NINTH CIRCUIT RULES ON DUE DILIGENCE STANDARD FOR EQUITABLE TOLLING FOR MOTIONS TO REOPEN

By Maddie Boyd[1]

I. Key

The Ninth Circuit issued a decision in *Eskilian v. Bondi*, 172 F.4th 682 (9th Cir. 2026) on April 2, 2026. This case can guide advocates on demonstrating due diligence for equitable tolling for an otherwise time- or number-barred Motion to Reopen (MTR). This analysis could be particularly helpful for clients from countries that previously did not accept individuals deported from the U.S., such as Laos, Cambodia, and Vietnam, as well as those from former Soviet countries.[2]

The Ninth Circuit determined that for "stateless" noncitizens "it is reasonable to expect that an individual will begin to take action to challenge removability only once that individual learns that they can be removed to a country and thus are no longer 'stateless.'" *Eskilian*, 172 F.4th at 688. Where possible, advocates should seek post-conviction relief (PCR) and file an MTR as soon as possible upon learning that a noncitizen is at risk of imminent removal. Advocates can rely on *Eskilian* when arguing that the due diligence requirement for equitable tolling has been met. Moreover, advocates should argue in the alternative that an MTR should be granted *sua sponte* due to exceptional circumstances.

II. Legal Framework

Generally, a noncitizen can only file one MTR, and that the one MTR must be filed within 90 days of the original final removal order.[3] The MTR is filed either with the immigration judge (IJ) or Board of Immigration Appeals (BIA), depending on which issued the final removal order. However, the noncitizen may argue that otherwise time-barred or number-barred MTR should be accepted based on a theory of equitable tolling the deadline and/or the numerical limit. The IJ or BIA may grant an MTR based on equitable tolling where the noncitizen demonstrates that there was "some extraordinary circumstance" that prevented them from filing on time, and they

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[1] Many thanks to Riley Harmon for her thoughtful contributions.

[2] In an unpublished decision, the Ninth Circuit expanded the reasoning in *Eskalian* to individuals who are citizens of countries that did not have a repatriation agreement with the United States. *Luong v. Blanche*, No. 25-3651, 2026 WL 1652950, at *1 (9th Cir. June 8, 2026). The Fourth Circuit in an unpublished decision found the opposite, "the lack of a repatriation agreement between two countries confers no legal right for citizens of one country to remain in another." *Tho Duc Huynh v. Blanche*, No. 25-1619, 2026 WL 1662162, at *4 (4th Cir. June 9, 2026).

[3] INA § 239a(c)(7)(A) and (C)(i).

acted with “due diligence” in pursuing their rights. *Eskilian* at 687. What is required is “a showing of reasonable diligence, not ‘maximum feasible diligence’” and due diligence is measured “‘from the date’ on which “a reasonable person in the petitioner’s position is put on notice that something was wrong.” *Bent v. Garland*, 115 F.4th 934, 942-43 (9th Cir. 2024). When evaluating equitable tolling, the court “‘consider[s] the petitioner’s overall level of care and caution in light of his or her particular circumstances,’” and . . . the court is “‘guided by decisions made in other similar cases . . . with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.’” *Id.* at 943.

A case may also be reopened *sua sponte* by the IJ or BIA, meaning the IJ or BIA may reopen a case on their own motion with no time or numerical limits.[4] The IJ or BIA may exercise *sua sponte* authority to reopen proceedings in exceptional circumstances. *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999).

III. Facts and Procedural History

Petitioner Susie Eskilian was born in Soviet Armenia and came to the United States in 1978. In 2010, Ms. Eskilian was convicted of grand theft under Cal. Penal Code § 487 and served 16 months in prison. *Eskilian*, 172 F.4th at 685 (9th Cir. 2026). In 2011, she was placed in removal proceedings and ordered removed based on her 2010 conviction. However, in 2011, Armenia was not accepting people born in Soviet Armenia, meaning her removal could not be effectuated and she was stateless. She was subsequently released from Immigration and Customs Enforcement (ICE) custody on an order of supervision (OSUP), which required annual check-ins with ICE.

In June 2018, at her ICE check-in, she was informed that Armenia was now accepting people born in Soviet Armenia and that she would be removed imminently. After learning this, she retained an attorney who filed a Cal. Pen Code § 1473.7 motion to vacate her 2010 grand theft conviction. In May 2019, the conviction was vacated.

Following the vacatur, Ms. Eskilian filed her first MTR in July 2019. This MTR was denied by the IJ because it did not include an equitable tolling argument explaining the gap between when the 1473.7 statute took effect in 2017 and the date she filed her MTR. Rather than appealing, Ms. Eskilian filed a second MTR in August 2019, alleging ineffective assistance of counsel (IAC) in her first MTR. She argued that she was prejudiced because the attorney who filed her first MTR failed to address the “key factor” of due diligence and that she did not have to follow the *Matter of Lozada* procedural requirements for claiming IAC because it was plain on the face of the record.[5]

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[4] 8 CFR §§ 1003.2(a), 1003.23(b)(1).

[5] The BIA in *Matter of Lozada* set forth the requirements for a motion to reopen for ineffective assistance of counsel: (1) the respondent must file an affidavit attesting to the relevant facts. The affidavit should include a statement of the agreement between the respondent and the attorney with respect to the representation; (2) before filing the motion, the respondent must inform prior counsel of the allegations and give counsel the opportunity to respond. Any response from prior counsel must be included with the MTR; (3) the motion should reflect whether a complaint has been filed with the appropriate disciplinary authorities, and if not, why not. 19 I&N Dec. 637 (BIA 1988)

In September 2019, the IJ denied Ms. Eskilian's second MTR, incorporating its August 2019 decision and stating that the second MTR was number-barred. Ms. Eskilian appealed to the BIA, which dismissed the appeal, finding that the motion was number-barred and not subject to equitable tolling because she did not attempt to comply with the *Lozada* requirements. The BIA rejected her argument that IAC was clear on the record and further found that she did not show she suffered prejudice or due diligence, where two years passed between the effective date of 1473.7 and the date she filed for PCR. She then appealed to the Ninth Circuit.

IV. Holding

The Ninth Circuit analyzed the issue of how being "stateless" affects the analysis of due diligence. The court defined a "stateless" person as someone who does not have a country to which they could be removed, like Ms. Eskilian. The Ninth Circuit found that "it is unreasonable to expect a 'stateless' individual to take affirmative steps to challenge removability when they do not face an immediate threat of removability." The Department of Homeland Security (DHS) had argued that Ms. Eskilian should have reached out yearly to an attorney to explore options to vacate her criminal conviction. However, the Ninth Circuit found that doing so would have been "far beyond" the expectations of reasonable due diligence, particularly taking into consideration the cost of retaining an attorney annually for this purpose.

Instead, for stateless people "it is reasonable to expect that an individual will begin to take action to challenge removability only once that individual learns that they can be removed to a country and thus are no longer 'stateless.'"

In Ms. Eskilian's case, she acted with due diligence and was entitled to equitable tolling of her second motion to reopen. *Id.* at 689. She was put on notice that her removal was possible in June 2018 at her check-in with ICE. Before that check-in, there was no indication in either her OSUP or work authorization from ICE that she could be imminently removed. *Id.* at 688. Instead, quickly after learning she could be removed in 2018, she retained a lawyer, vacated her conviction, and filed a motion to reopen her removal proceedings over the course of a little over a year.

In this situation, the Ninth Circuit ruled that the BIA abused its discretion in finding that she lacked due diligence because she waited two years to file the motion for post-conviction relief after California enacted Penal Code § 1473.7 in 2017. The BIA also erred in finding she did not suffer prejudice due to ineffective assistance of counsel. *Id.* at 689. The Ninth Circuit found that if not for her counsel's failure, she could have argued "due diligence because while considered 'stateless' and on a work permit approved by immigration services, Eskilian was not subject to removal and only needed to take prompt action after being put on notice in June 2018 that she was no longer 'stateless.'" *Id.* The Ninth Circuit vacated the BIA decision and remanded the case for proceedings consistent with its opinion. *Id.* at 689.[6]

In an unpublished decision, *Luong v. Blanche*, the Ninth Circuit expanded the reasoning in *Eskilian* to individuals who are citizens of countries that did not have a repatriation agreement

[6] Note that the court found that it could resolve the case based on diligence and did not need to address the BIA's analysis of the *Lozada* requirements when IAC is plain on the record. *Eskilian*, at 12-13 n. 2

with the United States at the time the individual was ordered removed.[7] Moreover, that case appears to require individualized notice, where the court noted "it is unclear whether the agency has ever given Luong notice that he could be removed immediately under the November 2020 repatriation agreement." *Id*. at *1. However, the Fourth Circuit, in an unpublished decision, declined to expand the reasoning in *Eskilian* to citizens of countries without repatriation agreements with the U.S.: [T]he lack of a repatriation agreement between two countries confers no legal right for citizens of one country to remain in another."[8] Practitioners are reporting that the immigration courts are reopening cases based on equitable tolling for clients from Laos and Vietnam.

Note also that Cambodian nationals who have final orders of removal may be *Chhoeun* class members.[9] Group 1 class members in that case include all Cambodian nationals who as of April 27, 2026, have final orders of removal and who were previously released from immigration detention. DHS is required to mail a one-time informational notice to all members of the Group 1 class.[10] DHS may argue that due diligence should be measured from the time that a *Chhoeun* class member receives this Group 1 notice (or before), so counsel should seek PCR and file an MTR as soon as possible following receipt of the notice, or even beforehand if you can. However, in individual cases, practitioners may be able to argue that due diligence should not be measured from the receipt of a *Chhoeun* notice where the circumstances of the case indicate that DHS is still unable to remove the person, for example in cases where there are no travel documents.[11]

The Ninth Circuit did not limit the basis for the due diligence standard to MTRs following vacatur of a conviction. Rather, the Court held that it is reasonable for someone to "take action to challenge removability" once they learn they are subject to imminent removal, leaving open other possible bases for equitably tolled MTRs.

V. Conclusion

Eskilian is particularly helpful for people who have sought PCR after being on an OSUP for an extended period of time. For people in this position, where the MTR 90-day filing deadline is long past, or an additional MTR needs to be filed, arguing that *Eskilian* can result in an interpretation of the due diligence standard for equitable tolling that reflects changes in ICE removal policies. This is particularly true for people who have been subjected to increased targeting and removal by the Trump administration or who are faced with the threat of third country removal.

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[7] *Luong v. Blanche*, No. 25-3651, 2026 WL 1652950, (9th Cir. June 8, 2026).
[8] *Tho Duc Huynh v. Blanche*, No. 25-1619, 2026 WL 1662162 at *4 (4th Cir. June 9, 2026).
[9] *See Chhoeun v. Giles*, No. 8:17-cv-01898-JWH (GJSx) (C.D. Cal. Mar. 20, 2026).
[10] Until DHS has sent out all the Group 1 notices, a subset of individuals are required to be provided 14 days' notice before DHS can detain them. This separate notice is required for individuals who have complied with OSUP requirements and have no new criminal convictions. For more information on the *Chhoeun* settlement, *see* https://www.asianlawcaucus.org/news-resources/guides-reports/cambodia-settlement-chhoeun-class-action and https://www.asianlawcaucus.org/news-resources/guides-reports/resources-for-cambodians-with-final-removal-orders.
[11] Note that the notice itself includes the text "The fact that you are receiving this informational notice does not mean that ICE has immediate plans to detain or deport you."

Argue that your client was not previously faced with imminent removal. If you have a client who could be considered “stateless” under *Eskilian*, argue that it was not reasonable for them to look for avenues to challenge their removal until they were put on notice that their removal could be effectuated imminently. If necessary, argue for the broadest possible application of this rule, for example, that your client did not have notice until ICE produced a valid travel document.

Argue that your client should be given specific, individualized notice from ICE regarding the risk of imminent removal. The court in *Luong v. Blanche* appeared to endorse a requirement of individualized notice by the agency. Argue that this notice should be required.

If your client is a *Chhoeun* class member, seek post-conviction relief as soon as possible, even before you receive Group 1 notice. In case DHS argues that due diligence should be measured from the date of receipt of the Group 1 notice (or before), advocates should seek PCR and file an MTR as soon as possible, even before an individual receives a Group 1 notice whenever possible. If you are not able to seek PCR and file an MTR until well after the Group 1 notice, argue that other factors, such as lack of a travel document, countervailed the Group 1 notice.

Where possible, seek post-conviction relief and file the MTR as soon as possible after the grant of PCR. Once your client has received notice of their possible imminent removal, seek PCR and file the MTR as soon as possible to have the strongest arguments for equitable tolling.

Always argue for the IJ or BIA to exercise its *sua sponte* authority to reopen. Include an argument in your MTR that the IJ or BIA should exercise its *sua sponte* authority.

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