnold & Porter LLP are currently litigating a class action challenge to MPP 1.0, seeking *inter alia* a declaratory judgment that MPP 1.0 was implemented in a manner that violated noncitizens' right to apply for asylum and to due process. *Immigrant Defenders Law Center v. Mayorkas*, No. 2:20-cv-09893-JGB (C.D. Cal.). The certified class in this case is “all individuals subjected to MPP 1.0 prior to June 1, 2021, who remain outside the United States and whose cases are not currently active due to termination of proceedings or a final removal order.” *Immigrant Defenders Law Center v. Mayorkas*, No. 2:20-cv-09893, 2023 WL 3149243, at *36 (C.D. Cal. Mar. 15, 2023).

available” to a detained petitioner.¹⁶⁹ (As discussed in Section VII.D below, practitioners may attempt to argue that people in MPP were “detained” during the course of their proceedings.)

For example, practitioners can highlight how any incidents of violence, kidnapping, or threats made it impossible for clients to prepare their case, collect evidence, or engage with their legal proceedings. In some cases, pragmatic barriers may have rendered evidence unavailable, *e.g.*, the high cost of receiving evidence from their country of origin or translating documents; limited funds for phone conversations; electrical outages; lack of a fixed address to receive documents; and limited confidential space to talk to witnesses or request help with gathering evidence in-country. In one MPP case, reopening was granted based on the fact that the respondent was not able to safely share all details of her asylum claim during her MPP hearing, as the IJ forced her to discuss her claim in front of other people present in the courtroom.¹⁷⁰

Any other due process issues that arose during the course of the removal proceeding may also help establish that evidence was unavailable, *e.g.*, if the IJ did not comply with their obligation to explain the right to apply for asylum, failed to help develop the record of a pro se applicant, cut off a respondent’s testimony, or ignored obvious competency issues.¹⁷¹ Any impediments to presenting evidence that stemmed from ineffective assistance of counsel or notario fraud can also be relevant. Noncitizens who were forced to proceed without interpretation in their best language, *e.g.*, Indigenous language speakers who had issues understanding the interpreter, may argue that the facts of their claim were unavailable on that basis.¹⁷²

C. *Prima Facie* Eligibility

For the purposes of reopening, the *prima facie* standard is met when the evidence shows a “reasonable likelihood that the statutory requirements for the relief sought have been satisfied.”¹⁷³ When assessing *prima facie* eligibility, adjudicators in the Ninth Circuit should generally assume that the facts alleged in the evidence submitted with the motion to reopen are true unless they are inherently unbelievable.¹⁷⁴ The Fifth Circuit allows for a more searching review and affirms that adjudicators may discredit facts that are not adequately corroborated, that

¹⁶⁹ *Oyeniran v. Holder*, 672 F.3d 800, 808 (9th Cir. 2012) (finding evidence not available when petitioner was detained and did not know the evidence existed); *cf. Goel v. Gonzales*, 490 F.3d 735, 738 (9th Cir. 2007) (finding evidence available because petitioner was not detained at the time).

¹⁷⁰ ----, AXXX XXX XXX (BIA Dec. 18, 2019) (unpublished) (on file with authors).

¹⁷¹ *Jacinto v. INS*, 208 F.3d 725, 728, 733-34 (9th Cir. 2000); *Arteaga-Ramirez v. Barr*, 954 F.3d 812, 813 (5th Cir. 2020) (acknowledging that an IJ “should facilitate the development of testimony” particularly for pro se applicants); *see Quintero v. Garland*, 998 F.3d 612, 629-30 (4th Cir. 2021). *But see Hussain v. Rosen*, 985 F.3d 634, 644 (9th Cir. 2021). For more information on competency issues and safeguards in immigration proceedings, see CLINIC, *Representing Noncitizens with Mental Illness* (May 2020), <https://www.cliniclegal.org/resources/removal-proceedings/representing-noncitizens-mental-illness>.

¹⁷² David Neal, EOIR, *Language Access in Immigration Court* (June 6, 2023), <https://www.justice.gov/eoir/book/file/1586686/download>.

¹⁷³ *L-O-G-*, 21 I&N Dec. at 419; *Fonseca-Fonseca v. Garland*, --- F.4th. ---, No. 20-71977, 2023 WL 5025268, at *2 (9th Cir. Aug. 8, 2023); *Tadevosyan v. Holder*, 743 F.3d 1250, 1255 (9th Cir. 2014).

¹⁷⁴ *See, e.g., Avagyan v. Holder*, 646 F.3d 672, 678-79 (9th Cir. 2011); *see also L-O-G-*, 21 I&N Dec. at 418-19.

were omitted from evidence presented in the noncitizen’s prior proceedings, or that are internally inconsistent or inconsistent with prior evidence.¹⁷⁵

For clients who seek to reopen their proceedings to apply for asylum, withholding of removal, and/or protection under the Convention Against Torture, practitioners thus need to establish their *prima facie* eligibility for all elements of the various forms of relief, including the inapplicability of any bars to relief.¹⁷⁶ While this showing will differ for each client based on the particulars of their claim, some people subjected to MPP may need to contend with the one-year filing deadline bar or the prior asylum denial bar. Each is discussed below.

1. One-Year Filing Deadline

People seeking asylum must generally file their application within one year of their last arrival in the United States.¹⁷⁷ For asylum seekers who are seeking to reopen their case from inside the United States, practitioners may need to consider the one-year bar.

a. *Asylum Seekers Who Did Not File an Asylum Application During MPP*

When a motion to reopen is submitted with an attached I-589 within a year of the noncitizen’s most recent arrival in the United States, practitioners should ensure that the date of arrival is clearly documented in the newly submitted evidence and argue that the attached I-589 is timely submitted as of the date the motion to reopen is filed.¹⁷⁸

When the motion is not filed within a year of the noncitizen’s most recent arrival, practitioners can include preliminary evidence establishing one of the exceptions to the one-year filing deadline, *i.e.*, changed or extraordinary circumstances, and argue that the application was filed within a reasonable time period in light of the circumstance(s).¹⁷⁹ For example, noncitizens who were paroled into the United States could point to their maintenance of parole status as an extraordinary circumstance.¹⁸⁰ If the noncitizen was traumatized from their persecution or experiences in MPP, that may also explain the delay in filing. There may be overlap with the evidence used to establish equitable tolling, *i.e.*, if the noncitizen received fraudulent or ineffective assistance of counsel during their first year in the United States.

Noncitizens who did not previously file an asylum application in their MPP proceedings will also need to explain—in the declaration submitted along with their motion to reopen and in the text of the motion itself—why they did not do so before, as discussed below in Section VI.D.

¹⁷⁵ *Abubaker Abushagif v. Garland*, 15 F.4th 323, 332 (5th Cir. 2021). It is thus critical that practitioners obtain and review records of the client’s prior proceeding to avoid denials on this basis.

¹⁷⁶ *Matter of S-V-*, 22 I&N Dec. 1306, 1309 (BIA 2000). For more information about the eligibility standards for asylum, withholding of removal, and CAT protection, see CGRS’s practice advisory, *Introduction to Asylum Law and Proceedings* (July 2021).

¹⁷⁷ INA § 208(a)(2)(B); 8 CFR § 1208.4(a)(2). For more details on arguments for overcoming the one-year bar, see CGRS’s practice advisory, *Bars to Fear-of-Return Relief: Chapters I-IV* (Dec. 2021).

¹⁷⁸ INA § 208(a)(2)(B).

¹⁷⁹ 8 CFR § 1208.4(a)(4), (5).

¹⁸⁰ 8 CFR § 1208.4(a)(5)(iv).

Note: noncitizens who have an executed order of removal and reentered the United States lawfully should be able to file affirmatively with USCIS, as discussed in Section II.C.1 above. If they did not previously file an asylum application, they may not need to move to reopen their MPP proceedings, since they will not need to contend with the prior denial bar, discussed below. For noncitizens in this posture, it may thus be easier to meet the one-year filing deadline.

b. Asylum Seekers Who Filed an Asylum Application During MPP

For clients who did file an asylum application during MPP, practitioners will need to determine whether their subsequent asylum application is an amendment to the initial application, or is a separate, new application. When the new application presents “a previously unraised basis for relief—such as a fear of persecution on account of a different protected ground” or is “predicated on a new or substantially different factual basis,” it may be deemed to be a new application, in which case the one-year filing deadline will apply and practitioners will need to consider the analysis above.¹⁸¹ If the application presents effectively the same claim for relief, it should be deemed an amendment to the prior application, in which case the initial filing date will control.

Note: noncitizens who may be eligible to file an affirmative asylum application with USCIS (e.g., noncitizens with executed MPP orders who re-entered the United States lawfully) may wish to get an affirmative asylum application on file with USCIS within one year of their last arrival, to help preserve the one-year filing deadline in cases where it may be an issue.

2. Prior EOIR Denial Bar

Another bar that may be implicated in motions to reopen is the prior denial of asylum bar, which precludes asylum for people who “previously applied for asylum and had such application denied” by an IJ or the BIA, unless they can show changed circumstances materially affecting asylum eligibility.¹⁸²

For asylum seekers who **did not file an I-589** during their MPP proceedings, this bar will not pose an issue (though they will need to explain why they did not previously file, as discussed below).

For asylum seekers **who did file an I-589** during their MPP proceedings and now seek to reopen their case without materially changing their claim for protection, practitioners can argue that this bar should not apply. While neither the Fifth nor Ninth Circuits have addressed the issue, practitioners can point to Tenth Circuit precedent holding that this subsequent I-589 should *not* be deemed a successive application, but rather an amendment to the existing application.¹⁸³

¹⁸¹ *Matter of M-A-F-*, 26 I&N Dec. 651, 657 (BIA 2015).

¹⁸² INA § 208(a)(2)(C); 8 CFR §§ 208.4(a)(3), 1208.4(a)(3); *see supra* note 39, USCIS Mandatory Bars Lesson Plan, at 6.

¹⁸³ *M-A-F-*, 26 I&N Dec. at 655; *see Villegas-Castro v. Garland*, 19 F.4th 1241, 1245-46 (10th Cir. 2021).

For asylum seekers who **did file an I-589** in their MPP proceedings and for whom the subsequent I-589 accompanying the motion to reopen is likely to be considered a successive I-589, this bar may apply. The statute suggests that once a final asylum denial has occurred, the only route for filing a successive I-589 is by showing “changed circumstances which materially affect the [noncitizen’s] eligibility for asylum.”¹⁸⁴ Practitioners should submit evidence to make this showing (which may often overlap with the evidence needed to establish the other portions of the reopening standard) and discuss why this bar is not at issue in the client’s case in the motion itself. For example, practitioners could argue that the termination of MPP, which the government now acknowledges was rife with due process violations,¹⁸⁵ constitutes a changed circumstance as the noncitizen is now able to fairly establish their eligibility for asylum.

Note: the prior denial bar does not apply to applications for withholding of removal and CAT protection. If a noncitizen is able to reopen their case but cannot avoid application of this bar, they will still be able to pursue these forms of protection.

D. Failure to Previously Apply for Asylum

The reopening regulations provide that motions to reopen for the purpose of applying for discretionary relief, *e.g.*, asylum, “will not be granted if it appears that the [noncitizen]’s right to apply for such relief was fully explained to [them] by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing.”¹⁸⁶

Thus, when representing clients who did not file an asylum application (or who withdrew an asylum application) in their MPP proceedings, practitioners will need to prepare documentation showing that (1) the client did not have the right to apply for asylum explained to them; and/or (2) that they did not have a meaningful opportunity to apply for asylum.¹⁸⁷ Any changed circumstances that have arisen subsequent to the hearing should also be highlighted.¹⁸⁸

Practitioners can request the DAR for all of their client’s previous hearings to assess the adequacy of the explanation of the right to apply for asylum and document all limitations in their client’s ability to pursue relief.¹⁸⁹ In many cases, the conditions imposed by MPP may be

¹⁸⁴ INA § 208(a)(2)(D). The regulations provide a non-exhaustive list of possible changed circumstances that might excuse a successive asylum application; this is the same regulatory provision governing changed circumstances for the purposes of an untimely filing. *See* 8 CFR § 1208.4(a)(4).

¹⁸⁵ *See* October Termination Explanation, *supra* note 4.

¹⁸⁶ 8 CFR § 1003.23(b)(3).

¹⁸⁷ *See Silva v. Sessions*, 699 F. App’x 609, 612 (9th Cir. 2017) (unpublished) (applying this regulatory provision to deny a motion to reopen when an application was filed but then withdrawn, without explanation); *Abubaker Abushagif*, 15 F.4th at 330 (explaining that the BIA may deny a motion to reopen if the noncitizen “has not reasonably explained his failure to apply for asylum initially”).

¹⁸⁸ *See, e.g., Silva*, 699 F. App’x at 612; *Swiri v. Ashcroft*, 95 F. App’x 708, 709 (5th Cir. 2004) (unpublished).

¹⁸⁹ *See, e.g., Rodriguez v. INS*, 841 F.2d 865, 871 (9th Cir. 1987) (suggesting that motion to reopen proceedings necessarily reopened the prior asylum application).

relevant to showing why the client did not have a real opportunity to apply for protection, as discussed above in Section II.

E. Discretionary Denials

Even when a noncitizen has established a *prima facie* case for asylum, the IJ or BIA may still decide to deny reopening as an exercise of discretion, particularly because asylum is a discretionary form of relief.¹⁹⁰ To preserve maximum chances of success on the motion, practitioners should submit evidence documenting the client’s positive equities and argue that reopening is warranted as a matter of discretion.¹⁹¹ Some practitioners have reported IJ denials of motions to reopen for MPP enrollees based on subsequent unlawful entries to the United States.¹⁹² To head off such a decision, practitioners can document why the client felt they needed to enter unlawfully, *e.g.*, due to imminent harm in the border regions or the closure of ports of entry under Title 42.

VII. Rescinding and Reopening *In Absentia* Removal Orders in MPP Cases

This section will discuss MPP-specific arguments for motions to rescind and reopen (MTRR) *in absentia* orders based on (1) DHS failure to establish removability; (2) the argument that MPP was statutorily unauthorized; (3) the respondent being in federal custody at the time of the hearing; (4) lack of notice; and (5) extraordinary circumstances. Remember that individuals can also seek reopening of an *in absentia* order based on any of the mechanisms discussed in Sections IV and VI.¹⁹³

A. Arguing That DHS Failed to Establish Removability

Practitioners representing MPP clients with *in absentia* removal orders should examine the record of proceedings and DAR of the client’s immigration court hearings to determine what evidence DHS submitted to prove the noncitizen’s removability by “clear, unequivocal, and convincing evidence” as the statute requires.¹⁹⁴ Review of the immigration court record and hearing recording may reveal that DHS failed to submit any evidence of removability.¹⁹⁵ If DHS’s evidence is nonexistent, unreliable, or otherwise inadequate to prove removability, or if

¹⁹⁰ 8 CFR § 1003.23(b)(3); *see INS v. Abudu*, 485 U.S. 94, 105 (1988); *Mendias-Mendoza v. Sessions*, 877 F.3d 223, 228 (5th Cir. 2017). Practitioners should note that the regulations and case law allowing a discretionary denial of reopening are arguably inconsistent with the INA since its amendment in 1996. Advocates interested in preserving an argument that the regulations violate the statute may wish to consult the practice advisory by NILA and AIC, *see supra* note 159, at 7-9.

¹⁹¹ *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 968 (9th Cir. 2006) (requiring the BIA to weigh positive equities against negative factors when deciding whether to deny reopening as a matter of discretion); *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005).

¹⁹² ----, AXXX XXX XXX (Judge Herbert, El Paso Immigration Court, Dec. 10, 2020) (on file with authors).

¹⁹³ For a thorough guide to motions to rescind and reopen *in absentia* orders on behalf of asylum seekers, and sample filings, see Asylum Seeker Advocacy Project (“ASAP”) & CLINIC, *A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders* (July 2019), <https://www.asylumadvocacy.org/resource/in-absentia-removal-guide/>.

¹⁹⁴ INA § 240(b)(5)(A).

¹⁹⁵ *See, e.g.*, Jorge Ronaldo Perez-Natareno, AXXX XXX 964 (BIA June 13, 2018) (unpublished), available in IRAC index, *supra* note 56.

DHS brought an incorrect removability charge, practitioners should argue in their motion that the IJ must rescind and reopen because DHS failed to establish removability.

Unreliable or inadequate evidence. DHS often relies on Form I-213, “Record of Deportable/Inadmissible Alien,” to prove removability. The Form I-213 often contains alleged statements made by the noncitizen admitting their country of nationality and citizenship, which DHS uses to prove alienage. In many cases, Form I-213—like other documents prepared by immigration enforcement officers—contains inaccurate information. Practitioners should examine the evidence proffered by DHS to prove removability, and, if unreliable or otherwise unfair, argue that it does not establish the client’s removability by “clear, unequivocal, and convincing” evidence as required.¹⁹⁶ For example, in an unpublished decision from 2017, the BIA concluded that the record in an *in absentia* case did not contain clear, unequivocal, and convincing evidence of removability where the Form I-213 contained false, unreliable information.¹⁹⁷

Incorrect removability charge. Practitioners should also determine if the NTA charge sustained by the IJ was incorrect and thus another basis for challenging the *in absentia* order. DHS charged many noncitizens placed in MPP with removability based on INA § 212(a)(7)(A)(i)(I), as a noncitizen who at the time of application for admission did not possess valid entry documents. DHS charged noncitizens with this removability ground regardless of whether they presented at a port of entry seeking admission or whether they were apprehended after crossing the border between ports of entry. In a published 2020 decision, *Matter of M-D-C-V-*, the BIA concluded that it was proper for MPP respondents who entered without inspection—rather than presenting at a port of entry—to be charged with this ground of removability.¹⁹⁸ In *M-D-C-V-*, the BIA relied on a since-overruled Ninth Circuit decision, *Minto v. Sessions*, to reason that a noncitizen’s “application for admission begins on the date he or she is present in the United States without admission or arrives in the country, whether or not at a port of entry.”¹⁹⁹ However, in an *en banc* 2020 decision, *Torres v. Barr*, the Ninth Circuit overruled *Minto* and ruled that “the time of application for admission” reference in INA § 212(a)(7)(A)(i)(I) is the moment a noncitizen applies to physically enter the United States at a port of entry (or from outside the United States).²⁰⁰

Thus, under *Torres*, if a person entered the United States without inspection, then they may be subject to removal under INA § 212(a)(6)(A)(i) as a person who arrived in the United States at an unauthorized place or time—but not under INA § 212(a)(7)(A)(i)(I).²⁰¹ For those noncitizens

¹⁹⁶ In making these arguments, practitioners will need to overcome the presumption of reliability afforded to Form I-213. See, e.g., *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (“[A]bsent any evidence that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage or deportability.” (citing *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988))).

¹⁹⁷ Jordan Omar Nunez-Zepeda, AXXX XXX 824 (BIA Sept. 29, 2017) (unpublished), available in IRAC index, *supra* note 56; see also *Matter of Mejia-Andino*, 23 I&N Dec. 533, 537-39 (BIA 2002) (Board Member Espenoza, concurring) (discussing reliability concerns related to Form I-213 prepared for 7-year-old child where source of its statements was unclear).

¹⁹⁸ *Matter of M-D-C-V-*, 28 I&N Dec. 18, 20-21 (BIA 2020).

¹⁹⁹ *Id.* at 21 (citing *Minto v. Sessions*, 854 F.3d 619, 624 (9th Cir. 2019)).

²⁰⁰ *Torres v. Barr*, 976 F.3d 918, 924 (9th Cir. 2020).

²⁰¹ *Id.* at 930.

who entered without inspection and were issued *in absentia* removal orders within the Ninth Circuit based on INA § 212(a)(7)(A)(i)(I), the *Torres* case provides a strong argument to challenge the removal order. For similarly situated noncitizens whose *in absentia* removal orders were issued within the Fifth Circuit, which has not directly addressed this issue, practitioners could make this argument to preserve the issue for federal court appeal.²⁰²

B. Arguing That MPP Proceedings Were Statutorily Unauthorized

Practitioners challenging an *in absentia* removal order could also consider including the argument that the MPP proceedings against the noncitizen were unauthorized by statute and thus the IJ's *in absentia* removal order must be rescinded and proceedings reopened. In a 2020 decision, *Innovation Law Lab v. Wolf*, the Ninth Circuit affirmed a preliminary injunction setting aside MPP as statutorily unauthorized.²⁰³ While that decision—and the district court's preliminary injunction—were later vacated as moot, its reasoning remains persuasive, particularly in the Ninth Circuit. In *Innovation Law Lab*, the Ninth Circuit concluded that the plaintiffs were likely to succeed in showing that MPP was inconsistent with INA § 235(b)(2)(C), the statute authorizing returns to contiguous territories. The Ninth Circuit reasoned that under the plain text of the INA, this statutory provision can only be used for applicants for admission described in INA § 235(b)(2), but not applicants for admission described in INA § 235(b)(1).²⁰⁴ Because the MPP policy was applied exclusively to applicants for admission described in INA § 235(b)(1), it violated the statute. The Ninth Circuit's language is forceful:

The “return-to-a-contiguous-territory” provision of § 1225(b)(2)(C) is thus available only for § (b)(2) applicants. There is no plausible way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government's longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.²⁰⁵

Following this reasoning (which is not binding precedent), practitioners could consider including a short argument that the client's MPP *in absentia* order was unlawful and cannot stand because there was no statutory authority for DHS to place them in MPP in the first place—and that their placement in MPP and the resulting unsafe conditions in Mexico was the reason they missed their hearing and received the *in absentia* order. This argument would likely not be successful with an IJ or the BIA, but might be included to preserve the issue for federal court review, particularly in the Ninth Circuit.

²⁰² Cf. *Marques v. Lynch*, 834 F.3d 549, 561 (5th Cir. 2016); *Deus v. Holder*, 591 F.3d 807, 811 (5th Cir. 2009).

²⁰³ 951 F.3d 1073 (9th Cir. 2020), vacated and remanded *sub nom.* *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021); *Innovation Law Lab v. Mayorkas*, 5 F.4th 1099 (9th Cir. 2021) (on remand from Supreme Court, directing district court to vacate preliminary injunction); *Innovation Law Lab v. Mayorkas*, No. 3:19-cv-00807-RS, ECF No. 131 (N.D. Cal. Aug. 6, 2021) (district court order vacating preliminary injunction).

²⁰⁴ INA § 235(b)(1) applies to asylum seekers arriving at the border. It authorizes expedited removal of certain noncitizens who are inadmissible either for lack of valid entry documents or misrepresentation, unless they express a fear of persecution or torture. If they express fear, they are entitled to an asylum screening, and, if they pass it, to full removal proceedings under INA § 240 in which they can seek asylum and any other relief. In contrast, INA § 235(b)(2) applies to all other inadmissible applicants.

²⁰⁵ *Innovation Law Lab*, 951 F.3d at 1085.

C. Arguing That There Was Insufficient Notice

Practitioners should explore notice-based arguments for rescission and reopening. In MPP cases, DHS typically personally served respondents with an NTA that specified the time, date, and address for the immigration court hearing. However, a noncitizen could have a lack of notice claim if, for example, the immigration court changed the date and time of the hearing after the NTA was issued, and the new notice of hearing did not reach the noncitizen in Mexico.

Noncitizens might also have a notice-based argument for rescission if the NTA does not comply with all of the requirements set forth in INA § 239(a)(1). In *Niz-Chavez v. Garland*, the U.S. Supreme Court held that an NTA must contain all of the information required by INA § 239(a)(1) in a single document in order to trigger the NTA stop-time rule in cancellation of removal cases.²⁰⁶ Relying on *Niz-Chavez*, the Fifth and Ninth Circuits each ruled that an NTA that does not comply with INA § 239(a)(1) provides grounds for rescission of an *in absentia* order.²⁰⁷ Practitioners should carefully review the client’s MPP NTA to see if it lacks information required by INA § 239(a)(1), including the hearing’s time and place. For example, a 2021 DHS Office of Inspector General report concluded that nearly 20 percent of the MPP NTAs sampled “did not meet statutory, regulatory, or internal DHS legal sufficiency standards or contained inaccurate information.”²⁰⁸ The report cautioned that “[w]ithout quality control and supervisory review procedures, CBP’s practices could . . . fail to provide migrants with accurate hearing information.”²⁰⁹ If the NTA lacks statutorily required information, practitioners should include a notice-based argument for rescission.²¹⁰

Even if the NTA provided the correct time and place for the hearing and contained all of the other information required by statute, a noncitizen might still have a notice argument if DHS did not provide adequate information about how to physically present themselves at the hearing—given that respondents stranded in Mexico due to MPP could only enter the United States for their hearing if DHS facilitated that entry. When DHS placed a noncitizen in MPP, DHS issued that noncitizen an NTA and also typically gave them what is commonly referred to as a “tear sheet.” The tear sheet gave the noncitizen information about how and when to present at the port

²⁰⁶ 141 S. Ct. 1474 (2021).

²⁰⁷ *Singh v. Garland*, 24 F.4th 1315, 1317 (9th Cir. 2022); *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021). *But see Matter of Laparra-Deleon*, 28 I&N Dec. 425 (BIA 2022), *vacated by Laparra-Deleon v. Garland*, 52 F.4th 514, 516 (1st Cir. 2022). On June 30, 2023, the Supreme Court granted certiorari to decide whether rescission of an *in absentia* removal order was appropriate based on an NTA that failed to specify a hearing time and place if a subsequent hearing notice supplied that information. *See Campos Chavez v. Garland*, No. 22-674 (writ of certiorari granted June 30, 2023). For more information on *Niz-Chavez* and its aftermath, see AIC & NIPNLG, *Practice Advisory: Strategies and Considerations in the Wake of Niz-Chavez v. Garland* (Mar. 24, 2023), https://nipnl.org/sites/default/files/2023-04/2023_24March-Niz-Chavez-advisory.pdf; NIPNLG & AIC, *Practice Alert: Matter of Laparra, 28 I&N Dec. 425 (BIA 2022)* (Feb. 8, 2022), <https://nipnl.org/work/resources/practice-alert-matter-laparra>.

²⁰⁸ DHS Office of Inspector General, *CBP Generally Provided Accurate Notices to Appear to Migrant Protection Protocols Enrollees, But Could Improve Procedures to Reduce Future Error*, at 1 (July 14, 2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-07/OIG-21-45-Jul21.pdf>.

²⁰⁹ *Id.* at 9.

²¹⁰ Note that in *Matter of Herrera Vasquez*, 27 I&N Dec. 825, 835 (BIA 2020), the BIA held (in an MPP case) that the absence of a checked noncitizen classification box at the top of an NTA “does not, by itself, render the notice to appear fatally deficient.” The BIA reasoned that INA § 239(a)(1) does not require that this classification be included in the NTA.

of entry on the day of the hearing in order for DHS to transport them to the immigration court. If a noncitizen’s record lacks a tear sheet with their name on it, or otherwise lacks evidence that the noncitizen received a tear sheet, this could form the basis of a notice-based rescission argument.²¹¹ In unpublished decisions, the BIA has stated that when the record does not contain evidence of a tear sheet in the respondent’s name that explains when and how the noncitizen was supposed to report to the border to attend their hearing, there is grounds for termination of proceedings due to inadequate notice because DHS has not shown that the noncitizen had a “meaningful opportunity to attend” the hearing.²¹² Similarly, if the tear sheet instructions contained unclear or incorrect information about how to attend the hearing, this might be grounds for a notice-based rescission argument. Practitioners could also consider including a notice argument if the tear sheet was not provided to the noncitizen in a language they understood, or if the noncitizen was illiterate.²¹³

D. Arguing That the Respondent Was in Federal Custody at the Time of the Hearing

In cases where the noncitizen missed their immigration court hearing while outside of the United States due to their placement in MPP, practitioners should consider including an argument that rescission is warranted under INA § 240(b)(5)(C)(ii). That provision allows for rescission of an *in absentia* removal order if the noncitizen was (1) in federal custody at the time of the hearing, and (2) their failure to appear was not their fault. Like the other statutory bases for rescission, this type of rescission motion has no deadline and triggers an automatic stay while the motion is pending.

1. Respondent Was in Federal Custody at Time of Hearing

Noncitizens could argue that, during the time they were stranded in Mexico awaiting their U.S. immigration court hearing as a result of MPP, they were in constructive federal custody. This argument is supported by a regulation which states that those returned to Mexico under INA § 235(b)(2)(C) “shall be considered detained for a proceeding within the meaning of section 235(b) of the [INA] and may be ordered removed *in absentia* by an immigration judge if the [noncitizen] fails to appear for the hearing.”²¹⁴ In fact, Trump administration officials described those subject to MPP as functionally detained. For example, then-Acting Deputy Secretary of Homeland Security Ken Cuccinelli stated that individuals in MPP “are essentially on what we call a ‘detained docket’—it means they are not going to be released until their case is heard. And

²¹¹ AIC, along with partner organizations, submitted an amicus brief to the BIA discussing the notice problems with MPP tear sheets that could be helpful in crafting these arguments. See Amicus Curiae Brief of Tahirih Justice Center et al., ---, AXXX-XXX-XXX (Oct. 26, 2020), <https://www.aila.org/infonet/amicus-brief-on-mpp-tear-sheets>.

²¹² See, e.g., A-P-F-R-, AXXX XXX 533 (BIA Mar. 4, 2021) (unpublished), available in IRAC index, *supra* note 56; E-R-A-P-, AXXX XXX 120 (BIA Jan. 4, 2021) (unpublished), available in IRAC index, *supra* note 56. But see *Matter of J.J. Rodriguez Rodriguez*, 27 I&N Dec. 762, 765 (BIA 2020) (concluding that the respondent received adequate notice where he was personally served with the NTA, the record contained an MPP tear sheet with the respondent’s signature, and there was “no adequate basis to assume,” as the IJ had, that the respondent did not understand the tear sheet instructions).

²¹³ But see *J.J. Rodriguez Rodriguez*, 27 I&N Dec. at 765 (“[T]here is no requirement that [a noncitizen] in immigration proceedings be provided with a notice to appear or any other document in their native language.”).

²¹⁴ 8 CFR § 235.3(d); see *Immigrant Defenders Law Center v. Mayorkas*, No. 2:20-cv-09893-JGB, 2021 WL 4296210, at *8 (C.D. Cal. June 2, 2021) (recognizing that those in MPP proceedings “are legally in the custody of the United States while in Mexico”).

so they're waiting in Mexico"²¹⁵ Further, when ICE transported MPP respondents to immigration court for their hearings, they were not free to leave and were treated like other noncitizens held in ICE detention. Thus, in arguing that MPP respondents were in federal custody, practitioners could note that individuals forced by the U.S. government to wait for their hearings in Mexico were treated similarly to those detained in the United States.

2. Failure to Appear Was Not Respondent's Fault

In addition to arguing that the noncitizen was in federal custody at the time of the hearing, practitioners should argue that the failure to appear was through no fault of the noncitizen. Practitioners should submit evidence supporting this claim, including a detailed declaration from the client as well as any other records that can be gathered such as declarations from family members or other witnesses, or medical records. Both EOIR and DHS have recognized that the circumstances MPP respondents faced in Mexico contributed to failure to appear. For example, in a June 2021 memo, EOIR noted that *in absentia* removal orders were "relatively common in MPP cases due to circumstances, some of which may have been outside of an individual respondent's control, that resulted in the respondents failing to appear at designated ports of entry to be transported to their hearings."²¹⁶ The memo also instructs IJs to be "aware of the concerns the DHS Secretary expressed about [] MPP" when adjudicating motions to reopen.²¹⁷ In the June 2021 memo terminating MPP, DHS Secretary Mayorkas noted that the high percentage of *in absentia* removal orders in MPP cases raised questions about "whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief."²¹⁸ In the October 2021 explanation memorandum, Secretary Mayorkas cited reports suggesting that individuals in MPP "failed to appear for proceedings because of insecurity in Mexico and inadequate notice about court hearings."²¹⁹

E. Arguing That the Failure to Appear Was Due to Exceptional Circumstances

Many noncitizens who received an *in absentia* removal order after missing their MPP hearing will have strong arguments for rescission and reopening of their removal proceedings based on exceptional circumstances. Motions to rescind and reopen based on exceptional circumstances must be filed within 180 days after the date of the *in absentia* removal order,²²⁰ though courts of appeals have held that the 180-day deadline can be equitably tolled, as discussed in Section V above. The INA defines "exceptional circumstances" to encompass compelling circumstances that are beyond the control of the noncitizen such as "battery or extreme cruelty to the [noncitizen] or any child or parent of the [noncitizen], serious illness of the [noncitizen], or serious illness or death of the spouse, child, or parent of the [noncitizen]."²²¹ BIA case law directs that exceptional circumstances are evaluated considering the totality of the

²¹⁵ Fox & Friends, *Securing the Southern Border*, FOX News, at 3:00–3:30 (Nov. 24, 2019) (interview with Acting Deputy Secretary of Homeland Security Ken Cuccinelli), <https://bit.ly/2TF3fPT>.

²¹⁶ See King Memo, *supra* note 82, at 2.

²¹⁷ *Id.*

²¹⁸ June Termination Memo, *supra* note 13, at 4.

²¹⁹ See October Termination Explanation, *supra* note 4, at 20.

²²⁰ INA § 240(b)(5)(C)(i).

²²¹ INA § 240(e).

circumstances,²²² and requires that the motion be supported by sufficient documentary evidence.²²³ Factors the BIA has identified as relevant to showing exceptional circumstances include:

- The respondent’s efforts to contact the court on the day of the hearing or “immediately thereafter.”²²⁴
- Evidence indicating that the noncitizen intended to appear at the hearing or had an incentive to do so, such as a previously filed application for relief, attendance at previous hearings, eligibility for relief from removal, and promptness in filing the motion to reopen.²²⁵
- A respondent’s young age “where there are multiple impediments to attending the removal hearing.”²²⁶

The Ninth Circuit also recognizes exceptional circumstances if an *in absentia* removal order would lead to “unconscionable results,” for example where the petitioner could demonstrate a strong claim for relief.²²⁷ In a 2021 decision, *Hernandez-Galand v. Garland*, the Ninth Circuit found that the petitioner had established exceptional circumstances for the failure to appear, where her memory problems and inability to read had caused her to misunderstand the date on the hearing notice.²²⁸

There are many horrific accounts of what befell MPP respondents forced to wait in Mexico for their hearings. Kidnapping, rape, and assault were common. Noncitizens stranded in Mexico often lacked adequate food, housing, and medical care, as discussed in Section II above. Many of

²²² *Matter of S-L-H- & L-B-L-*, 28 I&N Dec. 318, 321 (BIA 2021); *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996).

²²³ *Matter of B-A-S-*, 22 I&N Dec. 57, 58-59 (BIA 1998) (concluding that respondent did not show that foot injury was an exceptional circumstance “where he gave no explanation for neglecting to contact the Immigration Court before the hearing and did not support his claim with medical records or other evidence, such as an affidavit from his employer”); *Matter of J-P-*, 22 I&N Dec. 33, 34-35 (BIA 1998) (denying relief for severe headache due in part to lack of documentation; observing that giving notice of respondent’s inability to attend hearing was a “minimal and logical step”); see *S-L-H- & L-B-L-*, 28 I&N Dec. at 322; accord *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002) (finding insufficient evidence of illness).

²²⁴ *B-A-S-*, 22 I&N Dec. at 59; see *J-P-*, 22 I&N Dec. at 35; accord *Celis-Castellano*, 298 F.3d at 892 (finding no exceptional circumstances where the petitioner failed to give a reason for not notifying the court that he would miss or did miss the hearing, noting that the NTA “did not provide a telephone number or any other indication of the appropriate means by which Celis-Castellano could apprise the court of his inability to appear”); *Magdaleno de Morales v. INS*, 116 F.3d 145, 148-49 (5th Cir. 1997) (finding no exceptional circumstances because respondents did not make “adequate efforts” to contact the court, where they “made no effort to contact the court beyond a cursory search for the phone number” on the day of the missed hearing, and did not attempt further communication with the court until two weeks after the hearing when they received the mailed *in absentia* order).

²²⁵ *S-L-H- & L-B-L-*, 28 I&N Dec. at 321; accord *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) (finding exceptional circumstances where the petitioner was eligible for relief and had “no possible reason to try to delay the hearing”).

²²⁶ *S-L-H- & L-B-L-*, 28 I&N Dec. at 321 (citing *E.A.C.A. v. Rosen*, 985 F.3d 499 (6th Cir. 2021)). *E.A.C.A.* may be helpful to practitioners representing clients with MPP *in absentia* removal orders. In that case, the Sixth Circuit found exceptional circumstances for a child’s failure to attend her removal proceeding, based on her mother’s recent childbirth, the child’s “minor age, her difficulty obtaining transportation, and her difficulty navigating the immigration system without assistance.” *E.A.C.A.*, 985 F.3d at 506.

²²⁷ *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1036 (9th Cir. 2021).

²²⁸ *Id.* at 1035.

these circumstances would provide strong grounds for an exceptional circumstances-based motion to rescind and reopen. Examples of successful MPP motions to rescind and reopen based on exceptional circumstances include:

- A February 2021 IJ decision granting a motion to rescind and reopen an MPP *in absentia* removal order, where the respondent had submitted a detailed affidavit stating that she and her son had been kidnapped by cartel members in Mexico and, because of this experience, feared traveling through cartel territory to get to the port of entry for the hearing.²²⁹
- A November 2019 IJ decision granting a pro se motion to rescind and reopen an MPP *in absentia* removal order, where the respondent submitted a declaration explaining that the family had missed the hearing because they had been kidnapped in Mexico and held for 13 days against their will.²³⁰
- A January 2021 BIA decision finding exceptional circumstances where the respondent was a minor who relied on his father, and his father could not afford to travel with the respondent to the port of entry on the hearing date. The respondent also presented evidence that his father was abusive and he had subsequently fled his abusive father.²³¹
- A February 2021 BIA decision remanding an IJ’s denial of a motion to rescind and reopen, where the respondent submitted evidence that she had been raped two days before her hearing and required medical treatment including surgery and counseling, recognizing that this experience would qualify as exceptional circumstances.²³²
- A February 2021 BIA decision remanding for further consideration of exceptional circumstances where the respondent learned before his hearing that his wife and child were being held captive and mistreated and he went to assist them and gain their release.²³³
- A February 2021 BIA decision remanding for further consideration of exceptional circumstances where the respondents provided evidence with their appeal that they were kidnapped in Mexico and were being held for ransom at the time of the missed hearing.²³⁴
- A May 2021 BIA decision remanding for further consideration of exceptional circumstances where the respondent provided evidence with his appeal about the reasons he failed to appear and his pursuit of SIJS and raised competency issues.²³⁵
- A June 2022 BIA decision remanding for further consideration of exceptional circumstances and equitable tolling where the respondent was a child in her mother’s care during her MPP proceedings and had no choice but to follow her mother back to Honduras when her mother left, causing her to miss her hearing.²³⁶

These examples demonstrate the importance of including with the motion detailed allegations of the reasons for the failure to appear, with as much corroborating evidence as possible. This evidence should include a detailed declaration from the noncitizen—though declarations alone may be found to be insufficient evidence. For example, an IJ found no exceptional circumstances

²²⁹ ---, AXXX XXX XXX (Judge Harlow, San Antonio Immigration Court, Feb. 25, 2021) (on file with authors).

²³⁰ ---, AXXX XXX XXX (Judge Romig, San Diego Immigration Court, Nov. 8, 2019) (on file with authors).

²³¹ ---, AXXX XXX XXX (BIA Jan. 28, 2021) (available [here](#)).

²³² ---, AXXX XXX XXX (BIA Feb. 23, 2021) (available [here](#)).

²³³ ---, AXXX XXX XXX (BIA Feb. 2, 2021) (available [here](#)).

²³⁴ ---, AXXX XXX XXX (BIA Feb. 3, 2021) (available [here](#)).

²³⁵ ---, AXXX XXX XXX (BIA May 17, 2021) (available [here](#)).

²³⁶ ---, AXXX XXX XXX (BIA June 8, 2022) (available [here](#)).

to rescind and reopen an MPP *in absentia* removal order in a February 2021 decision where the respondent stated that she was very ill and bedridden on the day of hearing, had no money or insurance to go to the hospital, and believed based on her symptoms that she had COVID-19.²³⁷ The respondent submitted declarations from herself, her roommate at the time, and a neighbor. The IJ ruled she had not shown exceptional circumstances because she did not submit medical records to show the severity of her illness, nor did she immediately contact the immigration court.

Another example is a December 2020 IJ decision finding no exceptional circumstances to rescind and reopen an MPP *in absentia* removal order where the respondents stated their child had developed a rash all over her body and had difficulty breathing, they were denied care at a hospital in Mexico, and they had to return to country of origin (Ecuador) to receive medical treatment. The IJ reasoned that the respondent’s “self-serving declaration” was insufficient to show that the child suffered a serious illness. The IJ noted that the motion did not include any medical records or specify exactly when the child became ill and went to Ecuador for medical treatment, noting that the illness “was not severe enough that it prevented the rider respondent from traveling across Central and South America to Ecuador”²³⁸

For the other factors the BIA considers to determine a noncitizen’s motivation to appear at the hearing (including whether or not they promptly contacted the court or promptly filed the motion to reopen), practitioners could argue that these factors heavily weigh in favor of the noncitizen in the MPP context. The noncitizen should provide an explanation of any efforts to contact the court or reasons they were unable to do so, and practitioners may want to consider submitting other evidence about communication and other barriers that MPP respondents faced while the U.S. government forced them to wait in Mexico. Further, practitioners could argue that the fact that an MPP respondent was living in Mexico in unsafe, abysmal conditions in order to await their U.S. court hearings necessarily establishes their motivation and intention to appear at the hearing. This is especially true for noncitizens who remained in Mexico after receiving a removal order and who have been looking for a way to restart their immigration court case since. While these arguments may not win the day before some IJs, it may be wise to preserve them for appeal.

VIII. Practice Tips

The below is a non-comprehensive list of practice tips for devising and implementing an effective strategy for dealing with a client’s MPP removal order.

Conduct an Effective Screening of the Client’s MPP History. At the outset of the case, practitioners should conduct a thorough screening and gather as much information as possible to determine whether the client has a removal order at all, and, if so, whether it was issued in MPP proceedings. Practitioners should get details about every entry or attempted entry into the United States and every subsequent departure. A client may believe they were deported because they were returned by immigration officers to Mexico shortly after entering, but without more information it is impossible to know if this interaction was a removal or not. For example, it

²³⁷ ----, AXXX XXX XXX (Judge Tijerina, San Antonio Immigration Court, Feb. 24, 2021) (on file with authors).

²³⁸ ----, AXXX XXX XXX (Judge Herbert, El Paso Immigration Court, Dec. 10, 2020) (on file with authors).

could have been an expulsion under Title 42 if it happened between March 2020 and May 2023. Where possible, before meeting with the client, practitioners should look up the client's A number in the EOIR Automated Case Information System to find out if they were ordered removed, and if so, when, by which IJ, and in what immigration court.²³⁹

Some topics to cover during the client interview include:

- Date, location, and circumstances/outcome of each attempted entry into the United States.
- Date the client first entered Mexico.
- Date the client was first enrolled in MPP.
- Number of immigration court hearings the client attended, dates of each, and what the client understood happened at each hearing.
- Any paperwork the client submitted while in MPP.
- Any communications the client had with a lawyer while they were in Mexico, or while they were at the court on the day of a hearing, and/or obstacles to retaining and/or communicating with counsel while in MPP.
- Any communications the client had with nonlawyers holding themselves out to be lawyers.
- Any problems the client experienced while in Mexico.
- If the client was afraid of remaining in Mexico, whether they expressed fear to any U.S. government official (*e.g.* during court hearing) and if so, the government's response.

Gather Records. Practitioners should also submit records requests to the various relevant agencies to gather all documentation of the client's MPP proceedings. These records will be important to framing motion to reopen arguments.

To obtain the noncitizen's immigration court record of proceedings and DAR of all hearings, practitioners can use the email request process outlined in the Immigration Court Practice Manual, though they must enter an appearance in order to use that process.²⁴⁰ It may also be possible to assist the noncitizen in submitting a pro se request. Alternatively, if local practitioners report that the email request process is not working well at a particular immigration court, practitioners can request the record of proceedings through a Freedom of Information Act request to EOIR²⁴¹ and can request the DAR directly from the immigration court.²⁴²

²³⁹ The Automated Case Information System can be accessed by calling 1-800-898-7180 or online. See EOIR, *Automated Case Information*, <https://acis.eoir.justice.gov/en/>.

²⁴⁰ For a helpful guide to submitting records requests to EOIR, see CAIR Coalition's practice advisory, *Requesting ROPs and DARs from EOIR* (May 9, 2023),

<https://www.caircoalition.org/sites/default/files/EOIR%20Records%20Access%20Practice%20Advisory.pdf>.

²⁴¹ See EOIR, *Freedom of Information Act* (Mar.28, 2023), <https://www.justice.gov/eoir/freedom-information-act-foia>.

²⁴² Practitioners can call the immigration court to find out local procedures for requesting a copy of the DAR. In the authors' experience, a pro se noncitizen can mail a letter request for the DAR to the relevant immigration court with their name, A number, a blank CD, a return envelope, and a copy of their identification. A representative seeking a client's DAR can mail a letter request to the relevant immigration court with the client's name, A number, EOIR-28, a blank CD, and a return envelope.

In addition to requesting a copy of the client’s immigration court records, practitioners should request the client’s “A-file” from USCIS. Practitioners could also file other relevant FOIA requests such as to CBP and/or ICE.²⁴³

While these record-gathering efforts are important, practitioners must be mindful of any motion to reopen deadlines, or, if the deadline has passed, the importance of showing diligence. Practitioners may need to file the motion to reopen before the agency responds to the records request. In these circumstances, the practitioner should note in the motion to reopen that records request(s) are pending, delineating each record request that is outstanding, and that the practitioner may supplement the motion after receiving the results of the records request.²⁴⁴

Talk to Experienced Local Practitioners. Given the many uncertainties and complexities in MPP cases, it is wise to talk to local practitioners who have handled similar cases about their experience and suggestions. For example, they may be able to provide information about how the relevant OPLA office has responded to requests to join motions to reopen in MPP cases, have suggestions about what factors to highlight in the request that OPLA join a motion to reopen, or even have a sample successful request for a joint motion to reopen to share. Local practitioners may also be able to provide insight about the IJ who will hear the motion to reopen and suggestions for arguments to highlight or tips for framing the case.

Consider Other Strategies. While motions to reopen may be the best option for many individuals with MPP removal orders in order to reduce vulnerability to removal, pursue legal status, and clean up the client’s immigration record, practitioners should consider alternative strategies and decide which approach is best for the particular client. As discussed briefly above, other strategies may include:

- If DHS files a new NTA, filing an asylum application in the new, active immigration court proceedings.
- If the client entered the United States lawfully such as through parole, filing an asylum application with USCIS, arguing that USCIS has jurisdiction because the client’s prior removal order was executed, as discussed above in Section II.C.
- If a client’s removal is imminent, consider seeking a reasonable fear interview. As discussed above, DHS generally takes the position that individuals with MPP removal orders have not executed their orders and thus would not be subject to reinstatement and entitled to a reasonable fear interview as part of that process. However, some practitioners have reported success in persuading DHS to provide the client a reasonable fear interview. If a client is found to have a reasonable fear of persecution or torture, they would then be placed into withholding-only proceedings in immigration court.

Advise the Client About Risks and Potential Outcomes. Practitioners should carefully advise clients about the risks of any proposed strategy and the potential outcomes. If the strategy involves significant risk, it is wise to put the advice in writing (in addition to going over it orally with the client) and have the client sign an informed consent document. For example, if an

²⁴³ See Immigrant Legal Resource Center, *A Step-by-Step Guide to Completing FOIA Requests with DHS* (Dec. 2021), <https://www.ilrc.org/resources/step-step-guide-completing-foia-requests-dhs>.

²⁴⁴ See *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 998-99 (9th Cir 2006).

individual with an MPP removal order has entered the United States without inspection, filing a motion to reopen alerts the government of their presence and could lead ICE to take enforcement action against the individual. Given the government’s general position on MPP removal orders, the government would likely view the client’s removal order as unexecuted; enforcement action would thus mean taking steps to execute the order without any further process. In this scenario, it would be wise to have a stay motion prepared that can be filed with the entity—immigration court or BIA—where the motion to reopen is pending, as well as an ICE stay request.

Ask OPLA to Join the Motion to Reopen Before Filing It. As discussed above in Section IV.A, joint motions to reopen are not subject to the typical 90- or 180-day deadlines for motions to reopen. It is wise to approach the relevant OPLA office with a persuasive joint motion to reopen request before filing unilaterally with the court. If OPLA does not timely respond, or denies the request without explanation or for unsatisfactory reasons, the practitioner can escalate the request to the relevant Chief Counsel of the OPLA office.²⁴⁵

File a Well-Documented, Persuasively Argued Motion to Reopen to Set Up a Strong Appeal. Practitioners should create a compelling factual record supporting the motion to reopen. In addition to a detailed declaration from the client, practitioners should develop and include as much corroborating documentation as possible. In the motion to reopen brief, practitioners should preserve all viable arguments to set up the best possible record in the event an appeal is necessary. Given that noncitizens are only entitled to one motion to reopen, it is important to include in the motion all possible bases for reopening permitted by the client’s circumstances. Practitioners should think of the motion to reopen process as a long game—the client may have better chances of prevailing on a BIA appeal or PFR after the IJ denies the motion to reopen. The BIA and relevant court of appeals may be more receptive to the practitioner’s well-developed legal arguments than the IJ who issued the MPP removal order in the first instance, especially if the IJ issued the removal order after a merits hearing. And OPLA may be willing to reconsider joining a motion to reopen once a BIA appeal has been filed. Further, some practitioners have reported successful negotiation in MPP cases once they reach the courts of appeals on a PFR. Requesting mediation can provide a forum for discussing a case’s equities.²⁴⁶ At that point, negotiations are with attorneys from the Office of Immigration Litigation, the branch of the Department of Justice that represents the agency on PFRs. Practitioners new to the PFR process are encouraged to partner with an experienced litigator and reach out early to CGRS and NIPNLG to brainstorm the most effective framing of legal arguments to try to make good law. See the contact information provided in Section IX below.

Prepare to File a Motion to Change Venue, If Warranted. Because motions to reopen are directed to the adjudicator that last had the case, the vast majority of motions to reopen MPP cases will be filed in immigration courts along the southern border. Practitioners representing clients who now live elsewhere in the United States can anticipate that if the motion to reopen is granted, they may wish to file a subsequent motion to change venue. In general, successful motions to change venue highlight the fact that the client has moved away from the court’s

²⁴⁵ See OPLA Contact Information, *supra* note 86.

²⁴⁶ Information about the Fifth and Ninth Circuit’s mediation programs can be found on those courts’ websites. See U.S. Court of Appeals for the Fifth Circuit, *Circuit Mediation Program*, <https://www.ca5.uscourts.gov/about-the-court/court-offices/appellate-conference-attorney>; U.S. Court of Appeals for the Ninth Circuit, *The Mediation Process*, <https://www.ca9.uscourts.gov/mediation/the-mediation-process/>.

geographic area; that the attorney and/or key witnesses are also located outside the court's geographic area; and the difficulties posed by requiring travel to the immigration court.²⁴⁷

Share Your Experiences. The authors of this practice advisory are interested in seeing how MPP motions to reopen are being adjudicated. If you have an outcome you would like to share, consider emailing it to the authors (rscholtz@nipnlg.org and duttonanne@uclawsf.edu) and registering it in CGRS's [outcomes database](#).

IX. Conclusion

The injustices of MPP have been apparent since the policy's inception. Though MPP has now been formally terminated, its harmful effects are still being felt by people who were ordered removed under the policy and now face significant obstacles to reopening or restarting their cases. By offering zealous representation to clients previously ordered removed in MPP, practitioners play a critical role in mitigating its harms.

Practitioners who would like to discuss strategies for reopening an individual client's case are encouraged to reach out to the Center for Gender & Refugee Studies for technical assistance by emailing cgrs-ta@uchastings.edu and providing your [CGRS case number](#) or, for National Immigration Project members, by sending an email to mmendez@nipnlg.org and rscholtz@nipnlg.org with the subject line "Member TA Request."

²⁴⁷ See MaryBeth Keller, EOIR, *Operating Policies and Procedures Memorandum 18-01: Change of Venue* (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026726/download>. While a change of venue may be warranted in these circumstances, it is not mandatory for a client to seek to change venue after a move and they may wish to proceed in the original court—though DHS may also attempt to change venue if the client has moved.