MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

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IIRIRA transformed motions to reopen from a regulatory procedure to a statutory form of relief. *Dada v. Mukasey*, 554 U.S. 1, 14 (2008). For individuals in removal proceedings, motions to reopen and to reconsider are governed by 8 U.S.C. § 1229a(c)(7) and (6) (formerly codified at 8 U.S.C. § 1229a(c)(6) and (5)). For deportation cases pending before the April 1, 1997 effective date of IIRIRA, motions to reopen or to reconsider are governed by 8 C.F.R. §§ 1003.2(c) and 1003.23(b) (formerly codified at 8 C.F.R. §§ 3.2 and 3.23).

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND MOTIONS TO RECONSIDER

A. Motion to Reopen

"The motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Cuenca v. Barr*, 956 F.3d 1079, 1082 (9th Cir. 2020) (as amended) (internal quotation marks and citation omitted). *See also Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021); *Kucana v. Holder*, 558 U.S. 233, 242 (2010); *Dada v. Mukasey*, 554 U.S. 1 (2008)); *Chandra v. Holder*, 751 F.3d 1034, 1036 (9th Cir. 2014).

> "[E]very alien ordered removed" also "has a right to file one motion" with the IJ or Board to "reopen his or her removal proceedings." [*Dada v. Mukasey*, 554 U.S. 1, 4–5 (2008)]; *see* § 1229a(c)(7)(A). Subject to exceptions …, that motion to reopen "shall be filed within 90 days" of the final removal order. § 1229a(c)(7)(C)(i). Finally, the BIA's regulations provide that, separate and apart from acting on the alien's motion, the BIA may reopen removal proceedings "on its own motion"—or, in Latin, *sua sponte*—at any time. 8 C.F.R. § 1003.2(a) (2015).

Mata v. Lynch, 576 U.S. 143, 145 (2015). *See also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) (the INA permits a person one motion to reopen and the motion must usually be filed within 90 days of the date of entry of a final administrative order of removal).

"A motion to reopen is a traditional procedural mechanism in immigration law with a basic purpose that has remained constant – to give aliens a means to

provide new information relevant to their cases to the immigration authorities." *Meza-Vallejos v. Holder*, 669 F.3d 920, 924 (9th Cir. 2012) (internal quotation marks and citation omitted) (as amended); *see also Guerrero-Lasprilla*, 140 S. Ct. at 1067 (a motion to reopen is a form of procedural relief that asks the BIA to change its decision in light of newly discovered evidence); *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) ("a motion to reopen may be granted only upon a proffer of new evidence that is material and was not available and could not have been discovered or presented at the former hearing." (quotation marks omitted)); *Oyeniran v. Holder*, 672 F.3d 800, 808 (9th Cir. 2012) (motion to reopen alleges new facts bearing upon agency's earlier decision). A motion to reopen is based on factual grounds, and seeks a fresh determination based on newly discovered facts or a change in the applicant's circumstances since the time of the hearing. *See* 8 U.S.C. § 1229a(c)(7)(B) (removal proceedings); 8 C.F.R. § 1003.2(c); *Oyeniran*, 672 F.3d at 808; *Ali v. Holder*, 637 F.3d 1025, 1031–32 (9th Cir. 2011); *Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005) (providing history of motions to reopen), *abrogated on other grounds by Dada v. Mukasey*, 554 U.S. 1, 19–21 (2008).

Whereas "[a] motion to *reconsider* seeks to correct alleged errors of fact or law," a "motion to *reopen* … is purely fact-based, seeking to present newly discovered facts or changed circumstances since a petitioner's hearing." *Doissaint v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008). Accordingly, "when the BIA commits legal error in a petitioner's direct appeal, the BIA cannot cure that error in a denial of the petitioner's motion to reopen." *Id*. at 1170–71 (the BIA, which erroneously deemed CAT claim abandoned on direct appeal, could not cure error on motion to reopen, because "the legal basis for the IJ's denial of Petitioner's CAT claim – the IJ's adverse credibility finding – was not before the BIA on Petitioner's motion to reopen").

A petitioner's assertion of new legal arguments does not constitute new "facts" warranting reopening. *Membreno v. Gonzales*, 425 F.3d 1227, 1229–30 (9th Cir. 2005) (en banc).

"[A] standard motion to reopen—need only state the new facts that will be proven at the hearing and supporting evidentiary material." *Etemadi v. Garland*, 12 F.4th 1013, 1027 (9th Cir. 2021). However, "a motion to reopen proceedings *for the purpose of submitting an application for relief* must meet the additional requirement of attaching 'the appropriate application for relief.'" *Id.* (quoting 8 C.F.R. § 1003.2(c)(1)).

A motion to reopen for the purpose of submitting a new application for relief must be accompanied by the appropriate application for relief and all supporting documentation. *See* 8 C.F.R. § 1003.2(c)(1).

> A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing.

8 C.F.R. § 1003.2.

"Aliens who seek to remand or reopen proceedings to pursue relief bear a 'heavy burden' of proving that, if proceedings were reopened, the new evidence would likely change the result in the case." *Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008). "[A] prima facie case for relief is sufficient to justify reopening, … and a prima facie case is established when 'the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied." *See Tadevosyan v. Holder*, 743 F.3d 1250, 1254–55 (9th Cir. 2014) ("'A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation.' But the BIA does 'not require[ ] a conclusive showing that, assuming the facts alleged to be true, eligibility for relief has been established.'" (internal citations omitted)).

"[W]hen a petitioner seeks to reopen proceedings as to the original claim, nothing in § 1003.2(c)(1) requires the petitioner to attach a new application for relief instead of his initial (relevant) application for relief." *Aliyev v. Barr*, 971 F.3d 1085, 1087 (9th Cir. 2020) (holding that the BIA abused its discretion in denying petitioner's motion to reopen on the ground that he failed to attach the "appropriate application for relief" where he did not attach a new asylum application, but did however, attach his prior asylum application – the one he sought to reopen). *See also Etemadi v. Garland*, 12 F.4th 1013, 1027 (9th Cir. 2021) (concluding that Etemadi satisfied the requirement of the regulation, where

he submitted a standard motion to reopen that need only state the new facts that will be proven at the hearing and supporting evidentiary material).

Motions to reopen are also the appropriate avenue to raise ineffective assistance of counsel claims. *See Iturribarria*, 321 F.3d at 897; *see also Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) ("Indeed, as a practical matter, a motion to reopen is the only avenue ordinarily available to pursue ineffective assistance of counsel claims." (quoting *Iturribarria*, 321 F.3d at 896)).

B. Motion to Reconsider

A motion to reconsider is based on legal grounds, and seeks a new determination based on alleged errors of fact or law. *See* 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b)(1); *see also Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (a motion to reconsider addresses whether an IJ made errors of law or fact); *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004). A motion to reconsider must be accompanied by a statement of reasons and supported by pertinent authority. *See* 8 U.S.C. § 1229a(c)(6)(C); 8 C.F.R. § 1003.2(b)(1); *see also Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003). "A motion to reconsider a final order of removal generally must be filed within thirty days of the date of entry of the order." *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (citing 8 U.S.C. § 1229a(c)(6)(B)).

The BIA's grant of a motion to reconsider does not divest the court of jurisdiction. *See Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745–46 (9th Cir. 2008) (explaining that although the grant of a motion to reopen vacates the final order of deportation, a motion to reconsider is fundamentally different than a motion to reopen, and does not divest the court of appeals of jurisdiction), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); *see also Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012) (explaining that the grant of the motion to reconsider did not divest court of jurisdiction over the petition of review of initial order where the analysis and results reached after reconsideration were substantially the same; but further explaining that the precedential decision issued upon granting the motion to reconsider effectively superseded the initial opinion, and thus the petition for review of the initial decision was moot).

The procedures for both motions for reconsideration and motions to reopen are the same. *See Bartolome v. Sessions*, 904 F.3d 803, 815 (9th Cir. 2018).

C. Motion to Remand

A motion to remand removal proceedings from the BIA to the IJ is similar to a motion to reopen and should be drafted in conformity with the regulations pertinent to motions to reopen. *Angov v. Lynch*, 788 F.3d 893, 897 (9th Cir. 2015) (holding BIA did not abuse its discretion in denying motion to remand where petitioner did not provide any evidence supporting the motion nor explain why he believed a regulation had been violated). A motion to reopen or reconsider filed while an immigration judge's deportation or removal decision is before the BIA on direct appeal will be treated as a motion to remand the proceedings to the immigration judge. *See* 8 C.F.R. § 1003.2(b)(1) and (c)(4); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097 (9th Cir. 2005); *Rodriguez v. INS*, 841 F.2d 865, 867 (9th Cir. 1987). "The formal requirements of the motion to reopen and those of the motion to remand are for all practical purposes the same." *Rodriguez*, 841 F.2d at 867. *Cf. Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (per curiam) (motion to remand filed while appeal of IJ's denial of previous motion to reopen was pending was properly treated as a second motion to reopen).

"A party asserting that the [BIA] cannot properly resolve an appeal without further factfinding must file a motion for remand." 8 C.F.R. § 1003.1(d)(3)(iv); *see also Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1119 (9th Cir. 2019).

See also Taggar v. Holder, 736 F.3d 886, 889–90 (9th Cir. 2013) (concluding denial of motion to remand was not an abuse of discretion); *Movsisian*, 395 F.3d at 1097–98 (holding that the BIA must articulate its reasons for denying a motion to remand); *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) (holding that the BIA must address and rule on substantive remand motions).

D. Motion to Reissue

A motion to reissue the agency decision is treated as a motion to reopen. *See Coyt v. Holder*, 593 F.3d 902, 904 & n.1 (9th Cir. 2010) (government equated motion to reissue with a motion to reopen); *Chen v. U.S. Atty. Gen.*, 502 F.3d 73, 75 (2d Cir. 2007) ("A motion to reissue is treated as a motion to reopen." (citing *Tobeth-Tangang v. Gonzales*, 440 F.3d 537, 539 n.2 (1st Cir. 2006))). *See also Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010) (the BIA construed the petitioner's motion to reopen and reinstate as a motion to reissue, and this court referred to the motion as a "motion to reopen/reissue," reviewing for abuse of discretion); *Singh v. Gonzales*, 494 F.3d 1170, 1172 (9th Cir. 2007)

(petitioner "filed a motion to reopen with the BIA requesting that it reissue its decision so [he] could timely appeal to this court).

E. Improperly Styled Motions

Where a petitioner improperly titles a motion to reopen or to reconsider, the BIA should construe the motion based on its underlying purpose. *See Mohammed v. Gonzales*, 400 F.3d 785, 792–93 (9th Cir. 2005) (noting that the BIA properly construed "motion to reconsider" based on ineffective assistance of counsel as a motion to reopen, and that petitioner's subsequent "motion to reopen" should have been construed as a motion to reconsider the BIA's previous decision). For example, in *Hernandez-Velasquez v. Holder*, 611 F.3d 10733, 1075–77 (9th Cir. 2010), the BIA construed the petitioner's motion to reopen and reinstate as a motion to reissue, where she claimed she never received notice of the BIA's final decision and was requesting that the decision be reissued so that she could timely pursue her legal alternatives.

"Appeals asserting ineffective assistance claims, like improperly captioned motions asserting such claims, are effectively motions to reopen." *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (where petitioner improperly used an appeal to the BIA as vehicle to allege ineffective assistance of counsel, instead of a motion to reopen is which is as a practical matter "the only avenue ordinarily available to pursue ineffective assistance of counsel claims," the appeal was effectively a motion to reopen).

II. JURISDICTION

> As [the Supreme Court] held in *Kucana v. Holder*, circuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding. *See* [558 U.S. at 242]. The INA, in combination with a statute cross-referenced there, gives the courts of appeals jurisdiction to review "final order[s] of removal." 8 U.S.C. § 1252(a)(1); 28 U.S.C. § 2342. That jurisdiction, as the INA expressly contemplates, encompasses review of decisions refusing to reopen or reconsider such orders. *See* 8 U.S.C. § 1252(b)(6) ("[A]ny review sought of a motion to reopen or reconsider [a removal order] shall be consolidated with the review of the [underlying] order"). Indeed, as [the Court] explained in *Kucana*, courts have reviewed those decisions for nearly a hundred years; and even as Congress

> curtailed other aspects of courts' jurisdiction over BIA rulings, it left that authority in place. *See* 558 U.S., at 242–251, [].
>
> Nothing changes when the Board denies a motion to reopen because it is untimely—nor when, in doing so, the Board rejects a request for equitable tolling. Under the INA, as under our century-old practice, the reason for the BIA's denial makes no difference to the jurisdictional issue. Whether the BIA rejects the alien's motion to reopen because it comes too late or because it falls short in some other respect, the courts have jurisdiction to review that decision.

Mata v. Lynch, 576 U.S. 143, 147–48 (2015). *See also Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) (reviewing the denial of a motion to reconsider); *Oyeniran v. Holder*, 672 F.3d 800, 805 (9th Cir. 2012) (The denial of a motion to reopen is a final administrative decision generally subject to judicial review in the court of appeals.); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (permanent rules); *Sarmadi v. INS*, 121 F.3d 1319, 1322 (9th Cir. 1997) (concluding "that other recent changes to the INA did not alter our traditional understanding that the denial of a motion to reconsider or to reopen generally does fall within our jurisdiction over final orders of deportation"); *see also* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order").

Jurisdiction over motions to reopen may be limited where the underlying request for relief is discretionary.

> Section 1252(a)(2)(B)(i) permits the exercise of jurisdiction in cases in which the BIA rules that a motion to reopen fails to satisfy procedural standards such as the evidentiary requirements specified in 8 C.F.R. § 1003.2(c)(1), but bars jurisdiction where the question presented is essentially the same discretionary issue originally decided.
>
> …
>
> [Thus, i]f … the BIA determines that a motion to reopen proceedings in which there has already been an unreviewable discretionary determination concerning a statutory prerequisite to relief does not make out a prima facie case for that relief, § 1252(a)(2)(B)(i)

> precludes our visiting the merits, just as it would if the BIA had affirmed the IJ on direct appeal.

Fernandez v. Gonzales, 439 F.3d 592, 600–01 (9th Cir. 2006). *See also Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) (order) (concluding that denial of motion to reconsider was outside of court's jurisdiction because it could not "reconsider the discretionary, fact-based determination that petitioners failed to demonstrate the requisite hardship" and also that the court lacked jurisdiction over the motion to reopen to seek prosecutorial discretion based on the recent order of President Obama, citing 8 U.S.C. § 1252(g)).

However, "[w]here the relief sought is formally the same as was previously denied but the evidence submitted with a motion to reopen is directed at a different basis for providing the same relief, the circumstances can take the matter out of the realm of § 1252(a)(2)(B)(i)." *Fernandez*, 439 F.3d at 601. For example, the court would have jurisdiction to review the denial of a motion to reopen seeking consideration of non-cumulative evidence showing hardship for cancellation eligibility, such as a newly-discovered life-threatening medical condition afflicting a qualifying relative. *Id.* at 601–02. *See also Garcia v. Holder*, 621 F.3d 906, 910–12 (9th Cir. 2010) (discussing *Fernandez* and concluding that the court had jurisdiction where the motion to reopen presented hardship evidence regarding a medical condition that was new and distinct from the evidence presented at petitioners' hearing, which focused on the educational, cultural, and economic challenges that the daughters would face in Mexico).

The court also has jurisdiction to review motions to reopen seeking consideration of new requests for discretionary forms of relief. *See de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004) (holding that court retained jurisdiction to review denial of motion to reopen to apply for adjustment of status); *see also Medina-Morales v. Ashcroft*, 371 F.3d 520, 527 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(i) did not preclude review of the denial of a motion to reopen to re-apply for adjustment of status where the agency had not previously made a discretionary decision on the adjustment application); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169–70 (9th Cir. 2003) (holding that § 1252(a)(2)(B)(i) did not bar review of the denial of a motion to reopen to apply for adjustment of status); *Arrozal v. INS*, 159 F.3d 429, 431–32 (9th Cir. 1998) (holding that § 309(c)(4)(E) of the transitional rules did not bar review of the denial of petitioner's motion to reopen to apply for suspension of deportation).

Likewise, the court has jurisdiction to review the denial of motions to reopen in which an independent claim of ineffective assistance of counsel is at issue. *Fernandez*, 439 F.3d at 602. This is true even where the ineffectiveness and prejudice evaluations require an indirect weighing of discretionary factors. *See id.*; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002) (holding that court retained jurisdiction to review denial of motion to reopen arguing ineffective assistance of counsel in a suspension of deportation case).

The court generally lacks jurisdiction to review the BIA's decision not to invoke its *sua sponte* authority to reopen proceedings under 8 C.F.R. § 1003.2(a). *See Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1115 (9th Cir. 2019); *Singh v. Holder*, 771 F.3d 647, 650 (9th Cir. 2014); *Go v. Holder*, 744 F.3d 604, 609–10 (9th Cir. 2014) (the court lacks jurisdiction to review the BIA's decision not to invoke its *sua sponte* authority to reopen proceedings); *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009); *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008); *Ekimian v. INS*, 303 F.3d 1153, 1159–60 (9th Cir. 2002). However,

> [the] court has jurisdiction to review Board decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error. If, upon exercise of its jurisdiction, this court concludes that the Board relied on an incorrect legal premise, it should "remand to the BIA so it may exercise its authority against the correct 'legal background.' " *Pllumi*, 642 F.3d at 160 (quoting *Mahmood*, 570 F.3d at 469). Once it does so, this court will have no jurisdiction to review the *sua sponte* decision, as *Ekimian* instructs.

Bonilla v. Lynch, 840 F.3d 575, 588 (9th Cir. 2016) (as amended); *see also Lona v. Barr*, 958 F.3d 1225, 1227 (9th Cir. 2020) (stating *Bonilla* remains settled law in the Ninth Circuit); *Menendez-Gonzalez*, 929 F.3d at 1115; *Singh*, 771 F.3d at 650 (where the BIA "concludes that it lacks the *authority* to reopen, rather than denying a motion to reopen as an exercise of discretion … *Ekimian* does not preclude [the court's] jurisdiction.").

Although 8 C.F.R. § 1003.1(c) "grants the BIA authority to accept a procedurally improper appeal by certification," the court lacks jurisdiction to review the BIA's decision of whether to certify a claim under 8 C.F.R. § 1003.1(c) because such decision is committed to agency discretion. *See Idrees v. Barr*, 923 F.3d 539, 542–43 & n.3 (9th Cir. 2019) (dismissing challenge to the agency's discretionary decision not to certify petitioner's ineffective assistance of counsel

claim, where petitioner challenged only the BIA's exercise of discretion, and asserted no constitutional or legal error).

In cases involving noncitizens who are removable for having committed certain crimes, the Supreme Court has held that the courts of appeals have jurisdiction to consider the noncitizen's claims of due diligence for the purpose equitably tolling the deadline for filing a motion to reopen, when the underlying facts are not in dispute. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068–73 (2020).

The BIA's decision that a petitioner withdrew his appeal is "the logical and functional equivalent" of an order denying a motion to reopen or reconsider a final order of removal, which the court has jurisdiction to review. *Lopez-Angel v. Barr*, 952 F.3d 1045, 1047 (9th Cir. 2020) (as amended).

Cross-reference: Jurisdiction over Immigration Petitions, Jurisdiction over Motions to Reopen.

A. Finality of the Underlying Order

The filing of a motion to reopen does not disturb the finality of the underlying deportation or removal order. *See Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995). However, if the BIA grants a motion to reopen, "there is no longer a final decision to review," and the petition should be dismissed for lack of jurisdiction. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (order); *Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008) (order) (vacating prior opinion where unbeknownst to the court "the BIA *sua sponte* reopened the underlying proceeding, vacated its order of removal, and remanded the matter to the [IJ]" thereby stripping the court of jurisdiction); *Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (order) (advising parties to notify the court when the BIA grants a motion to reopen while a petition for review is pending); *cf. Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745–46 (9th Cir. 2008) (explaining that although the grant of a motion to reopen vacates the final order of deportation, a motion to reconsider is fundamentally different than a motion to reopen, and does not divest the court of appeals of jurisdiction), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc). Where the court is the only tribunal addressing a noncitizen's removability and there is a final removal order, even if the BIA granted a motion for reconsideration on some aspect of the proceedings, the court retains jurisdiction. *See Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010) (explaining the court "lack[s]

jurisdiction over a petition for review when the BIA reopens an alien's removal proceedings[,]" and concluding that although the BIA granted a motion for reconsideration, because the BIA affirmed its earlier decision, there remained a final order of removal which the court had jurisdiction to review).

This court may review the denial of a motion to reopen even if a motion to reconsider is pending before the BIA. *See Singh v. INS*, 213 F.3d 1050, 1052 n.2 (9th Cir. 2000).

B. Filing Motion to Reopen or Reconsider Not a Jurisdictional Prerequisite to Filing a Petition for Review

The filing of a motion to reopen or reconsider with the BIA is not a jurisdictional prerequisite to filing a petition for review with the court of appeals. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1023–24 (9th Cir. 1992); *see also Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (motions to reopen and reconsider are not remedies available as of right and not required for exhaustion).

C. No Tolling of the Time Period to File Petition for Review

The time period for filing a petition for review with the court of appeals is not tolled by the filing of a motion to reopen. *See Stone v. INS*, 514 U.S. 386, 405–06 (1995); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996).

D. No Automatic Stay of Deportation or Removal

The filing of a motion to reopen or reconsider does not automatically result in a stay of deportation or removal. *See* 8 C.F.R. § 1003.2(f); *Baria v. Reno*, 180 F.3d 1111, 1113 (9th Cir. 1999). *See also Dada v. Mukasey*, 554 U.S. 1, 18–19 (2008) (explaining there is no statutory authority for the automatic tolling of the voluntary departure period during the pendency of a motion to reopen).

1. Exception for In Absentia Removal or Deportation

The filing of a motion to reopen an *in absentia* order of deportation or removal stays deportation. *See* 8 C.F.R. § 1003.23(b)(4)(ii); 8 C.F.R. § 1003.2(f).

E. Consolidation

Judicial review of a motion to reopen or reconsider must be consolidated with the review of the final order of removal. *See* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.").

F. Departure from the United States

"Section 1003.23(b)(1) allows the IJ to reopen a case on his or her own motion—what is known as *sua sponte* reopening—or pursuant to a motion to reopen filed by either party." *Rubalcaba v. Garland*, 998 F.3d 1031, 1034 (9th Cir. 2021) (citing 8 C.F.R. § 1003.23(b)(1)). 8 C.F.R. § 1003.23(b)(1) provides in part: "A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States." 8 C.F.R. § 1003.23. "This provision, which the agency has interpreted to prevent a noncitizen who has departed the United States from reopening his or her removal proceedings, is known as the 'departure bar.' *Rubalcaba*, 998 F.3d at 1034 (quoting *Toor v. Lynch*, 789 F.3d 1055, 1057 (9th Cir. 2015)).

> In *Toor*, we held that an IJ or the BIA cannot apply the departure bar in cases where a noncitizen has filed a timely motion to reopen within ninety days of a final order of removal—regardless of when or how the noncitizen departed the United States. *Id.* That is because the immigration statute permits a noncitizen to file one motion to reopen proceedings within ninety days of a final order of removal without any limitation based on a noncitizen's presence in, or departure from, the United States. *Id.* at 1060; *see* 8 U.S.C. § 1229a(c)(7). In *Toor*, we explained that the BIA's interpretation of the departure bar was impermissible with respect to timely motions to reopen because it conflicted with the "clear and unambiguous" command of the statute. 789 F.3d at 1060–61, 1064; *see* 8 U.S.C. § 1229a(c)(7). As we noted, every other circuit to consider the question has agreed that the departure bar is invalid in the context of a single, timely motion to reopen. 789 F.3d at 1057 n.1 (collecting cases).

Rubalcaba, 998 F.3d at 1037 (explaining the court's holding in *Toor v. Lynch*).

Because *Toor* concerned regular and timely motions for reopening, it left open the question of "whether the departure bar limits an IJ's *sua sponte* reopening authority." *Rubalcaba*, 998 F.3d at 1037. That question was addressed in *Rubalcaba*. In *Rubalcaba*, the court held that the departure bar does not apply to bar an immigration judge's exercise of discretion to *sua sponte* reopen removal proceedings. 998 F.3d 1031, 1040–41 (9th Cir. 2021) (concluding "that the plain, unambiguous language of the regulation makes clear that the departure bar does not apply in the context of *sua sponte* reopening).

Note that "[a]s of January 15, 2021, the text of subsection (b)(1) has been amended by regulation." *Rubalcaba*, 998 F.3d at 1036 n.5 (citing 85 Fed. Reg. 81,588, 81,655 (Dec. 16, 2020)). The amended "regulation purports to limit the instances in which an IJ may exercise *sua sponte* reopening authority[.]" *Id.* (acknowledging that although, the amendment may affect Rubalcaba's case on remand, the court must evaluate the regulation as it existed and was applied at the time of the BIA's decision).

Where a petitioner has filed a motion to reopen, and then is involuntarily removed before the BIA has ruled on the motion, the BIA cannot deem the motion to reopen withdrawn. *See Coyt v. Holder*, 593 F.3d 902, 906–07 (9th Cir. 2010) (holding that 8 C.F.R. § 1003.2 was invalid as applied to a forcibly removed petitioner). Likewise, in addressing the withdrawal sanction in 8 C.F.R. § 1003.4, the court has held that "an alien does not withdraw his appeal of a final removal order, including the appeal of the denial of a motion to reopen or reconsider, simply because he was involuntarily removed before the appeal was decided. Rather, … § 1003.4 provides for withdrawal only when the petitioner engaged in conduct that establishes a waiver of the right to appeal." *Lopez-Angel v. Barr*, 952 F.3d 1045, 1049 (9th Cir. 2020) (as amended) (addressing the withdrawal sanction in 8 C.F.R. § 1003.4).

Additionally, physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 1076–77 (9th Cir. 2011). *See also Toor*, 789 F.3d at 1063 (explaining that in both *Coyt* and *Reyes-Torres*, the court held that IIRIRA invalidated the regulatory departure bar as applied to involuntary departures).

A motion to reopen may be made on the basis that the departure was not legally executed. *See Wiedersperg v. INS*, 896 F.2d 1179, 1181–82 (9th Cir. 1990) (holding that petitioner was entitled to reopen his deportation proceedings where his state conviction, which was the sole ground of deportation, was vacated);

Estrada-Rosales v. INS, 645 F.2d 819, 820–21 (9th Cir. 1981); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977). The court's holdings in *Wiedersperg* and *Estrada-Rosales* are not limited to cases in which a vacated state court conviction was the sole ground of deportability; rather, reopening is permitted where the conviction was a "key part" of the deportation or removal proceeding. *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) (holding that BIA was not precluded from ruling on motion to reopen).

Additionally, a noncitizen who departs the United States after the completion of immigration proceedings and then re-enters the United States may file a motion to reopen with an immigration judge, *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (concluding that 8 C.F.R. § 1003.23(b)(1) did not preclude jurisdiction in such circumstances), or with the BIA, *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007) (per curiam) (concluding that 8 C.F.R. § 1003.2(d) did not preclude jurisdiction in such circumstances).

Removal of a noncitizen from the United States does not divest the court of jurisdiction over his petition for review. *See Saavedra-Figueroa v. Holder*, 625 F.3d 621, 623 n.1 (9th Cir. 2010).

If a noncitizen who is removed pursuant to a removal order unlawfully reenters the United States, and the removal order is reinstated pursuant to 8 U.S.C. § 1231(a)(5), the noncitizen is barred from reopening the prior removal proceedings under § 1229a(c)(7). *See Cuenca v. Barr*, 956 F.3d 1079, 1082 (9th Cir. 2020) (as amended). Although, "an individual placed in reinstatement proceedings under § 1231(a)(5) cannot as a general rule challenge the validity of the prior removal order in the reinstatement proceeding itself[,]" the noncitizen retains "the right, conferred by § 1229a(b)(5)(C)(ii), to seek rescission of a removal order entered *in absentia*, based on lack of notice, by filing a motion to reopen 'at any time.'" *Miller v. Sessions*, 889 F.3d 998, 1002–03 (9th Cir. 2018).

Cross-reference: Jurisdiction over Immigration Petitions in the Ninth Circuit, Departure from the United States, Review of Motions to Reopen.

III. STANDARD OF REVIEW

A. Generally

The court reviews denials of motions to reopen, remand or reconsider for abuse of discretion. *See Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002);

see also B.R. v. Garland, 26 F.4th 827 (9th Cir. 2022) (reviewing the denial of a motion to reconsider for abuse of discretion); *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) (reviewing BIA decision to deny equitable tolling of a motion to reopen for abuse of discretion); *Aliyev v. Barr*, 971 F.3d 1085, 1085–86, 1087 (9th Cir. 2020) (holding the BIA abused its discretion by denying petitioner's motion to reopen); *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) (the denial of a motion to reconsider a final order of removal is generally reviewed for an abuse of discretion, and reversed when the denial is "arbitrary, irrational, or contrary to law"); *Aguilar Fermin v. Barr*, 958 F.3d 887, 892 (9th Cir. 2020) ("A denial of a motion to reopen is reviewed for abuse of discretion."), *cert. denied sub nom. Fermin v. Barr*, 141 S. Ct. 664 (2020); *Martinez v. Barr*, 941 F.3d 907, 921–22 (9th Cir. 2019) (holding the BIA "abused its discretion in failing to reopen proceedings that had a facially apparent due process violation and vacate the removal order that was unsupported by substantial evidence"); *Bartolome v. Sessions*, 904 F.3d 803, 815 (9th Cir. 2018) ("The IJ's failure to recognize that he had at least *sua sponte* jurisdiction to reopen proceedings was an abuse of discretion."); *Agonafer v. Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017) (motion to reopen); *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (motion to reopen and reconsider); *Salim v. Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016) (agency abused its discretion denying motion to reopen; petition for review granted); *Yang v. Lynch*, 822 F.3d 504, 509 (9th Cir. 2016) ("Because the BIA may not make credibility determinations on a motion to reopen, the BIA's decision to discredit Yang's affidavit based on application of the *falsus* maxim was contrary to law, and therefore an abuse of discretion."); *Garcia v. Lynch*, 786 F.3d 789, 792 (9th Cir. 2015) (motion to reconsider); *Velasquez-Escovar v. Holder*, 768 F.3d 1000 (9th Cir. 2014) (agency abused its discretion in denying motion to reopen); *Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014) (reviewing denial of motion to reopen for abuse of discretion, explaining that the BIA's decision may only be reversed if "arbitrary, irrational, or contrary to law"); *Tadevosyan v. Holder*, 743 F.3d 1250, 1252–53 (9th Cir. 2014) (explaining BIA abuses its discretion when it acts arbitrarily, irrationally, or contrary to the law and when it fails to provide a reasoned explanation for its actions, and granting the petition for review); *Taggar v. Holder*, 736 F.3d 886, 889–90 (9th Cir. 2013) (reviewing denial of motion to remand for abuse of discretion); *Zhao v. Holder*, 728 F.3d 1144, 1147 (9th Cir. 2013) (motion to reopen); *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010) (motion to reopen/reissue); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 895 (9th Cir. 2008) (motion to reconsider); *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1023 (9th Cir. 2007) (motion to remand); *see also Kucana v. Holder*, 558 U.S. 233, 242 (2010) ("Mindful of the Board's 'broad discretion' in

such matters, however, courts have employed a deferential, abuse-of-discretion standard of review.").

The abuse of discretion standard applies regardless of the underlying relief requested. *See INS v. Doherty*, 502 U.S. 314, 323 (1992). "'Motions for reopening of immigration proceedings are disfavored,' and as such, 'the Attorney General has broad discretion to grant or deny such motions.'" *Cui v. Garland*, 13 F.4th 991, 995 (9th Cir. 2021) (quoting *Doherty*, 502 U.S. at 323); *see also INS v. Abudu*, 485 U.S. 94, 107, 110 (1988) (noting, among other things, "the tenor of the Attorney General's regulations, which plainly disfavor motions to reopen"); *Chandra v. Holder*, 751 F.3d 1034 (9th Cir. 2014) ("Motions to reopen, however, are generally disfavored because every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." (internal quotation marks and citation omitted)); *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010) (same); *Lin v. Holder*, 588 F.3d 981, 984 (9th Cir. 2009) (motions to reopen are discretionary and disfavored).

This court will reverse the denial of a motion to reopen if it is "arbitrary, irrational, or contrary to law." *Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir. 2002) (internal quotation marks omitted); *see also Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021) ("The BIA abuses its discretion when its decision is arbitrary, irrational or contrary to law."); *Cui*, 13 F.4th at 995–96 ("The BIA only abuses its discretion when the decision is arbitrary, irrational or contrary to law." (internal quotation marks and citation omitted)); *Sanchez Rosales v. Barr*, 980 F.3d 716, 719 (9th Cir. 2020) ("The BIA abuses its discretion when it makes an error of law or fails to provide a reasoned explanation for its actions."); *Lona*, 958 F.3d at 1229; *Aguilar Fermin*, 958 F.3d at 892; *Agonafer*, 859 F.3d at 1203; *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008).

The BIA can deny a motion to reopen on any one of at least three independent grounds, for example, "failure to establish a prima facie case for the relief sought, failure to introduce previously unavailable, material evidence, and a determination that even if these requirements were satisfied, the movant would not be entitled to the discretionary grant of relief which he sought." *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010) (internal quotation marks and citation omitted).

The BIA's determination of purely legal questions is reviewed de novo. *See Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021) (reviewing legal questions de novo); *Etemadi v. Garland*, 12 F.4th 1013, 1018 (9th Cir. 2021)

(recognizing that a denial of a motion to reopen immigration proceedings is generally reviewed for abuse of discretion, but a de novo standard applies where the issue presented is a purely legal question); *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) (reviewing de novo the BIA's interpretation of the departure bar, which is a purely legal question of regulatory interpretation); *Martinez v. Barr*, 941 F.3d 907, 921 (9th Cir. 2019) (reviewing de novo legal questions, including claims of due process violations, as well as the sufficiency of a notice to appear); *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (de novo review applies to the BIA's determination of purely legal questions); *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041 (9th Cir. 2008) ("A denial of a motion to reopen immigration proceedings is generally reviewed for abuse of discretion; however, where … the issue presented is a 'purely legal question,' a *de novo* standard applies."); *Morales Apolinar*, 514 F.3d at 895; *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000); *see also Minasyan v. Mukasey*, 553 F.3d 1224, 1227 (9th Cir. 2009) (BIA's interpretation of the one-year period for filing an asylum application); *Sotelo v. Gonzales*, 430 F.3d 968, 970 (9th Cir. 2005). Factual findings are reviewed for substantial evidence. *See Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996).

Cross-reference: Jurisdiction over Immigration Petitions, Standards of Review; Ninth Circuit Standards of Review Outline.

B. Full Consideration of All Factors

The BIA must show proper consideration of all factors, both favorable and unfavorable. *See Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021); *Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014); *Zhao v. Holder*, 728 F.3d 1144, 1149 (9th Cir. 2013); *Ali v. Holder*, 637 F.3d 1025, 1031–32 (9th Cir. 2011) (remanding where BIA failed to consider all factors); *Garcia v. Holder*, 621 F.3d 906, 913 (9th Cir. 2010) (remanding to BIA where the BIA failed entirely to address petitioner's supplemental brief and the evidence attached to it; although BIA had discretion whether to consider the evidence, it was legal error for the BIA to fail entirely to exercise its discretion); *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (holding that the BIA abused its discretion in denying motion to reopen based solely on failure to post voluntary departure bond without consideration of favorable factors); *Bhasin v. Gonzales*, 423 F.3d 977, 986–87 (9th Cir. 2005) (holding that the BIA abused its discretion by improperly discrediting petitioner's affidavit as "self-serving" and failing to properly consider the factors relevant to eligibility for relief); *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) (holding that BIA abused its discretion by denying motion to reopen in

an incomplete and nonsensical opinion, and in failing to consider all attached evidence); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of BIA's unexplained failure to address petitioner's ineffective assistance of counsel claim); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097–99 (9th Cir. 2005) (remanding where BIA failed to articulate its reasons for denying motion to reopen).

The BIA has a duty to weigh all relevant evidence when there is a factual dispute about whether a document has been mailed by the BIA to a petitioner and, whether a document has been mailed by petitioner to the BIA. *See Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1078–79 (9th Cir. 2010) (granting petition because BIA failed to weigh the evidence petitioner submitted in support of her claim that she mailed a Change of Address form to the BIA and evidence that petitioner did not receive notice of BIA's decision).

"'The agency abuses its discretion if it fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief.'" *Etemadi v. Garland*, 12 F.4th 1013, 1029 (9th Cir. 2021) (citations omitted) ("The BIA abused its discretion in its conclusory analysis that the evidence Etemadi submitted with his motion to reopen failed to show changed country conditions in Iran.").

"The BIA abuses its discretion when it denies petitioner's claim with no indication that it considered all of the evidence and claims presented by the petition." *Avagyan v. Holder*, 646 F.3d 672, 678 (9th Cir. 2011) (remanding where it was unclear whether BIA considered specific claim raised by petitioner).

Although the BIA must consider all evidence, it need not expressly refute on the record every single piece of evidence presented. *Lin v. Holder*, 588 F.3d 981, 987–88 (9th Cir. 2009) (where BIA did not specifically address some of the evidence submitted, it did not abuse its discretion in denying the motion to reopen); *see also Agonafer v. Sessions*, 859 F.3d 1198, 1206 (9th Cir. 2017) (recognizing that the BIA does not have to write an exegesis on every contention).

In *Agonafer*, the court held that "[b]ecause the BIA failed to consider the issues raised by the new reports in a manner showing that it 'heard and thought and not merely reacted' to Agonafer's motion to reopen, … , it 'abused its discretion in dismissing the new evidence as demonstrating a mere continuance of the previous circumstances.' … Accordingly, the BIA's denial of Agonafer's motion to reopen was arbitrary, irrational, or contrary to law." *Id*. at 1207 (citations omitted).

1. Later-Acquired Equities

It is unclear whether equities acquired after a final order of deportation or removal must be given less weight than those acquired before the applicant was found to be deportable. *Compare Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995) ("The government rightly points out that equities flowing from [petitioner's] marriage should be given little weight because it took place … three months after the BIA's summary dismissal/final deportation order."), *with Vasquez v. INS*, 767 F.2d 598, 602 (9th Cir. 1985) (affirming denial of motion to reopen because petitioner's intra-proceedings marriage did not outweigh his violations of immigration law), *with Israel v. INS*, 785 F.2d 738, 741 (9th Cir. 1986) (concluding that the BIA's denial of a motion to reopen to adjust status based on a "last-minute marriage" was arbitrary). *See also Malhi v. INS*, 336 F.3d 989, 994 (9th Cir. 2003) (discussing regulatory presumption of fraud for intra-proceedings marriages and requirements of bona fide marriage exemption).

In *Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014), the court held that the "BIA committed legal error insofar as it determined that [petitioner's] post-removal conversion to Christianity rendered him ineligible to file an untimely motion under the changed conditions exception." The court explained that 8 C.F.R. § 1003.2(c)(3)(ii) does not prohibit "a motion to reopen based on evidence of changed country conditions that are relevant in light of the petitioner's changed circumstances." *Id*. at 1037.

C. Explanation of Reasons

"We have long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (granting petition where BIA summarily denied motion to reopen and remand without explanation). "[W]here the BIA entertains a motion to reopen in the first instance, and then fails to provide specific and cogent reasons for its decision, we are left without a reasoned decision to review." *Id.* (rejecting government's contention that BIA's summary denial of a motion to reopen and remand was consistent with its streamlining procedures). "While the BIA 'does not have to write an exegesis on every contention,' it is required to 'consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.'" *Agonafer v. Sessions*, 859 F.3d 1198, 1206 (9th Cir. 2017) (citation omitted).

See also *Etemadi v. Garland*, 12 F.4th 1013, 1029 (9th Cir. 2021) (concluding that although the BIA made a passing reference to the country-conditions reports submitted, the BIA failed to state its reasons and show proper consideration of all factors when weighing equities and denying relief); *Avagyan v. Holder*, 646 F.3d 672, 681–82 (9th Cir. 2011) (remanding were it was unclear whether BIA considered specific claim raised by petitioner); *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006); *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) ("[T]he BIA must issue a decision that fully explains the reasons for denying a motion to reopen."); *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) (holding that "the BIA must address and rule upon remand motions, giving specific, cogent reasons for a grant or denial"); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998) ("[T]he BIA must indicate how it weighed [the favorable and unfavorable] factors and indicate with specificity that it heard and considered petitioner's claims.").

D. Irrelevant Factors

The BIA may not rely on irrelevant factors. *See, e.g.*, *Virk v. INS*, 295 F.3d 1055, 1060–61 (9th Cir. 2002) (holding that BIA improperly considered the impact of an unrelated section of the INA and petitioner's wife's pre-naturalization misconduct); *Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) (holding that BIA improperly relied on misconduct of petitioner's father).

E. Credibility Determinations

The BIA should not make credibility determinations on motions to reopen. *See Silva v. Garland*, 993 F.3d 705, 718 (9th Cir. 2021) ("The BIA may not make credibility determinations on motions to reopen … and must accept as true the facts asserted by the [movant], unless they are 'inherently unbelievable[.]" (citations omitted)); *Yang v. Lynch*, 822 F.3d 504, 509 (9th Cir. 2016) ("[T]he BIA may not make adverse credibility determinations (including adverse credibility determinations based on the *falsus* maxim) in denying a motion to reopen."); *Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) ("As motions to reopen are decided without a factual hearing, the Board is unable to make credibility determinations at this stage of the proceedings."). Facts presented in supporting affidavits must be accepted as true unless inherently unbelievable. *See Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (stating that the "self-serving nature of a declaration in support of a motion to reopen is not an appropriate basis for discrediting its content"); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *see also Ordonez v. INS*,

345 F.3d 777, 786 (9th Cir. 2003) ("The BIA violates an alien's due process rights when it makes a *sua sponte* adverse credibility determination without giving the alien an opportunity to explain alleged inconsistencies."); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897 (9th Cir. 2003) (holding that where BIA cites no evidence to support a finding that petitioner's version of the facts is incredible, and none is apparent from the court's review of the record, petitioner's allegations will be credited), *amended by* 339 F.3d 1012 (9th Cir. 2003) (order). "[T]he BIA may not apply the *falsus* maxim to deny a motion to reopen." *Yang*, 822 F.3d at 509 (explaining that the maxim is discretionary rather than mandatory, and that it is in tension with the BIA's limited and deferential role in reviewing an IJ's credibility determination).

IV. REQUIREMENTS FOR A MOTION TO REOPEN

The BIA can deny a motion to reopen on any one of at least three independent grounds, such as "failure to establish a prima facie case for the relief sought, failure to introduce previously unavailable, material evidence, and a determination that even if these requirements were satisfied, the movant would not be entitled to the discretionary grant of relief which he sought." *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010) (internal quotation marks and citation omitted).

A. Supporting Documentation

A motion to reopen must be supported by affidavits, the new evidentiary material sought to be introduced, and, if necessary, a completed application for relief. *See* 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1); *see also INS v. Wang*, 450 U.S. 139, 143 (1981) (per curiam) (upholding BIA's denial of motion to reopen to apply for suspension of deportation because "the allegations of hardship were in the main conclusory and unsupported by affidavit"); *Agonafer v. Sessions*, 859 F.3d 1198, 1204 (9th Cir. 2017) ("A motion to reopen 'shall be supported by affidavits or other evidentiary material.' 8 C.F.R. § 1003.2(c)(1)."); *Patel v. INS*, 741 F.2d 1134, 1137 (9th Cir. 1984) ("[I]n the context of a motion to reopen, the BIA is not required to consider allegations unsupported by affidavits or other evidentiary material."). "Although the statute and regulation refer to 'affidavits,' [the court has] treated affidavits and declarations interchangeably for purposes of motions to reopen." *Malty v. Ashcroft*, 381 F.3d 942, 947 n.2 (9th Cir. 2004).

1. Exception

The petitioner's failure to submit supporting documentation does not bar reopening where the government either joins in the motion to reopen, or does not affirmatively oppose it. *See Konstantinova v. INS*, 195 F.3d 528, 530–31 (9th Cir. 1999) (where government did not oppose petitioner's motion to remand, BIA abused its discretion by denying the motion on basis that petitioner failed to include completed application for relief); *see also Guzman v. INS*, 318 F.3d 911, 914 n.3 (9th Cir. 2003) (per curiam).

The supporting documentation need not be submitted concurrently with the motion so long as it is submitted within the 90-day time limitation on motions to reopen. *Yeghiazaryan v. Gonzales*, 439 F.3d 994, 998–99 (9th Cir. 2006) (holding that BIA abused its discretion and violated due process in dismissing motion before expiration of the limitation period based on petitioner's failure to file supporting brief).

B. Previously Unavailable Evidence

The moving party must show that the previously unavailable material evidence could not have been discovered or presented at the former hearing. *See INS v. Doherty*, 502 U.S. 314, 324 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding based on lack of new material evidence); *Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) (granting petition for review where petitioner offered a legitimate and plausible explanation as to why evidence was new); *Goel v. Gonzales*, 490 F.3d 735, 738 (9th Cir. 2007) (holding that results of a polygraph examination administered after the former hearing before the IJ concerning events that took place prior to the hearing cannot serve as a basis for reopening); *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (explaining that the statute and 8 C.F.R. § 1003.2(c)(1) require that the evidence must not have been available to be presented at the former hearing before the IJ); *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen because "new" information was available and capable of discovery prior to deportation hearing); *Bolshakov v. INS*, 133 F.3d 1279, 1282 (9th Cir. 1998) (finding no evidence of new circumstances to support asylum application); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (holding that BIA erred in affirming the IJ's decision granting the government's motion to reopen based on a foreign birth certificate that could have been discovered and presented at prior hearing).

"It is not sufficient that the evidence physically existed in the world at large; rather, the evidence must have been reasonably available to the petitioner." *Oyeniran*, 672 F.3d at 808 (granting petition for review where new evidence was "significant, dramatic, and compelling").

C. Explanation for Failure to Apply for Discretionary Relief

If the motion to reopen is made for the purpose of obtaining discretionary relief, the moving party must establish that he or she was denied the opportunity to apply for such relief, or that such relief was not available at the time of the original hearing. *See INS v. Doherty*, 502 U.S. 314, 324, 327 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen because the applicant failed to satisfactorily explain his previous withdrawal of his asylum and withholding application); *INS v. Abudu*, 485 U.S. 94, 111 (1988) (affirming BIA's denial of motion to reopen to apply for asylum where applicant failed to explain why the asylum application was not submitted earlier); *Lainez-Ortiz v. INS*, 96 F.3d 393, 396 (9th Cir. 1996).

D. Prima Facie Eligibility for Relief

The applicant must also show prima facie eligibility for the underlying substantive relief requested. *See INS v. Wang*, 450 U.S. 139, 145 (1981) (per curiam); *see also Tzompantzi-Salazar v. Garland*, No. 20-71514, 2022 WL 1196787, at *7 (9th Cir. April 22, 2022) (holding the agency reasonably denied his motion to reopen because petitioner failed to establish a prima facie case for the relief sought); *Silva v. Garland*, 993 F.3d 705, 718–19 (9th Cir. 2021); *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1228 (9th Cir. 2016) ("A motion to reopen will not be granted unless the respondent establishes a prima facie case of eligibility for the underlying relief sought."); *Lopez-Vasquez v. Holder*, 706 F.3d 1072, 1080 (9th Cir. 2013) ("BIA entitled to deny a motion to reopen where applicant fails to demonstrate prima facie eligibility for the underlying relief."); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868–69 (9th Cir. 2003) (concluding that request to reinstate asylum application is analogous to motion to reopen); *Dielmann v. INS*, 34 F.3d 851, 853 (9th Cir. 1994); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *Aviles-Torres v. INS*, 790 F.2d 1433, 1435–36 (9th Cir. 1986).

A prima facie case is established "'where the evidence reveals a reasonable likelihood the statutory requirements for relief have been satisfied.'" *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1171 (9th Cir. 2006) (quoting *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003)); *see also Silva*, 993 F.3d at 718 ("To

establish a prima facie case, the movant must adduce evidence that, along with the facts already in the record, 'will support the desired finding if evidence to the contrary is disregarded.'"); *Ramirez-Munoz*, 816 F.3d at 1228 ("Prima facie eligibility for asylum relief is met when an alien demonstrates he is unwilling or unable to return to his country of origin 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'"); *Tadevosyan v. Holder*, 743 F.3d 1250, 1255 (9th Cir. 2014) (concluding the BIA abused its discretion in denying the motion to reopen and explaining that the BIA does not require a conclusive showing that relief has been established, but rather that the BIA is willing to reopen where the new facts alleged, when coupled with the facts already of record show that it would be worthwhile to develop issues further at a plenary injunction hearing on reopening); *Lopez-Vasquez*, 706 F.3d at 1080 (petitioner failed to establish reasonable likelihood that he was eligible for adjustment of status). *Cf. Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008) ("Aliens who seek to remand or reopen proceedings to pursue relief bear a 'heavy burden' of proving that, if proceedings were reopened, the new evidence would likely change the result in the case.").

E. Discretionary Denial

Where ultimate relief is discretionary, such as asylum, the BIA may leap over the threshold concerns, and determine that the moving party would not be entitled to the discretionary grant of relief. *See, e.g.*, *INS v. Abudu*, 485 U.S. 94, 105–06 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997); *Vasquez v. INS*, 767 F.2d 598, 600 (9th Cir. 1985); *see also* 8 C.F.R. § 1003.2(a) ("The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.").

However, "the BIA must consider and weigh the favorable and unfavorable factors in determining whether to deny a motion to reopen proceedings on discretionary grounds." *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where BIA did not consider any of the factors weighing in petitioner's favor); *see also Franco-Rosendo v. Gonzales*, 454 F.3d 965, 968 (9th Cir. 2006); *Arrozal v. INS*, 159 F.3d 429, 433–34 (9th Cir. 1998).

F. Failure to Depart Voluntarily

There is no statutory authority to automatically toll the voluntary departure period while a petitioner's motion to reopen is pending. *See Dada v. Mukasey*, 554 U.S. 1 (2008) (holding that to safeguard the right to pursue a motion to reopen, voluntary departure recipients should be permitted an opportunity to withdraw a motion for voluntary departure, provided the request is made prior to the departure period expiring). "Following *Dada*, the Executive Office of Immigration Review … issued a rule … provid[ing] that '[t]he filing of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure, and accordingly does not toll, stay, or extend the period allowed for voluntary departure.'" *Meza-Vallejos v. Holder*, 669 F.3d 920 (9th Cir. 2012) (quoting 8 C.F.R. § 1240.26(e)(1)). The regulation only applies prospectively. *Meza-Vallejos*, 669 F.3d at 924 n.4. "Whether, and how, *Dada* applies retroactively remains an open question" *Id.*

In *Nevarez Nevarez v. Holder*, 572 F.3d 605, 609–10 (9th Cir. 2009), the court granted the petition for review and remanded to the BIA so that it could decide in the first instance whether *Dada* applied retroactively. On remand, the BIA concluded that, since the petitioners "were unaware that they had a unilateral right to withdraw their request for voluntary departure," the BIA would "deem the filing of their motion to reopen, followed by their election to remain to pursue that motion, as an expression of their desire to exercise their unilateral right to withdraw their request for voluntary departure." *Meza-Vallejos*, 669 F.3d at 924 n.4.

Prior to *Dada*, this court had held that for permanent rules cases, the filing of a timely motion to reopen or reconsider automatically tolled the voluntary departure period, regardless of whether the motion was accompanied by a motion to stay the voluntary departure period. *Barroso v. Gonzales*, 429 F.3d 1195, 1204–05, 1207 (9th Cir. 2005); *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005) (rejecting the court's prior analysis in *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998), and holding that petitioner's voluntary departure period is tolled while the BIA considers a timely-filed motion to reopen accompanied by a motion to stay removal), *abrogated by Dada v. Mukasey*, 554 U.S. 1, 19–21 (2008); *cf. Medina-Morales v. Ashcroft*, 371 F.3d 520, 529–31 & n.9 (9th Cir. 2004) (holding, in permanent rules case, that where a petitioner bargains for voluntary departure in lieu of full adjudication under 8 U.S.C. § 1229c(a)(1), the BIA may weigh petitioner's voluntary departure agreement against the grant of a motion to reopen).

If the petitioner files a motion to reopen after the expiration of the voluntary departure period, the BIA must deny the motion to reopen based on petitioner's failure to depart. *See Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015 (9th Cir. 2008) (per curiam) (holding that because motion to reopen was filed after expiration of voluntary departure period, BIA was compelled to deny the motion); *de Martinez v. Ashcroft*, 374 F.3d 759, 763–64 (9th Cir. 2004) (denying petition for review in permanent rules case where petitioner moved to reopen to apply for adjustment of status 30 days after the expiration of her voluntary departure period); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1174 (9th Cir. 2003). Note that where the voluntary departure period expires on a weekend, and a motion to reopen is filed on the following Monday, the motion may be timely. *See Meza-Vallejos*, 669 F.3d at 927 (where voluntary departure period expired on weekend, and motion to reopen was filed on following Monday, court determined that motion was timely filed).

Under the transitional rules, the BIA may deny a motion to reopen to apply for relief where the petitioners failed to depart during the voluntary departure period. *See Shaar v. INS*, 141 F.3d 953, 959 (9th Cir. 1998) (pre-IIRIRA); *cf. Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (holding in transitional rules case that BIA erred in denying motion to reopen to apply for suspension of deportation where IJ failed to give adequate oral warning under the former statute of the consequences of failing to depart voluntarily).

The BIA may not deny reopening as a matter of discretion based solely on the failure to post a voluntary departure bond or to depart voluntarily without also considering the favorable factors in support of reopening. *See Franco-Rosendo v. Gonzales*, 454 F.3d 965, 968 (9th Cir. 2006) (remanding for consideration of positive factors in favor of reopening where BIA denied reopening based solely on petitioner's failure to post a voluntary departure bond and/or depart voluntarily).

Note that where voluntary departure was granted on or after January 20, 2009, the filing of a motion to reopen or reconsider, or the filing of a petition for review before the court of appeals will terminate voluntary departure. *See* 8 C.F.R. § 1240.26(e)(1); *Matter of Velasco*, 25 I. & N. Dec. 143 (BIA 2009); *see also Garfias-Rodriguez v. Holder*, 702 F.3d 504, 524–25 (9th Cir. 2012) (en banc) ("[B]ecause the filing of a petition now automatically terminates a petitioner's grant of voluntary departure, we conclude that, assuming that 8 C.F.R. § 1240.26(i) is valid, we have no authority to issue an equitable stay of Garfias's voluntary departure period."); *Meza-Vallejos*, 669 F.3d at 924 n.4.

Cross-reference: Cancellation of Removal, Ten-Year Bars to Cancellation, Failure to Depart.

G. Appeal of Deportation Order

"The BIA cannot deny a motion to reopen merely because an alien appeals a deportation order." *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531 n.10 (9th Cir. 2004) (citing *Watkins v. INS*, 63 F.3d 844, 851 (9th Cir. 1995)).

H. Fugitive Disentitlement Doctrine

Individuals who disregard the order of deportation against them by refusing to report on their appointed date of departure may have their motion to reopen denied as a matter of discretion. *See Antonio-Martinez v. INS*, 317 F.3d 1089, 1091 (9th Cir. 2003) (applying the fugitive disentitlement doctrine where petitioner had lost contact with his attorney and the agency and all efforts to contact him failed for over two years); *cf. Bhasin v. Gonzales*, 423 F.3d 977, 988–89 (9th Cir. 2005) (declining to uphold BIA's reliance on fugitive disentitlement doctrine in denying petitioner's motion to reopen because petitioner failed to receive critical agency documents).

"[T]he critical question the court must ask when deciding whether to apply the fugitive disentitlement doctrine is whether the appellant is a fugitive at the time the appeal is pending." *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009). "[F]or disentitlement to be appropriate, there must be some connection between a defendant's fugitive status and the appellate process." *Id.* (internal quotation marks omitted).

"Two justifications frequently advanced in support of dismissal on a fugitive disentitlement theory are: (1) the pragmatic concern with ensuring that the court's judgment will be enforceable against the appellant; and (2) the equitable notion that a person who flouts the authority of the court waives his entitlement to have his appeal considered." *Id.* at 804.

V. TIME AND NUMERICAL LIMITATIONS

A. Generally

1. Time Limitations

"8 U.S.C. § 1229a(c)(7)(C)(i) requires that a motion to reopen be filed within 90 days of a final order of removal. 8 U.S.C. § 1101(a)(47)(B) mandates that an order of removal becomes final upon the earlier of: (i) a BIA determination affirming the order; or (ii) the expiration of the deadline to seek the BIA's review of the order." *Ocampo v. Holder*, 629 F.3d 923, 927–28 (9th Cir. 2010); *see also Mata v. Lynch*, 576 U.S. 143, 145 (2015) ("Subject to exceptions …, [a] motion to reopen 'shall be filed within 90 days' of the final removal order."); *Nababan v. Garland*, 18 F.4th 1090, 1095 (9th Cir. 2021) ("Generally, a party wishing to file a motion to reopen must do so within ninety days."); *Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021) ("An alien may generally file one motion to reopen within ninety days of a final administrative order of removal."); *Go v. Holder*, 744 F.3d 604, 607 (9th Cir. 2014) (motion to reopen must be filed no later than 90 days after the final decision in the proceeding sought to be reopened; holding that 8 C.F.R. § 1003.2(c) applies to CAT claims); *Vega v. Holder*, 611 F.3d 1168, 1170–71 (9th Cir. 2010) (BIA reasonably interpreted 8 U.S.C. § 1229a(c)(7)(C)(i) as requiring the motion to reopen to have been filed within 90 days of the merits decision, rather than from a denial of the motion to reconsider); *Lin v. Holder*, 588 F.3d 981, 985 (9th Cir. 2009) (explaining that while a motion to reopen must be filed within 90 days of the entry of the final order of removal, there is no time limit for motions to reopen for asylum applications based on changed country conditions).

A motion to reconsider must be filed within thirty days after the date of entry of the final administrative decision. *See* 8 U.S.C. § 1229a(c)(6)(B); 8 C.F.R. § 1003.2(b)(2). *See also Goulart v. Garland*, 18 F.4th 653, 654 (9th Cir. 2021); *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) ("A motion to reconsider a final order of removal generally must be filed within thirty days of the date of entry of the order.").

The limitation period begins to run when the agency sends its decision to the correct address. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1258–59 (9th Cir. 1996); *see also Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1078–79 (9th Cir. 2010) (granting petition because BIA failed to weigh the evidence petitioner submitted in support of her claim that she mailed a Change of Address form to the BIA and evidence that petitioner did not receive notice of BIA's decision); *Singh v.*

Gonzales, 494 F.3d 1170, 1172 (9th Cir. 2007) (explaining that although the limitation period begins to run when the decision is sent to the correct address, the presumption of mailing may be rebutted by affidavits of nonreceipt, but declining to decide whether the presumption was rebutted and remanding for the BIA to consider the issue in the first instance).

A removal order granting voluntary departure becomes final for purposes of a motion to reopen upon the BIA's affirmance of the order, not upon the noncitizen's overstay of the voluntary departure period. *Ocampo*, 629 F.3d at 925–28. If the petitioner files a motion to reopen after the expiration of the voluntary departure period, the BIA must deny the motion to reopen based on petitioner's failure to depart. *See Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015 (9th Cir. 2008) (per curiam) (holding that because motion to reopen was filed after expiration of voluntary departure period, BIA was compelled to deny the motion); *de Martinez v. Ashcroft*, 374 F.3d 759, 763–64 (9th Cir. 2004) (denying petition for review in permanent rules case where petitioner moved to reopen to apply for adjustment of status 30 days after the expiration of her voluntary departure period); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1174 (9th Cir. 2003).

Where the voluntary departure period expires on a weekend, and a motion to reopen is filed on the following Monday, the motion may be timely. *See Meza-Vallejos v. Holder*, 669 F.3d 920, 927 (9th Cir. 2012) (where voluntary departure period expired on weekend, and motion to reopen was filed on following Monday, court determined that motion was timely filed).

"[T]he pendency of a petition for review of an order of removal does not toll the statutory time limit for the filing of a motion to reopen with the BIA." *Dela Cruz v. Mukasey*, 532 F.3d 946, 949 (9th Cir. 2008) (per curiam) (relying on *Stone v. INS*, 514 U.S. 386, 405–06 (1995) for proposition that "a removal order is final when issued" regardless of subsequent motion to reconsider) (internal quotation marks omitted).

Where a noncitizen is ordered deported, but is granted deferral under the CAT, the order constitutes an order of deportation, and the 90-day time period for filing a motion to reopen begins to run when the order becomes final. *See Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041–42 (9th Cir. 2008).

With respect to deadlines specified in regulations, "the general rules concerning adequacy of notice through publication in the Federal Register apply in the immigration context." *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir.

2008) (publication of CAT regulations in Federal Register provided adequate notice of June 21, 1999 deadline to file motion to reopen based on CAT claim of applicant subject to pre-March 22, 1999 removal order).

The court can "review the merits of a citizenship claim by way of a petition for review from the denial of a motion to reopen, even where the motion was 'untimely' and denied 'as procedurally improper.'" *Anderson v. Holder*, 673 F.3d 1089, 1096 n.6 (9th Cir. 2012).

2. Numerical Limitations

A party may make one motion to reopen and one motion to reconsider. *See* 8 U.S.C. § 1229a(c)(7)(A) and (c)(6)(A); 8 C.F.R. § 1003.2(c)(2) and (b)(2); *see also Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021) ("An alien may generally file one motion to reopen within ninety days of a final administrative order of removal."); *Agonafer v. Sessions*, 859 F.3d 1198, 1203 (9th Cir. 2017) (same); *Shin v. Mukasey*, 547 F.3d 1019, 1025 (9th Cir. 2008) ("[A]liens are entitled to file only one motion to reopen."). The single-motion limitation on motions to reopen does not apply to motions to reopen and rescind *in absentia* orders of deportation. *See Fajardo v. INS*, 300 F.3d 1018, 1020 (9th Cir. 2002) (noting for *in absentia* cases that the limitation applies only to removal cases under IIRIRA's permanent rules). Where a motion to remand is filed before a final administrative decision, it does not implicate 8 C.F.R. § 1003.2(c)(2). *See Zhao v. Holder*, 728 F.3d 1144, 1147 (9th Cir. 2013) (BIA erred in holding motion to reopen numerically barred when first motion to remand was filed before administrative decision was filed).

Whether "a petition to reopen that is denied for untimeliness and thus is not considered on the merits by the BIA counts as a first petition for purposes of the number-bar rule" is an open question. *See Nevarez Nevarez v. Holder*, 572 F.3d 605, 608 (9th Cir. 2009) (remanding for BIA to consider the question in first instance).

B. Exceptions to the Ninety-Day/One-Motion Rule

1. In Absentia Orders

a. Exceptional Circumstances

"[A] petitioner may challenge an in absentia removal order by filing 'a motion to reopen ... within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional

circumstances.'" *Cui v. Garland*, 13 F.4th 991, 996 (9th Cir. 2021) (quoting 8 U.S.C. § 1229a(b)(5)(C)(i)); *see also Arredondo v. Lynch*, 824 F.3d 801, 805 (9th Cir. 2016).

> "The term 'exceptional circumstances' refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. § 1229a(e)(1). While the enumerated examples are not exclusive, exceptional circumstances must include a "similarly severe impediment." *Singh-Bhathal v. INS*, 170 F.3d 943, 947 (9th Cir. 1999). Additionally, "[t]his court must look to the 'particularized facts presented in each case' in determining whether the petitioner has established exceptional circumstances." *Singh* [*v. INS*, 295 F.3d 1037,] 1040 [(9th Cir. 2002)] (quoting *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000)).

Arredondo, 824 F.3d at 805; *see also Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004); *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) ("This court must look to the particularized facts presented in each case in determining whether the petitioner has established exceptional circumstances." (internal quotation marks omitted)).

The applicant has 180 days to file a motion to reopen based on exceptional circumstances to rescind the *in absentia* order. *See* 8 U.S.C. § 1229a(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(1); *see also Hernandez-Galand v. Garland*, 996 F.3d 1030, 1034 (9th Cir. 2021); *Lo v. Ashcroft*, 341 F.3d 934, 936 (9th Cir. 2003).

Note that "a petitioner who arrives late for his immigration hearing, but while the IJ is still in the courtroom, has not failed to appear for that hearing … and is not required to demonstrate exceptional circumstances in order to reopen proceedings." *Perez v. Mukasey*, 516 F.3d 770, 774 (9th Cir. 2008).

Cross Reference: Equitable Tolling.

(i) Evidentiary Requirements

The BIA may not impose new proof requirements without notice. *See Singh v. INS*, 213 F.3d 1050, 1053–54 (9th Cir. 2000) (holding that BIA violated due

process where it newly required an applicant to produce an affidavit from his employer or doctor, and to contact the immigration court); *cf.* *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (holding that petitioner had notice of BIA's evidentiary requirements).

(ii) Cases Finding Exceptional Circumstances

Hernandez-Galand v. Garland, 996 F.3d 1030, 1037 (9th Cir. 2021) (holding that exceptional circumstances warranted reopening where Ms. Hernandez failed to appear due to memory problems and inability to read, and that imposing the in absentia removal order under these circumstances would lead to an unconscionable result); *Chete Juarez v. Ashcroft*, 376 F.3d 944, 948 (9th Cir. 2004) (holding that petitioner established exceptional circumstances because she appeared at all scheduled hearings but the last, of which she had no actual notice; she had prevailed on appeal before the BIA; and she had no reason to delay or evade the hearing); *Reyes v. Ashcroft*, 358 F.3d 592, 596–97 (9th Cir. 2004) (stating that ineffective assistance of counsel qualifies as an exceptional circumstance, but denying relief because petitioner failed to comply with the procedural prerequisites of *Matter of Lozada*); *Lo v. Ashcroft*, 341 F.3d 934, 939 (9th Cir. 2003) (holding that counsel's secretary's statement that hearing was on wrong day constituted ineffective assistance, which was an exceptional circumstance); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 894–95, 898 (9th Cir. 2003) (counsel's wife's advice to leave and reenter the United States the day before the hearing, in order to prove that petitioner's visa was valid, constituted ineffective assistance of counsel and exceptional circumstances), *amended by* 339 F.3d 1012 (9th Cir. 2003) (order); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (suggesting to BIA on remand that "it [would be] difficult to imagine" how the paralegal's failure to inform the petitioner "of her need to appear at her deportation hearing would not constitute an exceptional circumstance"); *Singh v. INS*, 295 F.3d 1037, 1039–40 (9th Cir. 2002) (holding that petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding, and had "no possible reason to try to delay the hearing" because he was eligible for adjustment of status); *Romani v. INS*, 146 F.3d 737, 739 (9th Cir. 1998) (holding that where applicants were in the courthouse but did not enter the courtroom due to incorrect advice by lawyer's assistant, they did not fail to appear for their hearing, and reopening was warranted). *See also* *Bassene v. Holder*, 737 F.3d 530, 535 (9th Cir. 2013) (as amended) (IJ agreed with noncitizen that he "was exempted from the one year filing period under the "extraordinary circumstances" exception because he filed the N–400 citizenship application less than six months after his J1 visa

expired[;]" the IJ then treated the mistakenly filed N-400 citizenship application as a quasi-asylum application).

(iii) Cases Finding No Exceptional Circumstances

Cui v. Garland, 13 F.4th 991 (9th Cir. 2021) (holding that BIA acted within its discretion in denying motion to reopen because Cui did not articulate exceptional circumstances that caused her to miss her original merits hearing, but instead, requested reopening based on the approval of her husband's I-130 petition); *Arredondo v. Lynch*, 824 F.3d 801, 806 (9th Cir. 2016) ("[A] car's mechanical failure does not alone compel granting a motion to reopen based on 'exceptional circumstances.'"); *Vukmirovic v. Holder*, 640 F.3d 977, 978 (9th Cir. 2011) (noncitizen's failure to know about post-remand removal hearing because he had moved from his previous address without advising his new lawyer or immigration court of his whereabouts did not constitute exceptional circumstances); *Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205–06 (9th Cir. 2003) (per curiam) (holding that applicant who was 4 ½ hours late due to a misunderstanding of the time of the hearing, and made no showing that she arrived while the IJ was still hearing cases, did not establish exceptional circumstances, especially where only possible relief was discretionary grant of voluntary departure); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891–92 (9th Cir. 2002) (severe asthma attack not exceptional); *Singh-Bhathal v. INS*, 170 F.3d 943, 946–47 (9th Cir. 1999) (holding that erroneous advice of immigration consultant not to appear at hearing did not constitute exceptional circumstances); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding that petitioner's failure personally to receive the notice of hearing, which was mailed to his last known address, where receipt was acknowledged, was not an exceptional circumstance); *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) (traffic congestion and parking difficulties not exceptional); *see also Hernandez-Vivas v. INS*, 23 F.3d 1557, 1559–60 (9th Cir. 1994) (holding under the previous standard of reasonable cause that the mere filing of a motion for a change of venue did not excuse the failure to appear).

(iv) Arriving Late While IJ On Bench

See Perez v. Mukasey, 516 F.3d 770, 774 (9th Cir. 2008) (holding that a petitioner does not need to demonstrate exceptional circumstances where he arrives late for his immigration hearing, but while the IJ is still in the courtroom); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999) (concluding that applicant did not fail to appear where he was 20 minutes late and the IJ was still on the bench, and that an *in absentia* order was too "harsh and unrealistic").

b. Improper Notice of Hearing

"An in absentia removal order can be rescinded if a noncitizen 'did not receive notice in accordance with paragraph (1) or (2) of section 1229(a).'" *Singh v. Garland*, 24 F.4th 1315, 1317 (9th Cir. 2022) (quoting 8 U.S.C. § 1229a(b)(5)(c)(ii)).

8 U.S.C. § 1229a(b)(5), authorizes immigration judges to order non-citizens removed from the country *in absentia*—that is, in the person's absence. Such orders may be entered when a non-citizen is directed to appear at a removal hearing but fails to show up, provided the government proves that it gave written notice of the hearing as required by statute and that the non-citizen is in fact removable. § 1229a(b)(5)(A). That rule would lead to obvious unfairness (and potential due process problems) if it were applied to someone who never actually received the required notice. So the statute provides a fail-safe mechanism: If the individual can show that she never received notice of the hearing, she may seek to rescind a removal order entered *in absentia* by filing a motion to reopen "at any time." § 1229a(b)(5)(C)(ii).

Miller v. Sessions, 889 F.3d 998, 999 (9th Cir. 2018). *See also* 8 U.S.C. § 1229a(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2). "Neither the statute nor the BIA's interpretation of the statute – or any court of appeals opinion – limits this 'any time' language by prescribing a cut-off period after an alien learns of the deportation order." *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam) (interpreting pre-IIRIRA notice provision in 8 U.S.C. § 1252b(c)(3)(B) (repealed 1996)). *See also Miller*, 889 F.3d at 1002–03.

A Notice to Appear must be a single document that includes all of the information set forth in 8 U.S.C. § 1229(a)(1), including the time and date of the removal proceedings. *See Singh*, 24 F.4th at 1320 (holding that because the government did not provide Singh with statutorily compliant notice before his removal hearing, Singh's in absentia removal order was subject to recission pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii)). A notice that is not statutorily compliant cannot be cured by subsequent hearing notices. *Singh*, 24 F.4th at 1320.

"[A]liens are entitled to notice unless they fail to give a current address to the government or fail to let the government know when they move." *Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1004 (9th Cir. 2014) (petition for review granted where agency denied motion to reopen removal proceeding in which

petitioner was ordered removed *in absentia*, and petitioner was entitled to notice of her deportation hearing).

Due process requires notice of an immigration hearing that is reasonably calculated to reach the interested parties. *See Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155–56 (9th Cir. 2004); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997). If petitioners do not receive actual or constructive notice of deportation proceedings, "it would be a violation of their rights under the Fifth Amendment of the Constitution to deport them in absentia." *Andia*, 359 F.3d at 1185.

A petitioner "does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." *Farhoud*, 122 F.3d at 796 (holding with respect to former 8 U.S.C. § 1252b(c)(1) that notice was sufficient where mailed to applicant's last address, where receipt was acknowledged); *see also Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002). "Actual notice is, however, sufficient to meet due process requirements." *Khan*, 374 F.3d at 828 (holding that a second notice in English was sufficient to advise petitioner of the pendency of the action when petitioner had appeared in response to an earlier notice in English). *Cf. Sembiring v. Gonzales*, 499 F.3d 981, 988–89 (9th Cir. 2007) (petitioner demonstrated nonreceipt of hearing notice for purpose of rescinding *in absentia* order).

In *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009), the court held that "serving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court." The government must serve all notices to appear and hearing notices on the counsel of record, when an appearance has been filed. *Id*.

"[A]n individual placed in reinstatement proceedings under § 1231(a)(5) cannot as a general rule challenge the validity of the prior removal order in the reinstatement proceeding itself. But she retains the right, conferred by § 1229a(b)(5)(C)(ii), to seek rescission of a removal order entered *in absentia*, based on lack of notice, by filing a motion to reopen 'at any time.'" *Miller v. Sessions*, 889 F.3d 998, 1002–03 (9th Cir. 2018) (holding that 8 U.S.C. § 1231(a)(5), which precludes reopening of a reinstated removal order where the non-citizen leaves the United States while under the order of removal and then reenters illegally, does not bar immigration judges from entertaining a motion to reopen based on lack of notice under § 1229a(b)(5)(C)(ii)).

Cross-reference: Due Process in Immigrations Proceedings; Notice of Hearing.

c. Proper Notice Requirements

(i) Presumption of Proper Notice

The INS will benefit from a presumption of effective delivery if the notice of hearing was properly addressed, had sufficient postage, and was properly deposited in the mails. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003). "A notice which fails to include a proper zip code is not properly addressed." *Id.* "Notice mailed to an address different from the one [the applicant] provided could not have conceivably been reasonably calculated to reach him." *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004).

The Supreme Court held in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), that a Notice to Appear that fails to designate the specific time or place of a noncitizen's removal proceedings is not a notice to appear under § 1229a and does not trigger the stop-time rule for purposes of cancellation of removal. *Id*. at 2113–14.

In *Aguilar Fermin v. Barr*, 958 F.3d 887 (9th Cir. 2020), *cert. denied sub nom. Fermin v. Barr*, 141 S. Ct. 664 (2020), the court held that a notice to appear that did not include the address of the immigration court, or date and time of hearing did not deprive immigration court of jurisdiction. *Id.* at 893–95 (rejecting petitioner's claim that the NTA was insufficient to vest jurisdiction in the immigration court, distinguishing the Supreme Court's decision in *Pereira*, which articulated the requirements for an NTA in regards to the stop-time rule under 8 U.S.C. § 1229b(d)(1)(A), but did not address the requirements for an NTA to vest an immigration court with jurisdiction).

The applicant is responsible for informing the immigration agency of his current address. *See* 8 U.S.C. § 1305(a); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *cf. Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005) (explaining that § 1305(a) applies only so long as the applicant is within the United States and where he or she receives written notice of the address notification requirement); *Lahmidi v. INS*, 149 F.3d 1011, 1017 (9th Cir. 1998) (holding, under the pre-1996 statutory provision, that applicant who was not informed of the change-of-address requirement established reasonable cause for failure to appear at the hearing); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (remanded

for further findings). However, "[o]nce the alien provides an address and phone number, the alien's work is done." *Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1005 (9th Cir. 2014) (holding that petitioner was entitled to notice where government sent notice to an outdated address and petitioner made plausible declaration that she had given immigration officials her current address).

Where an applicant seeks to reopen proceedings on the basis of nondelivery or improper delivery of the notice, the IJ and BIA must consider the evidence submitted by the applicant. *See Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (per curiam).

"[S]erving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court." *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009). The government must serve all notices to appear and hearing notices on the counsel of record, when an appearance has been filed. *Id.*

(ii) Pre-IIRIRA Proceedings

Before passage of IIRIRA, service of Orders to Show Cause and written notice of deportation hearings was governed by INA § 242B, 8 U.S.C. §§ 1252b(a)(1) and (a)(2) (repealed 1996).

(A) OSCs

Service of the Order to Show Cause was required to be given in person to the respondent or, if personal service was not practicable, by certified mail to the respondent or his counsel of record, with the requirement that the certified mail receipt be signed by the respondent or a responsible person at the respondent's address. *Matter of Grijalva*, 21 I. & N. Dec. 27, 32 (BIA 1995) (en banc). The pre-IIRIRA notice provision required that the Order to Show Cause be written in English and Spanish. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 (9th Cir. 2004); 8 U.S.C. § 1252b(a) (repealed 1996).

A presumption of effective service for OSCs sent via certified mail to the noncitizen's address of record does not exist, rather the government must demonstrate by clear, unequivocal, and convincing evidence that petitioner or a responsible person at his address signed the certified mail return receipt for his OSC. *Chaidez v. Gonzales*, 486 F.3d 1079, 1087 (9th Cir. 2007) (concluding that the government did not meet its burden of demonstrating signature on certified

mail receipt was that of a "responsible person" where signer signed for both OSC and hearing notice, but petitioner submitted affidavit stating he did not know signer, that he did not believe she lived at his address at the relevant time and that she did not have authorization to receive service for him).

(B) Hearing Notices

Unlike service of the Order to Show Cause, written notice of the time and place of the deportation hearing sent by certified mail to the respondent at the last address provided to the agency can be sufficient to establish proper service by "clear, unequivocal, and convincing" evidence, regardless of whether there is proof of actual service or receipt of the notice by respondent. *See* 8 U.S.C. § 1252b(c)(1) (repealed) (stating that written notice shall be considered sufficient if provided at the most recent address provided by respondent); *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (per curiam); *see also Matter of Grijalva*, 21 I. & N. Dec. 27, 33–34 (BIA 1995) (en banc).

Adopting the BIA's standard in *Matter of Grijalva*, this court has held that written notice of a deportation hearing sent by certified mail through the United States Postal Service with proof of attempted delivery creates a "strong presumption of effective service." *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011); *Arrieta*, 117 F.3d at 431; *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003); *see also Matter of Grijalva*, 21 I. & N. Dec. at 37. "This strong presumption of effective notice by certified mail contrasts with a weaker presumption that results from regular mail service." *Mejia-Hernandez*, 633 F.3d at 822 (holding that petitioner failed to overcome presumption of effective notice) (citation omitted). However, this presumption of service may be overcome if the applicant presents "substantial and probative evidence," such as documentary evidence from the Postal Service, or personal or third-party affidavits, that her mailing address has remained unchanged, that neither she nor a responsible party working or residing at the address refused service, and that there was nondelivery or improper delivery by the Postal Service. *Arrieta*, 117 F.3d at 431. This court has not addressed whether the presumption of delivery is rebutted where the INS lacks the certified return receipt. *See Busquets-Ivars*, 333 F.3d at 1009 (expressing "no opinion whether the record, lacking the return receipt, deprives the INS of the presumption that notice was effective"). *Contrast Singh v. Gonzales*, 412 F.3d 1117, 1119 n.1 (9th Cir. 2005) (noting that the government did not submit into evidence the certified mail return receipt).

(iii) Removal Proceedings

Proper notice procedures for removal proceedings are set forth in 8 U.S.C. § 1229(a)(1) and (2). The statute provides that "written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any)." *Id.* at § 1229(a)(1); *see also Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1004 (9th Cir. 2014); *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004). "In addition, the notice must include seven specified elements, including, *inter alia*, the nature of the proceedings, the conduct that is alleged to be in violation of the law, and the date and time of the proceedings." *Khan*, 374 F.3d at 828; *see also Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1479–1484 (2021); *Pereira v. Sessions*, 138 S. Ct. 2105, 2110–11 (2018) (discussing § 1229(a), and requirements for notice to appear); *Al Mutarreb v. Holder*, 561 F.3d 1023, 1026 (9th Cir. 2009) ("[N]otice is first accomplished through an NTA, which advises the alien that removal proceedings have begun, alerts [the alien] to the charges against him, and informs him of the date and location of the hearing.").

> The Supreme Court's decisions in *Pereira* and *Niz-Chavez*, along with the text and structure of the statutory provisions governing in absentia removal orders and Notices to Appear, unambiguously require[] the government to provide … a Notice to Appear as a single document that include[s] all the information set forth in 8 U.S.C. § 1229(a)(1), including the time and date of the removal proceedings

Singh v. Garland, 24 F.4th 1315, 1320 (9th Cir. 2022) (holding that because the government did not provide Singh with statutorily compliant notice before his removal hearing, Singh's in absentia removal order was subject to recission pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii)). A notice that is not statutorily compliant cannot be cured by subsequent hearing notices. *Singh*, 24 F.4th at 1320.

Neither the statute nor the regulations require notices to be provided in any language other than English. *See Khan*, 374 F.3d at 828 (distinguishing translation requirement for expedited removal proceedings); *see also Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 n.4 (9th Cir. 2004) (discussing Congressional intent to vest discretion for translation in the agency).

"[D]elivery by regular mail does not raise the same 'strong presumption' as certified mail, and less should be required to rebut such a presumption." *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (holding, under the new statutory

provision in 8 U.S.C. § 1229(a)(1), which does not require service by certified mail, that the BIA erred by applying the strong presumption of delivery accorded to certified mail under the former statutory provision); *see also Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011) ("Th[e] strong presumption of effective notice by certified mail contrasts with a weaker presumption that results from regular mail service."). An applicant's sworn affidavit that neither she nor a responsible party residing at her address received the notice "should ordinarily be sufficient to rebut the presumption of delivery and entitle [the applicant] to an evidentiary hearing." *Mejia-Hernandez*, 633 F.3d at 822 (noting that the applicant initiated the proceedings to obtain a benefit, appeared at an earlier hearing, and had no motive to avoid the hearing). *See also Sembiring v. Gonzales*, 499 F.3d 981, 987–89 (9th Cir. 2007) (applying *Salta* and concluding petitioner overcame weaker presumption of delivery of hearing notice for purpose of rescinding *in absentia* order).

Proper service of a notice of hearing amending the date and time of a removal hearing, does *not* establish proper service of an amended notice to appear, where the amended notice to appear replaces the underlying factual allegations lodged against the noncitizen. *See Martinez v. Barr*, 941 F.3d 907, 923 (9th Cir. 2019). In *Martinez*, the record provided no evidence that petitioner was served with the amended notice to appear, as required by regulation and due process. *Id.* As such, the court held that the BIA abused its discretion in failing to reopen proceedings that had a facially apparent due process violation and granted the petition for review, remanding to the BIA with instructions to reopen the removal proceedings. *Id.* at 924.

(iv) Notice to Counsel Sufficient

Notice to counsel is sufficient to establish notice to the applicant. *See Garcia v. INS*, 222 F.3d 1208, 1209 (9th Cir. 2000) (per curiam) (rejecting claim of inadequate notice where the government personally served written notice of the hearing on petitioner's counsel; noting that petitioner did not raise an ineffective assistance of counsel claim); *see also Al Mutarreb v. Holder*, 561 F.3d 1023, 1028 n. 6 (9th Cir. 2009) ("[S]ervice of a hearing notice on an alien's counsel, and not on the alien himself, may be a sufficient means of providing notice of the time and location of removal proceedings."). Where the government fails to send notice to counsel of record, notice is insufficient. *See Dobrota v. INS*, 311 F.3d 1206 (9th Cir. 2002).

"[S]erving a hearing notice on an alien, but not on the alien's counsel of record, is *insufficient* when an alien's counsel of record has filed a notice of appearance with the immigration court." *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009) (emphasis added). The government must serve all notices to appear and hearing notices on the counsel of record, when an appearance has been filed. *Id*.

See also Cui v. Mukasey, 538 F.3d 1289, 1293 (9th Cir. 2008) (addressing adequate notice in the context of fingerprint requirements and concluding that notice for fingerprint requirement was insufficient where petitioner spoke Mandarin and IJ directed fingerprint instructions to counsel).

(v) Notice to Juvenile

If a juvenile under 18 years old is released from INS custody to a responsible adult, proper written notice must be served on the juvenile and on the adult who took custody of him. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004). *But see Cruz Pleitez v. Barr*, 938 F.3d 1141, 1142 (9th Cir. 2019) (holding that service of Order to Show Cause and Notice of Hearing only on noncitizen minor, and not on responsible adult with whom noncitizen minor lived, did not violate the noncitizen minor's due process rights, where noncitizen minor had never been detained, and had affirmatively applied for asylum relief, distinguishing *Flores-Chavez*).

In *Jimenez-Sandoval v. Garland*, 22 F.4th 866, 870–71 (9th Cir. 2022), the court distinguished *Flores-Chavez* and concluded that because Jimenez-Sandoval was not released from detention into the custody of an adult there was no reason to believe that serving the OSC on an adult would be more effective in ensuring the minor's attendance at the hearing than serving notice on the minor. As such, the BIA acted within its discretion in denying Jimenez-Sandoval's motion to reopen the removal proceedings due to inadequate notice. *Jimenez-Sandoval*, 22 F.4th. at 871.

(vi) Notice to Applicant No Longer Residing in the United States

A notice to appear mailed to an applicant's former address after he has already departed the United States may not be sufficient to establish proper notice. *See Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005) (holding that BIA abused its discretion in denying a motion to reopen where applicant submitted

evidence demonstrating that the agency mailed notice to his former address after he had departed the United States).

2. Asylum and Withholding Claims Based on Changed Country Conditions

A motion to reopen to apply or reapply for asylum or withholding of removal based on changed country conditions that could not have been discovered or presented at the prior hearing, may be filed at any time. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); *Agonafer v. Sessions*, 859 F.3d 1198, 1203–04 (9th Cir. 2017) ("[T]he ninety-day deadline and one-motion limit do not apply if the motion to reopen is based on changed country conditions."); *Ali v. Holder*, 637 F.3d 1025, 1031–32 (9th Cir. 2011) (BIA abused discretion by denying motion to reopen); *Malty v. Ashcroft*, 381 F.3d 942, 945–46 (9th Cir. 2004) (holding that BIA abused its discretion in denying as untimely and numerically barred a motion to reopen based on changed circumstances in Egypt); *Azanor v. Ashcroft*, 364 F.3d 1013, 1021–22 (9th Cir. 2004). 8 C.F.R. § 1003.2(c) also applies to motions to reopen to apply for CAT relief based on changed country conditions. *See Go v. Holder*, 744 F.3d 604, 607–09 (9th Cir. 2014) (holding that procedural requirements specified in 8 C.F.R. § 1003.2(c) apply to CAT claims).

> Where, … , the motion to reopen is based on changed circumstances in the country to which removal has been ordered, the movant must: (1) produce evidence that conditions have changed in the country of removal, (2) demonstrate that the evidence is material, (3) show that the evidence was not available and would not have been discovered or presented at the previous hearing, and (4) demonstrate that the new evidence, when considered together with the evidence presented at the original hearing, would establish prima facie eligibility for the relief sought. *See* 8 U.S.C. 1229a(c)(7)(ii); 8 C.F.R. § 1003.2(c)(1); *Agonafer v. Sessions*, 859 F.3d 1198, 1204 (9th Cir. 2017).

Silva v. Garland, 993 F.3d 705, 718 (9th Cir. 2021). *See also Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021) (stating hurdles petitioner must clear for the BIA to grant a motion to reopen based on changed country conditions); *Rodriguez v. Garland*, 990 F.3d 1205, 1209 (9th Cir. 2021) (same)."[T]he changed country conditions exception is concerned with two points in time: the circumstances of the country at the time of the petitioner's previous hearing, and those at the time of the motion to reopen." *Salim v. Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016).

A petitioner's evidence regarding changed circumstances will almost always relate to his initial claim; nothing in the statute or regulations requires otherwise. The critical question is not whether the allegations bear some connection to a prior application, but rather whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution. *Malty*, 381 F.3d at 945; *see also Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1229 (9th Cir. 2016); *Najmabadi v. Holder*, 597 F.3d 983, 987–91 (9th Cir. 2010).

A petitioner's untimely motion to reopen may qualify under the changed conditions exception under 8 C.F.R. § 1003.2(c)(3)(ii), "even if the changed country conditions are made relevant by a change in the petitioner's personal circumstances." *Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014) (concluding BIA abused its discretion in denying motion to reopen). *See also Rodriguez v. Garland*, 990 F.3d 1205, 1209 (9th Cir. 2021) ("A petitioner's personal circumstances may act as a necessary predicate to the success of a motion to reopen where the new personal circumstances make the provided changed country conditions evidence relevant to the petitioner's (changed) personal circumstances." (internal quotation marks and citation omitted)).

"Changes in a petitioner's personal circumstances are only relevant where those changes are related to the changed country conditions that form the basis for the motion to reopen." *Rodriguez v. Garland*, 990 F.3d 1205, 1209–10 (9th Cir. 2021); *see also Chandra*, 751 F.3d at 1037. "Put differently, a petitioner is always *required* to demonstrate changed country conditions, but *may* also present evidence of changed personal circumstances to the extent that is helpful 'to establish the materiality' of the changed country conditions." *Rodriguez*, 990 F.3d at 1210.

The exception for changed country conditions does not apply to changes in United States asylum law. *See Azanor*, 364 F.3d at 1022 (rejecting claim that recognition of female genital mutilation as a ground for asylum constituted changed country conditions within the meaning of former 8 C.F.R. § 3.2(c)(3)(ii)).

In addition, changes in a noncitizen's *personal* circumstances do not provide a basis to file a successive or untimely asylum application. *See Chen v. Mukasey*, 524 F.3d 1028, 1031–34 (9th Cir. 2008) (deferring to BIA's interpretation that, despite 8 U.S.C. § 1158(a)(2)(D)'s exception for time and number limits in cases of "changed circumstances," a successive and untimely application must satisfy requirements for motion to reopen and 8 U.S.C. § 1229a(c)(7)(C)'s more restrictive changed country conditions exception); *see also Almaraz v. Holder*, 608

F.3d 638, 640–41 (9th Cir. 2010) (holding it was not an abuse of discretion to deny motion to reopen as untimely where the diagnosis of HIV did not constitute changed circumstances "arising in the country of nationality" under 8 C.F.R. § 1003.2(c)(3)(ii), and petitioner failed to establish that certain provisions of the Dominican Republic-Central America-United States Free Trade Agreement were material to his claim).

3. Jointly-Filed Motions

An exception to the number and time restrictions exists if the motion to reopen is agreed upon by all parties and jointly filed. *See* 8 C.F.R. § 1003.2(c)(3)(iii); *Bolshakov v. INS*, 133 F.3d 1279, 1281–82 (9th Cir. 1998) (rejecting government's contention that the "exception in section 3.2(c)(3)(iii) is an administrative remedy that must be exhausted before an alien can petition the Court of Appeals"). However, the deadline for filing a motion to reopen is not tolled while a petitioner waits for a response from the District Counsel regarding whether the government will join the motion. *See Valeriano v. Gonzales*, 474 F.3d 669, 673–75 (9th Cir. 2007).

4. Government Motions Based on Fraud

The government may, at any time, bring a motion based on fraud in the original proceeding or a crime that would support termination of asylum. *See* 8 C.F.R. § 1003.2(c)(3)(iv).

5. Movant in Custody

A motion to reopen to rescind an *in absentia* order of removal may be filed at any time if the applicant demonstrates that he failed to appear at the hearing because he was in state or federal custody. *See* 8 C.F.R. § 1003.2(c)(3) (referring to 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2)).

6. *Sua Sponte* Reopening by the Agency

The BIA may at any time reopen proceedings *sua sponte*. *See* 8 C.F.R. § 1003.2(a); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019). "Similarly, '[a]n Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case.'" *Menendez-Gonzalez*, 929 F.3d at 1116 (quoting 8 C.F.R. § 1003.23(b)(1)).

"The election to reopen or reconsider on its own motion is commonly called the exercise of '*sua sponte*' authority." *Menendez-Gonzalez*, 929 F.3d at 1116. "In practice, the agency's decision to exercise its *sua sponte* authority is often not actually initiated by the agency on its own but is instead prompted, …, by a party filing a motion to reopen *sua sponte*." *Id*.

"In order for an individual to obtain sua sponte relief under 8 C.F.R. § 1003.2(a), the Board must be persuaded that the respondent's situation is truly exceptional." *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (internal quotation marks and citation omitted). "Importantly, however, the Board is not *required*—by regulation or its own decisions—to reopen proceedings *sua sponte* in exceptional situations." *Id.* (internal quotation marks and citation omitted).

This court lacks jurisdiction to review a claim that the agency should have exercised its *sua sponte* power to reopen proceedings. *See Lona*, 958 F.3d at 1227; *Menendez-Gonzalez*, 929 F.3d at 1115 & 1116 (explaining that "denials of motions to reopen *sua sponte* generally are not reviewable because the decisions are committed to agency discretion"); *Go v. Holder*, 744 F.3d 604, 609–10 (9th Cir. 2014); *Sharma v. Holder*, 633 F.3d 865, 874 (9th Cir. 2011); *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009); *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002). Additionally, the court lacks jurisdiction to review the BIA's decision to overturn a *sua sponte* motion by IJ to reopen deportation proceedings. *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823–24 (9th Cir. 2011).

"This court generally lacks jurisdiction to review decisions denying *sua sponte* reopening because of 'the absence of a judicially manageable standard for [the court] to evaluate the BIA's *exercise of discretion*.'" *Menendez-Gonzalez*, 929 F.3d at 1117 (quoting *Singh v. Holder*, 771 F.3d 647, 650 (9th Cir. 2014)).

Where, "the BIA concludes that it lacks the *authority* to reopen, rather than denying a motion to reopen as an exercise of discretion, … *Ekimian* does not preclude … jurisdiction." *Singh v. Holder*, 771 F.3d 647, 650 (9th Cir. 2014). Additionally, the court has "jurisdiction to review the Board's decision [denying *sua sponte* reopening] so as to assure that the Board made its discretionary decision on the correct understanding of the applicable legal principles." *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (granting the petition for review where the BIA premised its decision on an erroneous understanding of the legal principles concerning prior deportation and reopening of deportation proceedings). *See also*

Cui v. Garland, 13 F.4th 991, 1001 (9th Cir. 2021) (recognizing the court may only exercise jurisdiction over BIA decisions denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error); *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) ("When the BIA denies *sua sponte* reopening or reconsideration as a matter of discretion, we lack jurisdiction to review that decision, although we retain jurisdiction to review the denial of *sua sponte* reopening for legal or constitutional error."); *Menendez-Gonzalez*, 929 F.3d at 1120 (holding that the present petition did not fit within the narrow exception where the BIA's decision was based on legal or constitutional error).

> The scope of … review under *Bonilla* is limited to those situations where it is obvious that the agency has denied sua sponte relief not as a matter of discretion, but because it erroneously believed that the law forbade it from exercising its discretion, …, or that exercising its discretion would be futile, … . In other words, … review under *Bonilla* is constricted to legal or constitutional error that is apparent on the face of the BIA's decision and does not extend to speculating whether the BIA *might* have misunderstood some aspect of its discretion.

Lona, 958 F.3d at 1234 (citations omitted).

The departure bar, which prevents a noncitizen who has departed the United States from reopening his or her removal proceedings, does not limit an immigration judge's *sua sponte* reopening authority. *Rubalcaba v. Garland*, 998 F.3d 1031, 1041 (9th Cir. 2021). Note that as of January 15, 2021, the text of subsection (b)(1) has been amended by regulation. *See id.* at 1036 n.5 (citing 85 Fed. Reg. 81,588, 81,655 (Dec. 16, 2020)). The amended regulation purports to limit the instances in which an IJ may exercise *sua sponte* reopening authority. *See Rubalcaba*, 998 F.3d at 1036 n.5 (recognizing amendment but applying the regulation as it was at the time of the BIA's decision).

In *Mata v. Lynch*, 576 U.S. 143, 147 (2015), the Supreme Court reiterated that "circuit courts have jurisdiction when an alien appeals from the Board's denial of a motion to reopen a removal proceeding." "[T]hat jurisdiction remains unchanged if the Board, in addition to denying the alien's statutorily authorized motion, states that it will not exercise its separate *sua sponte* authority to reopen the case." *Id.* at 148 (holding court of appeals had jurisdiction over BIA's denial

of motion to reopen, which was based on timeliness reasons, notwithstanding that the BIA determined not to exercise its *sua sponte* authority to reopen).

Cross-reference: Equitable Tolling, Ineffective Assistance of Counsel.

VI. EQUITABLE TOLLING

The statutory filing deadlines for a motion to reopen (within 90 days of the date of entry of the order) or a motion to reconsider (within 30 days of the date of entry of the order) are amenable to equitable tolling. *See Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) ("The BIA may equitably toll [the] statutory filing deadline [for filing a motion to reconsider], including in cases where the petitioner seeks excusal from untimeliness based on a change in the law that invalidates the original basis for removal."); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015) (the deadline for filing a motion to reopen is subject to equitable tolling). Equitable tolling is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003). *See also Lona*, 958 F.3d at 1230; *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824 (9th Cir. 2011) ("Equitable tolling is applied in situations where, despite all due diligence, the party requesting equitable tolling is unable to obtain vital information bearing on the existence of the claim."). Likewise, the 180-day limit on filing a motion to reopen and rescind an *in absentia* removal order may also be tolled. *See Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002) (180-day limit for filing motion to reopen proceedings conducted *in absentia* based on exceptional circumstances tolled due to deceptive actions of notaries).

"The jurisdictional question (whether the court has power to decide if tolling is proper) is of course distinct from the merits question (whether tolling is proper)." *Mata v. Lynch*, 576 U.S. 143, 150 (2015).

A. Circumstances Beyond the Applicant's Control

In *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc), the court held that equitable tolling is available "in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim." *Socop-Gonzalez*, 272 F.3d at 1193 (internal quotation marks omitted) (applying equitable tolling where INS

officer repeatedly provided erroneous information to the applicant). *See also Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) ("[E]quitable tolling is available where, despite all due diligence, the party invoking the doctrine is unable to obtain vital information bearing on the existence of the claim." (internal quotation marks and citation omitted)). "The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control."

See also Mendez-Alcaraz v. Gonzales, 464 F.3d 842, 845 (9th Cir. 2006) (holding that the IJ's erroneous statement that petitioner's conviction qualified as an aggravated felony and petitioner's unawareness of subsequent caselaw to the contrary did not warrant equitable tolling). *Compare United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) (reasoning in a collateral attack on an underlying removal order that IJ's erroneous, but qualified, advice about whether conviction constituted an aggravated felony invalidated prior deportation order).

B. Fraudulent or Erroneous Attorney Conduct

This court recognizes equitable tolling in cases involving ineffective assistance by an attorney or representative, coupled with fraudulent or erroneous conduct. *See, e.g.*, *Iturribarria v. INS*, 321 F.3d 889, 897–98 (9th Cir. 2003). "Where the ineffective performance was that of an actual attorney and the attorney engaged in fraudulent activity causing an essential action in her client's case to be undertaken ineffectively, out of time, or not at all, equitable tolling is available." *Id.* at 898; *see also Ray v. Gonzales*, 439 F.3d 582, 588 n.5 (9th Cir. 2006); *Singh v. Ashcroft*, 367 F.3d 1182, 1185–86 (9th Cir. 2004); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002); *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999); *cf. Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (stating that "[i]neffective assistance of counsel amounting to a due process violation permits untimely reopening"). As such, "[w]hen the issue is fraudulent representation, the limitations period is tolled until the petitioner definitively learns of counsel's fraud." *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824 (9th Cir. 2011) (internal quotation marks and citation omitted). "Equitable tolling applies in ineffective assistance of counsel cases because, '[a]lthough there is no Sixth Amendment right to counsel in a deportation proceeding, the due process guarantees of the Fifth Amendment still must be afforded to an alien petitioner.'" *Bonilla v. Lynch*, 840 F.3d 575, 582 (9th Cir. 2016) (citation omitted).

> In *Singh v. Holder*, 658 F.3d 879 (9th Cir. 2011), [the court] succinctly explained the requirements for equitable tolling due to ineffective assistance of counsel. The petitioner must demonstrate: "(a) that he was prevented from timely filing his motion due to prior counsel's ineffectiveness; (b) that he demonstrated due diligence in discovering counsel's fraud or error; and (c) that he complied with the procedural requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988)." *Id.* at 884. Having met these procedural requirements, the alien must show that his "counsel's performance was deficient, and [that he] suffered prejudice" as a result. *Id.* at 885.

Salazar-Gonzalez v. Lynch, 798 F.3d 917, 920 (9th Cir. 2015) (concluding petitioner was entitled to equitable tolling of 90-day limitation period for motions to reopen where there was ineffective assistance of counsel).

Ineffective assistance of counsel, where a nonattorney engaged in fraudulent activity causes an essential action in his or her client's case to be undertaken ineffectively, may equitably toll the statute of limitations. *See Fajardo*, 300 F.3d at 1020; *see also Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099 (9th Cir. 2005) (holding that fraudulent conduct by a non-attorney warranted equitable tolling of the deadline to file a motion to reopen under NACARA); *Rodriguez-Lariz*, 282 F.3d at 1224.

See also Cui v. Garland, 13 F.4th 991, 1000 (9th Cir. 2021) (concluding BIA did not abuse its discretion in declining to equitably toll the 180-day deadline to file a motion to reopen because the one-sentence 2016 motion to reopen did not allege any claims of fraud or deceit and petitioner failed to demonstrate due diligence in discovering any deception, fraud, or error); *Avagyan v. Holder*, 646 F.3d 672, 678 (9th Cir. 2011) (concluding that "even if a litigant is not constitutionally entitled to counsel, principles of equity can justify tolling a limitations period where counsel's behavior is sufficiently egregious").

C. Changes in Law

"Although claims for equitable tolling typically arise in conjunction with claims of ineffective assistance of counsel, … , claims based on changes in the law are not unheard of, nor are they prohibited." *Lona v. Barr*, 958 F.3d 1225, 1230–31 (9th Cir. 2020); *see also Goulart v. Garland*, 18 F.4th 653, 654 (9th Cir. 2021). As such, "[t]he BIA may equitably toll [the] statutory filing deadline [for filing a motion to reconsider], including in cases where the petitioner seeks excusal from

untimeliness based on a change in the law that invalidates the original basis for removal. *Lona*, 958 F.3d at 1230 (holding that given the lack of evidence that petitioner took any action prior to the change in law, and the obvious and uncomplicated nature of her underlying claim, the BIA's implicit denial of petitioner's claim for equitable tolling was not arbitrary, irrational, or contrary to law). *See also Goulart*, 18 F.4th at 655 (denying petition for review where Goulart failed to present any evidence suggesting that he diligently pursued relief during the years between his removal and the relevant change in law).

D. Due Diligence

The filing deadline may be tolled until the petitioner, exercising due diligence, discovers the fraud, deception, or error. In cases involving ineffective assistance, this court has found that the limitation period may be tolled until the petitioner meets with new counsel to discuss his file, thereby becoming aware of the harm resulting from the misconduct of his prior representatives. *See Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003); *see also Mejia-Hernandez v. Holder*, 633 F.3d 818, 824–26 (9th Cir. 2011) (discussing diligence, and concluding that petitioner was entitled to equitable tolling of deadline to apply for relief under NACARA); *Sun v. Mukasey*, 555 F.3d 802, 806 (9th Cir. 2009) (concluding that petitioner was entitled to equitable tolling where she acted with due diligence); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099–1100 (9th Cir. 2005) (holding that petitioner acted with due diligence in making a FOIA request for court case file after discovering former counsel's deception); *Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002).

The time limitation is not tolled while the petitioner awaits a response from the District Counsel regarding whether the government would join a motion to reopen because "attempting to obtain nonvital information or acquiescence is not 'diligence' within the meaning of our equitable tolling jurisprudence." *Valeriano v. Gonzales*, 474 F.3d 669, 673 (9th Cir. 2007).

"[R]eview of petitioner's diligence must be fact-intensive and case-specific, assessing the reasonableness of petitioner's actions in the context of his or her particular circumstances." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011).

> [T]o assess whether petitioner exercised due diligence, [the court] consider[s] three issues. First, we determine if (and when) a reasonable person in petitioner's position would suspect the specific fraud or error underlying her motion to reopen. Second, we ascertain

> whether petitioner took reasonable steps to investigate the suspected fraud or error, or, if petitioner is ignorant of counsel's shortcomings, whether petitioner made reasonable efforts to pursue relief. … Third, we assess when the tolling period should end; that is when petitioner definitively learns of the harm resulting from counsel's deficiency, or obtains vital information bearing on the existence of his claim.

Id. at 679 (internal citations and quotation marks omitted) (concluding BIA abused its discretion in denying as untimely motion to reopen on grounds of IAC with respect to application for adjustment of status).

Ignorance is not an excuse where there is sufficient notice under the due process clause. *Luna v. Holder*, 659 F.3d 753, 760 (9th Cir. 2011) (concluding that petitioner failed to establish due diligence).

See also Cui v. Garland, 13 F.4th 991, 1000 (9th Cir. 2021) (concluding BIA did not abuse its discretion in declining to equitably toll the 180-day deadline to file a motion to reopen because the one-sentence 2016 motion to reopen did not allege any claims of fraud or deceit and petitioner failed to demonstrate due diligence in discovering any deception, fraud, or error); *Bonilla v. Lynch*, 840 F.3d 575, 583 (9th Cir. 2016) ("Given the exceedingly long lapse of time before seeking further legal advice, the lack of any continuing relationship or follow up with the lawyer relied upon, and the general nature of the advice offered, the BIA appropriately concluded that Bonilla did not make "reasonable efforts to pursue relief," …, and so did not demonstrate the diligence necessary for equitable tolling." (citation omitted)).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Presented Through a Motion to Reopen

"Where the facts surrounding allegedly ineffective representation by counsel were unavailable to the petitioner at an earlier stage of the administrative process, motions before the BIA based on claims of ineffective assistance of counsel are properly deemed motions to reopen." *Iturribarria v. INS*, 321 F.3d 889, 891 (9th Cir. 2003) (holding that "the BIA misapplied its own regulations when it classified [petitioner's] motion alleging ineffective assistance of counsel as a motion to reconsider rather than a motion to reopen"); *see also Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005); *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004).

Like an improperly captioned motion asserting an ineffective assistance of counsel claim, an appeal to the BIA asserting such a claim is effectively a motion to reopen. *See Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (where petitioner improperly used an appeal to BIA as vehicle to allege ineffective assistance of counsel, the appeal was effectively a motion to reopen).

B. Exhaustion and Proper Forum

Where ineffective assistance of counsel ("IAC") occurred "prior to and during the removal proceeding," petitioner must first raise IAC claims in a motion to reopen before the BIA, and not in district court. *See Puga v. Chertoff*, 488 F.3d 812, 815–16 (9th Cir. 2007); *see also Singh v. Napolitano*, 649 F.3d 899 (9th Cir. 2011) (concluding that petitioner failed to exhaust his administrative remedies by failing to first file a motion to reopen with the BIA based on IAC that occurred after the BIA decision, prior to bringing his habeas petition in district court); *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995) (requiring petitioner to exhaust IAC claim through a motion to reopen before the BIA). Where the IAC claim arises out of attorney misconduct after the BIA decision on appeal (*e.g.*, attorney failed to file petition for review), petitioner can bring the IAC claim in district court habeas proceedings without filing a motion to reopen. *See Singh v. Gonzales*, 499 F.3d 969, 972 (9th Cir. 2007) (district court retains jurisdiction post-REAL ID Act to review claims of post-BIA IAC because not reviewing final order of removal); *see also Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1046 (9th Cir. 2000) (affirming the district court's grant of writ of habeas corpus based on IAC where counsel filed an untimely petition for review with this court). Petitioner may also bring these claims in a motion to reopen before the BIA. *See Singh*, 499 F.3d at 979 ("That Singh may have an alternative avenue for relief does not change our statutory analysis.").

See also Benedicto v. Garland, 12 F.4th 1049, 1062 (9th Cir. 2021) (explaining proper way to raise and exhaust claim that appointed counsel was ineffective is through a motion to reopen before the agency); *Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) (order) (stating that to the extent petitioners contend they received ineffective assistance of counsel, the court lacked jurisdiction because it was not raised before the BIA).

C. Standard of Review

The court reviews findings of fact regarding counsel's performance for substantial evidence. *Lin v. Ashcroft*, 377 F.3d 1014, 1023 (9th Cir. 2004). The

court reviews for abuse of discretion the BIA's denial of a motion to reopen, and reviews de novo claims of due process violations in removal proceedings, including claims of ineffective assistance of counsel. *Mohammed v. Gonzales*, 400 F.3d 785, 791–92 (9th Cir. 2005). *See also United States v. Lopez-Chavez*, 757 F.3d 1033, 1037–38 (9th Cir. 2014) (reviewing denial of motion to dismiss indictment where it was based on alleged due-process defects due to ineffective assistance of counsel in the underlying deportation proceeding); *Kwong v. Holder*, 671 F.3d 872, 880 (9th Cir. 2011) (reviewing motion to remand based on ineffective assistance of counsel for abuse of discretion, but purely legal questions, such as due process claims, de novo).

Cross-reference: Standards of Review.

D. Requirements for Due Process Violation

1. Constitutional Basis

Although individuals in immigration proceedings do not enjoy the Sixth Amendment's guarantee of an attorney's assistance at government expense, they do have the right to obtain counsel of their own choice. *Ray v. Gonzales*, 439 F.3d 582, 586–87 (9th Cir. 2006). "[T]he extent to which aliens are entitled to effective assistance of counsel during [immigration] proceedings is governed by the Fifth Amendment due process right to a fair hearing." *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004) (emphasis omitted), *amended by* 404 F.3d 1105 (9th Cir. 2005) (order); *see also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) ("The right to effective assistance of counsel in immigration proceedings stems from the Fifth Amendment's guarantee of due process."); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008). The Sixth Amendment "reasonableness" standard for ineffective assistance of counsel in criminal proceedings "does not attach to civil immigration matters." *Lara-Torres*, 383 F.3d at 974.

"Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (internal quotation marks omitted); *see also United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) ("There is no constitutional right to counsel in deportation proceedings, but must be accorded due process under the Fifth Amendment); *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101 (9th Cir. 2009) (rejecting petitioner's contention that he received

IAC where attorney conceded petitioner's alienage and did not inform him about the advantages of remaining silent); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857–58 (9th Cir. 2004) (per curiam). "An alien's right to a full and fair presentation of his claim includes the right to have an attorney who would present a viable legal argument on his behalf supported by relevant evidence, if he could find one willing and able to do so." *Lopez-Chavez*, 757 F.3d at 1041 (internal quotation marks and citation omitted). A noncitizen must also show prejudice by demonstrating the alleged violation affected the outcome of the proceedings. *See Torres-Chavez*, 567 F.3d at 1100. This court has explained that "aliens shoulder a heavier burden of proof in establishing ineffective assistance of counsel under the Fifth Amendment than under the Sixth Amendment." *Id.* (internal quotation marks and citation omitted).

Where, notwithstanding notice of the right to retain counsel and the availability of free legal services, "an individual chooses not to retain an attorney, and instead knowingly relies on assistance from individuals not authorized to practice law, such a voluntary choice will not support a due process claim based on ineffective assistance of counsel." *Hernandez v. Mukasey*, 524 F.3d 1014, 1020 (9th Cir. 2008) (concluding that where petitioners waived their right to counsel, and knowingly relied on a non-attorney immigration consultant for advice, there was no denial of due process because "reliance on a non-attorney [is] not sanctioned by law").

"[D]ue process rights to assistance of counsel do not extend beyond the fairness of the hearing itself." *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008). The "Fifth Amendment simply does not apply to preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing proceeding." *Id.* at 1051. Furthermore, the legal services must be rendered "*while proceedings were ongoing*." *Id.* at 1050 (concluding there was no ineffective assistance of counsel, where attorney failed to properly file visa application and the deficiency did not relate to the substance of an ongoing proceeding).

2. Counsel's Competence

To prevail on an ineffective assistance of counsel claim, the petitioner must make two showings. First, the petitioner must demonstrate that counsel failed to perform with sufficient competence. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005); *see also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015). "We do not require that [petitioner's] representation be brilliant, but it cannot serve to make [the] immigration hearing so fundamentally unfair that

[petitioner] was prevented from reasonably presenting his case." *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (internal quotation marks omitted) (holding that counsel's failure to investigate and present the factual and legal basis of Lin's asylum claim, attend the hearing in person, advocate on his behalf at the hearing, and file brief on appeal, constituted ineffective assistance of counsel). Impinging on a petitioner's "authority to decide whether, and on what terms, to concede his case" by failing to insure counsel's withdrawal will not prejudice the petitioner can "effectively deprive[] [the petitioner] of the ability to present his case … ." *See Nehad v. Mukasey*, 535 F.3d 962, 971–72 (9th Cir. 2008) (concluding that counsel's performance was deficient where counsel pressured client to accept voluntary departure under threat of counsel's withdrawal two hours before hearing); *see also United States v. Lopez-Chavez*, 757 F.3d 1033, 1041–42 (9th Cir. 2014) (counsel's concession that prior drug conviction was an aggravated felony under the INA and failure to appeal the question to the Court of Appeals constituted deficient performance).

Cross-reference: Cases Finding Ineffective Assistance, below.

3. Prejudice

Second, petitioner must generally show that she was prejudiced by her counsel's performance. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005); *see also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) ("an alien's burden is to demonstrate that his lawyer's errors may have affected the outcome of the proceedings"); *Kwong v. Holder*, 671 F.3d 872, 880 (9th Cir. 2011); *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101 (9th Cir. 2009) (rejecting petitioner's contention that he received IAC where attorney conceded petitioner's alienage and did not inform him about the advantages of remaining silent); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008). A showing of prejudice can be made if counsel's performance "was so inadequate that it may have affected the outcome of the proceedings." *Iturribarria v. INS*, 321 F.3d 889, 899–90 (9th Cir. 2003) (internal quotation marks omitted); *see also Flores v. Barr*, 930 F.3d 1082, 1087 (9th Cir. 2019) (per curiam) (stating "the petitioner need only demonstrate that counsel's deficient performance 'may have affected the outcome of the proceedings' by showing 'plausible' grounds for relief"); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013) (prejudice will be found "'when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings.'" (quoting *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999))); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835–36 (9th Cir. 2011) (petitioner was prejudiced by counsel's ineffective assistance where counsel admitted to

factual allegations without any factual basis for doing so); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008); *Mohammed*, 400 F.3d at 793–94; *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857–58 (9th Cir. 2004) (per curiam); *cf. Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004) (stating that petitioner must show "substantial prejudice, which is essentially a demonstration that the alleged violation affected the outcome of the proceedings") (internal quotation marks omitted), *amended by* 404 F.3d 1105 (9th Cir. 2005) (order).

The court will "consider the underlying merits of the case to come to a tentative conclusion as to whether [petitioner's] claim, if properly presented, would be viable." *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004). To show prejudice, the noncitizen "only needs to show that he has *plausible* grounds for relief." *Id.* (internal quotation marks omitted); *see also Flores*, 930 F.3d at 1087; *Morales Apolinar*, 514 F.3d at 898.

"Certain types of ineffective assistance entitle a petitioner to a rebuttable presumption of prejudice." *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090 (9th Cir. 2012). "[W]here an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely." *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000). "In cases involving such error, the proceedings are subject to a 'presumption of prejudice,' and [the court] will find that a petitioner has been denied due process if he can demonstrate 'plausible grounds for relief' on his underlying claim." *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (applying a presumption of prejudice where petitioner's counsel failed to file an appeal and concluding that the government failed to rebut that presumption where petitioner's asylum application provided plausible grounds for relief) (citation omitted); *see also Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) ("When a lawyer's error results in an alien being denied his right to appeal altogether, we apply a 'presumption of prejudice.'"); *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004). However, the presumption of prejudice is rebutted where a petitioner cannot demonstrate that his claims are viable. *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826–27 (9th Cir. 2003) (presumption rebutted where petitioner had no plausible claim to adjustment of status or voluntary departure).

Note that although "an alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney[,]" *Montes-Lopez*, 694 F.3d at 1093–94, "not all violations of the right to counsel are treated as structural errors mandating automatic reversal[,]" *Gomez-Velazco v. Sessions*, 879 F.3d 989,

993 (9th Cir. 2018). Rather, "[i]f the right to counsel has been wrongly denied only at a discrete stage of the proceeding, and an assessment of the error's effect can readily be made, then prejudice must be found to warrant reversal." *Gomez-Velazco*, 879 F.3d at 993–94 (holding that petitioner failed to show even if right to counsel was violated, the denial of counsel caused him any prejudice). In *Gomez-Velazco*, there was no presumption of prejudice, where although petitioner may have been improperly denied counsel during initial interaction with DHS officers, he was able to consult with counsel before the removal order was executed, and the prejudicial effect could be assessed. *Id.* (distinguishing the case from instances where counsel is precluded from participating in the merits hearing before an immigration judge). The court in *Gomez-Velazco* assumed without deciding that petitioner's right to counsel had been violated. *Id.* at 992.

Cross-reference: Due Process in Immigration Proceedings, Prejudice Requirement, Ineffective Assistance of Counsel.

a. Exception for In Absentia Orders

Where a claim of ineffective assistance of counsel is the basis for moving to reopen and rescind an *in absentia* removal order, a showing of prejudice is not required. *See Sanchez Rosales v. Barr*, 980 F.3d 716, 717 (9th Cir. 2020) ("A showing of prejudice is not required when ineffective assistance leads to an in absentia order of removal."); *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003); *see also Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (granting petition without discussing prejudice), *amended by* 339 F.3d 1012 (9th Cir. 2003) (order). In *Sanchez Rosales*, the court held that the BIA's denial of petitioners' motion to reopen based on a failure to show prejudice was an abuse of discretion. 980 F.3d at 720. "Petitioners were not required to demonstrate that the ineffective assistance of the non-attorney notario caused them prejudice[," where they alleged that such ineffective assistance caused them to be ordered removed *in absentia*. *Id.* at 719–20.

E. The *Lozada* Requirements

A motion to reopen based on ineffective assistance of counsel must generally meet the three procedural requirements set forth by the BIA in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). The petitioner must:

> 1) submit an affidavit explaining his agreement with former counsel regarding his legal representation, 2) present evidence that prior

> counsel has been informed of the allegations against her and given an opportunity to respond, 3) either show that a complaint against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed.

Iturribarria v. INS, 321 F.3d 889, 900 (9th Cir. 2003); *see also Al Ramahi v. Holder*, 725 F.3d 1133, 1138–39 (9th Cir. 2013) ("Compliance with *Lozada* ensures that the BIA has an objective basis for assessing the substantial number of claims of ineffective assistance of counsel that come before [it]." (internal quotation marks and citation omitted, alteration in original)); *Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010) (failure to satisfy *Lozada* was fatal to ineffective assistance of counsel claim where ineffectiveness was not plain on face of record and petitioner failed to provide any information regarding his purported former counsel); *Hernandez v. Mukasey*, 524 F.3d 1014, 1018 (9th Cir. 2008); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 895–96 (9th Cir. 2008); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 896 n.1 (9th Cir. 2003), *amended by* 339 F.3d 1012 (9th Cir. 2003) (order); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226–27 (9th Cir. 2002). If the petitioner fails to comply with the procedural requirements of *Lozada*, he is entitled to relief only if the ineffectiveness of counsel was plain on its face. *See Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019); *Tamang*, 598 F.3d at 1090.

The court "presume[s], as a general rule, that the Board does not abuse its discretion when it obligates petitioners to satisfy *Lozada*'s literal requirements." *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004). However, the court in *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131–32 (9th Cir. 2013) held that the BIA abused its discretion by requiring petitioner to provide correspondence from the state Bar indicating receipt of a complaint where petitioner provided a copy of the complaint with the motion, along with a declaration from the lawyer "admitting responsibility and absolving the client of any culpability for the delay."

1. Exceptions

This court has explained that the *Lozada* requirements are not sacrosanct, and the court has not hesitated to address an ineffective assistance of counsel claim even when petitioner fails to comply strictly with *Lozada*. *See Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (identifying cases holding that the failure to comply with *Lozada* was not dispositive); *see also Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008) (explaining that "[t]he *Lozada* factors are not rigidly applied, especially where their purpose is fully served by other means").

For example, the failure to comply with the *Lozada* requirements is not fatal where the alleged ineffective assistance is plain on the face of the administrative record. *See Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (explaining that because petitioner failed to comply with the procedural requirements of *Lozada*, he was entitled to relief only if "the ineffectiveness of counsel was plain on its face" and determining that the record did not show counsel performed deficiently); *Castillo-Perez v. INS*, 212 F.3d 518, 525–26 (9th Cir. 2000). "In addition, [the court has] concluded that 'arbitrary application' of the *Lozada* command is not warranted if petitioner shows 'diligent efforts' to comply were unsuccessful due to factors beyond petitioner's control." *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004).

See also Salazar-Gonzalez v. Lynch, 798 F.3d 917, 920 n.2 (9th Cir. 2015) ("Strict compliance with *Lozada* is not always necessary for equitable tolling."); *Morales Apolinar*, 514 F.3d at 896 (excusing failure to report attorney's misconduct to a disciplinary authority or to confront his attorney direction where such action would have been futile); *Lo v. Ashcroft*, 341 F.3d 934, 937–38 (9th Cir. 2003) (noting court's flexibility in applying the *Lozada* requirements, and holding that failure to comply with third *Lozada* factor did not defeat ineffective assistance of counsel claim given no suggestion of collusion between petitioners and counsel); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 825–26 (9th Cir. 2003) (failure to file bar complaint not fatal where former counsel submitted letter of self-report to bar); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (substantial compliance sufficient); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124–25 (9th Cir. 2000) (holding that the BIA may not impose the *Lozada* requirements arbitrarily); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000), *amended by* 213 F.3d 1221 (9th Cir. 2000) (order).

F. Cases Discussing Ineffective Assistance of Counsel

1. Cases Finding Ineffective Assistance

Sanchez Rosales v. Barr, 980 F.3d 716, 719–20 (9th Cir. 2020) (granting petition and remanding to the BIA to evaluate Petitioners' motion without requiring a showing of prejudice where petitioners claimed that ineffective assistance led to in absentia removal); *Flores v. Barr*, 930 F.3d 1082, 1087–90 (9th Cir. 2019) (per curiam) (holding that although the BIA correctly concluded Flores failed to show prejudice for several of his ineffective assistance of counsel claims, the BIA abused its discretion in concluding Flores failed to show prejudice from ineffective assistance with respect to petitioner's claims for relief under former

§ 212(c) and deferral of removal under the CAT); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920–22 (9th Cir. 2015) (petitioner's counsel performed deficiently and petitioner suffered prejudice, as such petitioner was entitled to equitable tolling of limitations period for filing a motion to reopen); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041–42 (9th Cir. 2014) (counsel's concession that prior drug conviction was an aggravated felony under the INA and the failure to appeal the question to the Court of Appeals constituted deficient performance); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131–34 (9th Cir. 2013) (concluding petitioner suffered prejudice where the record was undisputed his lawyer failed to file his application for cancellation of removal, and remanding to the BIA to allow petitioner to file his application for relief); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835–36 (9th Cir. 2011) (petitioner was prejudiced by counsel's ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so); *Nehad v. Mukasey*, 535 F.3d 962, 967–72 (9th Cir. 2008) (pressuring noncitizen to accept voluntary departure under threat of counsel's withdrawal two hours before hearing); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 899 (9th Cir. 2008) (failure to introduce available documentary evidence, failure to elicit testimony, and failure to establish petitioner's mother as a qualifying relative for the purpose of the hardship analysis); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (failure to file a brief with the BIA on appeal, failure to file a petition for review, and failure to meet procedural requirements of two motions to reopen); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (counsel's performance was ineffective and caused prejudice where she failed to present evidence of petitioner's past female genital mutilation); *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (failure to file motion to reopen to pursue claim under the Convention Against Torture constituted constitutionally deficient performance); *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (counsel's failure to: investigate and present the factual and legal basis of Lin's asylum claim; attend the hearing in person; advocate on his behalf at the hearing; and file brief on appeal, constituted ineffective assistance of counsel); *Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004) ("Failing to file a timely notice of appeal is obvious ineffective assistance of counsel."); *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (counsel's failure to file brief to BIA established ineffective assistance and caused prejudice where BIA dismissed based on failure to file brief); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (failure to file brief on appeal to BIA constituted ineffective assistance, but presumption of prejudice rebutted because petitioner had no plausible grounds for relief); *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (advisements to return to Mexico in order to prove validity of visa, where petitioner missed his hearing due to border detention upon attempted return,

constituted ineffective assistance and exceptional circumstances warranting reopening), *amended by* 339 F.3d 1012 (9th Cir. 2003) (order); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (counsel was ineffective, but petitioner could not show prejudice); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (non-attorney provided ineffective assistance by failing to file a timely application for relief while assuring petitioners he was diligently handling their case); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) (counsel's untimely petition for review presented valid basis for ineffective assistance claim); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (finding a "clear and obvious case of ineffective assistance of counsel" where counsel "failed, without any reason, to timely file [an] application" for relief even though petitioner was prima facie eligible); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (IJ denied applicant her right to counsel when he allowed an attorney whom she had never met and who had no understanding of her case to represent her), *amended by* 213 F.3d 1221 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (fraudulent legal representation by notary posing as an attorney established a meritorious ineffective assistance claim).

2. Cases Rejecting Ineffective Assistance of Counsel Claims

Flores v. Barr, 930 F.3d 1082, 1087–90 (9th Cir. 2019) (per curiam) (holding that the BIA correctly concluded Flores failed to show prejudice for several of his ineffective assistance of counsel claims, but also held that the BIA abused its discretion in concluding Flores failed to show prejudice from ineffective assistance with respect to petitioner's claims for relief under former § 212(c) and deferral of removal under the CAT); *Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (explaining that because petitioner failed to comply with the procedural requirements of *Lozada*, he was entitled to relief only if "the ineffectiveness of counsel was plain on its face" and determining that the record did not show counsel performed deficiently); *Al Ramahi v. Holder*, 725 F.3d 1133, 1138–39 (9th Cir. 2013) (petitioner failed to show that counsel's advice was deficient); *Kwong v. Holder*, 671 F.3d 872, 880–81 (9th Cir. 2011) (counsel's performance was not constitutionally deficient where counsel interrogated petitioner and presented sufficient evidence in support of petitioner's claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of that claim); *Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010) (failure to satisfy *Lozada* requirements was fatal to petitioner's IAC claim); *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101 (9th Cir. 2009) (rejecting petitioner's contention that he received IAC where attorney conceded petitioner's alienage and did not inform him about the advantages of remaining silent); *Balam-Chuc v. Mukasey*, 547 F.3d 1044,

1050–51 (9th Cir. 2008) (where attorney failed to properly file a visa petition, the Fifth Amendment did not apply because the deficiency did not relate to the substance or fundamental fairness of an ongoing hearing); *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008) (per curiam) (on rehearing, the court denied the petition for review concluding that even if there was IAC, there was no prejudice resulting from the ineffective assistance due to statutory bar to relief where petitioner overstayed voluntary departure period); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (counsel's actions did not deny petitioner his right to full and fair hearing where record showed that counsel diligently examined witnesses, argued points of law before IJ and informed petitioner of his right to appeal, and even if performance was ineffective, petitioner failed to demonstrate prejudice); *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 975–76 (9th Cir. 2006) (counsel's erroneous advice regarding the retroactivity of the stop-time rule did not result in the deprivation of due process); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (counsel's "unfortunate immigration-law advice" was not ineffective assistance because it did not "pertain to the actual substance of the hearing" or "call the hearing's fairness into question"), *amended by* 404 F.3d 1105 (9th Cir. 2005) (order); *Azanor v. Ashcroft*, 364 F.3d 1013, 1023 (9th Cir. 2004) (rejecting claim because petitioner failed to comply with *Lozada* and counsel's actions did not cause prejudice because petitioner failed to inform counsel of critical facts); *Reyes v. Ashcroft*, 358 F.3d 592, 597–98 (9th Cir. 2004) (rejecting claim because petitioner failed to comply substantially with *Lozada*); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (rejecting claim based on single statement of counsel during proceedings); *Lata v. INS*, 204 F.3d 1241 (9th Cir. 2000) (petitioner failed to show prejudice); *Ortiz v. INS*, 179 F.3d 1148 (9th Cir. 1999) (petitioner failed to show prejudice); *Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986) (finding no ineffective assistance by accredited representative); *Ramirez-Durazo v. INS*, 794 F.2d 491, 500–01 (9th Cir. 1986) (no ineffective assistance or prejudice); *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986) (attorney's decision to forego contesting deportability was a tactical decision that did not rise to the level of ineffective assistance).

Cross-reference: Due Process in Immigration Proceedings, Ineffective Assistance of Counsel.

VIII. CASES ADDRESSING MOTIONS TO REOPEN FOR SPECIFIC RELIEF

A. Motions to Reopen to Apply for Suspension of Deportation

INS v. Rios-Pineda, 471 U.S. 444 (1985) (Attorney General did not abuse discretion in denying motion to reopen); *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (BIA did not abuse discretion in denying motion to reopen).

Chete Juarez v. Ashcroft, 376 F.3d 944 (9th Cir. 2004) (petition granted); *Ordonez v. INS*, 345 F.3d 777 (9th Cir. 2003) (petition granted); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (petition denied); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because "new" information regarding date of entry was available and capable of discovery prior to deportation hearing); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (reversed and remanded); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (reversed and remanded); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (petition remanded); *Sequeira-Solano v. INS*, 104 F.3d 278 (9th Cir. 1997) (petition denied); *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (reversed and remanded); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991) (petition denied); *Gonzalez Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986) (en banc) (discretionary denial of reopening was arbitrary); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985) (reversed and remanded), *amended by* 785 F.2d 650 (9th Cir. 1986) (order); *Duran v. INS*, 756 F.2d 1338 (9th Cir. 1985) (reversed and remanded).

Cross-reference: Cancellation of Removal, Suspension of Deportation, and Section 212(c) Relief.

B. Motions to Reopen to Apply for Asylum and Withholding

INS v. Doherty, 502 U.S. 314 (1992) (Attorney General did not abuse his discretion by denying the motion to reopen); *INS v. Abudu*, 485 U.S. 94 (1988) (BIA did not abuse its discretion by denying the motion to reopen); *Nababan v. Garland*, 18 F.4th 1090, 1096 (9th Cir. 2021) (petition granted where BIA failed to assess individualized risk of persecution and directing the BIA on remand to assess whether country conditions in Indonesia have materially changed for evangelical Christians in particular, as distinct from Christians in general); *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1037 (9th Cir. 2021) (petition granted where

exceptional circumstances warranted reopening of immigration proceedings); *Cui v. Garland*, 13 F.4th 991, 1001 (9th Cir. 2021) (petition denied where permanent resident failed to make prima facie showing of eligibility for asylum or withholding of removal, and thus, BIA did not abuse its discretion in denying motion to reopen); *Silva v. Garland*, 993 F.3d 705 (9th Cir. 2021) (petition denied); *Rodriguez v. Garland*, 990 F.3d 1205, 1211 (9th Cir. 2021) (petition denied); *Salim v. Lynch*, 831 F.3d 1133, 1137 (9th Cir. 2016) (petition granted); *Zhao v. Holder*, 728 F.3d 1144, 1145 (9th Cir. 2013) (petition granted); *Ali v. Holder*, 637 F.3d 1025 (9th Cir. 2011) (petition granted); *Almaraz v. Holder*, 608 F.3d 638 (9th Cir. 2010) (petition denied); *Delgado-Ortiz v. Holder*, 600 F.3d 1148 (9th Cir. 2010) (petition denied); *Najmabadi v. Holder*, 597 F.3d 983 (9th Cir. 2010) (petition denied); *Lin v. Holder*, 588 F.3d 981 (9th Cir. 2009) (petition denied); *Toufighi v. Mukasey*, 538 F.3d 988, 996–97 (9th Cir. 2008) (petition denied); *Chen v. Mukasey*, 524 F.3d 1028, 1031–34 (9th Cir. 2008) (petition denied); *Bhasin v. Gonzales*, 423 F.3d 977, 989 (9th Cir. 2005) (petition granted); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (petition granted); *Malty v. Ashcroft*, 381 F.3d 942 (9th Cir. 2004) (petition granted); *Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004) (petition granted); *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004) (petition granted); *Singh v. Ashcroft*, 367 F.3d 1182 (9th Cir. 2004) (petition granted); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (denying petition as to asylum and withholding, granting as to CAT relief); *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004) (petition granted); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (granting petition for review of BIA's denial of motion to reconsider based on due process violation); *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002) (petition granted); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (petition denied); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (petition denied); *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996) (petition denied); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (petition granted); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984) (petition denied); *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987) (reversed and remanded); *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986) (petition granted); *Sakhavat v. INS*, 796 F.2d 1201 (9th Cir. 1986) (reversed and remanded); *Aviles-Torres v. INS*, 790 F.2d 1433 (9th Cir. 1986) (reversed and remanded); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (petition denied); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985) (remanding on asylum claim); *Sangabi v. INS*, 763 F.2d 374 (9th Cir. 1985) (petition denied); *Samimi v. INS*, 714 F.2d 992 (9th Cir. 1983) (remanded).

Cross-reference: Asylum, Withholding and the Convention Against Torture.

C. Motions to Reopen to Apply for Relief Under the Convention Against Torture

"Denial of a motion to reopen to present a claim under the Convention qualifies as a final order of removal," over which this court has jurisdiction. *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (petition granted).

"The 'reasonable likelihood' standard applies at the motion to reopen stage, while the 'more likely than not standard' applies to CAT protection claims themselves." *Kaur v. Garland*, 2 F.4th 823, 837 (9th Cir. 2021) (petition granted) (explaining that for Kaur to "prevail on her motion to reopen, [she] need not prove her CAT claim. She must merely show that there is a reasonable likelihood that she will be able to show that it is more likely than not she will be tortured if returned to India).

See also Etemadi v. Garland, 12 F.4th 1013, 1032 (9th Cir. 2021) (petition granted) ("Etemadi has demonstrated changed country conditions in Iran and has also made a prima facie showing of entitlement to CAT relief."); *Silva v. Garland*, 993 F.3d 705, 719 (9th Cir. 2021) (petition denied) (concluding that "[i]t was neither arbitrary nor irrational for the BIA to conclude that Silva's speculations in his motion to reopen and declaration were insufficient to show "that it is more likely than not that he would be tortured if removed to [the Philippines]."); *Agonafer v. Sessions*, 859 F.3d 1198, 1203–04 (9th Cir. 2017) ("The changed country conditions exception likewise applies to motions to reopen to assert CAT claims.") (petition granted); *Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014) (regulations governing motions to reopen filed with the BIA apply to motion that arise under the Convention Against Torture); *Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) (BIA abused discretion by rejecting new evidence relevant to whether petitioner eligible for deferral of removal under CAT); *Williams v. Mukasey*, 531 F.3d 1040, 1042–43 (9th Cir. 2008) (publication of CAT regulations in Federal Register provided adequate notice of June 21, 1999 deadline to file motion to reopen based on CAT claim of applicant subject to pre-March 22, 1999 removal order); *Huang v. Ashcroft*, 390 F.3d 1118 (9th Cir. 2004) (motions to reopen to apply for withholding or deferral of removal under CAT are both subject to the time limitations set forth in 8 C.F.R. § 208.18(b)(2)); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (granting petition as to CAT relief and remanding for evaluation under correct legal standard); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (IJ abused his discretion in failing to address motion to reopen to apply for CAT relief); *Abassi v. INS*, 305 F.3d 1028 (9th Cir. 2002) (petition granted in part); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001)

(vacated and remanded); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (motion to remand denied); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (petition denied as to motion to reopen to apply for CAT relief).

Cross-reference: Asylum, Withholding and the Convention Against Torture.

D. Motions to Reopen to Apply for Adjustment of Status

"[T]he Board of Immigration Appeals has authority to reopen proceedings of an alien who is under a final order of removal in order to afford the alien an opportunity to pursue an adjustment of status application before United States Citizenship and Immigration Services." *Singh v. Holder*, 771 F.3d 647, 649 (9th Cir. 2014). "Generally, a motion to reopen for adjustment of status will not be granted on the basis of a marriage entered into during deportation proceedings unless the petitioner qualifies for the bona fide marriage exception." *Yepremyan v. Holder*, 614 F.3d 1042, 1044 (9th Cir. 2010) (per curiam) (citing 8 U.S.C. 1255(e)) (denying petition where BIA acted within its discretion in denying motion to reopen where petitioner failed to prove her marriage to be bona fide by clear and convincing evidence).

See also Rubalcaba v. Garland, 998 F.3d 1031, 1041 (9th Cir. 2021) (granting petition because BIA erred in determining that departure bar prevented IJ from reopening proceedings *sua sponte* to allow him to apply for adjustment of status); *Bonilla v. Lynch*, 840 F.3d 575, 583–84 (9th Cir. 2016) (denying Bonilla's petition for review as to the motion to reopen for adjustment of status); *Avagyan v. Holder*, 646 F.3d 672, 681–82 (9th Cir. 2011) (BIA abused its discretion in denying as untimely motion to reopen on grounds on IAC in applying for adjustment of status); *Malilia v. Holder*, 632 F.3d 598 (9th Cir. 2011) (petition granted where petitioner entitled to continuance to allow agency an opportunity to adjudicate pending application for adjustment of status); *Sharma v. Holder*, 633 F.3d 865 (9th Cir. 2011) (petition denied where evidence insufficient to show bona fide marriage); *Ocampo v. Holder*, 629 F.3d 923, 928 (9th Cir. 2010) (motion to reopen to apply for adjustment of status denied as untimely); *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041–42 (9th Cir. 2008) (petition denied as untimely); *Kalilu v. Mukasey*, 548 F.3d 1215, 1217–18 (9th Cir. 2008) (per curiam) (remanding "for an exercise of the agency's discretion that takes into consideration the factors set forth in [*Matter of Velarde-Pacheco*, 23 I. & N. Dec. 253, 256 (BIA 2002)]"); *Ochoa-Amaya v. Gonzales*, 479 F.3d 989 (9th Cir. 2007) (petitioner did not qualify as child under Child Status Protection Act because he turned 21 before

visa petition approved by INS; petition denied); *Medina-Morales v. Ashcroft*, 371 F.3d 520 (9th Cir. 2004) (petition granted, holding that BIA erred in considering the strength of the stepparent-stepchild relationship); *de Martinez v. Ashcroft*, 374 F.3d 759 (9th Cir. 2004) (petition denied); *Manjiyani v. Ashcroft*, 343 F.3d 1018 (9th Cir. 2003) (order) (petition remanded); *Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (affirming BIA's denial of motion to remand to apply for adjustment of status based on marriage that occurred during deportation proceedings); *Zazueta-Carrillo v. INS*, 322 F.3d 1166 (9th Cir. 2003) (remanding BIA's denial of motion to reopen to apply for adjustment of status based on petitioner's failure to depart voluntarily); *Castillo Ison v. INS*, 308 F.3d 1036 (9th Cir. 2002) (per curiam) (adjustment of status and immigrant visa; petition granted); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002) (court lacks jurisdiction to review BIA's refusal *sua sponte* to reopen proceedings to allow applicant to apply for adjustment of status); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (reversing and remanding denial of motion to remand to adjust status); *Eide-Kahayon v. INS*, 86 F.3d 147 (9th Cir. 1996) (per curiam) (petition denied); *Caruncho v. INS*, 68 F.3d 356 (9th Cir. 1995) (petition denied); *Dielmann v. INS*, 34 F.3d 851 (9th Cir. 1994) (petition denied); *Ng v. INS*, 804 F.2d 534 (9th Cir. 1986) (reversed and remanded); *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986) (petition granted); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Ahwazi v. INS*, 751 F.2d 1120 (9th Cir. 1985) (consolidated petitions denied).

E. Motion to Reopen Reasonable Fear Proceeding

"No statute or regulation specifically addresses whether an alien may file a motion to reopen reasonable fear proceedings. However, in *Ayala v. Sessions*, [855 F.3d 1012, 1020–21 (9th Cir. 2017), the court] concluded that the IJ abused its discretion in not reconsidering the petitioner's motion for reconsideration of such proceedings." *Bartolome v. Sessions*, 904 F.3d 803, 815 (9th Cir. 2018). The court in *Bartolome* explained that nothing in the regulation precludes a noncitizen from filing a motion to reopen before an IJ, and that " § 1003.23(b)(1) provides that an IJ has *sua sponte* jurisdiction to reopen 'any case in which he or she has made a decision.'" *Bartolome*, 904 F.3d at 815. *See also Ayala*, 855 F.3d at 1020–21 (concluding IJ abused his discretion in denying Ayala's motion to reopen and reconsider where there was legal error in his previous decision affirming the negative reasonable fear determination).

F. Motions to Reopen to Apply for Other Relief

Quebrado Cantor v. Garland, 17 F.4th 869, 873 (9th Cir. 2021) (granting petition for review of denial motion to reopen removal proceedings based on claim that noncitizen met continuous presence requirement in United States, as required to be eligible for cancellation of removal); *Sanchez Rosales v. Barr*, 980 F.3d 716, 719–20 (9th Cir. 2020) (granting petition and remanding to the BIA to evaluate petitioners' motion to reopen to rescind petitioners' in absentia removal order); *Martinez v. Barr*, 941 F.3d 907, 922 (9th Cir. 2019) (motion to reopen removal proceedings after IJ issued an *in absentia* removal order); *Man v. Barr*, 940 F.3d 1354, 1355–58 (9th Cir. 2019) (per curiam) (motions to reopen to consider U visa); *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1143 (9th Cir. 2019) (motion to reopen seeking to rescind the deportation order entered *in absentia*); *Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018) (motion to reopen to rescind a removal order entered *in absentia*); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 824–27 (9th Cir. 2011) (time period for filing motion to reopen for NACARA relief equitably tolled due to fraudulent representation, and case remanded to BIA); *Navarro v. Mukasey*, 518 F.3d 729 (9th Cir. 2008) (motion to reopen on the basis that they qualified for benefits under the *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002) class action settlement; petition granted); *Avila-Sanchez v. Mukasey*, 509 F.3d 1037 (9th Cir. 2007) (motion to reopen to obtain waiver of inadmissibility; petition denied); *Pedroza-Padilla v. Gonzales*, 486 F.3d 1362 (9th Cir. 2007) (legalization, waiver of inadmissibility (212(a)(9)(A)(ii)(II)), continuous residence; petition denied); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090 (9th Cir. 2005) (NACARA § 203(c) special rule cancellation; petition granted); *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002) (holding that petitioner failed to exhaust equitable tolling argument); *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (section 241(f) waiver; petition granted); *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (court lacks jurisdiction to review denial of aggravated felon's motion to reopen to apply for former § 212(c) relief); *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996) (motion to reopen to request a humanitarian waiver; petition denied); *Alquisalas v. INS*, 61 F.3d 722 (9th Cir. 1995) (waiver of deportation; remanded); *Foroughi v. INS*, 60 F.3d 570 (9th Cir. 1995) (former § 212(c) relief; petition granted); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (former § 212(c) relief; petition granted); *Torres-Hernandez v. INS*, 812 F.2d 1262 (9th Cir. 1987) (former § 212(c) relief; petition denied); *Platero-Reymundo v. INS*, 807 F.2d 865 (9th Cir. 1987) (reinstatement of voluntary departure; petition denied); *Desting-Estime v. INS*, 804 F.2d 1439 (9th Cir. 1986) (to redesignate country of deportation; petition denied); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986) (reinstatement of voluntary

departure; finding no abuse of discretion); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Avila-Murrieta v. INS*, 762 F.2d 733 (9th Cir. 1985) (former § 212(c) relief; petition denied).