REOPENING REMOVAL PROCEEDINGS

Based on the Ineffective Assistance of Prior Counsel

By Aruna Sury

A motion to reopen (MTR) is a request to the Executive Office for Immigration Review (EOIR), which consists of the immigration courts and the Board of Immigration Appeals (BIA), to rethink a decision made during removal proceedings, in light of new information that wasn't available when the case was last before the agency. In immigration practice, a motion to reopen is frequently used to apply for relief that one did not qualify for earlier, or for raising new facts that can change the result of the case. Common examples of new facts are marriage to a U.S. citizen or a child born in the United States after the case was last before the immigration court. Additionally, in cases where someone was ordered removed *in absentia*, a motion to reopen is a way to get the case back in front of the judge for a hearing. A motion to reopen can also be a particularly important tool in cases where a prior attorney did not present all the pertinent facts of a case or made some other type of mistake, thus potentially resulting in the noncitizen losing their case before the immigration judge (IJ) or the BIA. If a motion to reopen is granted, it can serve as a tremendous advantage to a noncitizen by giving them an opportunity to win a case that they previously lost.

This practice advisory focuses specifically on motions to reopen based on ineffective assistance of prior counsel.[1] We will review the basic requirements of motions to reopen and then dive into the specific procedural and substantive requirements of motions to reopen based on the ineffective assistance of prior counsel. We will discuss the time and numerical limitations on motions to reopen and how to use the doctrine of equitable tolling to overcome these limitations. We will look at what documents should accompany a motion to reopen based on ineffective assistance of counsel so that the motion has the best chances of success. Finally, we will briefly discuss filing an appeal or a petition for review if the immigration court or the BIA denies the motion to reopen.

[1] Where a noncitizen is challenging a decision by United States Citizenship and Immigration Services (USCIS), a motion to reopen to USCIS or an appeal to the Administrative Appeals Office (AAO) may be available. The standard for these motions is slightly different and only requires the presentation of new facts, but not proof that this evidence was not previously available. 8 CFR § 103.5. This advisory does not cover the procedures involved in filing a motion to reopen with the AAO. Instead, we will focus on motions to reopen before the immigration judge and the BIA. This advisory will also not discuss motions to reconsider, which are based on a mistake of law or facts committed by the IJ or BIA, and not based on new evidence. Immigration and Nationality Act (INA) § 240(c)(6); 8 CFR §§ 1003.2(b), 1003.23(b)(2).

I. What are the Basic Requirements of a Motion to Reopen?

Generally, a motion to reopen must:

- Be filed within 90 days of the date of entry of a final administrative order of removal;[2]
- Be the first motion to reopen filed by the respondent; and
- State material and previously unavailable facts, supported by affidavits and other evidentiary material, including new applications for relief, if applicable.[3]

Even when these requirements are met, the decision whether to grant an MTR is discretionary.[4]

The statute and regulations specify certain exceptions to the numerical limit and the 90-day filing deadline:[5]

- MTR filed based on eligibility for asylum or withholding of removal based on changed country conditions. Such a motion can be filed at any time and the numerical limit does not apply.[6]
- MTR of *in absentia* removal or deportation order may be filed at any time if based on either lack of notice or that the respondent was in federal or state custody and failed to appear through no fault of their own.[7] The numerical bar does not apply to deportation cases, but does apply to removal cases.[8]

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[2] The MTR must be filed with the last EOIR agency that entered an order of removal. 8 CFR § 1003.2(a); BIA Practice Manual Ch. 5.2(a), 5.6(a). An MTR filed while an appeal is still pending with the BIA will be treated as a motion to remand, meaning, a request for a new hearing before the IJ. BIA Practice Manual Ch. 5.8.

[3] INA § 240(c)(7)(B); 8 CFR §§ 1003.2(c)(2), 1003.23(b).

[4] *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007) ("The Board has broad discretion over motions to reopen.").

[5] For a more in-depth explanation of motions to reopen generally, see NILA, AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Apr. 25, 2022), http://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory_0.pdf.

[6] INA § 240(c)(7)(C)(ii); 8 CFR § 1003.2(c)(3)(ii), § 1003.23(b)(4)(i). *But see*, *Djie v. Garland*, 39 F.4th 280, 284 (5th Cir. 2022) ("the INA provides a changed-country-conditions exception *only* to the *time* bar," [t]he regulation, by contrast, purports to apply the changed-country-conditions exception to the time *and number* bars …. To the extent a regulation attempts to carve out an exception from a clear statutory requirement, the regulation is invalid.").

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

[8] 8 CFR §§ 1003.23(b)(4)(ii), (iii). In spite of the regulation's language that the numerical limit applies to motions to reopen *in absentia* removal orders, in cases where prior MTRs have been filed by the respondent, practitioners should examine whether those first MTRs were subject to the numerical bar or not (for example based on asylum or VAWA eligibility, or equitable tolling). *Joshi v. Ashcroft*, 389 F.3d 732, 734–35 (7th Cir. 2004). Additionally, where the numerical bar does apply to an MTR of an *in absentia* removal order, practitioners should determine whether there are other bases for reopening that would not be subject to the numerical bar. The Board has held that an *in absentia* removal order need not be rescinded before the proceedings can be reopened on other grounds, such as *prima facie* eligibility for asylum. *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

- MTR of *in absentia* removal or deportation order must be filed within 180 days of the order[9] if the respondent's failure to appear was due to "exceptional circumstances."[10] The numerical bar does not apply.[11]
- MTR for battered spouses, children, and parents seeking relief as self-petitioners or through VAWA cancellation of removal must be filed within one year of the final order of removal.[12] The one-year time limit may be waived in cases of extraordinary circumstances or extreme hardship to the noncitizen's child. The numerical bar does not apply.[13]
- Jointly filed MTR by the respondent and DHS. There are no time or numerical limits.[14]
- *Sua sponte* MTR, meaning the IJ or BIA may reopen on their own motion. There are no time or numerical limits.[15]
- MTR of *in absentia* exclusion order based on a showing of "reasonable cause" for failure to appear. There are no time or numerical limits.[16]

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

PRACTICE TIP: The various grounds for reopening can be combined to argue multiple or alternate theories for reopening. Practitioners should argue as many grounds for reopening as possible. For example, a respondent who lost their removal case because their attorney's error, but who also now has a newly-formed fear of persecution should base their MTR on at least three theories: (1) their prior attorney's ineffective assistance; (2) material and previously unavailable evidence of changed circumstances have arisen, making the noncitizen eligible for asylum and withholding of removal; and (3) the noncitizen is deserving of *sua sponte* reopening of their proceedings.

[9] INA § 240(b)(5)(C); 8 CFR §§ 1003.2(c)(3), 1003.23(b)(4)(ii) (removal), (iii)(A) (deportation).
[10] The term "exceptional circumstances" refers to "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], but not including less compelling circumstances [] beyond the control of the [noncitizen]." INA § 240(e)(1). The Ninth Circuit has clarified that IAC is an "exceptional circumstance" that can justify reopening an *in absentia* removal order. *Singh v. Garland*, 117 F.4th 1145 (9th Cir. 2024).
[11] 8 CFR §§ 1003.2(c)(3)(i), 1003.23(b)(4)(iii)(A), (D). Additionally, if an *in absentia* deportation order was entered before June 13, 1992, both the time and numerical limitations do not apply. *Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999).
[12] INA § 240(c)(7)(C)(iv).
[13] INA § 240(c)(7)(A).
[14] CFR §§ 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).
[15] 8 CFR §§ 1003.2(a), 1003.23(b)(1).
[16] 8 CFR § 1003.23(b)(4)(iii)(B). Note that DHS may file an MTR in removal proceedings *at any time*, without a numerical limitation, in cases of asylum fraud. 8 CFR § 1003.2(c)(3). However, it must still prove that the evidence of fraud is material and was previously unavailable.

II. What are the Procedural Requirements for an MTR Based on Ineffective Assistance of Counsel?

In 1988, the BIA published its decision in *Matter of Lozada*,[17] in which it established a procedural and substantive framework for MTRs based on ineffective assistance of counsel (IAC). It recognized that IAC that occurs during deportation proceedings may violate a respondent's due process right to a fundamentally fair hearing, thus giving rise to a basis for reopening the proceedings. *Matter of Lozada* standards remain in effect and are binding on immigration courts and the BIA when adjudicating motions to reopen.[18]

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

1. An affidavit by the respondent attesting to the relevant facts, including a statement of the scope of the agreement between the respondent and the attorney detailing what the attorney was retained to do.
2. Proof that the respondent informed counsel of the IAC allegations and gave counsel an opportunity to respond. Any response from counsel should be included with the motion or if received after the motion is filed, should be filed as a supplement to the motion if it remains pending.
3. The motion should reflect whether a complaint has been filed with appropriate disciplinary authorities in the state where the prior attorney is licensed to practice law, and if not, why not.

The Board has stated that these procedures are "necessary to provide a basis for evaluating the many claims presented, to deter baseless allegations, and to notify attorneys of the standards for representing noncitizens in immigration proceedings.[19]

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

III. Are There Ever Any Exceptions to the *Lozada* Procedural Requirements?

For an individual seeking a remedy for IAC, full and timely compliance with the *Lozada* procedural requirements is the best practice. However, if a client has already filed a non-compliant MTR that has been denied, it may be necessary to argue that the agency may exempt some of the procedural requirements under *Lozada*.

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[17] 19 I&N Dec. 637 (BIA 1988).
[18] The *Lozada* requirements also apply to motions to remand before the BIA, that is, where the motion seeks a new hearing before the IJ while the underlying appeal is still pending with the BIA. While motions to remand are not subject to the time and numerical bars that apply to motions to reopen, they must comply with the procedural requirements under *Matter of Lozada* where the motion is based on IAC.
[19] *Matter of Assaad*, 23 I&N Dec. 553, 556 (BIA 2003).

A. Bar complaints

Despite some suggestions to the contrary, on its face, *Lozada* does not require filing a bar complaint in all circumstances. Filing a bar complaint is required only "if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities," and the motion "should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not."[20] *Lozada* expressly allows a noncitizen to explain why a bar complaint has not been filed.[21] Practitioners have reported, for instance, that the BIA has exempted the bar complaint requirement where former counsel admitted their negligence or mistake and "self-reported" to the state bar where they are licensed, although the BIA has held to the contrary in a published opinion.[22] When documentation of the fact that the prior attorney had been disbarred was submitted with the MTR, no state bar complaint was required by an Immigration Judge.[23]

Seeking reopening without a bar complaint against previous counsel increases the risk of denial on procedural grounds. Circuit courts, the BIA, and IJs generally reject motions where an individual does not provide an adequate explanation for their failure to file a bar complaint.[24]

B. "Substantial compliance"

In some jurisdictions, noncitizens need only demonstrate "substantial compliance" with, rather than "slavish adherence to," the *Lozada* requirements in order to merit review of the underlying motion.[25]

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[20] *Lozada*, 19 I&N Dec. at 639 (emphasis added).

[21] *See, e.g., Fadiga v. Att'y Gen.*, 488 F.3d 142, 156-57 (3d Cir. 2007) (excusing failure to file complaint "where counsel acknowledged the ineffectiveness and made every effort to remedy the situation"); *Matter of Zmijewska*, 24 I&N Dec. 87, 94-5 (BIA 2007) (finding noncitizen who was represented by an accredited representative "satisf[ied] the concerns underlying the *Lozada* requirements" without filing bar complaint); *cf. Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-32 (9th Cir. 2013) (holding that *Lozada* only requires an explanation of whether a bar complaint was submitted, not proof that the complaint was filed).

[22] *See Matter of Melgar*, 28 I&N Dec. 169 (BIA 2020) (counsel's acceptance of responsibility for an error does not discharge the bar complaint requirement).

[23] *See Morales Apolinar v. Mukasey*, 514 F.3d 893, 896–97 (9th Cir. 2008) (finding bar complaint would have been futile where former attorney was suspended by state bar after failing to respond to previous ineffective assistance charges); *Castillo-Perez v. INS*, 212 F.3d 518 (9th Cir. 2000) (finding that prior attorney's failure to file an application for relief was such a clear and obvious case of IAC, that a bar complaint was not required); *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993) (finding noncitizen's belief that former counsel had been suspended from practice of law sufficient).

[24] *See, e.g., Pepaj v. Mukasey*, 509 F.3d 725, 727 (6th Cir. 2007) (holding that a noncitizen who failed to file a bar complaint or provide an explanation would "forfeit[] her ineffective-assistance-of-counsel claim"); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 134-35 (3d Cir. 2001) (finding noncitizen's desire not to file complaint against counsel who represented him pro bono insufficient); *Lara v. Trominski*, 216 F.3d 487, 497-499 (5th Cir. 2000) (finding noncitizen's explanation that former counsel's error was not a violation of legal or ethical responsibilities under relevant state law insufficient); *Matter of Rivera-Claros*, 21 I&N Dec. 599, 606 (BIA 1996) (finding noncitizen's statement that former counsel's error was inadvertent insufficient).

[25] *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007); *see also*, *Fadiga v. Att. Gen.*, 488 F.3d 142, 156 (3d Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002).

Under a substantial compliance test, some courts have excused, for example, failure to provide a detailed enough affidavit, failure to personally notify counsel of the complaint, and failure to file a formal bar complaint.[26] Such exceptions should be argued only when absolutely necessary because courts do not typically apply them. For example, the Fifth and Seventh Circuits have suggested that noncitizens must show "strict compliance" with the procedural requirements.[27] Even where courts have recognized flexibility in the application of the requirements, the immigration courts and the BIA regularly reject claims based on failure to substantially comply with *Lozada*.

The BIA has not issued a precedent decision on whether to apply a substantial compliance standard; rather, it applies the law regarding whether to "mandat[e] strict adherence to all of the Lozada steps in every case … as is appropriate in each circuit."[28] It has suggested that it is unwilling to apply a substantial compliance standard unless "the record reflects a 'clear and obvious case of ineffective assistance of counsel.'"[29]

Practitioners should fully comply with all of the *Lozada* procedural requirements for MTRs based on IAC whenever possible. But recently, circuit courts have been reluctant to require substantial compliance where the totality of the circumstances show IAC as one of several reasons stated in support of the MTR, highlighting that deficient performance by counsel in the past does not automatically give rise to the *Lozada* requirements.[30]

IV. What Must an MTR Based on IAC Substantively Establish?

A motion to reopen based on ineffective assistance of counsel must generally establish:

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[26] *Piranej v. Mukasey*, 516 F.3d 137, 142-44 (2d Cir. 2008) (remanding for further fact finding where "the exact parameters of [the] attorney-client relationship [were] unclear"); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1125 (9th Cir. 2000) (excusing failure to provide notice where noncitizen did not receive information relevant to his claim until shortly before filing deadline); *Ray v. Gonzales*, 439 F.3d 582, 589 (9th Cir. 2006) (finding that noncitizen provided sufficient notice to prior attorneys by filing bar complaints against them); *Rranic v. Att'y Gen.*, 540 F.3d 165, 173-75 (3d Cir. 2008) (finding *Lozada* compliance, despite insufficient explanation for lack of bar complaint, where noncitizen satisfied policy concerns motivating complaint requirement).

[27] *See Hernandez-Ortez v. Holder*, 741 F.3d 644, 647-48 (5th Cir. 2014); *Lin Xing Jiang v. Holder*, 639 F.3d 751, 755 (7th Cir. 2011).

[28] *Matter of Assad*, 23 I&N Dec. 553, 559 n.6 (BIA 2003); *cf. Matter of D-R-*, 25 I&N Dec. 445, 457 n.8 (BIA 2011) ("We do not intend to suggest that [the Ninth Circuit's] exception to the *Lozada* requirements should be applied outside of [the Ninth Circuit"); *Matter of Zmijewska*, 24 I&N Dec. 87, 94 (BIA 2007) ("[W]e have not yet decided the question whether the *Lozada* requirements should be strictly applied to an accredited representative.…").

[29] *Matter of D-R-*, 25 I&N Dec. at 457 (quoting *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000)).

[30] *Singh v. Garland*, 117 F.4th 1145, 1151 (9th Cir. 2024) ("Singh does not have to substantially comply with the *Lozada* factors for the BIA to consider the involvement of his attorney as one of many occurrences that, together, might constitute 'exceptional circumstances.'"); *Romero-Morales v. I.N.S.*, 25 F.3d 125, 129 (2d Cir. 1994) ("[Petitioner's] good faith reliance on the assurances of counsel, reasonable or not, might have contributed to the establishment of 'exceptional circumstances.'"); *Murillo-Robles v. Lynch*, 839 F.3d 88, 93 (1st Cir. 2016) ("[P]etitioner's previous attorneys pulled the rug out from under him time and again, and this fact ought to have weighed heavily in the totality of the circumstances analysis.").

1. Counsel's performance was ineffective such that the respondent was prevented from reasonably presenting their case.
2. Counsel's performance prejudiced the respondent.[31]

A. Ineffectiveness

Ineffective or deficient performance by counsel is established by showing that "competent counsel would have acted otherwise."[32] However, "subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen."[33] Some examples of ineffective assistance of counsel are:

- Failure to properly advise a client regarding a hearing date or advising a client not to attend a scheduled hearing in immigration court.[34]
- Failure to submit relevant or sufficient evidence.[35]
- Failure to pursue a form of relief that a client is *prima facie* eligible for.[36]
- Admissions on behalf of a client or waiving the right to appeal, without any apparent tactical advantage.[37]
- Failure to file a timely Notice of Appeal or appeal brief.[38]
- Pressuring a client to accept voluntary departure under threat of counsel's withdrawal.[39]
- Failure to take action to ensure client remained eligible for relief.[40]

It is important to keep in mind that these are merely examples of ineffective assistance of counsel and do not constitute a comprehensive list of what can constitute ineffective assistance. Practitioners should be aware that the inquiry is extremely fact-specific and the scope of what constitutes ineffective assistance can vary depending on which circuit the proceedings are/were pending.

Ineffective assistance of counsel claims can arise from counsel's performance occurring during removal proceedings and even after entry of a final order of removal, particularly counsel's

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[31] *Matter of Lozada*, 19 I&N Dec. at 638.
[32] *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004); *see also Fadiga v. Att'y Gen.*, 488 F.3d 142, 157 (3d Cir. 2007); *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994); *Paul v. INS*, 521 F.2d 194, 199 (5th Cir. 1975).
[33] *Matter of B-B-*, 22 I&N Dec. 309, 310 (BIA 1998).
[34] *Aris v. Musakey*, 517 F.3d 595, 599-601 (2d Cir. 2008); *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 801-03 (5th Cir. 2007); *Fong Yang Lo v. Ashcroft*, 341 F.3d 934 (9th Cir. 2003); *Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (BIA 1996).
[35] *Habib v. Lynch*, 787 F.3d 826, 832 (7th Cir. 2015); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008); *N'Diom v. Gonzales*, 442 F.3d 494, 496, 499 (6th Cir. 2006); *Kay v. Ashcroft*, 387 F.3d 664, 676 (7th Cir. 2004).
[36] *Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013); *Sanchez v. Keisler*, 505 F.3d 641, 648 (7th Cir. 2007); *Figeroa v. INS*, 886 F.2d 76, 77, 79 (4th Cir. 1989); *Rabiu v. INS*, 41 F.3d 879, 883 (2d Cir. 1994).
[37] *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920-21 (9th Cir. 2015); *Mai v. Gonzales*, 473 F.3d 162, 166-67 (5th Cir. 2006).
[38] *Li v. Bondi*,—F.4th—(9th Cir. June 10, 2025), 2025 WL 1642427, at *3; *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004); *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993).
[39] *Nehad v. Mukasey*, 535 F.3d 962, 967-72 (9th Cir. 2008).
[40] *Singh v. Holder*, 658 F.3d 879, 885-86 (9th Cir. 2011).

failure to preserve a client's ability to appeal. However, ineffective assistance claims arising from counsel's conduct that occurred *before* commencement of proceedings, may not be a legitimate basis of a motion to reopen, unless there is some connection between the ineffective assistance and the fairness of the removal proceedings.[41]

A number of courts will not recognize that ineffective assistance of counsel is a due process violation where a prior representative's deficient performance only impacted a noncitizen's efforts to obtain a discretionary form of relief.[42] Yet even within these jurisdictions, individuals may still be able to pursue these claims before the immigration courts or the BIA, as the BIA has not taken a definitive position on the issue in a published decision, but has implied that such a claim may be possible.[43]

What if my client was not represented by an attorney? Can I still file a Motion to Reopen Based on Ineffective Assistance of Counsel?

Possibly. There are primarily three scenarios in which an individual may file a motion to reopen based on the ineffective assistance of a non-attorney:

- Ineffective assistance by a BIA-accredited representative.[44]
- A non-attorney working as an agent or employee of an attorney, who in turn provided deficient representation. In these situations, the ineffective assistance claim should be filed against the supervising attorney(s) of such agent or employee.[45]
- A non-attorney who purposefully or negligently held themselves out to be an attorney, and the client relied on that misrepresentation.[46]

In the Ninth Circuit, ineffective assistance claims against non-attorneys are generally limited to the above-mentioned scenarios, as the court has stated that non-attorneys "lack the expertise and legal professional duties to their clients that are the necessary preconditions" for such claims.[47] In such scenarios, typically involving a *notario*, whom the client knew was a non-attorney, the client may still be able to get their removal proceedings reopened on other

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[41] *See Contreras v. Att'y Gen.*, 665 F.3d 578, 585-86 (3d Cir. 2012); *Balum-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008). Subsequent to *Balum-Chuc*, the Ninth Circuit amended its prior decision in *Lara-Torres v. Ashcroft*, 383 F.3d 968 (9th Cir. 2004), on which *Balum-Chuc* had relied. In the amended decision, the court noted that ineffective assistance of counsel that occurred prior to the initiation of removal proceedings could be relevant where it had an impact on the fairness of the proceedings. *Lara-Torres v. Gonzales*, 404 F.3d 1105, 1105 (9th Cir. 2005).

[42] *See, e.g., Flores-Moreno v. Barr*, 971 F.3d 541, 545 (5th Cir. 2020); *Huicochea-Gomez v. INS*, 237 F.3d 696, 700 (6th Cir. 2001); *Guerra-Soto v. Ashcroft*, 397 F.3d 637, 640-41 (8th Cir. 2005); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1146–48 (11th Cir. 1999); *but see*, *Hernandez v. Reno*, 238 F.3d 50, 55-56 (1st Cir. 2001); *Rabiu v. INS*, 41 F.3d 879, 882-83 (2d Cir. 1994); *Calderon-Rosas v. Attorney General United States*, 957 F.3d 378, 388 (3d Cir. 2020); *Hernandez-Mendoza v. Gonzales*, 537 F.3d 976, 978 (9th Cir. 2007).

[43] *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) (implying MTR based on ineffective assistance of counsel can be granted where *prima facie* eligibility for discretionary relief is established).

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

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

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

[47] *Hernandez v. Mukasey*, 524 F.3d 1014, 1019-20 (9th Cir. 2008).

grounds, such as based on new and material evidence, regardless of whether those new facts amount to ineffective assistance of counsel.

B. Prejudice

In addition to showing that counsel's performance was deficient or ineffective, a respondent must further show that they were prejudiced by counsel's performance. The prejudice standards differ somewhat between circuits, but generally involve consideration of whether there is a "reasonable likelihood" or "reasonable probability" that the result of proceedings would have been different but for counsel's performance.[48] But at least three circuits require a heightened standard of a likelihood of change in the result, in order to meet the prejudice requirement.[49]

Many motions to reopen based on ineffective assistance are denied because the individual cannot establish prejudice. For this reason, practitioners should make special efforts to highlight the ways in which their client was prejudiced by former counsel's performance.

> **Example:** Sasha is from Russia and hired an attorney to file an asylum application during her removal proceedings in immigration court. Her attorney presented her claim for asylum based on persecution Sasha experienced due to her practice of Evangelical Christianity. The IJ denied Sasha's application, finding that there was insufficient evidence that the mistreatment she experienced was related to her religious faith. The BIA affirmed the IJ's decision. About one month later, Sasha comes to your office to see if anything can be done to prevent her removal. You question Sasha in detail regarding her history and discover that Sasha was beaten by the Politsiya, the Russian national police, when she was a university student in 1996, due to her political support of then-Presidential candidate, Mikhail Gorbachev. You consider whether to file an MTR on behalf of Sasha based on the ineffective assistance of her former counsel, who failed to submit this key information of past persecution to the immigration judge. While you can easily show that Sasha's former attorney acted ineffectively in failing to elicit facts regarding her past political persecution, proving prejudice would be much more challenging given the significant political change in Russia since 1996. You will likely have difficulty showing that there was a "reasonable likelihood" that the IJ would have found a well-founded fear of future persecution based on Sasha's political persecution

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[48] *See Contreras v. Att'y Gen.*, 665 F.3d 578, 584 (3d Cir. 2012); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2004); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008) (holding that prejudice requires showing that deficient performance "may have affected the outcome of the proceedings," and noncitizen "need only show plausible grounds for relief") (quotations omitted); *Paucar v. Garland*, 84 F.4th 71, 81 (2d Cir. 2023) (MTR must show prejudice by meeting a "reasonably probable" standard, not a "likely [to] grant of relief" standard).

[49] *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) ("[A noncitizen] must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States"); *Arroyo-Sosa v. Garland*, 74 F.4th 533, 542 (8th Cir. 2023) (upholding BIA's requirement that MTR show that reopening "would likely change the result in the case" rather than mere reasonable likelihood of success); *Reese v. Garland*, 66 F.4th 530, 535 (5th Cir. 2023) ("Petitioners must show substantial prejudice resulting from any error, meaning that they must make a prima facie showing that they would be entitled to relief in the absence of any error.")

decades earlier, although you may have a claim, depending on the severity of the harm Sasha experienced, that she was a victim of severe past persecution that still entitles her to humanitarian asylum.

Are there exceptions to the requirement to show prejudice?

There are some limited exceptions to the prejudice requirement. The primary exception is where counsel's performance resulted in the entry of an *in absentia* removal order. In such cases, prejudice is presumed.[50]

Additionally, where a noncitizen was deprived of their statutory right to counsel during removal proceedings (that is, the respondent was not at all represented by their attorney during proceedings), a number of circuits presume prejudice,[51] while other circuits still require a showing of prejudice in that scenario.[52] In circuits where the deprivation of the statutory right to counsel is presumed to cause prejudice, counsel should make the argument and cite to the relevant cases. Even in other circuits, counsel should present the argument and alternatively argue that the noncitizen has established prejudice.

Similarly, where there was ineffective assistance by a non-attorney, an additional showing of prejudice may not be required.[53]

NOTE: Additional diligence requirement. At least two circuits have affirmed the BIA's application of a diligence requirement to motions to reopen based on ineffective assistance of counsel.[54] In these cases, the courts affirmed the BIA's denial of motions to reopen because the respondents filed their ineffective assistance claims after the BIA's final order of removal, even though the ineffective assistance occurred only during the proceedings before the immigration judge. Most circuits, however, have not validated this additional requirement.[55]

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

[51] Five circuits recognize that the statutory right to counsel during immigration proceedings is so significant, that there is no independent requirement of proving prejudice in order to reopen the proceedings. *Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991); *Leslie v. U.S. Att'y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010) ("The right to counsel is a particularly important procedural safeguard because of the grave consequences of removal."); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975) ("When no lawyer appears to represent the defendant ... there is no room for nice calculations as to the amount of prejudice flowing from the denial.") (internal quotation marks omitted); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1092 (9th Cir. 2012) ("[D]enial of counsel more fundamentally affects the whole of a proceeding than ineffective assistance of counsel .... [T]he absence of counsel can change [the noncitizen's] strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence the [noncitizen] is able to include in the record."); *Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969); *Priva v. U.S. Attorney General*, 34 F.4th 946, 960–961 (11th 2022).

[52] *Hernandez Lara v. Barr*, 962 F.3d 45, 58 (1st Cir. 2020); *Farrokhi v. INS*, 900 F.2d 697, 702 (4th Cir. 1990); *Ogbemudia v. INS*, 988 F.2d 595, 598 (5th Cir. 1993); *Njoroge v. Holder*, 753 F.3d 809, 812 (8th Cir. 2014); *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990).

[53] *See Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) ("Petitioners were not required to demonstrate that the ineffective assistance of the non-attorney notario caused them prejudice").

[54] *See Massis v. Mukasey*, 549 F.3d 631, 636, 637 (4th Cir. 2008); *Maatougui v. Holder*, 738 F.3d 1230, 1243-46 (10th Cir. 2013).

[55] It is easy to get confused between the diligence requirement imposed by the two circuit courts in the ineffective assistance context for *timely* motions to reopen, and the due diligence requirement applicable to

Regardless of the circuit you are in, it is a good idea to demonstrate diligence through every step of the process, since the lack of diligence could certainly form a basis for denying the motion on discretionary grounds.

V. What if a Non-Citizen Has Missed the MTR Deadline or Used Up Their One MTR Due to Counsel's Error?

As discussed above, individuals may generally file only one motion to reopen and must file it within 90 days of their final order of removal. Where the motion to reopen is based on exceptional circumstances, which resulted in an *in absentia* removal order, the motion may be filed within 180 days of the order and is not subject to the one-motion numerical bar. The BIA has stated that there are no exceptions to the time and numerical limitations, other than that explicitly provided by statute or regulation.[56]

However, under the doctrine of equitable tolling, a non-jurisdictional deadline, such as the motion to reopen deadline, may be extended where the claimant has exercised diligence in exercising their rights, but extraordinary circumstances were responsible for their failure to make a timely filing.[57] While the Board has not published a decision regarding the validity of equitable tolling as applied to motions to reopen,[58] all circuits, with the exception of the First Circuit, have recognized the application of equitable tolling for reopening based on ineffective assistance of counsel.[59] Some circuits have also explicitly recognized that equitable tolling can be applied to the one-motion rule as well.[60]

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

- They exercised diligence in pursuing reopening; and
- The delay was due to extraordinary circumstances, most commonly ineffective assistance of prior counsel.[61]

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cases invoking equitable tolling after the motion to reopen deadline has passed. The two requirements are separate, with the latter applicable in all circuits that have recognized equitable tolling for MTRs, as explained in the next section.

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

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

[58] Recently, the BIA held that equitable tolling is available in the context of a late-filed Notice of Appeal caused by counsel's error. *Matter of Morales-Morales*, 28 I&N Dec. 708 (BIA 2023). In practice, the BIA does apply equitable tolling to late-filed motions to reopen based on ineffective assistance of counsel, although it has not explicitly stated so in a published decision.

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

[60] *Zhao v. INS*, 452 F.3d 154, 159-60 (2d Cir. 2006); *Williams v. Garland*, 59 F.4th 620, 640 (4th Cir. 2023), as amended; *Lugo-Resendez*, 831 F.3d 337, 343 (5th Cir. 2016); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002).

[61] At least one circuit court and the BIA have suggested that a significant court ruling that no longer makes a respondent removable, may constitute an extraordinary circumstance warranting equitable tolling. *Williams*

Noncitizens in the First Circuit—the only court of appeals that has not recognized the availability of equitable tolling—will face additional challenges seeking to reopen removal orders based upon ineffective assistance outside of the 90- or 180-day deadlines. The First Circuit has "not yet decided whether equitable tolling applies to the statute's ninety-day deadline, despite multiple opportunities to do so,"[62] but has directed the BIA to determine in the first instance whether tolling applies in particular cases.[63] Practitioners should emphasize that the First Circuit has found it "notabl[e]" that "every circuit that has addressed the issue thus far has held that equitable tolling applies to either or both the time and numerical limits to filing motions to reopen."[64] The court has also recently stated that it would "assume, without deciding, that the time and number constraints on statutory motions to reopen … may be equitably tolled in certain circumstances," based on the fact that neither the BIA nor government counsel argued to the contrary.[65]

REMINDER: Regardless of whether they are in a jurisdiction that has acknowledged the availability of equitable tolling, noncitizens seeking reopening after the motion to reopen deadline has passed may still request *sua sponte* reopening.[66]

A. What constitutes diligence for purposes of equitable tolling?

Equitable tolling is only permitted until the extraordinary circumstances that prevented a timely filing of the motion to reopen "is, or should have been, discovered by a reasonable person in the situation."[67] Practitioners should emphasize when presenting a claim for equitable tolling, that the client must only show "reasonable diligence," not "maximum feasible diligence."[68] Proving that an individual exercised due diligence is extremely "fact-intensive and case-specific," thus requiring a detailed presentation of facts.[69] Evidence should generally include a

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v. Garland, 59 F.4th 620, 643 (4th Cir. 2023), as amended, *citing Matter of G-D-*, 22 I&N Dec. 1132, 1135 (BIA 1999) (characterizing "a fundamental change in the principles of the law" as an "exceptional" circumstance warranting sua sponte reopening).

[62] *Bolieiro v. Holder*, 731 F.3d 32, 39 (1st Cir. 2013); *Esteban v. Garland*, 76 F.4th 27, 30 (1st Cir. 2023).

[63] *See*, *e.g.*, *Romer v. Holder*, 663 F.3d 40, 43 (1st Cir. 2011).

[64] *Bolieiro*, 731 F.3d at 39 n.7; *see also*, *Gyamfi v. Whitaker*, 913 F.3d 168, 174–75 (1st Cir. 2019) ("We take our cue from decisions past and assume, without deciding, that the ninety-day rule is subject to equitable tolling."); *But see*, *Tay-Chan v. Barr*, 918 F.3d 209, 214 (1st Cir. 2019) ("Actually, around here, [equitable tolling] should be used sparingly, if at all—we have not yet given the thumbs-up on applying equitable tolling to motions to reopen.").

[65] *Garcia v. Bondi*, 135 F.4th 1, 5 (1st Cir. 2025).

[66] 8 CFR §§ 1003.2(a), 1003.23(b)(1).

[67] *Iavorksi v. U.S. I.N.S.*, 232 F.3d 124,134 (2d Cir. 2000); *see also*, *Eneugwu v. Garland*, 54 F.4th 315, 319 (5th Cir. 2022) (finding that although former counsel may have been ineffective in failing to inform petitioners about their biometrics appointment, the petitioners' "later failure to move within the time to reopen was not caused by that shortcoming").

[68] *Holland*, 560 U.S. at 653 (internal quotations omitted).

[69] *Avagyan v. Holder*, 646 F.3d 672, 679, 682 n.9 (9th Cir. 2011) (requiring "assess[ment of] the reasonableness of petitioner's actions in the context of his or her particular circumstances," rather than some "magic period of time"); see also *Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (noting that "the mere passage of time—even a lot of time—before [a noncitizen] files a motion to reopen does not necessarily mean she was not diligent" because "the analysis ultimately depends on all of the facts of the

declaration from the respondent and corroborating witnesses regarding the precise timeline of when and how the respondent discovered the ineffective assistance, *and* when and how the respondent went about filing the motion to reopen after discovering the ineffective assistance.

PRACTICE TIP: The BIA frequently denies equitable tolling claims based on lack of diligence on the part of the respondent. You should ensure that you account for all the time that has passed since the client's final removal order. Whenever possible, the noncitizen should be very specific in their declaration regarding how they discovered the ineffective assistance of former counsel and when they acted to fix it. Any delay should be reasonably explained, such as misinformation the client may have received from subsequent attorneys, the client's efforts to save up money to consult with a new attorney, and any psychological or physical disabilities that contributed to the delay.

B. What constitutes extraordinary circumstances?

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

C. Effect of equitable tolling: Clock stopped approach vs. reasonable time approach

Circuits are split with respect to the effect of equitable tolling. A 2014 Supreme Court decision noted that a litigant "pauses the running of, or 'tolls,'" the relevant statute of limitations by diligently pursuing his rights in an appropriate circumstance.[70] In line with this decision, some courts of appeals recognize that equitable tolling essentially "stops the clock" on the filing deadline.[71] Several other courts expressly reject that proposition and provide noncitizens with only "some additional time" following the discovery of ineffective assistance or another

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case, not just the chronological ones"). As one court held, "the test for equitable tolling … is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier." *Pervaiz*, 405 F.3d at 490. As a result, the periods of time over which courts find noncitizens diligent vary widely. *Compare Borges*, 402 F.3d at 407 (finding due diligence where motion was filed four years after deadline); *Gaberov v. Mukasey*, 516 F.3d 590, 596-97 (7th Cir. 2008) (same); *Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) (finding no due diligence where motion was filed 16 days after deadline); *Perez-Camacho v. Garland*, 54 F.4th 597, 607 (9th Cir. 2022) (finding no due diligence where petitioner waited 21 years to seek modification of his conviction in state court based on the defense counsel's alleged ineffective assistance); *Ragbir v. United States*, 950 F.3d 54, 64 (3d Cir. 2020) ("Ragbir's pursuit of administrative remedies cannot constitute a sound reason for delay since the immigration relief he seeks is dependent upon a successful collateral challenge to his underlying conviction.").

[70] *Lozano v. Montoyo Alvarez*, 572 U.S. 1, 10 (2014); *see also*, *Arellano v. McDonough*, 598 U.S.—,143 S.Ct. 543, 547 (2023).

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

extraordinary circumstance.[72] As a result, even where equitable tolling may be available, motions to reopen should be filed as promptly as possible. In at least some jurisdictions, time spent complying with the *Lozada* procedural requirements will not result in tolling.[73]

> **Example:** Rafael, a national of Venezuela, hired an attorney in January 2016, within two months of entering the United States, to help him affirmatively file an asylum application. Unbeknownst to Rafael, the attorney waited over 11 months to file the application, therefore missing the one-year filing deadline applicable to asylum applications. When the Asylum Office referred Rafael's case to the immigration court due to his failure to prove an exception to the one-year filing deadline, the same attorney represented him in immigration court. The IJ denied Rafael's asylum application due to Rafael's failure to comply with the one-year deadline but granted him withholding of removal. The attorney told Rafael that he had "gotten a good deal" and that he should not appeal the IJ's decision. Trusting his attorney, and happy that he would not be deported, Rafael did not appeal the IJ's denial of asylum.
>
> About one year later, Rafael attempted to enroll in university courses and learned for the first time that withholding of removal did not confer him with permanent immigration status. After meeting with a counselor at the university, Rafael makes an appointment with you for the following week, which is approximately one year and four months after the IJ's decision. This is the first time Rafael learns that the reason for the denial of his asylum application was his prior attorney's failure to comply with the one-year deadline.
>
> You file a motion to reopen, arguing that due to ineffective assistance of counsel, the 90-day motion to reopen deadline should be tolled. Depending on the circuit you are in, the 90-day deadline will be tolled until Rafael met you and definitively learned of his former attorney's error, or tolled for a reasonable amount of time depending on the circumstances. Regardless of the circuit, you must show that Rafael exercised diligence throughout the process and that he acted reasonably in trusting his former attorney and relying on it for one year, before he attempted to enroll in college. And you, his new attorney, must act quickly to file the MTR soon after first meeting with Rafael.

VI. What Documents Must Be Submitted with an MTR Based on Ineffective Assistance of Counsel?

Along with the motion, an MTR based on IAC should include documentation to support the motion.

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

[73] *See, e.g., Galvez Pineda v. Gonzales*, 427 F.3d 833, 839 (10th Cir. 2005) (noting that, "had the [noncitizens] been unable to fulfill all the *Lozada* requirements within 90 days, they could still have filed the motion and explained any unavoidable delay"); but see *Avagyan*, 646 F.3d at 679 n.6 (describing as "an open question whether the tolling period extends until the [noncitizen] complies with the requirements of *Lozada*").

- An affidavit from the respondent regarding their agreement with former counsel and although not required, a detailed account of their history with counsel, including facts demonstrating the client's diligence in discovering the IAC and acting on it.
- If there was a written contract with former counsel, that should be included, along with proof of payment(s) to counsel.
- Proof of former counsel's State Bar membership and proof that a complaint was filed with the appropriate disciplinary authority *and* that former counsel has been notified of the complaint filed against them. Such proof can be in the form of current counsel's affidavit detailing the relevant filing and notice procedures followed, and/or can be in the form of direct evidence of such actions (a copy of the Bar Complaint and a letter to former counsel). If the State Bar separately informed former counsel of the complaint, proof of that should be included as well.
- If former counsel responded to the complaint, include a copy of the response. If no response has been received by former counsel by the time the MTR is filed, indicate that you will update the court or the BIA if any response is received by former counsel while the MTR is pending.
- If former counsel responded to the complaint, the MTR should include rebuttal evidence, including a detailed declaration by the noncitizen which addresses former counsel's assertions.

PRACTICE TIP: Facts presented in affidavits supporting a motion to reopen must be accepted as true unless "inherently unbelievable."[74] The MTR should include, at least briefly, an argument that your client's claims are not "inherently unbelievable" and must be accepted as true for purposes of adjudicating the motion.

VII. If My MTR is Denied, Can I Appeal That Decision?

If the IJ denies a motion to reopen, it can be appealed to the BIA within 30 days of the IJ's order by filing a Notice of Appeal.[75] The process for appealing the denial of an MTR is the same as the process involved in appealing an IJ's order of removal.[76]

Similarly, if the BIA denies an MTR or affirms an IJ's denial of an MTR, the noncitizen may be able to appeal the BIA's decision to a federal circuit court by filing a petition for review.[77] It is well-settled that despite the INA's prohibition against judicial review of the agency's discretionary decisions,[78] federal courts do retain jurisdiction to review legal and constitutional

[74] *INS v. Abudu*, 485 U.S. 94, 101 (1988) ("[F]or purposes of the limited screening function of motions to reopen, the BIA must draw all reasonable inferences in favor of the [noncitizen] unless the evidence presented is inherently unbelievable."); *Saint Ford v. Attorney General United States*, 51 F.4th 90, 96 (3d Cir. 2022)*; Bhasin v. Gonzales,* 423 F.3d 977, 987 (9th Cir. 2005).
[75] 8 CFR § 1003.3(a).
[76] *See* BIA Practice Manual, Ch. 4; ILRC, *Identifying Issues for a BIA Appeal* (Jun. 2022), https://www.ilrc.org/sites/default/files/resources/identifying_issues_for_bia_appeal_june_2022_final.pdf.
[77] INA § 242(a)(1). The petition for review should be filed with the federal circuit court with jurisdiction over the location where the IJ completed proceedings. INA § 242(b)(2).
[78] INA § 242(a)(2)(B)(ii).

findings made by the BIA in the course of adjudicating motions to reopen.[79] So if the IJ or BIA has denied an MTR on grounds other than the exercise of discretion,[80] noncitizens should explore the option of appealing the decision to the federal circuit court.

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[79] *Kucana v. Holder*, 558 U.S. 233 (2010); *Dada v. Mukasey*, 554 U.S. 1 (2008).
[80] In the majority of circuits, even the denial of a *sua sponte* MTR can be appealed to the federal court, as long as the denial was based on a legal or constitutional error. *See Thompson v. Barr*, 959 F.3d 476 (1st Cir. 2020); *Mahmood v. Holder*, 570 F.3d 466 (2d Cir. 2009); *Pllumi v. Attorney General of the United States*, 642 F.3d 155 (3d Cir. 2011); *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349 (5th Cir. 2018); *Fuller v. Whitaker*, 914 F.3d 514 (7th Cir. 2019); *Rubalcaba v. Garland*, 998 F.3d 1031 (9th Cir. 2021); *Salgado-Toribio v. Holder*, 713 F.3d 1267 (10th Cir. 2013). But at least three circuits have found that the federal courts do not have jurisdiction to review the BIA's denial of a *sua sponte* MTR, even where it committed legal error. *See Rais v. Holder*, 768 F.3d 453 (6th Cir. 2014); *Chong Toua Vue v. Barr*, 953 F.3d 1054 (8th Cir. 2020); *Butka v. U.S. Att'y Gen.*, 827 F.3d 1278 (11th Cir. 2016).