

MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

Table of Contents

I.	DIFFERENCES BETWEEN MOTIONS TO REOPEN AND MOTIONS TO RECONSIDER	6
A.	Pertinent Regulations	7
B.	Motion to Reopen	7
C.	Motion to Reconsider	10
D.	Motion to Remand	11
E.	Motion to Reissue	12
F.	Motion to Amend	13
G.	Improperly Styled Motions	13
II.	JURISDICTION	13
A.	Effect of 8 U.S.C. § 1252(a)(2)(B)(i)	15
C.	Sua Sponte Reopening	17
D.	Certification Under 8 C.F.R. § 1003.1(c)	19
E.	Finality of the Underlying Order	19
F.	Filing Motion to Reopen or Reconsider Not a Jurisdictional Prerequisite to Filing a Petition for Review	20
G.	Tolling of the Time Period to File Petition for Review	21
H.	No Automatic Stay of Removal or Tolling of Voluntary Departure Period	21
1.	Exception for In Absentia Removal or Deportation Orders	21
I.	Consolidation	22
J.	Departure from the United States (Departure Bar)	22

K.	Bar Under 8 U.S.C. § 1231(a)(5)	25
III.	STANDARD OF REVIEW	26
A.	Generally	26
B.	Full Consideration of All Factors	29
1.	Later-Acquired Equities	31
C.	Explanation of Reasons	32
D.	Irrelevant Factors	33
E.	Credibility Determinations	33
IV.	REQUIREMENTS FOR A MOTION TO REOPEN	34
A.	Supporting Documentation	35
1.	Exceptions	36
B.	Material and Previously Unavailable Evidence	36
C.	Explanation for Failure to Apply for Discretionary Relief	37
D.	Prima Facie Eligibility for Relief	38
E.	Discretionary Denial	39
F.	Relevance of Prior Grant of Voluntary Departure	41
1.	Voluntary Departure Regulations	42
2.	<i>Dada v. Mukasey</i>	42
3.	<i>Pre-Dada v. Mukasey</i>	43
G.	Appeal of Deportation Order	44
H.	Fugitive Disentitlement Doctrine	44
V.	TIME AND NUMERICAL LIMITATIONS	45
A.	Generally	45
1.	Time Limitations	45
2.	Numerical Limitations	48
B.	Exceptions to the 90-Day/One-Motion Rules	49
1.	In Absentia Orders	49

a.	Reopening and Rescission Based on Exceptional Circumstances	49
(i)	Evidentiary Requirements	52
(ii)	Cases Finding Exceptional Circumstances	53
(iii)	Cases Finding No Exceptional Circumstances	54
(iv)	Arriving Late While IJ On Bench	55
b.	Reopening and Rescission Based on Improper Notice of Hearing	55
(i)	Actual or Constructive Notice Sufficient.....	58
(ii)	Noncitizens’ Address Obligations and Right to Notice	61
(iii)	Presumption of Effective Delivery.....	62
(iv)	Improper Service of NTA	64
(v)	Defective NTA in In Absentia Context.....	64
(vi)	Notice in Pre-IIRIRA Proceedings.....	65
c.	Movant in Custody	67
2.	Changed Country Conditions/Circumstances	67
(i)	Requirements for Motion Premised on Changed Country Conditions/Circumstances	68
(ii)	Significance of Prior Adverse Credibility Determination.....	72
(iii)	Changes in Personal Circumstances.....	73
(iv)	Changes in U.S. Asylum Law	75
3.	Jointly Filed Motions	75
4.	Government Motions Based on Fraud	76
5.	Sua Sponte Reopening by the Agency.....	76
(i)	Exceptional Circumstances and Discretion.....	77
(ii)	Limited Judicial Review.....	77
(iii)	Departure or Illegal Reentry.....	79

VI.	EQUITABLE TOLLING	79
-----	-------------------------	----

A.	Circumstances Beyond the Applicant’s Control	85
B.	Fraudulent or Erroneous Attorney Conduct.....	85
C.	Changes in Law	86
D.	Due Diligence.....	87
VII.	INEFFECTIVE ASSISTANCE OF COUNSEL	89
A.	Presented Through a Motion to Reopen.....	90
B.	Exhaustion and Proper Forum.....	90
C.	Standard of Review	92
D.	Requirements for Due Process Violation.....	93
1.	Constitutional and Statutory Basis.....	93
2.	Fundamentally Unfair Proceeding; Competence	96
3.	Prejudice.....	99
a.	Rebuttable (and Irrebuttable) Presumptions of Prejudice	
	101	
b.	Exception for In Absentia Orders.....	104
E.	The <i>Lozada</i> Requirements.....	105
F.	Cases Discussing Ineffective Assistance of Counsel.....	109
1.	Cases Finding Ineffective Assistance	109
2.	Cases Rejecting Ineffective Assistance of Counsel Claims ...	111
VIII.	CASES ADDRESSING MOTIONS TO REOPEN FOR SPECIFIC RELIEF	
		113
A.	Motions to Apply for Cancellation of Removal.....	114
B.	Motions to Reopen to Apply for Asylum and Withholding	115
C.	Motions to Reopen to Apply for Relief Under the Convention Against Torture (CAT)	117
D.	Motions to Reopen to Apply for Adjustment of Status	119
E.	Motion to Reopen Reasonable Fear Proceeding	120
F.	Motions to Reopen to Apply for Other Relief	121
1.	Suspension of Deportation.....	121

2.	NACARA Relief.....	121
3.	212(c) Relief	121
4.	Miscellaneous Relief.....	122

MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) transformed motions to reopen from a regulatory procedure to a statutory form of relief. *See Dada v. Mukasey*, 554 U.S. 1, 14 (2008); *Meza-Vallejos v. Holder*, 669 F.3d 920, 924 (9th Cir. 2012) (“Prior to IIRIRA, there was no time limit for requesting the reopening of a case due to the availability of new evidence. IIRIRA provided the first statutory right to a motion to reopen” (citations and internal quotation marks omitted)); *Azarte v. Ashcroft*, 394 F.3d 1278, 1283 (9th Cir. 2005) (recounting the history of motions to reopen), *abrogated on other grounds by Dada v. Mukasey*, 554 U.S. 1 (2008).

For individuals in removal proceedings, motions to reconsider and motions to reopen are governed by 8 U.S.C. § 1229a(c)(6) and (7) respectively (formerly codified at 8 U.S.C. § 1229a(c)(5) and (6)). 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) (BIA) and 1003.23(b) (immigration judge) (formerly codified at 8 C.F.R. §§ 3.2 and 3.23).

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND MOTIONS TO RECONSIDER

The court has differentiated motions to reopen and motions to reconsider as follows:

Motions to reopen and reconsider are two separate and distinct motions with different requirements. A motion to reconsider must specify errors in a previous BIA decision, *see* 8 C.F.R. § 1003.2(b)(1), so the BIA evaluates the motion using the same record evidence used in making its prior decision. A motion to reopen, in contrast, is premised on evidence unavailable at the time of a previous BIA decision. *See* 8 C.F.R. § 1003.2(c)(1). Critical to this case are the different filing deadlines applicable to the two types of motions. A motion to reconsider must be filed within thirty days of the challenged BIA decision, while a motion to reopen must be filed within ninety days. 8 C.F.R. § 1003.2(b)(2), (c)(2).

Garcia Corrales v. Blanche, 179 F.4th 739, 742 (9th Cir. 2026) (case citations and internal quotation marks omitted).

A. Pertinent Regulations

Regulations regarding motions to reopen and motions to reconsider are set forth at 8 C.F.R. §§ 1003.2 (to the BIA) and 1003.23 (to an immigration court). The regulations were amended effective January 2021, *see* 85 Fed. Reg. 81588-01, but the amendment was stayed and preliminarily enjoined. *See Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919 (N.D. Cal. 2021). This court acknowledged the stay and preliminary injunction without commenting on the validity of the regulations. *See Perez-Camacho v. Garland*, 54 F.4th 597, 603 n.5 (9th Cir. 2022) (discussing § 1003.2); *Bravo-Bravo v. Garland*, 54 F.4th 634, 637 n.2 (9th Cir. 2022) (discussing § 1003.23).

Disclaimer: Although this Outline may reference prior versions of the regulations, this does not reflect the court’s view on the current status of the regulations.

B. Motion to Reopen

“The motion to reopen is an ‘important safeguard’ intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.” *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)); *accord Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021); *Chandra v. Holder*, 751 F.3d 1034, 1036 (9th Cir. 2014).

“‘[E]very alien ordered removed . . . has a right to file one motion’ with the IJ or Board to ‘reopen his or her removal proceedings.’” *Mata v. Lynch*, 576 U.S. 143, 145 (2015) (quoting *Dada v. Mukasey*, 554 U.S. 1, 4–5 (2008)); *accord Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020) (“[T]he Immigration and Nationality Act permits a person one motion to reopen.”).

Subject to exceptions, “that motion to reopen ‘shall be filed within 90 days’ of the final removal order.” *Mata v. Lynch*, 576 U.S. 143, 145 (2015) (quoting 8 U.S.C. § 1229a(c)(7)(C)(i)); *see also Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020) (“[T]he motion must usually be filed ‘within 90 days of the date of entry of a final administrative order of removal.’” (quoting 8 U.S.C. § 1229a(c)(7)(C)(i))).

The 90-day deadline does not apply to sua sponte reopening: the BIA may reopen proceedings on its own motion (sua sponte) at any time. See *Mata v. Lynch*, 576 U.S. 143, 145 (2015) (quoting 8 CFR § 1003.2(a) (2015)).

“A motion to reopen is a form of procedural relief that asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing.” *Dada v. Mukasey*, 554 U.S. 1, 12 (2008) (internal quotation marks omitted).

A motion to reopen may provide new evidence with respect to an *existing* application for relief. See *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, whereas 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.’” (quoting 8 C.F.R. § 1003.23(2), (3))); *Oyeniran v. Holder*, 672 F.3d 800, 808 (9th Cir. 2012), *as amended* (May 3, 2012) (“[A] motion to reopen alleges new facts that bear upon the agency’s earlier decision.” (alteration in original) (quoting *Ghahremani v. Gonzales*, 498 F.3d 993, 997 n.1 (9th Cir. 2007))).

Alternatively, a motion to reopen may provide new evidence with respect to an *additional* application for relief. See *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1063–64 (9th Cir. 2008) (“A petitioner may . . . move to reopen for the purpose of submitting a new application for relief, provided such motion is accompanied by the proper application for relief and all supporting documentation, and the evidence sought to be offered is material and was not available and could not have been presented at the former hearing.” (citing 8 C.F.R. § 1003.2(c)(1))), *overruled on other grounds by* *Cheneau v. Garland*, 997 F.3d 916 (9th Cir. 2021) (en banc).

A motion to reopen is not a proper vehicle for raising an error of law:

a motion to reopen is not a means by which the BIA can correct its own legal error. A motion to *reconsider* seeks to correct alleged errors of fact or law. A motion to *reopen*, on the other hand, is purely fact-based, seeking to present newly discovered facts or changed circumstances since a petitioner’s hearing. . . . We hold that, 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.

Doissaint v. Mukasey, 538 F.3d 1167, 1170–71 (9th Cir. 2008) (citations omitted).

The agency properly denies a motion to reopen when it raises new legal arguments but presents no new facts. See *Membreno v. Gonzales*, 425 F.3d 1227, 1229–30 (9th Cir. 2005) (en banc) (“The BIA properly denied Membreno’s motion to reopen because Membreno presented the BIA with no new facts, but only new legal arguments. . . . The BIA did not abuse its discretion when it declined to reopen proceedings because Membreno presented no new facts in her motion to reopen.”).

Claims of ineffective assistance of counsel should be raised in a motion to reopen when they are based on facts and evidence that were not available when the agency rendered its original decision. See *Correa-Rivera v. Holder*, 706 F.3d 1128, 1130–31 (9th Cir. 2013) (a filing raising ineffective assistance of counsel before the IJ was treated as a motion to reopen, rather than an appeal, where it was based on facts and evidence that were not available when the IJ rendered his decision); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (BIA erred as a matter of law in characterizing a filing as a motion to reconsider, rather than a motion to reopen, where it raised a claim of ineffective assistance based on factual representations that previously had been unavailable); *Iturribarria v. INS*, 321 F.3d 889, 895–97 (9th Cir. 2003) (a filing raising ineffective assistance of counsel was treated as a motion to reopen, rather than a motion to reconsider, where it was “based on new evidence that was purportedly not discoverable at an earlier stage”); *id.* at 891 (“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.”).

Where a petitioner alleges ineffective assistance of counsel based on counsel’s failure to exhaust an argument before the agency, the ineffective assistance claim should be presented to the agency in a motion to reopen. See *Benedicto v. Garland*, 12 F.4th 1049, 1062 (9th Cir. 2021) (“The proper way to raise and exhaust an ineffective assistance of counsel claim in this situation is through a motion to reopen before the agency.”).

“[A] motion to reopen is the proper vehicle to challenge the dismissal of an untimely appeal when the challenge is premised on evidence not previously before the BIA.” *Garcia Corrales v. Blanche*, 179 F.4th 739, 743 (9th Cir. 2026) (BIA abused its discretion in treating motion to reopen as motion to reconsider where the motion was premised on evidence that the petitioner’s notice of appeal had been grossly delayed in the mail).

The BIA’s granting of a motion to reopen divests the court of appeals of jurisdiction over a pending petition for review because it eliminates a prerequisite for this court’s jurisdiction—a final order of removal. *See Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (“The BIA’s granting of the motion to reopen means there is no longer a final decision to review. This court only reviews final orders of removal.”; dismissing petition for review for lack of jurisdiction where the BIA granted a motion to reopen and remanded to the IJ).

C. 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) (permitting one motion to reconsider, filed within 30 days of the final order of removal, which specifies the errors of law or fact in the previous order and is supported by pertinent authority); 8 C.F.R. § 1003.2(b)(1) (2020) (motions to reconsider before the BIA); *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 . . .”).

A motion to reconsider “shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.” 8 U.S.C. § 1229a(c)(6)(C); *see* 8 C.F.R. § 1003.2(b)(1) (2020); *see also Iturribarria v. INS*, 321 F.3d 889, 895–96 (9th Cir. 2003) (“The only supporting materials required for a motion to reconsider are a statement of the party’s arguments regarding the BIA’s alleged errors and ‘pertinent authority.’”).

“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 motion must be filed within 30 days of the date of entry of a final administrative order of removal.”)).

The BIA's grant of a motion to reconsider does not necessarily divest this court of jurisdiction over a pending petition for review. *See Robles-Urrea v. Holder*, 678 F.3d 702, 707 (9th Cir. 2012) ("The BIA's grant of the motion for reconsideration does not divest us of jurisdiction over the petition for review of its initial order, because the analysis and the result reached by the BIA after reconsideration were substantially the same as in the previous order."; the BIA's decision on reconsideration, however, rendered the petition for review of the BIA's previous decision moot); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745–46 (9th Cir. 2008) ("Once a petition for review has been filed, federal court jurisdiction is divested only where the BIA subsequently vacates or materially changes the decision under review."), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); *id.* (where the BIA granted a motion to reconsider but expressly affirmed its prior decision, the BIA's grant of the motion to reconsider did not divest the court of jurisdiction over the petition for review challenging the final order of removal).

D. Motion to Remand

"Motions to remand are appropriately filed before the BIA while the Immigration Judge's deportation decision is before the BIA on direct appeal, whereas a motion filed after a final order has been issued [by the BIA] is a motion to reopen." *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (BIA properly construed motion to remand as motion to reopen because it was filed after the deportation order had become final).

A motion to remand is similar to a motion to reopen and is subject to the same statutory or regulatory requirements. *See Angov v. Lynch*, 788 F.3d 893, 897 (9th Cir. 2015) (holding the BIA did not abuse its discretion in denying a motion to remand where petitioner did not provide any evidence supporting the motion nor explain why he believed a regulation had been violated); *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.").

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) (2020); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097 (9th Cir. 2005) ("The motion to reopen, filed while his appeal was pending before the BIA, is treated as a motion to remand to the IJ for further proceedings.");

Rodriguez v. INS, 841 F.2d 865, 867 (9th Cir. 1987) (“Since the appeal was pending and the Board had not yet rendered a decision, the BIA properly treated their motion [to reopen] as a motion to remand to the immigration judge.” (citation and internal quotation marks omitted)).

“To prevail on a motion to remand, a petitioner must, among other things, proffer evidence that is material.” *Ani v. Bondi*, 155 F.4th 1118, 1131 (9th Cir. 2025) (internal quotation marks omitted) (citing 8 C.F.R. § 1003.2(c)(1), which governs motions to reopen).

Like motions to reopen, motions to remand may be used for the purpose of submitting new applications for relief. See *Gonzalez-Lara v. Garland*, 104 F.4th 1109, 1115 (9th Cir. 2024) (“[W]hile an appeal is pending before the BIA, a motion to remand is the proper course of action for a petitioner to submit a new application for relief, especially when that application is based on a substantial change in the law.”).

“A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.” 8 C.F.R. § 1003.1(d)(3)(iv) (2020); accord *Torres-Casas v. Blanche*, 182 F.4th 1121, 1126 (9th Cir. 2026) (quoting 8 C.F.R. § 1003.1(d)(3)(iv)); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1119 (9th Cir. 2019). This requirement is a corollary to the rule that the BIA may not itself engage in factfinding.

The BIA abuses its discretion when it fails to provide a reasoned explanation for its denial of a motion to remand. See *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005); *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004) (“To guard against piecemeal appeals and to insure this court is presented with a full and complete record, the BIA must address and rule upon remand motions, giving specific, cogent reasons for a grant or denial.”).

E. Motion to Reissue

Ordinarily, when a noncitizen files a motion asking the BIA to reissue a decision, the purpose of the motion is to afford the noncitizen a new 30-day period for filing a petition for review in the court of appeals.

In analyzing a motion to reissue an agency decision, this court has applied the legal standards governing a motion to reopen. *See Coyt v. Holder*, 593 F.3d 902, 904 & n.1 (9th Cir. 2010) (petitioner filed a motion to reissue, which this court analyzed under the standards applicable to a motion to reopen); *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1076–77 (9th Cir. 2010) (petitioner filed a motion to reopen and reissue, which the BIA construed as a motion to reissue; this court construed the motion as a motion to reopen and reissue and, in addressing the merits of the motion, applied the legal standards applicable to a motion to reopen); *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”; this court applied the legal standards governing a motion to reopen).

F. Motion to Amend

An immigration judge has “broad authority to grant motions to amend documents in removal proceedings.” *Matter of R-T-P-*, 28 I. & N. Dec. 828, 839 (BIA 2024); *see Urias-Gaxiola v. Blanche*, No. 22-1474, 2026 WL 2590513, at *3–6 (9th Cir. Sept. 2, 2026) (BIA abused its discretion by affirming the IJ’s erroneous denial of a noncitizen’s motion to amend his answer to withdraw a factual admission).

G. 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) (BIA properly construed motion to reconsider raising ineffective assistance of counsel as a motion to reopen; BIA also properly construed a subsequent motion to open as a motion to reconsider); *see also Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (putative “appeal” raising ineffective assistance of counsel claim construed as motion to reopen).

II. JURISDICTION

The court of appeals has jurisdiction to review the agency’s refusal to reopen or reconsider a final order of removal:

[C]ircuit courts have jurisdiction when an alien appeals from the Board’s denial of a motion to reopen a removal

proceeding. [*Kucana v. Holder*, 558 U.S. 233, 242 (2010)]. 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”).

Mata v. Lynch, 576 U.S. 143, 147–48 (2015); see 8 U.S.C. § 1252(b)(6) (“When a petitioner seeks review of [a final order of removal], any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.”); *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) (reviewing denial of motion to reconsider); *Agonafer v. Sessions*, 859 F.3d 1198, 1202 (9th Cir. 2017) (“We . . . ‘have jurisdiction when an alien appeals from the [BIA]’s denial of a motion to reopen a removal proceeding.’” (second alteration in original) (quoting *Mata*, 576 U.S. at 147)); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) (reviewing denial of motion to reopen for adjustment of status); *Hernandez v. Holder*, 738 F.3d 1099, 1100 (9th Cir. 2013) (jurisdiction to review BIA’s dismissal of a motion to reopen for lack of jurisdiction); *Meza-Vallejos v. Holder*, 669 F.3d 920, 923 (9th Cir. 2012) (court has jurisdiction to review denial of motion to reopen pursuant to 8 U.S.C. § 1252(a)); *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (discussing long history of federal-court review of administrative decisions denying motions to reopen removal proceedings); *He v. Gonzales*, 501 F.3d 1128, 1129 n.1 (9th Cir. 2007) (“The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals.”).

The court’s jurisdiction to review the denial of a motion to reopen or reconsider applies to denials on grounds of untimeliness:

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, 148 (2015).

Where the petitioner files a motion to reopen or reconsider (or appeals the IJ’s denial of a motion to reopen to the BIA) and the BIA issues an order automatically withdrawing the motion (or appeal) due to the petitioner’s departure from the United States, the order is the “functional equivalent” of an order denying the motion to reopen or reconsider for purposes of the court’s jurisdiction. *See Lopez-Angel v. Barr*, 952 F.3d 1045, 1047 (9th Cir. 2019) (citing *Madrigal v. Holder*, 572 F.3d 239, 242 (6th Cir. 2009)).

A. Effect of 8 U.S.C. § 1252(a)(2)(B)(i)

When the BIA denies a motion to reopen (or another procedural motion) pertaining to an application for a form of relief enumerated in § 1252(a)(2)(B)(i)—the criminal admissibility waiver under § 1182(h), the fraud or misrepresentation waiver under § 1182(j), cancellation of removal under § 1229b, voluntary departure under § 1229c, or adjustment of status under § 1255—the court’s jurisdiction to review that denial is governed in part by § 1252(a)(2)(B)(i). Specifically:

- The court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review the agency’s rulings on constitutional claims and questions of law. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 965 (9th Cir. 2025) (“We reiterate that we always retain jurisdiction to review constitutional claims and questions of law. Even where the BIA states that it would deny relief as a matter of discretion, we retain jurisdiction over legal arguments that the BIA, for example, applied the wrong preliminary law, failed to accept the proffered evidence as true, or misapplied its regulations.” (citation omitted)).
- The court has jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review the agency’s rulings on mixed questions of law and fact—i.e., on the application of a legal standard to a set of established or undisputed facts. *See Wilkinson v. Garland*, 601 U.S. 209, 212 (2024) (holding that mixed questions constitute legal questions under § 1252(a)(2)(D)); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020); *see, e.g., Lemus-Escobar v. Bondi*, 158 F.4th 944, 963 (9th Cir. 2025) (court has jurisdiction to review the BIA’s

denial of a motion to reopen on the grounds that proffered evidence is not new because whether a motion to reopen presents “new” evidence is a mixed question of law and fact); *id.* (court has jurisdiction to review the BIA’s denial of a motion to reopen on the grounds that the motion to reopen is untimely); *id.* (court has jurisdiction to review the BIA’s denial of a motion to reopen on the grounds that the applicant failed to establish changed country conditions to excuse the procedural defects in a second motion to reopen); *id.* (court has jurisdiction to review the BIA’s denial of a motion to reopen on the grounds that the applicant failed to establish “extraordinary circumstances” to excuse a late motion to reopen); *id.* at 963–64 (court has jurisdiction to review the BIA’s denial of a motion to reopen based on the BIA’s determination that the applicant’s evidence does not establish a prima facie case of statutory eligibility for relief, such as continuous physical presence, good moral character, or hardship requirements applicable to an application for cancellation of removal); *id.* at 966 (“We have jurisdiction over a denial for a preliminary procedural reason and over a denial on the ground that the petitioner has not established a prima facie case of statutory eligibility for relief.”).

- The court lacks jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(i) to review the agency’s rulings regarding how it would exercise its purely discretionary judgment about the ultimate grant or denial of the enumerated form of relief. *See Lemus-Escobar v. Bondi*, 158 F.4th 944, 964–65 (9th Cir. 2025) (holding that § 1252(a)(2)(B)(i) precludes judicial review of “a determination by the BIA that, accepting the facts as true and assuming that the petitioner is statutorily eligible for a discretionary form of relief such as NACARA cancellation of removal, the petitioner has not established that the BIA would likely change its discretionary denial”); *id.* at 965 (“We lack jurisdiction . . . over the BIA’s purely discretionary judgment that it would deny relief as a matter of discretion.”); *id.* at 966 (“[W]e lack jurisdiction when the BIA rules that the petitioner failed to establish that the new evidence would likely change the BIA’s determination that the petitioner does not warrant a favorable exercise of discretion.”).
- The court lacks jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(i) to review factual rulings relating to one of the enumerated forms of relief. *See Figueroa Ochoa v. Garland*, 91 F.4th 1289, 1293–95 (9th Cir. 2024) (holding that § 1252(a)(2)(B)(i) “applies to factual judgments made in the

course of ruling on procedural motions such as [the motion to remand and the motion for a continuance] at issue here”).

Note: Older cases addressing the application of [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(i\)](#) to judicial review of orders denying motions to reopen and other procedural motions should be examined with the foregoing *Figueroa Ochoa* and *Lemus-Escobar* framework in mind.

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

B. Effect of [8 U.S.C. § 1252\(a\)\(2\)\(C\)](#)

[Section 1252\(a\)\(2\)\(C\)](#) limits the scope of judicial review of a final order of removal that rests upon the fact that the noncitizen has committed certain crimes. [Section 1252\(a\)\(2\)\(D\)](#), however, provides for judicial review over constitutional claims and questions of law.

In [Guerrero-Lasprilla v. Barr](#), 589 U.S. 221, 225 (2020), the petitioners, who were subject to [§ 1252\(a\)\(2\)\(C\)](#), filed motions to reopen their removal proceedings after the 90-day time limit had long since passed. The BIA denied the petitioners’ request for equitable tolling of the time limit, concluding that they failed to demonstrate due diligence. *Id.* at 226. The Supreme Court held that the court of appeals had jurisdiction to review the BIA’s decisions because (1) due diligence constitutes a mixed question of law and fact and (2) a mixed question constitutes a “question of law” for purposes of [§ 1252\(a\)\(2\)\(D\)](#). *Id.* at 226–36.

C. Sua Sponte Reopening

The court lacks jurisdiction to review the purely discretionary decision to deny sua sponte reopening but has jurisdiction to review the decision for legal or constitutional error. *See Perez-Camacho v. Garland*, 54 F.4th 597, 606 & n.12 (9th Cir. 2022) (citing *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (“[T]his 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.”)); *see also Magana-Magana v. Bondi*, 129 F.4th 557, 575 (9th Cir. 2025) (court lacks jurisdiction over the purely discretionary decision to sua sponte reopen because “BIA’s *sua sponte* reopening power was quintessentially discretionary and . . . there was no ‘sufficiently meaningful standard against which to judge the BIA’s decision not to reopen’” (quoting

Ekimian v. INS, 303 F.3d 1153, 1159 (9th Cir. 2002)); *Lara-Garcia v. Garland*, 49 F.4th 1271, 1277 (9th Cir. 2022) (jurisdiction to review denial of request for sua sponte reopening based on legal error); *Cui v. Garland*, 13 F.4th 991, 1001 (9th Cir. 2021) (“We 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.’” (quoting *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016))); *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.’” (quoting *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020))); *Lona v. Barr*, 958 F.3d 1225, 1234 (9th Cir. 2020) (“[O]ur 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.”); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1115 (9th Cir. 2019) (court generally lacks jurisdiction to review BIA decision not to exercise its sua sponte authority to reopen removal proceedings but has jurisdiction to address legal or constitutional error); *Bonilla v. Lynch*, 840 F.3d 575, 581 (9th Cir. 2016) (“[W]e have jurisdiction to review the Board’s denial of a motion to reopen *sua sponte* for the limited purpose of determining whether the Board based its decision on legal or constitutional error.”); *Go v. Holder*, 744 F.3d 604, 609–10 (9th Cir. 2014) (court lacked jurisdiction to review BIA’s discretionary decision not to sua sponte reopen); *Minasyan v. Mukasey*, 553 F.3d 1224, 1229 (9th Cir. 2009) (court lacks jurisdiction to remand to BIA with instructions to exercise sua sponte reopening discretion); *Toufighi v. Mukasey*, 538 F.3d 988, 993 n.8 (9th Cir. 2008) (“We lack jurisdiction to review the Board’s refusal to reopen removal proceedings *sua sponte*.” (citing *Ekimian*, 303 F.3d at 1160)); cf. *Mata v. Lynch*, 576 U.S. 143, 148 (2015) (noting, without adopting, the Fifth and Eighth Circuit decisions holding that courts generally lack jurisdiction to review the BIA’s decision not to exercise its sua sponte authority to reopen).

“If, upon exercise of its jurisdiction, this court concludes that the Board relied on an incorrect legal premise [in declining to exercise its authority to reopen sua sponte], it should ‘remand to the BIA so it may exercise its authority against the correct legal background.’” *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (quoting *Pllumi v. Att’y Gen. of U.S.*, 642 F.3d 155, 160 (3d Cir. 2011)). “Once it does so, this court will have no jurisdiction to review the *sua sponte* decision, as *Ekimian* instructs.” *Id.*

D. Certification Under 8 C.F.R. § 1003.1(c)

The above rule also applies to the BIA's discretionary decision of whether to certify a claim under 8 C.F.R. § 1003.1(c), which grants the BIA authority to accept a procedurally improper appeal by certification. *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). Because "the decision of whether to certify a claim under 8 C.F.R. § 1003.1(c) is committed to agency discretion," and "[t]he regulation contains no standard for how the agency should exercise its discretion in determining whether to certify a claim for review," the court lacks jurisdiction to review the IJ's and BIA's decisions not to certify an appeal. *Id.* at 542–43 (applying 5 U.S.C. § 701(a), the Administrative Procedure Act provision limiting judicial review of final agency actions to actions that are not committed to agency discretion).

The court, however, retains jurisdiction over constitutional claims and questions of law. *See Idrees v. Barr*, 923 F.3d 539, 543 (9th Cir. 2019) (court retains jurisdiction to review claims that the BIA's or IJ's refusal to certify a claim rested on any constitutional or legal error).

E. 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 Membreno v. Gonzales*, 425 F.3d 1227, 1229 (9th Cir. 2005); *cf. Nken v. Holder*, 556 U.S. 418, 430 n.1 (2009) (noting that staying a removal order does not affect finality, whereas granting a motion to reopen would extinguish that finality).

If the BIA *grants* a motion to reopen, however, "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); *see also Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010) ("We lack jurisdiction over a petition for review when the BIA reopens an alien's removal proceedings."); *Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008) (vacating prior opinion and denying petition for rehearing as moot where, unbeknownst to the court, the BIA had "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) (explaining that parties should notify the court when the BIA grants a motion to reopen while a petition for review is pending)

Neither the filing of a motion to reconsider nor the denial of a motion to reconsider affects jurisdiction over a petition for review of the underlying removal order. See *Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

A grant of a motion to reconsider, moreover, does not *automatically* render the underlying removal order nonfinal or divest the court of jurisdiction over a pending petition for review. See *Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); see also *Singh v. INS*, 213 F.3d 1050, 1052 n.2 (9th Cir. 2000) (“We may review the [BIA’s] denial of a motion to reopen while the motion to reconsider is pending [before the BIA].”); *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010) (court retained jurisdiction over petition for review where, while the petition was pending, the BIA granted reconsideration and affirmed the part of the underlying removal order addressed in the petition for review).

Rather, “[o]nce a petition for review has been filed, federal court jurisdiction is divested only where the BIA subsequently vacates or materially changes the decision under review.” *Plasencia-Ayala v. Mukasey*, 516 F.3d 738, 745 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

F. 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 *Santos-Zacaria v. Garland*, 598 U.S. 411, 425 (2023) (“Because Board reconsideration (like reopening) is a discretionary form of review, it is not available to the noncitizen ‘as of right.’ Section 1252(d)(1) therefore does not require a noncitizen to pursue it.”); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003) (“The INS’s contention that Noriega-Lopez was obliged to file a motion to reopen or reconsider before seeking review of the BIA’s order of

removal is erroneous.”); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023–24 (9th Cir. 1992) (“A motion to reopen might have been granted as a matter of discretion, but reopening was not available ‘as of right,’ so a motion to reopen was not a jurisdictional prerequisite.”).

G. Tolling of the Time Period to File Petition for Review

The time limit 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) (“[A] deportation order is final, and reviewable, when issued. Its finality is not affected by the subsequent filing of a motion to reconsider.”); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996) (noting that *Stone* abrogated circuit precedent holding that “the filing of a motion to reopen or reconsider effectively tolled the statutory time in which to appeal the underlying final order” to the court of appeals).

Section 1252(b)(1)’s 30-day deadline for filing a petition for review is nonjurisdictional; it is a mandatory claims-processing rule. See *Riley v. Bondi*, 606 U.S. 259, 263, 277 (2025).

H. No Automatic Stay of Removal or Tolling of Voluntary Departure Period

The filing of a motion to reopen or reconsider does not automatically result in a stay of deportation or removal or toll a voluntary departure period. See 8 C.F.R. § 1003.2(f) (2020); *Baria v. Reno*, 180 F.3d 1111, 1113 (9th Cir. 1999); cf. *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 Orders

The filing of a motion to reopen of an in absentia order of deportation or removal automatically stays deportation. See 8 C.F.R. § 1003.23(b)(4)(ii) (2020) (before IJ); 8 C.F.R. § 1003.23(b)(4)(iii)(C) (2020); 8 C.F.R. § 1003.2(f) (2020) (before BIA).

I. 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.”).

J. Departure from the United States (Departure Bar)

Two federal regulations purport to preclude a noncitizen from filing or pursuing a motion to reopen after departure from the United States:

- [8 C.F.R. § 1003.23\(b\)\(1\)](#), concerning motions to reopen or reconsider made before an immigration judge, states: “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. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.” [8 C.F.R. § 1003.23\(b\)\(1\)](#).
- [8 C.F.R. § 1003.2\(d\)](#), concerning motion to reopen or reconsider made before the BIA, states: “A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.”

These regulations, known as the regulatory departure bar, are invalid as applied to procedurally proper motions to reopen. *See* [Rubalcaba v. Garland](#), 998 F.3d 1031, 1037 (9th Cir. 2021) (“[A]n 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.”); *Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) (holding that the regulatory departure bar is invalid as applied to a noncitizen who voluntarily departs from the United States); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1076–77 (9th Cir. 2011) (holding that the regulatory departure bar is invalid as applied to a noncitizen who files a motion to reopen after his voluntary removal); *Coyt v. Holder*, 593 F.3d 902, 906–07 (9th Cir. 2010) (holding that “the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen”—involuntary departure).

The regulatory departure bar is also inapplicable to sua sponte reopening. See *Rubalcaba v. Garland*, 998 F.3d 1031, 1041 (9th Cir. 2021) (“[W]e conclude that the plain, unambiguous language of the regulation makes clear that the departure bar does not apply in the context of sua sponte reopening.”).

The regulatory departure bar in 8 C.F.R. § 1003.23(b)(1) and 8 C.F.R. § 1003.2(d) applies only to persons who are presently subject to removal proceedings. See *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007) (holding that § 1003.23(b)(1) did not bar a motion to reopen by a noncitizen who previously had been removed to China; “Because petitioner’s original removal proceedings were completed when he was removed to China, he did not remain the subject of removal proceedings after that time.”); see also *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001, 1002 (9th Cir. 2007) (holding that § 1003.2(d) did not bar a motion to reopen by a noncitizen who filed the motion “after the completion of immigration proceedings”).

Another federal regulation purports to render an administrative appeal to the BIA withdrawn if the movant departs from the United States. See 8 C.F.R. § 1003.4 (“Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens as defined in § 1001.1(q) of this chapter, subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.”). This regulatory departure bar is also invalid. See *Lopez-Angel v. Barr*, 952 F.3d 1045, 1049 (9th Cir. 2020) (“We . . . hold 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, we hold that § 1003.4 provides for withdrawal only when the petitioner engaged in conduct that establishes a waiver of the right to appeal.”).

Two former regulations, 8 C.F.R. § 3.2 and 8 C.F.R. § 1105a(c), precluded BIA review of deportation orders that had already been executed. *See Perez-Camacho v. Garland*, 54 F.4th 597, 604 (9th Cir. 2022) (“Before 1996, the INA precluded the BIA from reviewing a challenge to a removal order brought by an alien who had been removed from the United States.” (citing 8 U.S.C. § 1105a(c) (2020) and 8 C.F.R. § 3.2)).

The court had held that these jurisdictional bars applied “only where the ‘departure’ was a ‘legally executed’ one.” *Wiedersperg v. INS*, 896 F.2d 1179, 1181 (9th Cir. 1990). Accordingly, the BIA had jurisdiction to consider a motion to reopen on the ground that a deportation had been based on an invalid conviction. *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 provided the sole ground of deportation, had been vacated); *Estrada-Rosales v. INS*, 645 F.2d 819, 820–21 (9th Cir. 1981) (the former regulations did not bar the BIA from considering a motion to reopen deportation proceedings where the deportation had been based on an invalid conviction, such that the deportation had not been “legally executed”); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977) (holding that “departure” under former 8 U.S.C. § 1105a meant a “legally executed” departure, which excluded departure in contravention of due process). A deportation or removal order was not “legally executed” where a vacated state court conviction was “a key part” or the deportation or removal proceeding; the vacated conviction need not have provided the sole ground of deportability. *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 (9th Cir. 2006) (holding that the regulatory bar to filing a motion to reopen after the noncitizen’s departure from the country, 8 C.F.R. § 1003.2, does not apply to a person who was removed due to a later-expunged conviction).

The *Wiedersperg* line of authority does not provide an exception to the subsequently adopted limitations on the timing and number of motions to reopen. *See Perez-Camacho v. Garland*, 54 F.4th 597, 603 (9th Cir. 2022) (“[W]hen an alien brings a motion to reopen that is neither time nor number-barred, and challenges a removal order on the ground that it is based on a prior conviction that has been vacated or modified, the BIA may consider whether this claim demonstrates the alien’s eligibility for relief.”); *id.* at 603–07 (holding that the BIA did not abuse its discretion in denying petitioner’s time- and number-barred motion to reopen where petitioner obtained a conviction modification 13 years after the removal order, and equitable tolling was not warranted where petitioner did not explain why he waited so many years to seek the conviction modification or how

he was prevented from discovering the alleged ineffective assistance of his prior defense counsel).

K. Bar Under 8 U.S.C. § 1231(a)(5)

If a noncitizen who was 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) (“We conclude that an alien whose removal order is reinstated pursuant to § 1231(a)(5) may not reopen the prior removal proceeding under § 1229a(c)(7). The bar is a consequence of having reentered unlawfully.”), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (holding that § 1231(a)(5)’s bar on motions to reopen is nonjurisdictional and therefore subject to waiver and forfeiture).

Section 1231(a)(5), which provides that, if a noncitizen has reentered the United States illegally after having been removed, “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed,” is not subject to an exception for removal orders that result in a gross miscarriage of justice. See *Bravo-Bravo v. Garland*, 54 F.4th 634, 636 (9th Cir. 2022), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (holding that § 1231(a)(5)’s bar on motions to reopen is nonjurisdictional and therefore subject to waiver and forfeiture).

Section 1231(a)(5) also applies to the agency’s authority to reopen such removal orders sua sponte. See *Bravo-Bravo v. Garland*, 54 F.4th 634, 636 (9th Cir. 2022), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024).

The court has held that, “[w]hen the BIA denies a motion to reopen a reinstated removal order on grounds other than a lack of jurisdiction, we may deny a petition challenging that ruling based on the BIA’s lack of jurisdiction under 8 U.S.C. § 1231(a)(5).” *Gutierrez-Zavala v. Garland*, 32 F.4th 806, 811 (9th Cir. 2022), *abrogated on other grounds by Suate-Orellana v. Garland*, 101 F.4th 624, 632 (9th Cir. 2024) (holding that § 1231(a)(5)’s bar on motions to reopen is nonjurisdictional and therefore subject to waiver and forfeiture). *Suate-Orellana* abrogates *Gutierrez-Zavala*’s holding to the extent that the decision was based on § 1231(a)(5) being jurisdictional. *Gutierrez-Zavala*, however, remains good law to

the extent that it holds that this court may sustain a BIA decision on a ground upon which the BIA did not rely if remand would be idle and useless.

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; and Review of Removal Orders.

III. STANDARD OF REVIEW

A. Generally

The court reviews denials of motions to reopen, remand, or reconsider for abuse of discretion. See *Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) (“We review the BIA’s denial of a motion to reopen for abuse of discretion.”); *Ani v. Bondi*, 155 F.4th 1118, 1126 (9th Cir. 2025) (“We review the BIA’s denial of a motion to remand for abuse of discretion.”); *B.R. v. Garland*, 26 F.4th 827, 835 (9th Cir. 2022) (“We review the denial of a motion to reconsider for abuse of discretion.”); *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) (“We review BIA decisions to deny equitable tolling of a motion to reopen for abuse of discretion.”); *Lona v. Barr*, 958 F.3d 1225, 1229 (9th Cir. 2020) (“We generally review the denial of a motion to reconsider a final order of removal for an abuse of discretion, reversing when the denial is ‘arbitrary, irrational, or contrary to law.’” (quoting *Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014))); *Martinez v. Barr*, 941 F.3d 907, 921–22 (9th Cir. 2019) (“The BIA abused its discretion in failing to reopen proceedings that had a facially apparent due process violation”); *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) (“We review the BIA’s denial of a motion to reopen for an abuse of discretion.”); *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) (“We review the denial of a motion to reconsider for abuse of discretion.”); *Taggar v. Holder*, 736 F.3d 886, 889-90 (9th Cir. 2013) (“We review the Board’s denial of motions to remand for abuse of discretion.”).

The abuse of discretion standard applies regardless of the underlying relief requested. See *INS v. Doherty*, 502 U.S. 314, 323–24 (1992).

“The 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. To properly act within its discretion, the BIA must give some indication that it considered all of the evidence and claims presented by the petition.” *Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) (citations and 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.”); *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.”); *Tadevosyan v. Holder*, 743 F.3d 1250, 1252–53 (9th Cir. 2014) (“The 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.” (quoting *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005))).

In reviewing the BIA’s denial of a motion to reopen, “[w]e review the BIA’s determination of purely legal questions de novo and the BIA’s factual findings for substantial evidence.” *Nababan v. Garland*, 18 F.4th 1090, 1094 (9th Cir. 2021); *Rubalcaba v. Garland*, 998 F.3d 1031, 1035 (9th Cir. 2021) (reviewing de novo a purely legal question of regulatory interpretation); *Martinez v. Barr*, 941 F.3d 907, 921 (9th Cir. 2019) (“We review de novo the BIA’s determination of purely legal questions, including claims of due process violations [and the sufficiency of a notice to appear].”); *Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (in reviewing the BIA’s denial of a motion to reconsider, de novo review applies to the BIA’s determination of purely legal questions).

“‘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 *INS v. Doherty*, 502 U.S. 314, 323 (1992)); see also *INS v. Abudu*, 485 U.S. 94, 107, 110 (1988) (noting that “the Attorney General’s [former] regulations . . . plainly disfavor motions to

reopen”); *Chandra v. Holder*, 751 F.3d 1034, 1036 (9th Cir. 2014) (“Motions to reopen . . . are generally disfavored because ‘every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.’” (quoting *INS v. Doherty*, 502 U.S. 314, 323 (1992))); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1150 (9th Cir. 2010) (same).

Applying a former regulation governing motions to reopen, 8 C.F.R. § 3.2 (1987), the Supreme Court noted that a motion to reopen was analogous to “a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden.” *INS v. Abudu*, 485 U.S. 94, 110 (1988); see also *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.” (quoting *Matter of Coelho*, 20 I. & N. Dec. 464, 472 (BIA 1992) (in turn quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)))).

“The BIA can deny a motion to reopen on any one of at least three independent grounds—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.” *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1180 (9th Cir. 2023) (quoting *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010) (in turn quoting *INS v. Doherty*, 502 U.S. 314, 323 (1992))).

The court reviews for abuse of discretion the BIA’s determination that the petitioner failed to establish changed country conditions, as required to file a motion to reopen outside the 90-day deadline under 8 C.F.R. § 1003.2(c)(3)(ii). See, e.g., *Reyes-Corado v. Garland*, 76 F.4th 1256, 1265 (9th Cir. 2023) (“The BIA thus abused its discretion in determining that Reyes-Corado had not provided qualitatively different [country conditions] evidence.”); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 805 (9th Cir. 2022) (“[T]he agency did not abuse its discretion in determining that petitioner had not shown changed country conditions in Mexico.”); *Rodriguez v. Garland*, 990 F.3d 1205, 1211 (9th Cir. 2021) (“The BIA therefore did not abuse its discretion in denying Petitioner’s motion to reopen on the grounds that he did not demonstrate a relevant change in country conditions.”); *Salim v. Lynch*, 831 F.3d 1133, 1139 (9th Cir. 2016) (“[T]he BIA abused its discretion when it concluded that the evidence proffered did not ‘meaningfully reflect’ changed country conditions in Indonesia.”). Underlying

factual findings, however, are reviewed for substantial evidence. *See Kaur v. Garland*, 2 F.4th 823, 831–33 (9th Cir. 2021) (BIA’s finding that treatment of widows in India had not worsened was not supported by substantial evidence).

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

B. Full Consideration of All Factors

“While the Board has broad discretion in ruling on a motion to reopen, it must show proper consideration of all factors, both favorable and unfavorable, in determining whether to grant a motion to reopen.” *Toufighi v. Mukasey*, 538 F.3d 988, 993 (9th Cir. 2008); *see also Ali v. Holder*, 637 F.3d 1025, 1032 (9th Cir. 2011) (“When the BIA reviews a motion to reopen, it must show proper consideration of all factors, both favorable and unfavorable.”).

See, e.g., Nababan v. Garland, 18 F.4th 1090, 1096 (9th Cir. 2021) (“We hold that the BIA committed legal error because it did not assess the individualized risk of persecution that Petitioners face due to their identity as evangelical Christians. . . . On remand, the BIA should assess whether country conditions in Indonesia have materially changed for evangelical Christians in particular, as distinct from Christians in general.”); *Chandra v. Holder*, 751 F.3d 1034, 1039 (9th Cir. 2014) (“The BIA abused its discretion when it failed to assess Chandra’s evidence that treatment of Christians in Indonesia had deteriorated since his 2002 removal hearing. . . . Further, the BIA committed legal error insofar as it determined that Chandra’s post-removal conversion to Christianity rendered him ineligible to file an untimely motion under the changed conditions exception.”); *Zhao v. Holder*, 728 F.3d 1144, 1151 (9th Cir. 2013) (remanding where petitioner “tendered substantial evidence in support of her motion to reopen that was unaddressed or improperly rejected by the BIA”); *Ali v. Holder*, 637 F.3d 1025, 1032 (9th Cir. 2011) (remanding where the BIA failed to consider what effect a 2006 coup in Fiji had on petitioner’s presumption of a well-founded fear of persecution, as well as “other favorable factors,” such as any similarities between the 2006 coup and prior coups); *Garcia v. Holder*, 621 F.3d 906, 913 (9th Cir. 2010) (remanding where the BIA entirely failed 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 entirely fail to exercise that 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; any misconduct on the part of petitioners in failing to depart “does not change the BIA’s responsibility to weigh all the factors, positive *and* negative”); *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 “relevant factors weighing in favor of reopening”); *Mohammed v. Gonzales*, 400 F.3d 785, 792–93 (9th Cir. 2005) (holding that the BIA abused its discretion by denying motion to reopen in an “incomplete” and “nonsensical” opinion and in “failing to consider all the attached evidence”; “the BIA is obligated to consider and address in its entirety the evidence submitted by a petitioner”); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA’s unexplained failure to address petitioner’s claim of ineffective assistance of counsel); *Movsisian v. Ashcroft*, 395 F.3d 1095, 1097–99 (9th Cir. 2005) (“[W]e conclude that the BIA abused its discretion in denying Movsisian’s motion to reopen without articulating its reasons.”).

“[T]he BIA . . . has a duty to weigh all relevant evidence, including affidavits or declarations, in cases in which there is a factual dispute about whether a document has been mailed by a petitioner to the BIA.” *Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1078 (9th Cir. 2010).

“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, 682 (9th Cir. 2011).

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) (although BIA did not specifically address some of the evidence submitted, it did not abuse its discretion in denying the motion to reopen where it considered much of the evidence, “especially the evidence that was specific to her”); *see also Agonafer v. Sessions*, 859 F.3d 1198, 1206–07 (9th Cir. 2017) (“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.’” (quoting *Lopez v. Ashcroft*, 366 F.3d 799, 807 n.6 (9th Cir. 2004))).

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.” *Agonafer v. Sessions*, 859 F.3d 1198, 1207 (9th Cir. 2017) (citations omitted).

1. Later-Acquired Equities

Equities arising after a final order of deportation or removal may be given less weight than those acquired before the applicant was found to be deportable. See *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.”). But see *Israel v. INS*, 785 F.2d 738, 740–42 (9th Cir. 1986) (BIA acted arbitrarily by declining to reopen case of noncitizen who had recently married where the BIA had stated in a prior decision that it would routinely reopen deportation proceedings in such circumstances).

Equities arising when the noncitizen knows that she is in the country unlawfully also may be given less weight. See *Vasquez v. INS*, 767 F.2d 598, 602 (9th Cir. 1985) (“Since *Vasquez* married after he violated his departure order, the favorable equities of his marriage are entitled to less weight than if he had married while a legal resident.”); *Sangabi v. INS*, 763 F.2d 374, 375 (9th Cir. 1985) (equities arising when the noncitizen knows that he is in the country illegally are entitled to less weight than are the equities arising when the alien is legally in this country).

On a motion to reopen or remand for adjustment of status premised on a marriage that occurred during deportation proceedings, the motion must present clear and convincing evidence indicating a strong likelihood that the marriage is bona fide. See *Malhi v. INS*, 336 F.3d 989, 993–94 (9th Cir. 2003) (discussing the regulatory presumption of fraud for intra-proceeding marriages, 8 C.F.R. § 204.2(a)(1)(iii)).

“[A] petitioner’s untimely motion to reopen may qualify under the changed conditions exception in 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, 1038 (9th Cir. 2014). Accordingly, “the BIA committed legal error insofar as it determined that Chandra’s post-removal conversion to Christianity rendered him ineligible to file an untimely motion under the changed conditions exception.” *Id.* at 1039.

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) (quoting *Lopez v. Ashcroft*, 366 F.3d 799, 807 n.6 (9th Cir. 2004)).

“[T]he BIA must address and rule upon remand motions, giving specific, cogent reasons for a grant or denial.” *Narayan v. Ashcroft*, 384 F.3d 1065, 1068 (9th Cir. 2004).

See, e.g., Avagyan v. Holder, 646 F.3d 672, 681–82 (9th Cir. 2011) (remanding where it was unclear whether BIA considered specific claim raised by petitioner); *Franco-Rosendo v. Gonzales*, 454 F.3d 965, 967–68 (9th Cir. 2006) (remanding where BIA did not mention factors favoring reopening in the denying the motion); *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.”); *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 give weight to plainly irrelevant factors.” *Virk v. INS*, 295 F.3d 1055, 1060–61 (9th Cir. 2002) (holding that BIA improperly considered the plainly irrelevant factor of petitioner’s wife’s alleged misconduct); *see also Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) (“The inclusion of an improper factor in reaching a discretionary decision is grounds for remand.”; the BIA improperly relied on misconduct of petitioner’s father).

E. Credibility Determinations

The BIA may not make credibility determinations on motions to reopen. *See 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.”).

Accordingly, “facts presented in affidavits supporting a motion to reopen must be accepted as true unless inherently unbelievable.” *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (“[T]he self-serving nature of a declaration in support of a motion to reopen is not an appropriate basis for discrediting its content.”)

Although the BIA must accept the facts in a noncitizen’s affidavit as true, “[t]he Board may then draw its own legal conclusions from the evidence presented.” *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002) (BIA did not abuse its discretion in denying motion to reopen and rescind an in absentia removal order where petitioner’s statement, even accepted as true, that he has asthma and had an attack did not “definitively establish that [his] illness was ‘serious’ under the statute” so as to constitute “exceptional circumstances” under the applicable legal standard).

The BIA, moreover, “is free to interpret that evidence free from inferences in favor of the moving party.” *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991).

In addition, the BIA “may rely on a previous adverse credibility determination to deny a motion to reopen if that earlier finding still factually

undermines the petitioner’s new argument.” *Greenwood v. Garland*, 36 F.4th 1232, 1234 (9th Cir. 2022); *see id.* at 1235 (“If the materiality of the evidence on changed country conditions ‘is contingent, in part or in whole, on factors that were determined to lack credibility and have not been rehabilitated, the respondent’s ability to successfully establish prima facie eligibility may be undermined.’” (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 4 (BIA 2020))); *accord Singh v. Garland*, 46 F.4th 1117, 1122 (9th Cir. 2022) (“[T]o prevail on a motion to reopen alleging changed country conditions where the persecution claim was previously denied based on an adverse credibility finding in the underlying proceedings, the respondent must either overcome the prior determination or show that the new claim is independent of the evidence that was found to be not credible.” (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 3 (BIA 2020))).

“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.” *Ordonez v. INS*, 345 F.3d 777, 786 (9th Cir. 2003).

An adverse credibility determination is not supported by substantial evidence if the record contains no evidence contradicting the noncitizen’s version of the facts. *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 897–88 (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 must be credited), *amended by* 339 F.3d 1012 (9th Cir. 2003).

Cross-Reference: Relief from Removal, Credibility Determinations, Motions to Reopen.

IV. REQUIREMENTS FOR A MOTION TO REOPEN

There are “‘at least’ three independent grounds on which the BIA might deny a motion to reopen—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.” *INS v. Doherty*, 502 U.S. 314, 323 (1992); *accord Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1180 (9th Cir. 2023) (“The BIA can deny a motion to reopen on any one of at least three independent grounds—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.” (quoting *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010))).

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) (“The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.”); 8 C.F.R. § 1003.2(c)(1) (2020) (before BIA) (“A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. 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.”); 8 C.F.R. § 1003.23(b)(3) (2020) (before IJ) (similar requirements); see also *INS v. Wang*, 450 U.S. 139, 143 (1981) (upholding the BIA’s denial of motion to reopen to apply for suspension of deportation where “the allegations of hardship were in the main conclusory and unsupported by affidavit”); *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,’ we have treated affidavits and declarations interchangeably for purposes of motions to reopen, as well for purposes of BIA proceedings generally.” *Malty v. Ashcroft*, 381 F.3d 942, 947 n.2 (9th Cir. 2004) (citations omitted).

The movant may submit an existing application for relief, rather than a new one, if she is seeking to reopen the existing application rather than to submit a new one. See *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 attached the prior asylum application that he sought to reopen; “[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.”).

1. Exceptions

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, the BIA abused its discretion by denying the motion on basis that petitioner failed to include a completed application for relief; the BIA should have exercised its authority to waive the procedural requirements); *see also Guzman v. INS*, 318 F.3d 911, 914 n.3 (9th Cir. 2003) ("It would be an abuse of discretion . . . for the BIA to deny the motion [to remand] solely for [the reason that the petitioner failed to submit an application for adjustment of status with the motion] when the motion was not opposed by the INS.").

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. Material and Previously Unavailable Evidence

"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" 8 C.F.R. § 1003.2(c)(1); *see INS v. Doherty*, 502 U.S. 314, 324 (1992) (holding that the Attorney General did not abuse his discretion by denying a 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 IJ hearing concerning events that took place prior to the IJ hearing could not serve as a basis for reopening where there was no reason why the petitioner could not have secured a polygraph report before the IJ hearing); *Guzman v. INS*, 318 F.3d 911, 913 (9th Cir. 2003) (BIA did not abuse its discretion by denying motion to reopen where the new information at issue was available and capable of discovery prior to deportation hearing); *Bolshakov v. INS*, 133 F.3d 1279, 1282 (9th Cir. 1998) (new

information—petitioner’s recent certification as a gifted artist—was not grounds for reopening where the petitioner could have applied for such status before his deportation proceedings ended and his asylum claim was denied); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (the BIA abused its discretion by affirming the IJ’s decision to grant the government’s motion to reopen the petitioner’s deportation proceedings where the new information—a birth certificate—could have been discovered before the prior deportation hearing).

The movant need show only that the evidence was unavailable at the time of the IJ hearing, even if it was available before the appeal to the BIA. See *Lemus-Escobar v. Bondi*, 158 F.4th 944, 967 (9th Cir. 2025) (“The BIA erred as a matter of law by ruling that the evidence was not new because it became available after the hearing before the IJ [but before the appeal to the BIA].” (citing *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005))); *Bhasin v. Gonzales*, 423 F.3d 977, 987 (9th Cir. 2005) (evidence was previously unavailable for purposes of a motion for reopen if it was unavailable at the time of the proceedings before the IJ, even if the evidence became available during the pendency of the appeal to the BIA).

“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 v. Holder*, 672 F.3d 800, 808 (9th Cir. 2012) (Nigerian arrest warrant was not reasonably available to petitioner where he was in immigration detention in the United States for three years).

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 8 C.F.R. § 1003.2(c)(1) (“[N]or 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.”).

Cf. INS v. Doherty, 502 U.S. 314, 324, 327 (1992) (applying former 8 C.F.R. § 208.11 (1987), pertaining to motions to reopen for the purposes of pursuing asylum claims) (“[T]he Attorney General did not abuse his discretion in denying

reopening . . . on the basis that respondent failed to satisfactorily explain his previous withdrawal of these claims.”); *id.* at 327 (sustaining the Attorney’s General’s finding that “withdrawing a claim for a tactical advantage is not a reasonable explanation for failing to pursue the claim at an earlier hearing” and is the “functional equivalent” of failing to reasonably explain the failure to pursue the claim at the original hearing); *INS v. Abudu*, 485 U.S. 94, 111 (1988) (applying former 8 C.F.R. 208.11) (BIA did not abuse its discretion in concluding that the petitioner failed to reasonably explain his failure to request asylum during his deportation hearing where the new information would not have provided “significant additional support” for an asylum claim).

D. Prima Facie Eligibility for Relief

An applicant filing a motion to reopen must show prima facie eligibility for the underlying substantive relief requested. See *Tzompantzi-Salazar v. Garland*, 32 F.4th 696, 703 (9th Cir. 2022) (“[T]he agency may deny a motion to reopen if . . . the petitioner failed to establish a prima facie case for the relief sought”); *Silva v. Garland*, 993 F.3d 705, 718 (9th Cir. 2021) (“Where, as here, the motion to reopen is based on changed circumstances in the country to which removal has been ordered, the movant must . . . 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.” (citing 8 U.S.C. § 1229a(c)(7)(ii) and 8 C.F.R. § 1003.2(c)(1))), *abrogated on other grounds as stated in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *id.* at 719 (BIA did not abuse its discretion in concluding that the petitioner failed to establish a prima facie case for asylum or withholding of removal where petitioner offered only speculation as to the possibility of future persecution); *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.”); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868–69 (9th Cir. 2003) (petitioner’s request to reinstate his withdrawn asylum application was analogous to a motion to reopen; the legal standards applicable to the denial of a motion to reopen therefore applied).

“[P]rima facie eligibility for relief requires only a threshold showing of eligibility—a reasonable likelihood that the petitioner would prevail on the merits if the motion to reopen were granted.” *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1179 (9th Cir. 2023). “[A] noncitizen demonstrates prima facie eligibility

for relief where the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied.” *Id.* (internal quotation marks omitted).

“The ‘reasonable likelihood’ standard requires a petitioner to show more than a mere possibility she will establish a claim for relief, but it does not require the petitioner to demonstrate she is more likely than not to prevail.” *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1183 (9th Cir. 2023); *see also*; *Reyes-Corado v. Garland*, 76 F.4th 1256, 1263–66 (9th Cir. 2023) (noncitizen is not required to conclusively establish entitlement to relief); *Silva v. Garland*, 993 F.3d 705, 718 (9th Cir. 2021) (“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.’” (quoting *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985))), *abrogated on other grounds as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Tadevosyan v. Holder*, 743 F.3d 1250, 1255 (9th Cir. 2014) (discussing reasonable likelihood standard); *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1171 (9th Cir. 2006) (“A respondent demonstrates prima facie eligibility for relief where the evidence reveals a reasonable likelihood the statutory requirements for relief have been satisfied.” (alteration omitted) (quoting *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003))).

See, e.g., Lemus-Escobar v. Bondi, 158 F.4th 944, 967–70 (9th Cir. 2025) (BIA abused its discretion in concluding that petitioner failed to establish prima facie eligibility for asylum, withholding of removal, and CAT relief); *Sarkar v. Garland*, 39 F.4th 611, 622–23 (9th Cir. 2022) (BIA did not abuse its discretion in concluding that petitioner’s new evidence showing a growing influence of Jihadist extremists in Bangladesh was not material to petitioner and thus was insufficient to demonstrate a prima facie claim for asylum and related relief).

E. Discretionary Denial

Even if the movant establishes a prima facie case for the relief sought and introduces previously unavailable, material evidence, the BIA may deny a motion to reopen on the ground that “the movant would not be entitled to the discretionary grant of relief which he sought.” *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1180 (9th Cir. 2023).

Such determinations are subject to a “would likely change” standard, which “requires a petitioner to establish that it is at least more probable than not that the new evidence would change the outcome of the claim.” *Fonseca-Fonseca v.*

Garland, 76 F.4th 1176, 1183 (9th Cir. 2023) (clarifying that “the ‘reasonable likelihood’ standard applies to decisions made on the prima facie ground, and the ‘would likely change’ standard applies to decisions made on the discretionary ground”).

“[I]f the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met.” *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *see INS v. Abudu*, 485 U.S. 94, 105 (1988) (“[I]n cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.”); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997) (“[W]here the ultimate grant of relief is discretionary, as it is in the case of suspension of deportation, the BIA may determine that the movant is not entitled to relief even though he meets the threshold requirements for eligibility.”); *see also* 8 C.F.R. § 1003.2(a) (2020) (“The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.”).

But “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, 967–68 (9th Cir. 2006) (BIA abused its discretion in denying motion to reopen based solely on petitioners’ failure to post voluntary departure bond, without considering favorable factors); *id.* at 968 (“Instead of evaluating the favorable factors and the evidence, the BIA considered exclusively the petitioners’ failure to depart, even though it assumed that they were eligible for relief. Where, as here, the petitioners are eligible for relief, any misconduct does not change the BIA’s responsibility to weigh all the factors, positive *and* negative.”); *Arrozal v. INS*, 159 F.3d 429, 433 (9th Cir. 1998) (“In its determination, the BIA must take into account *all* relevant factors. . . . Moreover, the BIA must indicate how it weighed these factors and indicate with specificity that it heard and considered petitioner’s claims.”).

F. Relevance of Prior Grant of Voluntary Departure

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 or depart voluntarily).

If a petitioner files a motion to reopen to apply for discretionary relief *after* the expiration of the voluntary departure period, he or she may be unable to establish prima facie eligibility for the relief sought. *See, e.g., Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015–16 (9th Cir. 2008) (BIA was compelled to deny petitioner's motion to reopen by operation of 8 U.S.C. § 1229c(d)(1), which states that “if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien . . . shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.”); *de Martinez v. Ashcroft*, 374 F.3d 759, 764 (9th Cir. 2004) (BIA correctly determined that petitioner was ineligible for adjustment of status where she filed her motion to reopen 30 days after expiration of her voluntary departure period).

A movant remains eligible for relief, however, if the failure to voluntarily depart was uninformed and hence not voluntary. *See Singh v. Holder*, 658 F.3d 879, 887, 887 n.10 (9th Cir. 2011) (petitioner remained eligible for adjustment of status because failure to depart was not “voluntary,” where petitioner did not receive a copy of the BIA's decision and order of voluntary departure and his attorney did not tell him about the voluntary departure order) (distinguishing *Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1015–16 (9th Cir. 2008)).

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 v. Holder*, 669 F.3d 920, 927 (9th Cir. 2012) (“[W]e hold that, where the last day of a period of voluntary departure falls on a day on which an immigrant cannot file a motion for affirmative relief with the BIA, that day does not count in the voluntary departure period if, as here, the immigrant files on the first available day a motion that would either have tolled, automatically withdrawn, or otherwise affected his request for voluntary departure.”).

1. Voluntary Departure Regulations

A grant of voluntary departure terminates automatically when a timely motion to reopen or reconsider is filed. 8 C.F.R. § 1240.26(b)(3)(iii); (e)(1) (2020); *see also* 73 Fed. Reg. 76936. This regulation applies only prospectively. *Meza-Vallejos v. Holder*, 669 F.3d 920, 924 n.4 (9th Cir. 2012); *see also* 73 Fed. Reg. 76936.

A related regulation, effective January 20, 2009, also results in automatic termination of voluntary departure upon the filing of a petition for review. *See* 8 C.F.R. § 1240.26(i) (2020) (“If the alien files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately.”); *see also Garfias-Rodriguez v. Holder*, 702 F.3d 504, 524–25 (9th Cir. 2012) (en banc) (“[B]ecause the filing of a petition . . . automatically terminates a petitioner’s grant of voluntary departure, we conclude that, assuming that 8 C.F.R. § 1240.26(i) [(2012)] is valid, we have no authority to issue an equitable stay of Garfias’s voluntary departure period.”).

2. *Dada v. Mukasey*

Prior to the 2009 effective date of 8 C.F.R. § 1240.26, the Supreme Court in *Dada v. Mukasey* held that a timely-filed motion to reopen does not automatically stay the voluntary departure period while a petitioner’s motion to reopen is pending and that voluntary departure recipients should be permitted an opportunity to withdraw a motion for voluntary departure where the request is made prior to the departure period expiring. Withdrawing a motion for voluntary departure allows a noncitizen to exercise her right to file a motion to reopen removal proceedings without suffering the penalties associated with failing to voluntarily depart within the required 60 days. *See Dada v. Mukasey*, 554 U.S. 1, 5–6 (2008) (“Absent a valid regulation resolving the dilemma in a different way, we conclude the alien must be permitted an opportunity to withdraw the motion for voluntary departure, provided the request is made before the departure period expires.”).

“Whether, and how, *Dada* applies retroactively remains an open question.” *Meza-Vallejos v. Holder*, 669 F.3d 920, 925 n.4 (9th Cir. 2012) (noting that this court previously had remanded the question of *Dada*’s retroactivity in *Nevarez v. Holder*, 572 F.3d 605, 609–10 (9th Cir. 2009), and, on remand, the BIA deemed petitioners’ filing of a motion to reopen, followed by their election to

remain in the United States to pursue that motion, as petitioners’ exercise of their unilateral right to withdraw their request for voluntary departure).

3. **Pre-*Dada v. Mukasey***

Prior to *Dada*, this court had held that, for permanent rules cases, “the timely filing of a motion to reopen or reconsider automatically tolls 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, 1204–08 (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 was tolled while the BIA considered a timely filed motion to reopen accompanied by a motion to stay removal or voluntary departure), *abrogated by Dada v. Mukasey*, 554 U.S. 1, 19–21 (2008) (finding no statutory authority for “automatic tolling of the voluntary departure period during the pendency of the motion to reopen”); cf. *Medina-Morales v. Ashcroft*, 371 F.3d 520, 529–31 & n.9 (9th Cir. 2004) (holding, in a 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); *id.* at 530 n.9 “[W]e hold that the BIA may weigh a § 1229c(a) voluntary departure against granting an alien’s motion to reopen made before a full adjudication of removal proceedings where, as here, the alien bargained for voluntary departure in lieu of full adjudication.”).

Prior to IIRIRA, the BIA could deny a motion to reopen to apply for relief where the petitioners had failed to depart during the voluntary departure period. See *Shaar v. INS*, 141 F.3d 953, 954–59 (9th Cir. 1998), *superseded by statute as stated in Barroso v. Gonzales*, 429 F.3d 1195, 1201 n.13 (9th Cir. 2005); cf. *Ordonez v. INS*, 345 F.3d 777, 783–84 (9th Cir. 2003) (holding, in a transitional rules case, that the BIA erred in denying a motion to reopen to apply for suspension of deportation where the IJ failed to give an adequate oral warning under the former statute of the consequences of failing to depart voluntarily).

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).

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. But the fugitive disentitlement doctrine is a “severe sanction” that should not be lightly imposed. See *Bhasin v. Gonzales*, 423 F.3d 977, 987–88 (9th Cir. 2005) (holding that the BIA abused its discretion in denying a motion to reopen on the basis of the fugitive disentitlement doctrine where, although the petitioner had failed to report in accordance with the removal order, the agency had sent critical documents to the wrong address and there were serious questions as to whether the petitioner had received notice to appear for removal).

The fugitive disentitlement doctrine has been applied by this court. See, e.g., *Antonio-Martinez v. INS*, 317 F.3d 1089, 1091 (9th Cir. 2003) (dismissing petition for review under the fugitive disentitlement doctrine where petitioner lost contact with his attorney and the agency and all efforts to contact him failed for over two years).

“[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.* (quoting *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244 (1993)).

“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.” *Sun v. Mukasey*, 555 F.3d 802, 804 (9th Cir. 2009).

V. TIME AND NUMERICAL LIMITATIONS

A. Generally

1. Time Limitations

Federal law states: “Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.” 8 U.S.C. § 1229a(c)(7)(C)(i); see *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.” (citing 8 C.F.R. § 1003.2(c)(2))); *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) (2014) applies to CAT claims); *id.* at 609 (“[W]e hold that the procedural requirements specified in 8 C.F.R. § 1003.2(c) apply to CAT claims.”); *Ocampo v. Holder*, 629 F.3d 923, 927–28 (9th Cir. 2010) (“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.”).

There is no time limit for motions to reopen for asylum applications based on changed country conditions. See *Lin v. Holder*, 588 F.3d 981, 985 (9th Cir. 2009).

“[A]n 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) (citing 8 U.S.C. § 1101(a)(47)(B)); see also *Vega v. Holder*, 611 F.3d 1168, 1170–71 (9th Cir. 2010) (applying *Chevron* deference and holding that BIA reasonably interpreted 8 U.S.C. § 1229a(c)(7)(C)(i) as requiring a motion to reopen to be filed within 90 days of the merits decision, rather than from a denial of the motion to reconsider).

A motion to reconsider must be filed within 30 days of the date of entry of a final administrative decision at issue. See 8 U.S.C. § 1229a(c)(6)(B) (“The motion [to reconsider] must be filed within 30 days of the date of entry of a final

administrative order of removal.”); 8 C.F.R. § 1003.2(b)(2) (2020) (“A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision”); *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.”); accord *Goulart v. Garland*, 18 F.4th 653, 654 (9th Cir. 2021) (same).

The limitations 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) (“‘[T]he date of issuance’ is the date the final deportation order was mailed to the correct address.”); 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 that petitioner did not receive notice of BIA’s decision); *Singh v. Gonzales*, 494 F.3d 1170, 1172 (9th Cir. 2007) (although a properly addressed cover letter creates a presumption of mailing on the date of the cover letter, such a presumption can be rebutted by affidavits of nonreceipt by a petitioner or a petitioner’s counsel of record).

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. See *Ocampo v. Holder*, 629 F.3d 923, 925–28 (9th Cir. 2010) (holding that “a removal order that permits voluntary departure is final upon its issuance” rather than “upon expiration of the voluntary departure period” for purposes of determining the timeliness 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) (BIA was compelled by 8 U.S.C. § 1229c(d)(1) to deny a motion to reopen filed after expiration of the voluntary departure period); *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; BIA properly determined that petitioner “was ineligible for relief due to her failure to depart the United States within the period allotted for her voluntary departure”); cf. *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1174 (9th Cir. 2003) (holding that “the

voluntary departure period begins when an Immigration Judge or the BIA enters an order granting voluntary departure”).

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) (“[W]e hold that, where the last day of a period of voluntary departure falls on a day on which an immigrant cannot file a motion for affirmative relief with the BIA, that day does not count in the voluntary departure period if, as here, the immigrant files on the first available day a motion that would either have tolled, automatically withdrawn, or otherwise affected his request for voluntary departure.”).

“[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, 948–49 (9th Cir. 2008) (citing *Stone v. INS*, 514 U.S. 386, 405–06 (1995) (holding that a removal order is “final when issued” and that the filing of a motion to reopen or to reconsider with the BIA does not toll the statutory time limit for filing a petition for review), *clarified on other grounds by Riley v. Bondi*, 606 U.S. 259, 276–77 (2025))).

Where a noncitizen is ordered deported but is granted CAT deferral, the 90-day period for filing a motion to reopen begins to run when the deportation or removal order becomes final; “[t]hat petitioner’s deportation was deferred under CAT does not alter this conclusion.” *Alali-Amin v. Mukasey*, 523 F.3d 1039, 1041–42 (9th Cir. 2008).

With respect to the 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 noted, however, that “[p]ublication in the Federal Register may not be sufficient notice to a party when the published information concerns imminent government action that directly affects the party’s rights and that party’s interest in the government action is more than purely speculative.” *Id.* (internal quotation marks omitted).

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

Generally, a party may make one motion to reopen and one motion to reconsider. See 8 U.S.C. § 1229a(c)(7)(A) (“An alien may file one motion to reopen proceedings under this section [except as provided in § 1229a(c)(7)(C)(iv)].”); 8 U.S.C. § 1229a(c)(6)(A) (“The alien may file one motion to reconsider a decision that the alien is removable from the United States.”); 8 C.F.R. § 1003.2(c)(2) (“Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge)”); 8 C.F.R. § 1003.2(b)(2) (“A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider.”); 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 (as opposed to in absentia orders of removal). See *Fajardo v. INS*, 300 F.3d 1018, 1020 (9th Cir. 2002) (for in absentia cases governed by IIRIRA’s permanent rules, the single-motion limitation applies to removal orders but not to deportation orders).

A motion to remand filed *before* a final administrative decision does not implicate the single-motion limitation under 8 C.F.R. § 1003.2(c)(2) (2020). See *Zhao v. Holder*, 728 F.3d 1144, 1147 (9th Cir. 2013) (BIA erred in holding motion to reopen numerically barred where the petitioner’s first motion to remand was filed before administrative decision in her case).

“The question of 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 that neither we, nor the BIA, have previously considered.” *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 90-Day/One-Motion Rules

1. In Absentia Orders

“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.” *Miller v. Sessions*, 889 F.3d 998, 999 (9th Cir. 2018) (citing 8 U.S.C. § 1229a(b)(5)(A)).

In *Campos-Chaves v. Garland*, 602 U.S. 447, 452 (2024), the Supreme Court observed:

There are three scenarios in which an in absentia removal order may be rescinded. First, the alien can file a motion to reopen within 180 days of the order, and must demonstrate that the failure to appear was because of “exceptional circumstances.” § 1229a(b)(5)(C)(i). Second, an alien can seek to rescind his in absentia removal order if he “demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.” § 1229a(b)(5)(C)(ii). Third, . . . an alien can seek rescission if he “demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2)” of § 1229(a).

a. Reopening and Rescission Based on Exceptional Circumstances

“An *in absentia* removal order can be rescinded if a petitioner files a motion to reopen within 180 days and demonstrates that his ‘failure to appear was because of exceptional circumstances.’” *Singh v. Garland*, 117 F.4th 1145, 1150 (9th Cir. 2024) (quoting 8 U.S.C. § 1229a(b)(5)(C)(i)), *abrogated on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); *Cui v. Garland*, 13 F.4th 991, 996 (9th Cir. 2021) (“8 U.S.C. § 1229a(b)(5)(C)(i) states that 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.” (alteration in original)).

“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.” *Singh v. Garland*, 117 F.4th 1145, 1150 (9th Cir. 2024) (quoting 8 U.S.C. § 1229a(e)(1)), *abrogated on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc). “The statutory examples are explicitly not exhaustive.” *Singh v. Garland*, 117 F.4th 1145, 1150 (9th Cir. 2024), *abrogated on other grounds by Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); see *Arredondo v. Lynch*, 824 F.3d 801, 805 (9th Cir. 2016) (“While the enumerated examples are not exclusive, exceptional circumstances must include a ‘similarly severe impediment.’” (quoting *Singh-Bhathal v. INS*, 170 F.3d 943, 947 (9th Cir. 1999))).

“In other words, the circumstances (1) must cause the noncitizen’s failure to appear, (2) must be beyond the petitioner’s control, and (3) must be sufficiently compelling.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc). The court held:

“Exceptional circumstances” are by definition unique, and the statute’s listed examples of compelling circumstances are explicitly not exhaustive. We thus look to the particularized facts presented in each case to decide whether a failure to appear was because of sufficiently compelling circumstances beyond the petitioner’s control. This requires considering the totality of the circumstances. Evidence relevant to the statutory factors may include whether the petitioners were diligent, whether they encountered external or unforeseen circumstances, and whether they lacked a motive to evade the hearing. . . . Other factors may be relevant depending on the circumstances.

Montejo-Gonzalez v. Bondi, 166 F.4th 851, 854 (9th Cir. 2026) (en banc) (internal quotation marks and citations omitted).

“[W]e reject any categorical rules dictating what does or does not meet th[e exceptional circumstances] standard.” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 858 (9th Cir. 2026) (en banc).

Montejo-Gonzalez clarified that the possibility of unconscionable results is not a standalone element of “exceptional circumstances” that the agency must consider. *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc) (overruling *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1036–37 (9th Cir. 2021)).

Montejo-Gonzalez also rejected a BIA and IJ “per se rule that ‘traffic’ cannot satisfy 8 U.S.C. § 1229a(b)(5)(C)(i).” *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 856 (9th Cir. 2026) (en banc) (holding that extraordinary and unusual traffic conditions may constitute exceptional circumstances under the specific circumstances of a particular case).

Where the noncitizen relies on her attorney’s failure to apprise her of the removal hearing as evidence of exceptional circumstances, the petitioner need not satisfy the factors set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), for ineffective assistance of counsel claims. See *Singh v. Garland*, 117 F.4th 1145, 1151 (9th Cir. 2024) (“Substantial compliance with the *Lozada* factors is not required for consideration of an attorney’s involvement as it relates to the totality of the circumstances. Whether Singh has substantially complied with the *Lozada* factors only bears on the viability of ineffective assistance of counsel as an independent basis for rescission of the *in absentia* removal order.”), *abrogated on other grounds by* *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc). But see *Reyes v. Ashcroft*, 358 F.3d 592, 597–99 (9th Cir. 2004) (applying the *Lozada* requirements in the context of a motion to reopen an *in absentia* order); *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003) (applying the *Lozada* requirements in the context of a motion to reopen an *in absentia* order, while noting that the requirements are flexibly rather than rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance).

An applicant has 180 days to file a motion to reopen based on exceptional circumstances to rescind an *in absentia* removal order. See 8 U.S.C. § 1229a(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii) (removal order); 8 C.F.R. § 1003.23(iii)(A)(1) (deportation order).

The 180-day limit is subject to equitable tolling. *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); *Varela v. INS*, 204 F.3d 1237, 1239 (9th Cir. 2000) (“[A] statute of limitation governing motions to reopen a deportation proceeding is equitably tolled ‘where the alien’s late petition is the result of deceptive actions by a notary posing as an attorney.’” (quoting *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (“We conclude that the statute of limitations to reopen an order of deportation is equitably tolled where the alien’s late petition is the result of the deceptive actions by a notary posing as an attorney.”))), *superseded by statute on other grounds as stated in Granados-Oseguera v. Mukasey*, 546 F.3d 1011, 1016 (9th Cir. 2008).

“[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. Accordingly, he is not required to demonstrate exceptional circumstances in order to reopen proceedings.” *Perez v. Mukasey*, 516 F.3d 770, 774–75 (9th Cir. 2008) (agency abused its discretion by denying motion to reopen based on movant’s failure to demonstrate exceptional circumstances; showing of exceptional circumstances was not required); *accord Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 857 (9th Cir. 2026) (en banc); *cf. Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205 (9th Cir. 2003) (petitioner failed to appear at hearing where she arrived four and one-half hours late and the IJ was no longer on the bench hearing cases).

Cross Reference: Motions to Reopen or Reconsider Immigration Proceedings, Equitable Tolling, *infra*.

(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); *id.* (“[T]he BIA may not rely on newly-created evidentiary standards to deny a motion to reopen a deportation proceeding held in absentia. . . . Fundamental fairness requires that Singh be given an opportunity to satisfy the BIA’s evidentiary requirements.”); *cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (holding that petitioner had notice of the BIA’s evidentiary requirements).

(ii) Cases Finding Exceptional Circumstances

See *Singh v. Garland*, 117 F.4th 1145, 1150–52 (9th Cir. 2024) (remanding for reconsideration where the BIA failed to address the merits of the petitioner’s pending claims for asylum and withholding of removal, failed to consider whether deportation would be an unconscionable result, failed to consider the significant extent to which the petitioner’s hearing was rescheduled, failed to provide an adequately reasoned decision, and failed to consider the petitioner’s reliance on his attorney’s repeated statements regarding the timing of his hearing), *abrogated in part* by *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); *Hernandez-Galand v. Garland*, 996 F.3d 1030, 1037 (9th Cir. 2021) (holding that exceptional circumstances warranted reopening where petitioner failed to appear due to memory problems and inability to read), *overruled in part* by *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 854 (9th Cir. 2026) (en banc); *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 except the last hearing, of which she had no actual notice; she had prevailed on appeal before the BIA and was likely to prevail on her claim for suspension of deportation; and she had no reason to delay or evade the hearing); *Lo v. Ashcroft*, 341 F.3d 934, 938–39 (9th Cir. 2003) (employee in attorney’s office erroneously informed petitioner that the hearing was on a later date); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897–98 (9th Cir. 2003) (exceptional circumstances established where the petitioner failed to appear at his hearing because he relied on the negligent advice of his attorney’s agent that he travel to Tijuana the day before his hearing in an attempt to validate his visa; “reasonable and justifiable reliance on the advice of his attorney’s agent . . . constitutes an exceptional circumstance beyond Monjaraz’s control”), *amended*, 339 F.3d 1012 (9th Cir. 2003); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (remanding to the BIA for reconsideration and stating that “it is difficult to imagine how [an immigration paralegal’s] failure to inform Fajardo of her need to appear at her deportation hearing would not constitute an exceptional circumstance excusing her absence”); *Singh v. INS*, 295 F.3d 1037, 1039–40 (9th Cir. 2002) (petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding as to the scheduled time of the hearing 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) (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).

(iii) Cases Finding No Exceptional Circumstances

See *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) (BIA acted within its discretion in denying motion to reopen because Cui did not articulate exceptional circumstances beyond her control that caused her to miss her original merits hearing and instead requested reopening based on the approval of her husband's Form 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.’ . . . [M]echanical failure, coupled with decisions to leave insufficient time to account for routine delays and to pay for car repairs instead of transportation to court, does not constitute 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; petitioner failed to demonstrate the diligence necessary by failing to keep the government apprised of his change in address); *Reyes v. Ashcroft*, 358 F.3d 592, 596–97 (9th Cir. 2004) (IJ did not abuse his discretion in denying motion to reopen where the petitioner failed to satisfy the *Matter of Lozada* requirements for establishing ineffective assistance of counsel); *Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205–06 (9th Cir. 2003) (no exceptional circumstances where petitioner misunderstood the time of her hearing, was ineligible for any relief from deportation, and the most she could have hoped for at the missed hearing would have been a discretionary grant of voluntary departure); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891–92 (9th Cir. 2002) (BIA did not abuse its discretion by concluding that asthma attack did not amount to exceptional circumstances where petitioner failed to offer evidence regarding the severity of the attack); *Singh-Bhathal v. INS*, 170 F.3d 943, 946–47 (9th Cir. 1999) (erroneous advice of immigration consultant not to appear at hearing did not constitute exceptional circumstance beyond petitioner’s control; “Singh was informed that he was required to attend the November 30th hearing or be subject to immediate deportation, but he chose to heed the consultant’s advice and disregard the written notice provided by the INS”); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (petitioner’s failure to receive the notice of hearing personally was not an exceptional circumstance where the notice “was mailed to his last known address and receipt was acknowledged by someone at that address”); see also *Hernandez-Vivas v. INS*, 23 F.3d 1557, 1559–60 (9th Cir. 1994) (applying the former standard requiring a showing of “reasonable cause” rather than exceptional circumstances and holding that “the mere filing of a motion to change venue does not establish

reasonable cause”; motion had not been granted and petitioner had failed to inquire as to the status of the motion).

In *Arredondo v. Lynch*, 824 F.3d 801, 806 (9th Cir. 2016), the court held that “[t]raffic and trouble finding parking, standing alone, do not constitute exceptional circumstances justifying a motion to reopen.” See also *Sharma v. INS*, 89 F.3d 545, 547 (9th Cir. 1996) (“traffic congestion and trouble finding parking” did not constitute exceptional circumstances; “The BIA correctly found that Petitioners’ traffic difficulties do not qualify as exceptional circumstances beyond Petitioners’ control.”). In *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 858 (9th Cir. 2026) (en banc), however, the court rejected a per se rule that traffic cannot establish exceptional circumstances. See *id.* (“The IJ and BIA abused their discretion by misreading our prior case law and applying a bright line rule that ‘traffic’ cannot constitute exceptional circumstances.”).

(iv) Arriving Late While IJ On Bench

A noncitizen does not “fail to appear” for a removal hearing, and therefore need not establish exceptional circumstances to reopen in absentia removal proceedings, if she arrives at the courtroom late but while the IJ is still on the bench. See *Montejo-Gonzalez v. Bondi*, 166 F.4th 851, 857 (9th Cir. 2026) (en banc) (“[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.” (quoting *Perez v. Mukasey*, 516 F.3d 770, 774 (9th Cir. 2008))); *Jerezano v. INS*, 169 F.3d 613, 615 (9th Cir. 1999) (“Jerezano was 15 to 20 minutes late, but arrived while the IJ was still on the bench. . . . [W]e hold that these circumstances do not constitute a failure to appear.”); cf. *Valencia-Fragoso v. INS*, 321 F.3d 1204, 1205 (9th Cir. 2003) (petitioner failed to appear at hearing where she arrived over four hours late and the IJ was no longer on the bench).

b. Reopening and Rescission Based on Improper Notice of Hearing

An in absentia removal order can be rescinded through a motion to reopen if the noncitizen “did not receive notice in accordance with paragraph (1) or (2) of section 1229(a).” 8 U.S.C. § 1229a(b)(5)(c)(ii). Section 1229(a)(1) governs notices to appear, while § 1229(a)(2) governs subsequent hearing notices. See also 8 C.F.R. § 1003.23(b)(4)(ii) (“An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien

demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act”); *Miller v. Sessions*, 889 F.3d 998, 999 (9th Cir. 2018) (“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.’” (quoting 8 U.S.C. § 1229a(b)(5)(C)(ii))).

In *Campos-Chaves v. Garland*, 602 U.S. 447, 450 (2024), the Supreme Court held that, “to rescind an *in absentia* removal order on the ground that the alien ‘did not receive notice in accordance with paragraph (1) or (2),’ the alien must show that he did not receive notice under either paragraph for the hearing at which the alien was absent and ordered removed.” Accordingly, if noncitizens did not receive a notice to appear that complied with § 1229(a)(1) but received proper notice of the removal hearing under § 1229(a)(2), “they cannot seek rescission of their *in absentia* removal orders on the basis of defective notice under § 1229a(b)(5)(C)(ii).” *Campos-Chaves v. Garland*, 602 U.S. 447, 450–51 (2024) (rejecting the holding in *Singh v. Garland*, 24 F.4th 1315, 1317–20 (9th Cir. 2022), that lack of notice in the notice to appear alone rendered the *in absentia* removal order rescindable). The court explained:

An alien can have his *in absentia* removal order rescinded under § 1229a(b)(5)(C)(ii) only if he can demonstrate that he “did not receive” a paragraph (1) notice *or* a paragraph (2) notice—whichever corresponds to the hearing at which he was ordered removed *in absentia*. Each alien before us received paragraph (2) notices for the hearings they missed. They are therefore ineligible for rescission of their *in absentia* removal orders.

Campos-Chaves v. Garland, 602 U.S. 447, 457 (2024). “The only way to make sense of § 1229a(b)(5)(C)(ii)’s reference to a single notice is for that notice to be the one that matters: the one that informed the alien of the time and date of the hearing the alien missed, and at which he was ordered removed.” *Campos-Chaves v. Garland*, 602 U.S. 447, 460–61 (2024).

Due process requires notice of an immigration hearing that is reasonably calculated to reach the interested parties. See *United States v. Rivera-Valdes*, 157 F.4th 978, 990–91 (9th Cir. 2025) (en banc) (OSC that provided notice that a deportation hearing was forthcoming without specifying the date, time, or location of the hearing failed to afford the opportunity to be heard required by due process);

Khan v. Ashcroft, 374 F.3d 825, 828–29 (9th Cir. 2004) (notice of hearing in English was sufficient, under the circumstances, to satisfy due process); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155–56 (9th Cir. 2004) (“Because due process requires that aliens receive notice of their deportation hearings that is reasonably calculated to reach them, failure to provide adequate notice is grounds for reopening deportation proceedings.” (citation omitted)); *Andia v. Ashcroft*, 359 F.3d 1181, 1185 (9th Cir. 2004) (interpreting pre-IIRIRA notice provision in 8 U.S.C. § 1252b(c)(3)(B) (repealed 1996)) (“Had petitioners not received any notice satisfying constitutional requirements—actual *or* constructive—of the deportation proceedings, it would be a violation of their rights under the Fifth Amendment of the Constitution to deport them in absentia.”); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (“An alien does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied. Rather, due process is satisfied if service is conducted in a manner ‘reasonably calculated’ to ensure that notice reaches the alien.”; mailing notice of deportation hearing to the address provided by the noncitizen complied with due process).

“Where the Government learns that its notice efforts have not succeeded, that knowledge triggers an obligation on the Government’s part to take additional reasonable steps to effect notice, if it is practicable to do so. Notice is not ‘reasonably calculated’ under the circumstances when the Government knows its method of service was ineffective and takes no additional steps to effect notice that are reasonably available to it.” *United States v. Rivera-Valdes*, 157 F.4th 978, 989 (9th Cir. 2025) (en banc) (citation omitted).

“[T]he due process principles of *Mullane [v. Central Hanover Bank & Trust Co.]*, 339 U.S. 306 (1950),] and *Jones [v. Flowers]*, 547 U.S. 220 (2006),] apply to immigration removal proceedings.” *United States v. Rivera-Valdes*, 157 F.4th 978, 989 (9th Cir. 2025) (en banc).

Notice that meets “statutory notice requirements” does not “necessarily satisf[y] constitutional requirements as well.” *United States v. Rivera-Valdes*, 157 F.4th 978, 989 (9th Cir. 2025) (en banc). The government is required to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. *Id.* at 990.

A motion to reopen to rescind an in absentia removal order based on lack of notice of the removal hearing may be brought at any time: “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) (interpreting pre-IIRIRA notice provision in 8 U.S.C. § 1252b(c)(3)(B) (repealed 1996)) (“As there is no time limitation for motions to reopen in absentia orders based on lack of notice, the IJ could not create one as a matter of discretion.”).

Although an individual in reinstatement proceedings under § 1231(a)(5) generally cannot challenge the validity of the prior removal order in the reinstatement proceeding itself, “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 noncitizen leaves the United States while under the order of removal and then reenters illegally, does deprive immigration judges of jurisdiction to entertain a motion to reopen based on lack of notice under § 1229a(b)(5)(C)(ii)).

(i) Actual or Constructive Notice Sufficient

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 v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding, with respect to former 8 U.S.C. § 1252b(c)(1), that notice was sufficient where it was mailed to the applicant’s last address, where receipt was acknowledged); *see also Dobrota v. INS*, 311 F.3d 1206, 1211 (9th Cir. 2002) (“[A]n alien does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied. Rather, the INS may generally satisfy notice requirements by mailing notice of the hearing to an alien at the address last provided to the INS, or, if she is represented, to her attorney’s address of record.” (citations and internal quotation marks omitted)).

“Actual notice is, however, sufficient to meet due process requirements.” *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) (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, 988–90 (9th Cir. 2007) (petitioner produced sufficient evidence to overcome the presumption of effective service by regular mail where she stated that she did not receive the notice, she had no motive to avoid the hearing, she had initiated the removal proceedings by applying for asylum, she had

appeared at other proceedings, and the government presented weak evidence that the notice in question had in fact been mailed).

(A) Notice to Counsel

Notice to counsel is sufficient to establish notice to the applicant. *See Garcia v. INS*, 222 F.3d 1208, 1209 (9th Cir. 2000) (rejecting claim of inadequate notice where the government personally served written notice of the hearing on petitioner’s counsel of record and 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.”).

“We . . . hold 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. When such an appearance has been filed, the government must serve all notices to appear and all hearing notices on the counsel of record.” *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009); *see Dobrota v. INS*, 311 F.3d 1206 (9th Cir. 2002) (notice insufficient where counsel of record was not provided with notice).

Cf. Cui v. Mukasey, 538 F.3d 1289, 1293–95 (9th Cir. 2008) (addressing adequate notice in the context of fingerprint requirements and concluding that notice of the requirement was insufficient where petitioner spoke Mandarin and IJ directed limited fingerprint instructions to counsel).

(B) Notice to Juvenile

If a juvenile under 18 years old is released from INS custody to a responsible adult, proper written notice of the removal hearing 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).

Notice to the juvenile alone is sufficient where the juvenile is released on her own recognizance, rather than being released in the custody of an adult who has agreed to be responsible for the juvenile. *See Jimenez-Sandoval v. Garland*, 22 F.4th 866, 870–71 (9th Cir. 2022) (distinguishing *Flores-Chavez* and concluding that sufficient notice of deportation proceedings was provided where Order to Show Cause and Notice of Hearing were served on 17-year-old petitioner who was

released from immigration custody on her own recognizance rather than into the custody of an adult and no adult had entered an agreement with the government to assume responsibility for the juvenile); *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1143–47 (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 the noncitizen minor had never been detained and had affirmatively applied for asylum relief, distinguishing *Flores-Chavez*).

“[I]mproper service of an NTA on a minor alien released from DHS custody can be cured if DHS later perfects service before substantive removal proceedings begin.” *B.R. v. Garland*, 26 F.4th 827, 837 (9th Cir. 2022). The court held that “*Flores-Chavez* requires DHS to serve the NTA on the custodian of a minor alien after he is released. It does not create a bizarre rule where, if service on the custodian is not made the instant the minor is released, DHS is barred from pursuing removal.” *B.R. v. Garland*, 26 F.4th 827, 839–40 (9th Cir. 2022) (although DHS failed to provide notice of removal hearing to petitioner’s mother, petitioner received proper notice of his removal hearing where notice was provided to him directly (through his attorney of record) and he had by that time become an adult; DHS cured its failure to provide notice to the petitioner’s mother by effecting service to the petitioner, who by then was an adult, directly, because “[r]e-service should conform to DHS regulations that apply to the alien at the time of the service,” and notice to the petitioner occurred prior to any substantive removal proceedings).

(C) Notice to Applicant No Longer in United States

A notice to appear mailed to an applicant’s former address after she 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) (BIA abused its discretion in denying a motion to reopen where the applicant submitted evidence demonstrating that the agency mailed notice to his former address after he had departed the United States; under the circumstances of the case, the applicant had not been required to provide the INS with a change in his address).

(ii) Noncitizens' Address Obligations and Right to Notice

The applicant is responsible for informing the immigration agency of her current address. *See* 8 U.S.C. § 1305(a) (“Each alien required to be registered under this subchapter who is within the United States shall notify the Attorney General in writing of each change of address and new address within ten days from the date of such change and furnish with such notice such additional information as the Attorney General may require by regulation.”); 8 U.S.C. § 1306(b) (criminal and civil penalties for failing to notify the government of change in address); *Vukmirovic v. Holder*, 640 F.3d 977, 979 (9th Cir. 2011) (“Aliens are advised in various ways that they must keep the government apprised of any change of address.” (citing 8 U.S.C. §§ 1305, 1306(b))).

By its plain language, 8 U.S.C. § 1305(a) applies only to noncitizens who are present in the United States. *See Singh v. Gonzales*, 412 F.3d 1117, 1121–22 (9th Cir. 2005).

“[A]n alien may not rely on lack of notice if the alien did not provide his or her current address to the government after being notified of the obligation to do so.” *Urquia-Yanez v. Blanche*, 176 F.4th 622, 626 (9th Cir. 2026) (citing 8 U.S.C. §§ 1229(a)(2)(B), 1229a(b)(5)(B)).

English-language notices generally are reasonably calculated to reach and to inform noncitizens of their obligation to update their addresses and thus are sufficient to satisfy due process. *See Urquia-Yanez v. Blanche*, 176 F.4th 622, 629 (9th Cir. 2026) (holding that the petitioner received adequate notice of her removal hearing where notice of the hearing was sent to her address on file rather than her current address). The court explained:

No regulatory or statutory provision requires DHS or the immigration court to provide an alien with notice of her obligation to update her address *in her native language* in order to subsequently enter an in absentia removal order. . . . And holding that due process requires such notice would run counter to our previous holding that English notices generally are “reasonably calculated to reach and to inform” aliens of their obligations.

Urquia-Yanez v. Blanche, 176 F.4th 622, 628 (9th Cir. 2026) (quoting *Khan v. Ashcroft*, 374 F.3d 825, 829 (9th Cir. 2004)).

“[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 proceeding in which petitioner was ordered removed in absentia, and petitioner was entitled to notice of her hearing).

A noncitizen’s failure to provide an updated address, however, may not be fatal to a claim of lack of notice. In *United States v. Rivera-Valdes*, 157 F.4th 978, 991–92 (9th Cir. 2025) (en banc), the court assumed without deciding that the petitioner failed to update his address with the agency but held that the petitioner did not forfeit his right to constitutionally sufficient notice where: (1) the notice of hearing was returned to the government unclaimed; (2) there was a discrepancy between addresses in the record; and (3) the government took no further steps to effect service after attempted notice was returned unclaimed.

(iii) Presumption of Effective Delivery

The government 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) (“[I]f a letter *properly directed* is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.” (internal quotation marks omitted)).

“A notice which fails to include a proper zip code is not properly addressed.” *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1010 (9th Cir. 2003).

“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).

“[T]he presumption of effective service of notices to appear by regular mail is weaker than the presumption when applied to delivery by certified mail.” *Perez-Portillo v. Garland*, 56 F.4th 788, 793 (9th Cir. 2022) (quoting *Sembiring v. Gonzales*, 499 F.3d 981, 987 (9th Cir. 2007)); accord *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.”); *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (“[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.”).

“[T]he test for whether an individual produced sufficient evidence to overcome the presumption of service by regular mail is ‘practical and commonsensical rather than rigidly formulaic,’ and . . . in many cases the only proof may be the individual’s statement as well as circumstantial evidence.” *Perez-Portillo v. Garland*, 56 F.4th 788, 793 (9th Cir. 2022) (quoting *Sembiring v. Gonzales*, 499 F.3d 981, 988 (9th Cir. 2007)).

“Where a petitioner actually initiates a proceeding to obtain a benefit, appears at an earlier hearing, and has no motive to avoid the hearing, a sworn affidavit from petitioner that neither he nor a responsible party residing at his address received the notice should ordinarily be sufficient to rebut the presumption of regular mail delivery.” *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011) (alterations omitted) (quoting *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002)); cf. *Sembiring v. Gonzales*, 499 F.3d 981, 988–90 (9th Cir. 2007) (petitioner produced sufficient evidence to overcome the presumption of effectively service by regular mail where she stated that she did not receive the notice, she had no motive to avoid the hearing, she had initiated the removal proceedings by applying for asylum, she had appeared at other proceedings, and the government presented weak evidence that notice had in fact been mailed).

In addressing whether the petitioner has overcome the presumption of delivery, the agency must consider “all evidence presented.” *Perez-Portillo v. Garland*, 56 F.4th 788, 794 (9th Cir. 2022); see *id.* at 795–96 (remanding where the agency invoked the doctrine of constructive notice without considering the credibility of the petitioner’s claim of non-receipt in light of all the circumstantial and corroborating evidence); *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (“[W]hen an alien is seeking to reopen deportation proceedings on the ground of lack of notice of the deportation hearing, the . . . presumption [of delivery where certified mail of notice of deportation proceedings is sent to an alien’s last known address] requires the IJ and BIA to consider the evidence submitted by an alien which supports the defense of nondelivery or improper delivery of the notice.”).

(iv) Improper Service of NTA

“[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. When such an appearance has been filed, the government must serve all notices to appear and all hearing notices on the counsel of record.” *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009) (holding in absentia removal order must be rescinded).

“[A]bsent a showing of prejudice, improper service of an NTA can be cured and is not fatal.” *B.R. v. Garland*, 26 F.4th 827, 837 (9th Cir. 2022).

The agency must provide proper notice of both the time and place of the hearing and the charges. Accordingly, 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 that amends the underlying factual allegations lodged against the noncitizen. See *Martinez v. Barr*, 941 F.3d 907, 923 (9th Cir. 2019); *id.* at 925 (“[T]he BIA abuse[d] its discretion in denying the appeal of an [motion to reopen], where the IJ in the underlying removal proceeding ordered Diaz Martinez removable in absentia on the basis of an amended NTA of which she did not receive proper notice.”).

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

(v) Defective NTA in In Absentia Context

“[T]o rescind an in absentia removal order on the ground that the alien ‘did not receive notice in accordance with paragraph (1) or (2),’ the alien must show that he did not receive notice under either paragraph for the hearing at which the alien was absent and ordered removed.” *Campos-Chaves v. Garland*, 602 U.S. 447, 450 (2024). Accordingly, if noncitizens did not receive a notice to appear that complied with § 1229(a)(1) but received proper notice of the removal hearing under § 1229(a)(2), “they cannot seek rescission of their in absentia removal orders on the basis of defective notice under § 1229a(b)(5)(C)(ii).” *Campos-Chaves v. Garland*, 602 U.S. 447, 450–51 (2024) (rejecting the holding in *Singh v. Garland*, 24 F.4th 1315, 1317–20 (9th Cir. 2022), that lack of notice in the notice to appear alone rendered the in absentia removal order rescindable).

Proper notice procedures for removal proceedings are set forth in 8 U.S.C. § 1229(a)(1) and (2).

Section 1229(a)(1) states 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).” 8 U.S.C. § 1229(a)(1); see *Velasquez-Escovar v. Holder*, 768 F.3d 1000, 1003 (9th Cir. 2014) (discussing § 1229(a)(1)’s requirements); *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) (same).

Section 1229(a)(1) states that “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 v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004); see *Niz-Chavez v. Garland*, 593 U.S. 155, 159 (2021) (noting that IIRIRA requires a notice to appear to include “the nature of the proceedings against the alien, the legal authority for the proceedings, the charges against the alien, the fact that the alien may be represented by counsel, the time and place at which the proceedings will be held, and the consequences of failing to appear”); *Pereira v. Sessions*, 585 U.S. 198, 202–04 (2018) (quoting § 1229(a)(1) and listing NTA requirements); *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 him to the charges against him, and informs him of the date and location of the hearing.”).

Neither the statute nor its implementing regulations require notices to appear or hearing notices to be provided in any language other than English. See *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) (distinguishing expedited removal proceedings for aggravated felons, in which the government is required to translate notice into a noncitizen’s native language or a language the noncitizen understands); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 n.4 (9th Cir. 2004) (“Current law does not require that the Notice to Appear . . . be in any language other than English.”).

(vi) Notice in Pre-IIRIRA Proceedings

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

(A) Orders to Show Cause

Service of the Order to Show Cause (OSC) 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 an OSC to 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).

The government bore the burden of demonstrating proper OSC service by clear, unequivocal, and convincing evidence. See *Chaidez v. Gonzales*, 486 F.3d 1079, 1087 (9th Cir. 2007) (“We conclude that the government has not met its burden, established in former 8 U.S.C. § 1252b(c)(1) and explicated in *Grijalva*, of demonstrating by clear, unequivocal, and convincing evidence that Chaidez or a responsible person at his address signed the certified mail return receipt for his OSC.”).

(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 was sufficient to establish proper service by “clear, unequivocal, and convincing” evidence, regardless of whether there was 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); *Matter of Grijalva*, 21 I. & N. Dec. 27, 33–34 (BIA 1995) (en banc).

Adopting the BIA's standard from *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 created a “strong presumption of effective service.” *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011); *Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (“[C]ertified mail of notice of deportation proceedings which is sent to an alien's last known address provides sufficient notice under Section 242B, and . . . there is no requirement that the certified mail receipt be signed by the alien or a responsible person at his

address in order to effect service.”); *see also Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (en banc) (“[I]n cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises.”).

“This presumption of effective service may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service.” *Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (en banc); *see Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (“[T]he ‘presumption of effective service may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service’ based on substantial and probative evidence presented by the alien.” (quoting *Matter of Grijalva*, 21 I. & N. Dec. 27, 37 (BIA 1995) (en banc))).

In *Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003), where the INS sent a hearing notice by certified mail but could not produce a return receipt, the court expressed “no opinion whether the record, lacking the return receipt, deprives the INS of the presumption that notice was effective and thus relieving the Busquets of having to rebut the presumption.”

“Th[e] strong presumption of effective notice by certified mail contrasts with a weaker presumption that results from regular mail service.” *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011).

c. Movant in Custody

A motion to reopen to rescind an in absentia removal order 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 U.S.C. § 1229a(b)(5)(C)(ii) (in absentia removal order “may be rescinded . . . upon a motion to reopen filed at any time if . . . the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien”); 8 C.F.R. § 1003.2(c)(3) (2020) (referring to 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(2) (2020)).

2. Changed Country Conditions/Circumstances

A motion to reopen to apply or reapply for asylum or withholding of removal based on changed country conditions or circumstances 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) (“There is no time limit on the filing of a motion to

reopen if the basis of the motion is to apply for [asylum or withholding of removal] and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.”); 8 C.F.R. § 1003.2(c)(3)(ii) (2020) (the time and numerical limitations shall not apply to a motion to reopen “[t]o apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing”); *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.”).

See, e.g., *Ali v. Holder*, 637 F.3d 1025, 1031–32 (9th Cir. 2011) (BIA abused its discretion by denying motion to reopen based on changed country conditions); *Malty v. Ashcroft*, 381 F.3d 942, 945–48 (9th Cir. 2004) (BIA abused its discretion by denying motion to reopen based on changed circumstances in Egypt); *Azanor v. Ashcroft*, 364 F.3d 1013, 1021–22 (9th Cir. 2004) (BIA did not abuse its discretion by denying motion to reopen where the motion asserted changes in U.S. asylum law rather than changes in country conditions in Nigeria).

8 C.F.R. § 1003.2(c) (2020)’s limits on the timing and number of motions to reopen apply to motions to reopen to apply for CAT protection based on changed country conditions. See *Go v. Holder*, 744 F.3d 604, 607–09 (9th Cir. 2014) (“[W]e hold that the procedural requirements specified in 8 C.F.R. § 1003.2(c) apply to CAT claims.”).

(i) Requirements for Motion Premised on Changed Country Conditions/Circumstances

The changed country conditions exception to the timing and numerical limitations on motions to reopen are subject to four requirements:

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.

Silva v. Garland, 993 F.3d 705, 718 (9th Cir. 2021) (citing 8 U.S.C. § 1229a(c)(7)(ii); 8 C.F.R. § 1003.2(c)(1) (2020)), *abrogated on other grounds as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *accord Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021) (same); *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, 1137–41 (9th Cir. 2016) (BIA abused its discretion in denying motion to reopen based on failure to establish changed country conditions where petitioner presented evidence of increased persecution of Christians in Indonesia; BIA also abused its discretion by failing to apply the disfavored-group analysis to the petitioner’s case).

“The critical question is . . . 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 v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004).

See, e.g., Reyes-Corado v. Garland, 76 F.4th 1256, 1265 (9th Cir. 2023) (the BIA abused its discretion in determining petitioner had not provided qualitatively different evidence where petitioner’s new evidence—actions and threats against petitioner’s immediate family in his country of origin and that were outside of his control—undermined the agency’s prior reasons for denying relief); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 805 (9th Cir. 2022) (no abuse of discretion in denying reopening where the country conditions articles presented did not demonstrate that violence against law enforcement had materially changed from the time of petitioner’s removal proceedings or was relevant to him, and the only other evidence petitioner presented was dated, vague, and largely pertained to a personal dispute); *Agonafer v. Sessions*, 859 F.3d 1198, 1206 (9th Cir. 2017) (“We conclude that the BIA abused its discretion because it clearly disregarded or failed to give credit to the post-2007 evidence submitted by Agonafer, which

demonstrates that the country conditions regarding the treatment of homosexuals in Ethiopia are qualitatively different from the country conditions presented to the IJ in 2007.”); [Ramirez-Munoz v. Lynch](#), 816 F.3d 1226, 1229 (9th Cir. 2016) (although the petitioners presented evidence of an increase in violent crimes in Mexico, they did not present evidence that violent individuals were targeting Americans or even wealthy individuals); [Najmabadi v. Holder](#), 597 F.3d 983, 987–91 (9th Cir. 2010) (substantial evidence supported the BIA’s conclusion that the evidence the petitioner, an Irani woman, submitted in her motion to reopen was not qualitatively different from the evidence presented at the original hearing); [Malty v. Ashcroft](#), 381 F.3d 942, 945–46 (9th Cir. 2004) (BIA abused its discretion by denying motion to reopen where the petitioner “presented new, previously unavailable evidence indicating that the harassment had increased to the level of persecution [in Egypt], both with respect to Coptic Christians generally and with respect to Malty’s family specifically”; where new evidence was qualitatively different from the evidence presented at the initial asylum hearing, “[t]he BIA abused its discretion in dismissing the new evidence as demonstrating a mere continuance of the previous circumstances” rather than materially changed country conditions).

“A self-induced change in personal circumstance, such as a child’s birth in the United States, does not suffice for changed country circumstances purposes. However, changed circumstances that occur in the country of nationality or the country to which removal is ordered, and are entirely outside the petitioner’s control, may constitute changed country circumstances even if they are personal, painful, or life-altering.” [Reyes-Corado v. Garland](#), 76 F.4th 1256, 1262 (9th Cir. 2023) (citation modified) (threats against petitioner and his family in Guatemala constituted changed country conditions, not changed personal circumstances). The “intra-familial” nature of the purported changed circumstances—in that case, an “escalating campaign of threats, harassment, and physical violence against [the petitioner’s] family in Guatemala”—did not take the case outside of the changed conditions exception under 8 C.F.R. § 1003.2(c)(3)(ii) (2020). *Id.* at 1261–62.

The new information much be individually relevant to the petitioner. *See Sarkar v. Garland*, 39 F.4th 611, 622 (9th Cir. 2022) (“Although Sarkar contends that the changes in marriage laws, the removal of certain poems and stories from educational textbooks, and a terrorist attack that killed mostly foreigners show a change in Bangladesh’s acceptance of radical Islam, he failed to show that those conditions more severely impact him and his family than the population at large. Thus, Sarkar has fallen short of his burden to show individualized relevancy and

that his predicament is appreciably different from the dangers faced by his fellow citizens.” (citation modified)); *Najmabadi v. Holder*, 597 F.3d 983, 989–90 (9th Cir. 2010) (new country conditions evidence may lack materiality where “it simply recounts generalized [country] conditions”).

“If the materiality of the evidence on changed country conditions ‘is contingent, in part or in whole, on factors that were determined to lack credibility [in the prior proceeding] and have not been rehabilitated, the [petitioner’s] ability to successfully establish prima facie eligibility [in connection with a motion to reopen] may be undermined.’” *Greenwood v. Garland*, 36 F.4th 1232, 1235 (9th Cir. 2022) (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 4 (BIA 2020)). “The BIA can thus reject a motion to reopen by relying on a previous adverse credibility determination if that earlier finding factually undermines the petitioner’s new claim.” *Greenwood v. Garland*, 36 F.4th 1232, 1236 (9th Cir. 2022).

But *Greenwood* “does not mean the BIA can deny a motion to reopen just because that motion touches upon the same claim or subject matter as the previous adverse credibility finding.” *Singh v. Garland*, 46 F.4th 1117, 1120 (9th Cir. 2022). If the prior adverse credibility finding does not implicate the newly submitted evidence, the new evidence must be addressed by the agency. *Id.* at 1122 (“[T]he new evidence submitted by Singh is independent of the evidence that the IJ relied on in making the adverse credibility finding. And in fact, the new evidence fills some gaps on which the adverse credibility finding was predicated. We thus hold that the BIA erred in finding Singh’s motion to reopen foreclosed by the prior adverse credibility determination.”).

Greenwood thus does not alter the general rule that the BIA may not make credibility determinations or factual findings in ruling on a motion 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, and internal quotation marks omitted)), *abrogated on other grounds as stated in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024).

Cross Reference: Motions to Reopen or Reconsider Immigration Proceedings, Time and Numerical Limitations, Exceptions to Ninety-Day/One-Motion Requirements, Changed Country Conditions/Circumstances, Significance of Prior Adverse Credibility Determination, *infra*.

Evidence that was “available” and “could have been presented or discovered at the initial removal hearing” is insufficient to justify reopening. *See* 8 U.S.C. § 1229a(c)(7)(C)(ii) (exception applies if “evidence is material and was not available and would not have been discovered or presented at the previous proceeding”); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 805 (9th Cir. 2022) (BIA could conclude that evidence of alleged threats and harassment from drug cartels that was available and could have been discovered at the time of petitioner’s initial removal proceedings was insufficient to justify reopening (citing 8 U.S.C. § 1229a(c)(7)(C)(ii))).

The new information need not have postdated the initial hearing; it need only be newly available. *See Maltz v. Ashcroft*, 381 F.3d 942, 946 (9th Cir. 2004).

“Prima facie eligibility for relief is established when the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied.” *Sarkar v. Garland*, 39 F.4th 611, 622–23 (9th Cir. 2022) (internal quotations marks omitted) (petitioner’s new country conditions evidence was insufficient to establish prima facie eligibility for relief where petitioner did not submit evidence of “direct” or “specific” facts establishing a reasonable fear of persecution or that was material to a claimed fear of torture); *cf. Nababan v. Garland*, 18 F.4th 1090, 1096 (9th Cir. 2021) (the BIA committed legal error by failing to assess the individualized risk of persecution that petitioners faced in Indonesia due to their identity as evangelical Christians, as distinct from Christians in general).

(ii) Significance of Prior Adverse Credibility Determination

“If the materiality of the evidence on changed country conditions [in a motion to reopen] ‘is contingent, in part or in whole, on factors that were determined to lack credibility [in the prior proceeding] and have not been rehabilitated, the [petitioner’s] ability to successfully establish prima facie eligibility may be undermined.’” *Greenwood v. Garland*, 36 F.4th 1232, 1235, 1236 (9th Cir. 2022) (quoting *Matter of F-S-N-*, 28 I. & N. Dec. 1, 4 (BIA 2020), and concluding the agency did not abuse its discretion in denying the motion to reopen where petitioner did not challenge the agency’s prior adverse credibility determination, which had called into question his identity, and thus petitioner could not connect the new evidence to himself).

This court has cautioned, however, that *Greenwood*'s holding "does not mean the BIA can deny a motion to reopen just because that motion touches upon the same claim or subject matter as the previous adverse credibility finding." *Singh v. Garland*, 46 F.4th 1117, 1120 (9th Cir. 2022) (holding that the BIA "erred in holding that the earlier adverse credibility finding barred [petitioner's] motion to reopen," and remanding). In *Singh*, the petitioner's new evidence was independent of the evidence relied on by the IJ in making the prior adverse credibility finding and, in fact, the new evidence "fill[ed] in some gaps on which the adverse credibility finding was predicated." *Id.* at 1122 (distinguishing *Greenwood v. Garland*, 36 F.4th 1232, 1234 (9th Cir. 2022)).

Greenwood thus does not alter the general rule that the BIA may not make credibility determinations or factual findings in ruling on a motion 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, and internal quotation marks omitted)), *abrogated on other grounds as stated in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024).

(iii) Changes in Personal Circumstances

"[A] petitioner's untimely motion to reopen may qualify under the changed conditions exception in 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, 1038–39 (9th Cir. 2014) (BIA abused its discretion in denying motion to reopen where petitioner had converted to Christianity in the United States and submitted evidence purporting to show worsened conditions for Christians in Indonesia); 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." (citation modified)); *Salim v. Lynch*, 831 F.3d 1133, 1137–41 (9th Cir. 2016) (BIA abused its discretion by denying reopening where petitioner converted from Buddhism to Catholicism in the United States and submitted evidence of changed country conditions for Christians in Indonesia; "changed country conditions can become material due to changes in a petitioner's personal circumstances, including religious conversion").

“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) (no abuse of discretion in denying motion to reopen based on changed country conditions where petitioner submitted evidence of a change in personal circumstances—having become a cooperating witness for the government—but did not show that conditions in Mexico had changed).

“[W]hile changes in personal circumstances may be *relevant* to a motion to reopen based on changed country conditions, a petitioner cannot succeed on such a motion that ‘relies *solely* on a change in personal circumstances,’ without also providing sufficient evidence of related changed country conditions.” *Rodriguez v. Garland*, 990 F.3d 1205, 1209 (9th Cir. 2021) (quoting *Chandra v. Holder*, 751 F.3d 1034, 1037 (9th Cir. 2014)). “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 v. Garland*, 990 F.3d 1205, 1210 (9th Cir. 2021) (quoting *Chandra v. Holder*, 751 F.3d 1034, 1037 (9th Cir. 2014)).

“A self-induced change in personal circumstance, such as a child’s birth in the United States, does not suffice for changed country circumstances purposes. However, changed circumstances that occur in the country of nationality or the country to which removal is ordered, and are entirely outside the petitioner’s control, may constitute changed country circumstances even if they are personal, painful, or life-altering.” *Reyes-Corado v. Garland*, 76 F.4th 1256, 1262 (9th Cir. 2023) (citation modified) (citing *Kaur v. Garland*, 2 F.4th 823, 830–31 (9th Cir. 2021)).

Cross-Reference and Contrast: Exceptions to Ninety-Day/One-Motion Requirements, Changes in Country Conditions/Circumstances.

A self-induced change in personal circumstance, such as a child’s birth in the United States, does not suffice for changed country circumstances purposes; otherwise, applicants could move to reopen by changing circumstances within their control. See *Kaur v. Garland*, 2 F.4th 823, 830 (9th Cir. 2021).

But changes that are personal to the petitioner, but entirely outside the petitioner's control, can suffice. *Kaur v. Garland*, 2 F.4th 823, 831 (9th Cir. 2021).

A motion to reopen must be “based on changed country conditions arising in the country of nationality or the country to which removal has been ordered.” 8 U.S.C. § 1229a(c)(7)(C)(ii); *see, e.g., Almaraz v. Holder*, 608 F.3d 638, 640–42 (9th Cir. 2010) (no 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) (2010); petitioner also failed to establish that certain provisions of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA) qualified as a material change in his circumstances arising from his country of origin); *Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004) (changes in United States asylum law not proper grounds for reopening under the changed country conditions exception).

(iv) Changes in U.S. Asylum Law

The exception for changed country conditions does not apply to changes in United States asylum law. *See Azanor v. Ashcroft*, 364 F.3d 1013, 1022 (9th Cir. 2004) (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) (2002)).

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) (2020) (“The time and numerical limitations . . . shall not apply to a motion to reopen proceedings . . . [a]greed upon by all parties and jointly filed.”); *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”).

The deadline for filing a motion to reopen is not equitably tolled while a petitioner waits for a response from the District Counsel regarding whether the government will join a motion to reopen if the petitioner does not need that response to file the motion to reopen. *See Valeriano v. Gonzales*, 474 F.3d 669, 673–75 (9th Cir. 2007) (waiting for a response showed a lack of diligence where

the petitioner could have filed a solo motion to reopen under [8 C.F.R. § 1003.2\(c\)\(1\)](#)).

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\(c\)\(3\)\(iv\) \(2020\)](#).

5. Sua Sponte Reopening by the Agency

The BIA may at any time reopen proceedings sua sponte (i.e., on its own motion). *See* [8 C.F.R. § 1003.2\(a\) \(2020\)](#) (“The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.”); *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019) (quoting regulation).

An immigration judge also has authority to reopen proceedings sua sponte. *See* [8 C.F.R. § 1003.23\(b\)\(1\) \(2019\)](#) (“An 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 in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals.”).

“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, as here, by a party filing a motion to reopen *sua sponte*.” *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019).

Regulations effective in 2021 purport to limit an immigration judge’s authority to sua sponte reopen:

Unless jurisdiction is vested with the Board of Immigration Appeals, an immigration judge may at any time reopen a case in which he or she has rendered a decision on his or her own motion solely in order to correct a ministerial mistake or typographical error in that decision or to reissue the decision to correct a defect in service. Unless jurisdiction is vested with the Board of Immigration Appeals, in all other cases, an immigration judge may only reopen or reconsider any case in which he

or she has rendered a decision solely pursuant to a motion filed by one or both parties.

8 C.F.R. § 1003.23(b)(1) (2026); *see Rubalcaba v. Garland*, 998 F.3d 1031, 1036 n.5 (9th Cir. 2021) (recognizing the amendment but applying the regulation as it was at the time of the BIA’s decision).

But the 2021 version of the regulations was, at least at one time, stayed and preliminarily enjoined. *See Perez-Camacho v. Garland*, 54 F.4th 597, 606 n.12 (9th Cir. 2022).

(i) Exceptional Circumstances and Discretion

“In order for an individual to obtain sua sponte relief under 8 C.F.R. § 1003.2(a) [(2020)], 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 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).

(ii) Limited Judicial Review

The court lacks jurisdiction to review the BIA’s exercise of discretion in denying sua sponte reopening: “‘the exceptional situation’ benchmark [for sua sponte reopening] does not provide a sufficiently meaningful standard to permit judicial review,” *see Bonilla v. Lynch*, 840 F.3d 575, 586 (9th Cir. 2016) (citing *Ekimian v. INS*, 303 F.3d 1153, 1159–60 (9th Cir. 2002)), nor is there a “judicially manageable standard for us to evaluate the BIA’s *exercise of discretion*,”” *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1117 (9th Cir. 2019) (quoting *Singh v. Holder*, 771 F.3d 647, 650 (9th Cir. 2014)).

But the court retains “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.” *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (granting 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 Lara-Garcia v. Garland*, 49 F.4th 1271, 1277 (9th Cir. 2022) (court retained jurisdiction to review the BIA’s legal conclusions that (1) petitioner’s conviction fell outside of the Federal First Offenders Act and (2) petitioner remained removable due to his crimes involving

moral turpitude); [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.”); [Singh v. Holder](#), 771 F.3d 647, 650 (9th Cir. 2014) (“Where, as here, the BIA concludes that it lacks the *authority* to reopen, rather than denying a motion to reopen as an exercise of discretion, we hold that *Ekimian* [which rests on the absence of a judicially manageable standard for us to evaluate the BIA’s exercise of discretion in ruling on a motion to reopen] does not preclude our jurisdiction.”).

The scope of the court’s review of legal error:

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 v. Barr](#), 958 F.3d 1225, 1234 (9th Cir. 2020) (citations omitted); *see, e.g., Cui v. Garland*, 13 F.4th 991, 1001 (9th Cir. 2021) (BIA did not commit legal error in declining *sua sponte* reopening of removal proceedings); [Menendez-Gonzalez v. Barr](#), 929 F.3d 1113, 1119–20 (9th Cir. 2019) (“This petition does not fit within the narrow exception where the BIA’s decision was based on legal or constitutional error.”).

In [Mata v. Lynch](#), 576 U.S. 143, 147 (2015), the Supreme Court held that a court has jurisdiction to review the denial of a motion to reopen a removal proceeding because the jurisdiction to review final orders of removal encompasses “review of decisions refusing to reopen or reconsider such orders.”

Furthermore, the court has jurisdiction to review the denial of a motion to reopen when the BIA “denies a motion to reopen because it is untimely” or, “when, in doing so, the Board rejects a request for equitable tolling.” [Mata v. Lynch](#), 576 U.S. 143, 148 (2015).

Furthermore still, the court has jurisdiction to review the denial of a motion to reopen when the BIA, “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.” [Mata v. Lynch, 576 U.S. 143, 148 \(2015\)](#). Thus, even assuming arguendo that the court lacks jurisdiction to review the denial of sua sponte reopening, the court’s jurisdiction to review the denial of a statutorily authorized motion to reopen is unaffected by the BIA’s additional denial of sua sponte reopening.

Cross-Reference: Jurisdiction and Standards of Review, Jurisdiction Over Certain Motions, Motions to Reopen and Motions to Reconsider.

(iii) Departure or Illegal Reentry

The departure bar at [8 C.F.R. § 1003.23\(b\)\(1\)](#), which purports to prevent 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 \(9th Cir. 2021\)](#) (“[W]e hold that the BIA erred in determining that the departure bar prevented the IJ from reopening Rubalcaba’s immigration proceedings sua sponte. . . . [T]he plain, unambiguous language of the regulation makes clear that the departure bar does not apply in the context of *sua sponte* reopening . . .”).

A removal order that has been reinstated under [8 U.S.C. § 1231\(a\)\(5\)](#) because a noncitizen has reentered the United States illegally after having been removed “is not subject to being reopened or reviewed.” [8 U.S.C. § 1231\(a\)\(5\)](#). This prohibition applies to sua sponte reopening, although the bar is nonjurisdictional. See [Suato-Orellana v. Garland, 101 F.4th 624, 632 \(9th Cir. 2024\)](#) (recognizing as abrogated [Bravo-Bravo v. Garland, 54 F.4th 634, 636 \(9th Cir. 2022\)](#)). Accordingly, the government can waive or forfeit the bar on sua sponte reopening contained in [§ 1231\(a\)\(5\)](#). See [Suato-Orellana v. Garland, 101 F.4th 624, 632 \(9th Cir. 2024\)](#) (“The government did not raise [§ 1231\(a\)\(5\)](#) until we ordered supplemental briefing on the issue. The issue therefore has been forfeited.”).

VI. EQUITABLE TOLLING

Cross-reference: Motions to Reopen or Reconsider Immigration Proceedings, Ineffective Assistance of Counsel, *infra*.

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 *Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) (“[A] motion to reopen that would otherwise be time- or number-barred can be reviewed if the deadline is subject to equitable tolling.”); *Bent v. Garland*, 115 F.4th 934, 941 (9th Cir. 2024) (“[T]his ninety-day period is subject to equitable tolling.”); *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”); see also *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (“We cannot penalize individuals in [immigration proceedings] for reasonably relying on the advice of counsel, even if that counsel turns out to have been incompetent or predatory.”); *id.* at 682 (“Many, many immigrants fall victim to incompetent or fraudulent counsel who extract large sums of money but perform inadequately, or not at all. In recognition, we have long afforded equitable tolling of deadlines and numerical limitations to aliens who are prevented from timely or adequately filing due to ineffective assistance of counsel.”).

“Equitable tolling is available when some extraordinary circumstance stood in the petitioner’s way and prevented timely filing, and the petitioner acted with due diligence in pursuing the petitioner’s rights.” *Eskilian v. Bondi*, 172 F.4th 682, 687 (9th Cir. 2026) (citation modified); see also *Bent v. Garland*, 115 F.4th 934, 941 (9th Cir. 2024) (“A petitioner seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” (quoting *Holland v. Florida*, 560 U.S. 631, 634 (2010))).

“This court . . . recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods 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). “When 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 omitted).

“In addition, equitable 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.” *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (internal quotation marks omitted).

“We do not require petitioner to act with the maximum diligence possible—only due or reasonable diligence.” *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (internal quotation marks omitted).

“Our review 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).

The court has explained:

[A]s a general rule we measure a petitioner’s diligence from the date on which a reasonable person in the petitioner’s position is put on notice that something was wrong. We have also held that due diligence requires a showing of reasonable diligence, not maximum feasible diligence. In assessing a petitioner’s diligence, we consider the petitioner’s overall level of care and caution in light of his or her particular circumstances, and are guided by decisions made in other similar cases with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Eskilian v. Bondi, 172 F.4th 682, 687–88 (9th Cir. 2026) (citation modified).

To qualify for equitable tolling based on ineffective assistance of counsel, a petitioner must establish both procedural and substantive requirements. *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 922 (9th Cir. 2015).

Procedurally: “To qualify for equitable tolling on account of ineffective assistance of counsel, a 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).” *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); accord *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015).

“*Lozada* states: (1) The motion must be ‘supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts,’ (2) ‘former counsel must be informed of the allegations and allowed the opportunity to respond,’ and (3) if the prior counsel’s conduct violated ‘ethical or legal responsibilities,’ the motion should reflect whether a complaint has been filed with the appropriate disciplinary authorities, and if not, why.” *Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002) (quoting *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (BIA 1988)).

“In some cases, we have not required strict compliance with *Lozada* requirements, especially when the record shows a clear and obvious case of ineffective assistance.” *Puga v. Chertoff*, 488 F.3d 812, 816 (9th Cir. 2007) (internal quotation marks omitted).

Substantively: “Having met these procedural requirements, the alien must show that his counsel’s performance was deficient, and that he suffered prejudice as a result.” *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015) (alteration and internal quotation marks omitted); *id.* at 922 (“We conclude [the petitioner] has met the substantive requirement of demonstrating that his counsel performed deficiently and that he suffered prejudice as a result.”); see also *Singh v. Holder*, 658 F.3d 879, 885 (9th Cir. 2011) (“When considering the merits of a motion to reopen premised on ineffective assistance of counsel, the BIA asks whether counsel’s performance was deficient, and whether the alien suffered prejudice.”).

A petitioner establishes prejudice by showing that “his lawyer’s errors may have affected the outcome of the proceedings.” *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (internal quotation marks omitted).

“When a lawyer’s error results in an alien being denied his right to appeal altogether, we apply a presumption of prejudice.” *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (internal quotation marks omitted).

See, e.g., *Ray v. Gonzales*, 439 F.3d 582, 588 n.5 (9th Cir. 2006) (petitioner entitled to equitable tolling of the filing deadline and numerical restrictions where he reasonably believed his attorney would handle the filing of his motion to reopen

and acted diligently after learning of counsel's failure to do so); *Singh v. Ashcroft*, 367 F.3d 1182, 1185–86 (9th Cir. 2004) (BIA abused its discretion in not equitably tolling the filing deadline where petitioner acted with due diligence after learning of counsel's deceit; counsel had failed to file a timely appellate brief to the BIA, the BIA had summary dismissed the appeal, and counsel had failed to communicate these facts to petitioner).

Equitable tolling may be based on the actions of non-attorneys. See *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099 (9th Cir. 2005) (“It is well established in this circuit that 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.”); *id.* (NACARA section 203(c) statute of limitations equitably tolled where petitioner “was affirmatively deceived by a nonattorney” who lied to petitioner about filing a motion to reopen to seek relief under NACARA); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002) (“The numerical limit on motions to reopen . . . may be waived (or tolled) in cases where a petitioner has been defrauded by an individual purporting to provide legal representation.”); *id.* at 1224–25 (“Torres, who was not an attorney, missed the deadline for filing the application for suspension of deportation and then lied about having done so, assuring petitioners that it was the IJ that had lost the application and that the IJ’s error could be rectified on appeal. Torres then compounded his mistakes and misrepresentations by advising the filing of a motion for reconsideration that prejudiced petitioners’ claims. Torres’ actions constitute the type of fraudulent representation that triggers equitable tolling . . .”).

Whether classified as “equitable tolling” or “exceptional circumstances,” ineffective of counsel, or of non-attorneys, can extend the 180-day deadline for filing a motion to reopen in absentia removal proceedings beyond the 180-day statutory deadline. See, e.g., *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) (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); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002) (180-day limit for filing motion to reopen proceedings conducted in absentia tolled due to deceptive actions of notaries); *Lopez v. INS*, 184 F.3d 1097, 1100 (9th Cir. 1999) (exceptional circumstances were demonstrated where a notary posing an attorney advised petitioner that he need not appear at his removal hearings; “We conclude that the statute of limitations to

reopen an order of deportation is equitably tolled where the alien’s late petition is the result of the deceptive actions by a notary posing as an attorney.”).

The filing deadlines applicable to section 203(c) of NACARA, which allows a noncitizen one opportunity to file a petition to reopen his or her deportation or removal proceedings to obtain cancellation of removal, are nonjurisdictional and subject to equitable tolling. *See Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1098 (9th Cir. 2005) (“[W]e conclude that section 203(c) is subject to equitable tolling.”).

Ineffective assistance of counsel can rise to a deprivation of due process. *See Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801 (9th Cir. 2022) (“Under the Fifth Amendment, the petitioner must demonstrate that counsel’s conduct was egregious, in that it rendered the proceeding so fundamentally unfair that the alien was prevented from reasonably presenting his case. The petitioner must also show substantial prejudice, meaning that counsel’s performance was so inadequate that the outcome of the proceeding may have been affected by the alleged violation.”); *see also id.* at 802–03 (summarizing circumstances found to be sufficiently or insufficiently egregious); *Bonilla v. Lynch*, 840 F.3d 575, 582 (9th Cir. 2016) (“Equitable tolling applies in ineffective assistance of counsel cases because, although 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.” (citation modified)); *Avagyan v. Holder*, 646 F.3d 672, 677 (9th Cir. 2011) (“If the ineffective assistance of an alien’s counsel prevents him from timely filing a motion to reopen, counsel has prevented the alien from reasonably presenting his case and denied him due process.”); *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004) (“Ineffective assistance of counsel amounting to a due process violation permits untimely reopening.”).

See, e.g., Hernandez-Ortiz v. Garland, 32 F.4th 794, 803–04 (9th Cir. 2022) (holding that petitioner failed to show either deficient performance or prejudice where his prior counsel failed to file earlier untimely motions to reopen).

“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). Thus, the court has jurisdiction over the question of equitable tolling even if it turns out that the claim of equitable tolling is without merit.

A. Circumstances Beyond the Applicant's Control

“[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.” *Lona v. Barr*, 958 F.3d 1225, 1230 (9th Cir. 2020) (internal quotation marks omitted); accord *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582, 599 (9th Cir. 2020) (en banc).

“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.” *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) (citing the example of a party’s mental incapacity), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582, 599 (9th Cir. 2020) (en banc).

See, e.g., *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 845 (9th Cir. 2006) (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; “Tolling requires that his or her ignorance of the limitations period was caused by circumstances beyond the party’s control, and that these circumstances go beyond a garden variety claim of excusable neglect.” (internal quotation marks omitted)); cf. *United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006) (determining, for purposes of a collateral challenge to a removal order during criminal proceedings, where the government conceded petitioner was excused from the exhaustion requirement, that an IJ’s implicit, erroneous categorization of petitioner’s conviction as an aggravated felony rendered the removal order fundamentally unfair).

A 42-day delay in the delivery of a notice of appeal sent by certified mail—and mailed 11 days before the filing deadline—may merit equitable tolling. See *Garcia Corrales v. Blanche*, 179 F.4th 739, 743 (9th Cir. 2026).

B. Fraudulent or Erroneous Attorney Conduct

The court recognizes equitable tolling in cases involving ineffective assistance by an attorney or representative, coupled with fraudulent or erroneous conduct. See *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (“This court

. . . recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods 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.”).

“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.” *Iturribarria v. INS*, 321 F.3d 889, 898 (9th Cir. 2003).

“When 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) (quoting *Singh v. Gonzales*, 491 F.3d 1090, 1096 (9th Cir. 2007)); *cf.* *Smith v. Davis*, 953 F.3d 582, 598–99 (9th Cir. 2020) (en banc) (rejecting the stop-clock approach for evaluating when a petitioner must be diligent and stating that, “for a litigant to demonstrate he has been pursuing his rights diligently, and thus satisfies the first element required for equitable tolling, he must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim” (citation and internal quotation marks omitted)).

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) (“The BIA may equitably toll [the 30-day statutory deadline for filing a motion to reconsider a final order of removal], including in cases where the petitioner seeks excusal from untimeliness based on a change in the law that invalidates the original basis for removal.”); *see id.* at 1232 (citing example of “complete reversal of BIA precedent”); *id.* (holding that the BIA did not abuse its discretion in denying equitable tolling because the petitioner “alleged no facts . . . suggesting a diligent pursuit of her rights in the intervening years between her removal” and the relevant change in law); *see also Goulart v. Garland*, 18 F.4th 653, 655 (9th Cir. 2021) (BIA did not abuse its discretion in denying equitable tolling where the petitioner “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

“[T]he proper starting point for measuring diligence in . . . is when a reasonable person in [the petitioner’s] position would be put on notice of the error underlying his motion to reopen.” *Bent v. Garland*, 115 F.4th 934, 942 (9th Cir. 2024); see *Perez-Camacho v. Garland*, 54 F.4th 597, 606 (9th Cir. 2022) (“In determining whether an alien exercised due diligence in alleging ineffective assistance of counsel, we consider when a reasonable person in the alien’s position would suspect the specific fraud or error underlying her motion to reopen. We also consider whether the alien took reasonable steps to investigate the attorney’s suspected fraud or error or, if the alien was ignorant of counsel’s shortcomings, whether the alien made reasonable efforts to pursue relief.” (citation modified)); *Sun v. Mukasey*, 555 F.3d 802, 806 (9th Cir. 2009) (BIA abused its discretion in denying equitable tolling where the petitioner “acted with admirable diligence” by retaining counsel and promptly filing a motion to reopen after she became aware of prior counsel’s errors); *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (“This court . . . recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods 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.”); cf. *Smith v. Davis*, 953 F.3d 582, 598–99 (9th Cir. 2020) (en banc) (“[F]or a litigant to demonstrate he has been pursuing his rights diligently, and thus satisfies the first element required for equitable tolling, he must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim” (citation and internal quotation marks omitted)).

“[D]ue diligence requires a showing of reasonable diligence, not maximum feasible diligence.” *Bent v. Garland*, 115 F.4th 934, 943 (9th Cir. 2024) (internal quotation marks omitted).

“Our review 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).

Avagyan stated:

In order to assess whether petitioner exercised due diligence, we consider 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. Typically, an alien is diligent if he continues to pursue relief and relies on the advice of counsel as to the means of obtaining that 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. In many cases, this occurs when the alien obtains a complete record of his immigration proceedings and is able to review that information with competent counsel.

Avagyan v. Holder, 646 F.3d 672, 679 (9th Cir. 2011)

“[F]or individuals born during the Soviet era or who are otherwise deemed ‘stateless’ for purposes of removability, we hold that it is reasonable to expect that an individual will begin to take action to challenge removability only once that individual learns that they can be removed to a country and thus are no longer ‘stateless.’” *Eskilian v. Bondi*, 172 F.4th 682, 688 (9th Cir. 2026).

See, e.g., *Eskilian v. Bondi*, 172 F.4th 682, 688–89 (9th Cir. 2026) (petitioner acted with due diligence in waiting to seek vacatur of state conviction until she became subject to removal rather than being stateless); *Perez-Camacho v. Garland*, 54 F.4th 597, 607 (9th Cir. 2022) (BIA did not abuse its discretion in denying equitable tolling where the petitioner waited 21 years (13 of which occurred after his final order of removal was rendered) to seek modification of his conviction in state court based on the defense counsel's alleged ineffective representation, presented no evidence that he reasonably pursued relief during that period, and failed to show that he was prevented from discovering defense counsel's ineffective assistance); *Cui v. Garland*, 13 F.4th 991, 1000 (9th Cir. 2021) (“Cui’s one-sentence . . . motion to reopen does not allege any claims of fraud or deceit and simply asks to reopen the removal order so Cui may ‘file an

adjustment of status with CIS.’ The BIA therefore did not abuse its discretion in declining to equitably toll the 180-day deadline to file a motion to reopen where Cui 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 and internal quotation marks omitted)); *Luna v. Holder*, 659 F.3d 753, 760–61 (9th Cir. 2011) (six-month delay in filing motion to reopen demonstrated a lack of diligence, and petitioner “failed to demonstrate that he exercised due diligence in discovering the deadline for filing a special motion to reopen” seeking section 212(c) relief); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099–1100 (9th Cir. 2005) (petitioner acted diligently once he became concerned with prior counsel’s performance by making a FOIA request for his immigration court file and retaining new counsel, and petitioner acted diligently by filing his motion to reopen 121 days after receiving his FOIA response and learning that prior counsel had failed to file a motion to reopen).

The deadline for filing a motion to reopen is not equitably tolled while a petitioner waits for a response from the District Counsel regarding whether the government will join a motion to reopen where the petitioner does not need that response to file the motion to reopen. See *Valeriano v. Gonzales*, 474 F.3d 669, 673–75 (9th Cir. 2007) (waiting for response showed a lack of diligence because the petitioner could have filed a solo motion to reopen under 8 C.F.R. § 1003.2(c)(1); “diligence in attempting to obtain nonvital information or acquiescence is not ‘diligence’ within the meaning of our equitable tolling jurisprudence”).

Whether the BIA properly applied the equitable tolling due diligence standard to a set of established or undisputed facts presents a mixed question of law and fact which the courts may review under 8 U.S.C. § 1252(a)(2)(D), notwithstanding the jurisdiction-stripping provisions set out in 8 U.S.C. § 1252(a)(2)(B) and (C). See *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225–26 (2020).

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) (“[T]he 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) (“Our case law holds that a motion to reopen—not a motion to reconsider—is the proper avenue ordinarily available to pursue ineffective assistance of counsel claims [based on newly available information].” (internal quotation marks omitted)); *Siong v. INS*, 376 F.3d 1030, 1036 (9th Cir. 2004) (“The facts regarding Attorney Domingo’s failure to file the notice of appeal obviously were not available to Siong at the time of the initial appeal that was dismissed as untimely. The BIA thus abused its discretion when it misapplied its regulations to classify Siong’s motion as a motion to reconsider.” (alteration and internal quotation marks omitted)); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (BIA improperly characterized motion based on newly available facts as a motion to reconsider).

“Appeals [to the BIA] asserting ineffective assistance claims, like improperly captioned motions asserting such claims, are effectively motions to reopen. We therefore read the BIA’s decision [dismissing the appeal] as [the denial of a] motion to reopen” *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013).

B. Exhaustion and Proper Forum

“The proper way to raise and exhaust an ineffective assistance of counsel claim [arising from attorney conduct before the BIA] is through a motion to reopen before the agency. . . . [T]his court simply does not have jurisdiction to review claims not raised to the BIA.” *Benedicto v. Garland*, 12 F.4th 1049, 1062 (9th Cir. 2021); *Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) (“[T]o the extent petitioners contend they received ineffective assistance of counsel, we lack jurisdiction to review unexhausted claims that could have been corrected by the BIA.”).

Because exhaustion is required for federal habeas relief sought under 28 U.S.C. § 2241, a noncitizen must present an ineffective assistance of counsel claim to the BIA before presenting it to the district court in a federal habeas petition, even if the attorney’s conduct occurred after a final removal order was entered. See *Singh v. Napolitano*, 649 F.3d 899, 900–01 (9th Cir. 2011).

Earlier decisions had held that the exhaustion requirement applied only to ineffective assistance claims involving attorney conduct occurring prior to the BIA’s decision on the final order of removal. See *Puga v. Chertoff*, 488 F.3d 812, 815–16 (9th Cir. 2007) (holding, as a matter of prudential exhaustion, that a noncitizen is required to exhaust an ineffective assistance of counsel claim in the BIA before raising it in district court if the claim relates to attorney conduct that occurred prior to and during the administrative removal proceedings); *Singh v. Gonzales*, 499 F.3d 969, 974 (9th Cir. 2007) (“Singh’s first IAC claim, which arose prior to his hearing before the IJ, is barred [from consideration in district court] by his failure to exhaust administrative remedies.”); cf. *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995) (“[W]e will not require a petitioner to engage in the futile exercise of making a motion to reopen when the BIA lacks the jurisdiction to entertain the claim.”).

In *Singh v. Gonzales*, 499 F.3d 969, 975–80 (9th Cir. 2007), the court held that a district court has jurisdiction to review claims of ineffective assistance based on conduct occurring after a final order of removal is entered—i.e., counsel’s failure to file a timely petition for review in the court of appeals—because the claim does not involve review of a final order of removal; thus, the statutory provisions granting courts of appeals exclusive jurisdiction to review final orders of removal, 8 U.S.C. § 1252(a)(5) and (b)(9), do not strip the district court of jurisdiction); cf. *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1046 (9th Cir. 2000) (affirming the district court’s grant of a writ of habeas corpus based on ineffective assistance where counsel filed an untimely petition for review with this court).

The BIA abuses its discretion by failing to offer a reasoned explanation for declining to review claims of ineffective assistance of counsel based on attorney conduct occurring in the court of appeals. *Li v. Bondi*, 139 F.4th 1113, 1116 (9th Cir. 2025) (BIA declined to consider a motion to reopen raising ineffective assistance of counsel based on counsel’s failure to file an opening brief in the Ninth Circuit, which caused the petition for review to be dismissed); see *id.* at 1122 (“Precedent firmly establishes that the Board has the discretion to consider

ineffective assistance of counsel claims involving conduct before a different tribunal.”); *id.* at 1126 (noting that, as a possible remedy for counsel’s errors, the BIA could reissue its decision on the final order of removal, which would provide the petitioner a new 30-day period for filing a petition for review in the court of appeals); *see also Menjivar-Ayala v. Blanche*, 181 F.4th 948, 952 (9th Cir. 2026) (rejecting the BIA’s conclusion that it could not reissue its prior decision because counsel’s ineffective assistance occurred after the conclusion of proceedings before the BIA and holding that “counsel’s failure to notify Petitioners of a BIA decision and a corresponding filing deadline in this court is grounds to seek reopening [and reissuance] before the BIA”); *id.* at 953 (“Just as in *Li*, the BIA abused its discretion when it denied Petitioners’ motion to reopen on the basis that the claimed ineffective assistance occurred before a ‘different tribunal’ without offering any reasoned explanation.”).

C. Standard of Review

The court reviews findings of fact regarding counsel’s performance for substantial evidence. *See Lin v. Ashcroft*, 377 F.3d 1014, 1024 (9th Cir. 2004) (“We review findings of fact regarding counsel’s performance for substantial evidence.”).

“We review BIA rulings on motions to reopen and reconsider for abuse of discretion and reverse only if the Board acted arbitrarily, irrationally, or contrary to law.” *Mohammed v. Gonzales*, 400 F.3d 785, 791 (9th Cir. 2005).

“Questions of law, including claims of due process violations due to ineffective assistance, we review de novo.” *Mohammed v. Gonzales*, 400 F.3d 785, 791–92 (9th Cir. 2005).

“This court reviews BIA denials of motions to reopen for abuse of discretion, but reviews purely legal questions, such as due process claims, de novo.” *Kwong v. Holder*, 671 F.3d 872, 880 (9th Cir. 2011) (citation modified).

Cross-reference: Jurisdiction Over Immigration Petitions, Procedural Rules, and Standards of Review; Scope and Standards of Review.

D. Requirements for Due Process Violation

1. Constitutional and Statutory Basis

Noncitizens in removal proceedings do not possess a Sixth Amendment right to counsel but possess a statutory right to counsel and a right to competent representation from a retained attorney under the Due Process Clause of the Fifth Amendment:

Because a deportation hearing is a civil proceeding involving non-citizens, aliens involved in such proceedings do not enjoy the full panoply of constitutional rights that American citizens would enjoy in a criminal proceeding. For example, aliens involved in deportation proceedings do not enjoy the Sixth Amendment's guarantee of an attorney's assistance at the government's expense.

Yet aliens are not without representational rights. Federal law guarantees an alien the right to obtain counsel of his own choice in "any removal proceedings before an immigration judge," 8 U.S.C. § 1362, and we have explained that this statutory provision stems from a constitutional guarantee of due process. Further, this Circuit has long recognized that an alien's due process right to obtain counsel in immigration matters also includes a right to *competent representation* from a retained attorney. Because due process requires more than the formal *availability* of counsel, we have held that an alien is denied due process when his attorney provides ineffective assistance. 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.

Ray v. Gonzales, 439 F.3d 582, 586–87 (9th Cir. 2006) (citations and internal quotation marks omitted); *see also, e.g., 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.”); *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (“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.” (quoting *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985))).

The statutory right to counsel is set out in 8 U.S.C. § 1362, which states: “In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” See *Hernandez v. Mukasey*, 524 F.3d 1014, 1020 (9th Cir. 2008) (“Because individuals have a statutory right to obtain counsel in removal proceedings, a failure to recognize that right, or an attorney’s misdeeds, can interfere with the proceedings, resulting in a denial of due process.”).

“[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).

- In *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004), *amended sub nom. Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005), for example, the court held that the petitioner could not establish a due process violation where counsel’s alleged deficiencies did not affect the fairness of the removal hearing; the mere fact that the attorney provided the petitioner poor advice was insufficient. “While this temporal distinction may not always be significant, in this case, Pineda’s allegedly ineffective assistance did not undermine the fairness of the removal proceedings in part because it was given well before the prospect of a hearing materialized.” *Lara-Torres v. Gonzales*, 404 F.3d 1105, 1105 (9th Cir. 2005).
- In *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050 (9th Cir. 2008), the petitioner’s attorney failed to file a visa petition within the statutorily required deadline. The court held that the attorney’s conduct did not establish a due process violation, because “[t]his deficiency does not relate to the substance of an ongoing hearing; in fact, no proceedings had begun at the time the alleged attorney misconduct took place.” *Id.*

“Although the failings of Balam-Chuc’s attorney in this case have resulted in terrible consequences for him and his family, the Fifth Amendment simply does not apply to the preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing proceeding.” *Id.* at 1051.

- In *Flores v. Barr*, 930 F.3d 1082, 1090 (9th Cir. 2019), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished), the court rejected the petitioner’s claim that he suffered prejudice as a result of his prior counsel’s failure to recognize his eligibility for a U visa because the authority to issue such visas rests with USCIS rather than the BIA; the petitioner thus failed to “articulate[] how the lack of a visa caused any prejudice in his immigration proceedings before the IJ or BIA.”

A noncitizen “cannot be precluded from demonstrating ineffective assistance of counsel because he reasonably relied upon and assumed his counsel’s competence.” *Iturribarria v. INS*, 321 F.3d 889, 901 (9th Cir. 2003).

In *Hernandez v. Mukasey*, 524 F.3d 1014, 1020 (9th Cir. 2008), the court held that “reliance upon the advice of a non-attorney cannot form the basis of a claim for ineffective assistance of counsel in a removal proceeding” if the petitioner has been offered free legal services but affirmatively chose to rely on an individual that they knew was not an attorney:

The record indicates that the IJ repeatedly asked petitioners if they wished to obtain counsel, and that petitioners affirmatively declined. On at least two occasions, they were even provided with a list of attorneys who would provide free legal services. Having ensured that petitioners understood they were entitled to retain counsel and waived that right, the IJ properly allowed petitioners to proceed as they wished. . . . Because petitioners’ reliance on a non-attorney was not sanctioned by law, advice from [the non-attorney] did not affect the fundamental fairness of their proceedings. There was no denial of due process.

Hernandez v. Mukasey, 524 F.3d 1014, 1020 (9th Cir. 2008).

“To establish ineffective assistance of counsel in immigration proceedings in violation of the right to due process, a petitioner must show (1) that the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case, and (2) prejudice.” *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) (internal quotation marks omitted); accord *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004); *Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003); cf. *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) (“To prevail, the petitioner must demonstrate first that counsel failed to perform with sufficient competence, and, second, that she was prejudiced by counsel’s performance.”); see, e.g., *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (BIA did not err in rejecting ineffective assistance claim where petitioner established neither deficient performance nor prejudice). These two requirements are discussed below.

2. Fundamentally Unfair Proceeding; Competence

“[A]n alien’s right to due process can be violated by egregious conduct that threatens the fairness of the proceeding, including egregiously deficient performance by the alien’s lawyer.” *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) (internal quotation marks omitted).

“[A] lawyer’s performance in an immigration proceeding is not measured using ‘specific guidelines,’ but is instead a context-dependent inquiry into whether the attorney acted with sufficient competence.” *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (citations and internal quotation marks omitted).

“We do not require that [the petitioner’s] representation be brilliant, but it cannot serve to make [the petitioner’s] immigration hearing so fundamentally unfair that he was prevented from reasonably presenting his case.” *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (alteration and internal quotation marks omitted).

Ineffective assistance may be based on, inter alia: failing to make a considered determination as to the viability of arguments that would benefit a noncitizen; lacking sufficient knowledge of the facts to make a strategic judgment based on the plausible statutory interpretations; failing to raise female genital mutilation as part of an asylum claim; failing to perform legal research; or lack of

preparation that prevents counsel from researching and preparing basic legal arguments fundamental to the asylum claim. See *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041–42 (9th Cir. 2014) (collecting cases).

Similarly, ineffective assistance may be based on: telling one’s clients the wrong date for a removal hearing, resulting in their removal; inadvertently or without justification causing the petitioner’s application for relief to be denied on purely procedural grounds for failure to file required documents; carelessly failing to notice a timely appeal of an adverse decision; or defrauding a client by, for instance, accepting payment while providing no substantive legal assistance. See *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 802 (9th Cir. 2022) (collecting cases).

“[C]ounsel’s failure to file necessary papers in immigration proceedings may constitute ineffective assistance of counsel.” *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003).

“[W]hen counsel does not pursue a particular course of action as a tactical choice, she generally has not provided ineffective assistance, even if the choice turned out to be unwise or to the client’s detriment.” *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 802 (9th Cir. 2022) (internal quotation marks omitted). “[M]ost strategic decisions by counsel do not rise to the level of egregious conduct that threatens the fairness of the proceeding.” *Id.* (internal quotation marks omitted).

Ineffective assistance generally does not occur when counsel: declines to raise claims or arguments that counsel determines lack merit; weighs the tradeoffs between different strategies and chooses not to pursue a strategy that could expose his client to undue risk; or fails to present cumulative evidence in support of a claim that counsel believes would not change the petitioner’s likelihood of success. See *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 802–03 (9th Cir. 2022) (collecting cases).

Counsel are not required “to follow a ‘scorched earth’ strategy in which they pursue[] every possible avenue for relief, regardless of the legal impediments.” *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 804 (9th Cir. 2022).

See, e.g., *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 803–04 (9th Cir. 2022) (counsel not ineffective for failing to file untimely motions to reopen with no apparent prospect for avoiding the time bar); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) (ineffective assistance established where attorney

conceded conviction was for aggravated felony before the IJ and failed to appeal issue to the BIA even though this was an open issue in the court of appeals; “counsel failed to do the minimal research that would have allowed him to acquire an understanding of immigration proceedings and would have revealed the key precedential BIA decision concerning the ground for [petitioner’s] removability”); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013) (lawyer ineffective for failing to file application for cancellation of removal); *Kwong v. Holder*, 671 F.3d 872, 881 (9th Cir. 2011) (“BIA did not err in ruling that counsel’s performance was not constitutionally deficient, particularly in light of the facts that counsel had to work with.”; “Counsel presented sufficient evidence in support of Kwong’s claim for withholding of removal to permit the IJ to make a reasoned decision on the merits of that claim.”); *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835 (9th Cir. 2011) (ineffective assistance where counsel admitted to factual allegations without any factual basis for doing so or appropriate investigation); *Nehad v. Mukasey*, 535 F.3d 962, 971–72 (9th Cir. 2008) (counsel deprived the petitioner of the ability to present his case to the immigration court and to the BIA where he announced that he would withdraw if the petitioner did not accept an offer of voluntary departure, which impinged on the petitioner’s right to decide whether to concede his case, and violated his duty to insure that withdrawal would be conducted in a manner that would not prejudice his client); *Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004) (counsel ineffective where “[s]he was unprepared; had not expected to argue; did not seek out the evidence she should have found; did not present effectively the evidence she had at hand; presented no legal framework for an asylum claim; and left her client alone, bewildered, and unrehabilitated as a witness”); *Lo v. Ashcroft*, 341 F.3d 934, 938 (9th Cir. 2003) (counsel ineffective where counsel’s office calendared the wrong hearing date and therefore advised noncitizen not to attend her hearing); *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003) (counsel ineffective by failing to file a timely application for suspension of deportation and by erroneously filing an application for cancellation of removal).

The relationship between the first prong of an ineffective assistance claim under the Sixth Amendment (*Strickland*) and the first prong of an ineffective assistance claim under the Due Process Clause has been examined in several cases:

- In *Lara-Torres v. Ashcroft*, 383 F.3d 968, 974 (9th Cir. 2004), *amended sub nom. Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005), the court rejected the proposition that the first prong of *Strickland v. Washington*, 466 U.S. 668, 688 (1984), which asks

“whether counsel’s assistance was reasonable considering all the circumstances,” governs in the immigration context. “The Petitioners are thus wrong to assert that we must assess Pineda’s performance strictly in terms of *Strickland*’s ‘reasonableness’ standard. The proper focus of our inquiry is whether the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case.” *Id.* (internal quotation marks omitted).

- In *Torres-Chavez v. Holder*, 567 F.3d 1096 (9th Cir. 2009), the court noted that “aliens shoulder a heavier burden of proof in establishing ineffective assistance of counsel under the Fifth Amendment than under the Sixth Amendment.” *Id.* at 1100 (internal quotation marks omitted). Thus, “[i]f an attorney’s performance passes muster under *Strickland*, it cannot render an alien’s proceeding fundamentally unfair. In other words, there is no violation of the alien’s Fifth Amendment right to due process if the alien’s counsel was effective for Sixth Amendment purposes.” *Id.*

Cross-reference: Cases Finding Ineffective Assistance, below.

3. Prejudice

“Prejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings.” *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999); see *Flores v. Barr*, 930 F.3d 1082, 1088–89 (9th Cir. 2019) (“In the context of a motion to reopen for ineffective assistance, the petitioner need not show that he would win or lose on any claims. Rather, the question with respect to prejudice is whether counsel’s deficient performance may have affected the outcome of the proceedings, which means that the petitioner need only show plausible grounds for relief.” (citation modified)), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) (“The question before us is not whether [the petitioner’s] claims would prevail, but merely whether they are plausible enough to warrant consideration by the BIA on remand.”); *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005) (“To prevail, the petitioner . . . need not show that the counsel’s ineffectiveness definitively changed the outcome.”); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858–59 (9th Cir. 2004) (“Petitioners must demonstrate that counsel’s performance was so inadequate that it may have

affected the outcome of the proceedings. They need not show that they would win or lose on any claims. . . . [The BIA] should have asked only whether [counsel’s] deficient performance may have affected the proceedings.” (citation and internal quotation marks omitted)); *cf. Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) (“An alien must also show substantial prejudice by demonstrating that the alleged violation affected the outcome of the proceedings.” (internal quotation marks omitted)); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (“To establish a due process violation, the Petitioners must [show] . . . substantial prejudice, which is essentially a demonstration that the alleged violation affected the outcome of the proceedings.” (internal quotation marks omitted)), *amended sub nom. Lara-Torres v. Gonzales*, 404 F.3d 1105 (9th Cir. 2005); *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (“A showing of prejudice is essentially a demonstration that the alleged violation affected the outcome of the proceedings . . .”).

Prejudice is established where the petitioner demonstrates that, but for counsel’s errors, her claims would have been viable or plausible. *See Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005) (“In order to assess whether [the petitioner] suffered prejudice, we must consider the underlying merits of the case to come to a tentative conclusion as to whether her claim, if properly presented, would be viable. . . . [The petitioner] must demonstrate only that she has *plausible* grounds for relief.” (citations and internal quotation marks omitted)).

See, e.g., Eskilian v. Bondi, 172 F.4th 682, 689 (9th Cir. 2026) (petitioner established prejudice in second motion to reopen where counsel failed to provide any facts, evidence, or argument of petitioner’s diligence in first motion to reopen); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 804 (9th Cir. 2022) (no prejudice where counsel failed to file untimely motions to reopen earlier; “if petitioner’s prior lawyers had filed motions to reopen, they would have been in substantially the same position that petitioner is in today: filing an untimely motion to reopen immigration proceedings, with no valid basis to excuse the untimeliness”); *Flores v. Barr*, 930 F.3d 1082, 1090 (9th Cir. 2019) (no prejudice from counsel’s failure to file response to motion to dismiss where petitioner failed to identify any arguments that might have defeated the motion), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920–21 (9th Cir. 2015) (counsel performed ineffectively by failing to appeal the IJ’s denial of cancellation of removal based on the belief that the petitioner would soon

receive an I-130 visa, where the petitioner was in fact ineligible for that visa); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1043 (9th Cir. 2014) (prejudice established where counsel failed to pursue open legal issue that the court of appeals later resolved, in a different case, in a manner that would have rendered the petitioner non-removable); *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101 (9th Cir. 2009) (counsel’s performance “did not fall outside the wide range of reasonable representation” where counsel “could have reasonably made the tactical decision to concede his client’s alienage”); *Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) (counsel’s advice to accept voluntary departure and to concede claims prejudiced the petitioner because he had a nontrivial chance of success both in applying for asylum and related relief and in appealing the IJ’s determination that he was removable); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) (no prejudice caused by counsel’s failure to present petitioner’s supporting witness where, given the other evidence in the record, the witness’s testimony “would not likely have led the IJ to reach a different outcome”); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898–99 (9th Cir. 2008) (prejudice established as to cancellation of removal where counsel failed to introduce available documentary evidence or elicit testimony demonstrating continuous physical presence and hardship); *Mohammed v. Gonzales*, 400 F.3d 785, 794–802 (9th Cir. 2005) (petitioner prejudiced where counsel failed to introduce evidence of past female genital mutilation, which would have presented plausible claims for asylum, withholding, and CAT relief); *Iturribarria v. INS*, 321 F.3d 889, 900 (9th Cir. 2003) (no prejudice from counsel’s failure to file timely application for suspension for deportation where petitioner would not have been able to establish the hardship required for relief); *Ortiz v. INS*, 179 F.3d 1148, 1153–54 (9th Cir. 1999) (prejudice not established where petitioners failed to identify any evidence that, if it had been introduced, would have rendered them eligible for asylum).

a. Rebuttable (and Irrebuttable) Presumptions of Prejudice

“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).

“When a lawyer’s error results in an alien being denied his right to appeal [to the BIA] altogether, we apply a presumption of prejudice.” *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 921 (9th Cir. 2015) (internal quotation marks omitted). “In cases involving such error, the proceedings are subject to a presumption of

prejudice, and we 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) (internal quotation marks omitted) (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); *see also Singh v. Ashcroft*, 367 F.3d 1182, 1189 (9th Cir. 2004) (presumption applied where the BIA summarily dismissed the appeal for failure to file a brief and presumption not rebutted where petitioner had plausible claim for asylum); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826–27 (9th Cir. 2003) (presumption applied where the BIA summarily dismissed appeal for failure to file brief, but presumption rebutted where petitioner had no plausible claim to adjustment of status or voluntary departure).

The presumption of prejudice applicable to counsel’s failure to file a timely BIA appeal applies even if the BIA subsequently considers a motion to reopen. *See Siong v. INS*, 376 F.3d 1030, 1038 (9th Cir. 2004) (“Because the BIA was considering only the denial of a motion to reopen, Siong did not receive the in-depth review of the IJ’s factual conclusion that he would be entitled to receive on direct appeal.”; presumption not rebutted where petitioner showed plausible grounds for relief).

The presumption also applies when counsel fails to file a petition for review in the court of appeals. *See Menjivar-Ayala v. Blanche*, 181 F.4th 948, 954 (9th Cir. 2026) (“Because [counsel’s] error in failing to notify Petitioners of the BIA’s decision and the subsequent deadline to file a petition for review effectively denied Petitioners’ right to appeal altogether, the BIA should have applied a presumption of prejudice when adjudicating Petitioners’ IAC claim.” (brackets and internal quotation marks omitted)); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045–46 (9th Cir. 2000) (“[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.”; petitioner showed prejudice because her counsel’s error resulted in this court’s dismissal of her petition for review as untimely and she had demonstrated plausible grounds for relief).

Where counsel fails to timely notify the petitioners of the BIA’s decision and the 30-day deadline for filing a petition for review, “service of a courtesy copy of the BIA’s decision on Petitioners is not sufficient to rebut the presumption that their counsel’s deficient performance caused them prejudice.” *Menjivar-Ayala v.*

Blanche, 181 F.4th 948, 953 (9th Cir. 2026) (“Petitioners retained counsel for the express purpose of representing them in their immigration proceedings and were thus entitled to rely on counsel for that assistance.”).

The presumption applies where counsel ineffectively admits the factual allegations in the charge of removal, effectively preventing the noncitizen from presenting a case. See *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 835–36 (9th Cir. 2011) (presumption applied where counsel admitted factual allegations without a factual basis for doing so, thereby altogether preventing the petitioner from presenting his case; presumption not rebutted where petitioner would have had a plausible argument that his conduct did not fall within the smuggling ground for deportation).

An *irrebuttable* presumption of prejudice applies to denials of the right to counsel at a merits hearing or similarly significant stage in the proceedings. See *Zuniga v. Barr*, 946 F.3d 464, 471 (9th Cir. 2019) (“[A]n 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.”); *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) (“[A]n individual who is wrongly denied the assistance of counsel at the merits hearing need not show prejudice in order to prevail. Prejudice in that context is conclusively presumed and automatic reversal is required.” (citation omitted)); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1093–94 (9th Cir. 2012) (“[W]e hold that 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.”; petitioner was denied his right to counsel at his IJ merits hearing when the IJ denied his request for a continuance to obtain new counsel after his existing counsel was suspended from the bar).

The automatic reversal rule does not necessarily apply to denials of counsel at less significant stages in the proceedings. See *Gomez-Velazco v. Sessions*, 879 F.3d 989, 994 (9th Cir. 2018) (declining to apply the automatic reversal rule where the petitioner “was not denied the assistance of counsel throughout the entirety of the administrative removal process, which commences with service of the Notice of Intent to Issue a Final Administrative Removal Order and ends with execution of the order,” but rather “lacked counsel at one discrete stage of the process—the point of his initial interaction with DHS officers”); *id.* at 994–95 (refusing to apply a presumption of prejudice and requiring the petitioner to show prejudice “when an individual is denied the right to counsel during his initial interaction with DHS

officers, provided the individual is able to consult with counsel before the removal order is executed,” because, “[i]n that scenario, we can determine what the evidentiary record would have looked like had the violation not occurred” and “assess what prejudicial effect, if any, counsel’s absence had on the outcome of the proceedings”).

In *Zuniga v. Barr*, 946 F.3d 434 (9th Cir. 2021), the court distinguished *Gomez-Velazco* and applied the automatic reversal rule where the petitioner was denied his statutory right to counsel in his reasonable fear review hearing before the IJ:

In *Gomez-Velazco*, we distinguished *Montes-Lopez* on the ground that, after the discrete phase in which he lacked counsel, Gomez-Velazco was able to consult with counsel before his removal order was actually executed. The same was not true here. Zuniga was denied his right to counsel at the final stage of the reasonable fear proceeding—and thus, unlike the situation in *Gomez-Velazco*, Zuniga’s attorney had no later opportunity to remedy any damage done by his client’s un-counseled admissions or waivers.

Zuniga v. Barr, 946 F.3d 464, 471 n.10 (9th Cir. 2019) (alterations, citations, and internal quotation marks omitted).

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

b. 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) (“The BIA . . . does not normally require a showing of prejudice when a motion for rescission of an *in absentia* removal order is grounded on ineffective assistance of counsel.”).

Accordingly, the BIA abuses its discretion by denying a motion to reopen an in absentia removal order based on a failure to establish prejudice. See *Sanchez*

Rosales v. Barr, 980 F.3d 716, 719–20 (9th Cir. 2020) (“Petitioners were not required to demonstrate that the ineffective assistance of the non-attorney notario caused them prejudice. . . . [W]hen ineffective assistance leads to in absentia removal, we have followed the BIA’s usual practice of not requiring a showing of prejudice.” (internal quotation marks omitted)).

Cf. *Monjaraz-Munoz v. INS*, 327 F.3d 892, 896–98 (9th Cir. 2003) (noncitizen’s reasonable reliance on the advice of his attorney’s agent established exceptional circumstances for reopening removal proceedings in which in absentia removal order had been issued), *amended on other grounds*, 339 F.3d 1012 (9th Cir. 2003).

E. The *Lozada* Requirements

A motion to reopen based on ineffective assistance of counsel generally must meet the three procedural requirements set out by the BIA in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). See *Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005) (“A petitioner who seeks to reopen on the basis of ineffective assistance of counsel is usually expected to comply with the procedural guidelines set forth in *Matter of Lozada*, 19 I. & N. Dec. at 639.”); *Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003).

Under *Lozada*, 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).

“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.” *Al Ramahi v. Holder*, 725 F.3d 1133, 1139 (9th Cir. 2013) (alteration and internal quotation marks omitted); see also *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (“[T]he policy goals of *Lozada* . . . are to provide a framework within which to assess the *bona fides* of the substantial

number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance.” (internal quotation marks omitted)); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226–27 (9th Cir. 2002) (“These *Lozada* factors are intended to ensure both that an adequate factual record exists for an ineffectiveness complaint and that the complaint is a legitimate and substantial one.” (internal quotation marks omitted)).

“In practice, we have been flexible in our application of the *Lozada* requirements. The *Lozada* factors are not rigidly applied, especially where their purpose is fully served by other means.” *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008); see *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131 (9th Cir. 2013) (noting that the *Lozada* requirements “are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance”); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (“We have approved these so-called *Lozada* requirements, but we have also cautioned that these requirements are not sacrosanct. While these procedural requirements serve important policy goals—such as ensuring that a legitimate claim actually exists and developing an adequate factual basis for the BIA to adjudicate the claim—we have not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada*.”) (collecting cases); *Mohammed v. Gonzales*, 400 F.3d 785, 794 n.9 (9th Cir. 2005) (“[T]his court has rejected the BIA’s position that compliance with *Lozada* is always necessary.”); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (“These factors are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance.”).

A petitioner need only *substantially comply* with the *Lozada* requirements. See *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008) (“We conclude that Morales substantially complied with the *Lozada* requirements.”); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824–25 (9th Cir. 2003) (“We have . . . permitted an ineffective assistance of counsel claim to go forward when there is substantial compliance with *Lozada* such that the purpose of *Lozada* is fully served by other means.” (internal quotation marks omitted)); *id.* at 825 (noncitizen substantially complied with third requirement where, although noncitizen did not present evidence of filing of bar complaint, he presented evidence that the attorney self-reported the violation to the state bar); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (“[P]etitioners have substantially complied with the *Lozada* factors.”).

A petitioner need not comply with the *Lozada* requirements “when the record shows a clear and obvious case of ineffective assistance.” *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002); *see id.* (“[T]he record itself demonstrates the legitimacy of petitioners’ ineffective assistance complaint—relieving them of the need technically to comply with *Lozada*—since it is undisputed that petitioners’ counsel failed timely to file their applications.”); *see also Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 825–26 (9th Cir. 2003) (the legitimacy of the petitioner’s claim was plain on the face of the administrative record where counsel did not file a brief—despite a promise to do so in the notice of appeal—and the BIA summarily dismissed the appeal); *see, e.g., Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (ineffectiveness not plain on the face of the record where, although counsel failed to object to the admission of the asylum officer’s notes in the proceedings before the IJ, the petitioner established no legal basis for excluding the notes from the proceeding); *Tamang v. Holder*, 598 F.3d 1083, 1089–91 (9th Cir. 2010) (ineffectiveness not plain on its face where petitioner provided no facts regarding counsel’s purported failure to file a timely asylum application); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (compliance with *Lozada* not required where the facts were plain on the face of the record; IJ allowed an attorney whom petitioner had never met and who had no understanding of her case to represent her), *amended on other grounds*, 213 F.3d 1221 (9th Cir. 2000); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (“The face of the record shows a clear and obvious case of ineffective assistance of counsel.”; record was undisputed that counsel failed to file application for suspension of deportation, in spite of having told petitioner that he did so, and that petitioner would have been *prima facie* eligible for relief had the application been filed).

The petitioner need not comply with the *Lozada* requirements when doing so would be futile. *See Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (“[T]he BIA’s insistence upon strict compliance with *Lozada* in cases where such compliance would clearly be futile only worsens the plight of the immigrant.”); *id.* (“We conclude that, in cases where a petitioner’s attorney has been suspended after failing to respond to prior charges of ineffective assistance, it would be futile for the petitioner to inform counsel of the accusations or file a complaint [in accordance with the second *Lozada* requirement], and [the petitioner’s] failure to do so therefore does not bar her ineffective assistance of counsel claim.”).

“[A]rbitrary 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) (internal quotation marks omitted); see *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124–25 (9th Cir. 2000) (“Although the BIA acts within its discretion to impose the heightened *Lozada* procedural requirements, it may not impose the *Lozada* requirements arbitrarily.” (citations omitted)); *id.* at 1125 (where petitioner “could not be expected to identify the specifics of counsel’s deficient performance without reference to an accurate and substantially complete record of the filings and proceedings before the IJ,” and petitioner made diligent but unsuccessful efforts to obtain those materials from counsel and the agency, the petitioner “could neither notify prior counsel of his allegations and give him the opportunity to respond, nor responsibly draft a complaint to the state bar,” as *Lozada* requires).

The petitioner’s failure to satisfy the *Lozada* requirements, however, may be fatal to a claim of ineffective assistance of counsel if the ineffectiveness of counsel is not plain on its face or it is otherwise impossible to determine whether the claim has merit. See *Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010); see also *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004) (noting that 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”); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824 (9th Cir. 2003) (“[U]nder ordinary circumstances the BIA does not abuse its discretion when it denies a motion to remand or reopen based on alleged ineffective assistance of counsel where petitioner fails to meet the requirements of *Lozada*.” (internal quotation marks omitted)).

As to the second *Lozada* requirement, the court held that, “in cases where a petitioner’s attorney has been suspended after failing to respond to prior charges of ineffective assistance, it would be futile for the petitioner to inform counsel of the accusations or file a complaint, and Morales’s failure to do so therefore does not bar her ineffective assistance of counsel claim.” *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (no obligation to inform counsel when doing so would be futile).

As to the third *Lozada* requirement, the court 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 both a copy of the complaint and a declaration from the lawyer “admitting responsibility and absolving the client of any culpability for the delay.” *Correa-Rivera v. Holder*,

706 F.3d 1128, 1131–32 (9th Cir. 2013). The court explained that “*Lozada* doesn’t require that a petitioner present probative evidence of having submitted a complaint to the bar, much less correspondence from the bar acknowledging such a complaint. *Lozada* suggests only that the motion should reflect whether such a complaint has been filed.” *Id.* at 1131 (internal quotation marks omitted).

As to the third requirement, a noncitizen may reasonably decline to file a complaint with the state bar where the attorney’s error was nothing more than an inadvertent mistake. See *Lo v. Ashcroft*, 341 F.3d 934, 938 (9th Cir. 2003) (where there was no evidence that the petitioners and counsel colluded to use their ineffective assistance of counsel claims to achieve delay, the petitioners’ failure to file a complaint with the appropriate disciplinary authorities did not defeat the petitioners’ ineffective assistance of counsel claim).

F. Cases Discussing Ineffective Assistance of Counsel

1. Cases Finding Ineffective Assistance

See *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 order of removal); *Flores v. Barr*, 930 F.3d 1082, 1087–90 (9th Cir. 2019) (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 CAT deferral of removal), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920–22 (9th Cir. 2015) (where petitioner’s counsel performed deficiently and petitioner suffered prejudice, petitioner was entitled to equitable tolling of the motion to reopen deadline); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041–42 (9th Cir. 2014) (in reviewing an illegal reentry case in which petitioner collaterally attacked his underlying removal order, determining that the concession by petitioner’s immigration counsel that his prior drug conviction was an aggravated felony under the INA, and failure to appeal that question to the court of appeals, constituted deficient performance); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131–34 (9th Cir. 2013) (petitioner suffered prejudice where the record was undisputed that his lawyer failed to file his application for cancellation of removal; 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 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, 967–73 (9th Cir. 2008) (ineffective assistance established where counsel pressured noncitizen to accept voluntary departure under threat of counsel’s withdrawal two hours before hearing); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898–99 (9th Cir. 2008) (failure to introduce available documentary evidence, to elicit testimony, and to establish petitioner’s mother as a qualifying relative for the purpose of the hardship analysis established ineffective assistance); *Ray v. Gonzales*, 439 F.3d 582, 588–90 (9th Cir. 2006) (failure to file a brief with the BIA on appeal, to file a petition for review, and to meet procedural requirements of two motions to reopen established ineffective assistance); *Mohammed v. Gonzales*, 400 F.3d 785, 793–803 (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, 826–28 (9th Cir. 2004) (failure to file motion to reopen to pursue CAT claim constituted constitutionally deficient performance); *Lin v. Ashcroft*, 377 F.3d 1014, 1023–32 (9th Cir. 2004) (counsel’s failure to investigate and present the factual and legal basis of petitioner’s asylum claim, attend the hearing in person, advocate on petitioner’s behalf at the hearing, and file a 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, 1185–90 (9th Cir. 2004) (counsel’s failure to file brief to BIA established ineffective assistance and caused prejudice where BIA dismissed the appeal based on petitioner’s failure to file a brief); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 824–28 (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, 896–97 (9th Cir. 2003) (advice 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 on other grounds*, 339 F.3d 1012 (9th Cir. 2003); *Iturribarria v. INS*, 321 F.3d 889, 897–903 (9th Cir. 2003) (counsel was ineffective, but petitioner failed to show prejudice); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224–27 (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, 1044–45 (9th Cir.

2000) (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 for which petitioner was prima facie eligible); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (compliance with *Lozada* not required where IJ deprived petitioner of the right of counsel by allowing an attorney whom petitioner had never met and had no understanding of her case to represent her), *amended on other grounds*, 213 F.3d 1221 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097, 1100–01 (9th Cir. 1999) (fraudulent legal representation by notary posing as an attorney established ineffective assistance).

2. Cases Rejecting Ineffective Assistance of Counsel Claims

See *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 803–04 (9th Cir. 2022) (petitioner failed to show prior counsel acted deficiently in failing to file earlier untimely motions to reopen or that he was prejudiced by counsel’s “tactical decision” not to do so where, under the circumstances of the case, there was no apparent prospect of avoiding the time bar); *Flores v. Barr*, 930 F.3d 1082, 1087–90 (9th Cir. 2019) (BIA correctly concluded Flores failed to show prejudice for several of his ineffective assistance of counsel claims but abused its discretion in concluding that 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), *abrogation on other grounds suggested by Bedoya-Collazos v. Bondi*, No. 25-1081, 2026 WL 312173, at *2 (9th Cir. Feb. 5, 2026) (unpublished); *Guan v. Barr*, 925 F.3d 1022, 1033 (9th Cir. 2019) (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”; ineffectiveness was not plain where 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 the claim); *Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010) (failure to satisfy *Lozada* requirements was fatal to petitioner’s ineffective assistance claim where ineffective assistance was not otherwise apparent); *Torres-Chavez v. Holder*, 567 F.3d 1096, 1101–02 (9th Cir. 2009) (rejecting petitioner’s contention that he received

ineffective assistance where attorney conceded petitioner's alienage and did not inform him about the advantages of remaining silent; attorney's conduct fell within "wide range of reasonable representation" because counsel "could have reasonably made the tactical decision to concede his client's alienage"); *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 right to competent representation in removal proceedings 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) (even if there was ineffective assistance, petitioner suffered no prejudice 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 the record showed that counsel diligently examined witnesses, argued points of law before the IJ, and informed petitioner of his right to appeal; in addition, even if counsel's 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 affect the opportunity to present a case at the removal hearing and so did not establish a cognizable due process violation, as in *Lara-Torres, infra*); *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 on other grounds*, 404 F.3d 1105 (9th Cir. 2005); *Azanor v. Ashcroft*, 364 F.3d 1013, 1023 (9th Cir. 2004) (rejecting claim because petitioner failed to comply with *Lozada* and, alternatively, because petitioner—who did not inform counsel that she had suffered female genital mutilation—could not establish prejudice); *Reyes v. Ashcroft*, 358 F.3d 592, 597–98 (9th Cir. 2004) (rejecting claim because petitioner failed to comply substantially with *Lozada* and ineffective assistance was not apparent from the record); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071–72 (9th Cir. 2003) (petitioner failed to demonstrate prejudice from counsel's statement denigrating petitioner's hearing testimony); *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (petitioner failed to show prejudice); *Ortiz v. INS*, 179 F.3d 1148, 1153–54 (9th Cir. 1999) (petitioner failed to show prejudice).

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

VIII. CASES ADDRESSING MOTIONS TO REOPEN FOR SPECIFIC RELIEF

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\(c\)\(1\) \(2020\)](#) (motions to reopen before BIA); [8 C.F.R. § 1003.23\(b\)\(3\) \(2020\)](#) (motions to reopen before IJ).

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\(c\)\(1\) \(2020\)](#).

“[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.” [Tadevosyan v. Holder](#), 743 F.3d 1250, 1255 (9th Cir. 2014) (citation and internal quotation marks omitted); *see also* [Fonseca-Fonseca v. Garland](#), 76 F.4th 1176, 1183 (9th Cir. 2023) (“The ‘reasonable likelihood’ standard requires a petitioner to show more than a mere possibility she will establish a claim for relief, but it does not require the petitioner to demonstrate she is more likely than not to prevail.”).

The agency has discretion to deny a motion to reopen even if the movant has made out a prima facie case for relief. *See* [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.”); [8 C.F.R. § 1003.23\(b\)\(3\)](#) (“The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.”); [Aviles-Torres v. INS](#), 790 F.2d 1433, 1436 (9th Cir. 1986) (“In some instances, the BIA does not abuse its discretion when it denies

reopening after the petitioner has made a prima facie showing of entitlement to discretionary relief.”).

Where the agency denies a motion to reopen as an exercise of discretion, rather than based on the movant’s failure to make out a prima facie case, the “would likely change” standard applies. See *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1183 (9th Cir. 2023) (“[T]he ‘would likely change’ standard applies to decisions made on the discretionary ground.”); *id.* (“[T]he ‘would likely change’ standard requires a petitioner to establish that it is at least more probable than not that the new evidence would change the outcome of the claim.”).

For forms of mandatory, nondiscretionary relief, however, the BIA lacks discretion to deny reopening if the applicant makes out a prima facie case for relief. See *Aviles-Torres v. INS*, 790 F.2d 1433, 1436 (9th Cir. 1986) (because the BIA lacks discretion to deny withholding of deportation under § 243(h) if the applicant proves a clear probability of persecution, the BIA must either grant relief or remand to the IJ for factfinding where the motion to reopen establishes a prima facie case for relief).

“[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 attach the prior asylum application that he was seeking to reopen).

A. Motions to Apply for Cancellation of Removal

See *Fonseca-Fonseca v. Garland*, 76 F.4th 1176, 1180–83 (9th Cir. 2023) (remanding for reconsideration of petitioner’s motion to reopen to reapply for cancellation of removal where the agency applied the incorrect burden of proof); *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).

B. Motions to Reopen to Apply for Asylum and Withholding

See, e.g., INS v. Doherty, 502 U.S. 314, 324–29 (1992) (asylum and withholding) (Attorney General did not abuse his discretion by denying the motion to reopen); *INS v. Abudu*, 485 U.S. 94, 104–11 (1988) (asylum and withholding) (holding that the abuse of discretion standard applies to denials of motions to reopen and that BIA did not abuse its discretion by denying the motion to reopen); *Reyes-Corado v. Garland*, 76 F.4th 1256, 1265 (9th Cir. 2023) (asylum) (petition granted where BIA erroneously determined petitioner had not provided qualitatively different country conditions evidence); *Singh v. Garland*, 46 F.4th 1117, 1120 (9th Cir. 2022) (asylum) (petition granted where the BIA “erred in holding that the earlier adverse credibility finding barred [petitioner’s] motion to reopen”); *Sarkar v. Garland*, 39 F.4th 611, 622 (9th Cir. 2022) (asylum, withholding, and CAT relief) (petition denied where new country conditions evidence was not material to petitioner and therefore insufficient to demonstrate a prima facie claim for asylum and related relief); *Greenwood v. Garland*, 36 F.4th 1232, 1235–36 (9th Cir. 2022) (withholding and CAT relief) (petition denied where the materiality of petitioner’s new country conditions evidence was contingent on petitioner’s identity, a factor which the agency had previously determined lacked credibility); *Hernandez-Ortiz v. Garland*, 32 F.4th 794, 801–05 (9th Cir. 2022) (asylum, withholding, and CAT relief) (petition denied where petitioner failed to establish equitable tolling based on ineffective assistance of counsel or changed country conditions to excuse untimely filing); *Nababan v. Garland*, 18 F.4th 1090, 1096 (9th Cir. 2021) (asylum, withholding, and CAT relief) (petition granted where BIA failed to assess individualized risk of persecution; directing the BIA on remand to assess whether country conditions in Indonesia had 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) (asylum, withholding, and CAT relief) (petition granted where exceptional circumstances warranted reopening of immigration proceedings involving in absentia removal order), *overruled on other grounds by* *Montejo-Gonzalez v. Bondi*, 166 F.4th 851 (9th Cir. 2026) (en banc); *Silva v. Garland*, 993 F.3d 705, 717–19 (9th Cir. 2021) (asylum, withholding, and CAT relief) (petition denied), *abrogated on other grounds as stated in* *Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Rodriguez v. Garland*, 990 F.3d 1205, 1211 (9th Cir. 2021) (asylum and withholding) (petition denied); *Salim v. Lynch*, 831 F.3d 1133, 1137–41 (9th Cir. 2016) (asylum and withholding) (petition granted); *Zhao v. Holder*, 728 F.3d 1144, 1145–51 (9th Cir. 2013) (asylum) (petition granted).

See also, e.g., *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 but 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 for reconsideration of the denial of a motion to reopen 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 as to motion to reopen but granted as to motion to remand); *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) (petition granted); *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986) (petition granted), superseded by statute on other grounds as stated in *Bhasin v. Gonzales*, 423 F.3d 977, 987 n.5 (9th Cir. 2005); *Sakhavat v. INS*, 796 F.2d 1201 (9th Cir. 1986) (petition granted); *Aviles-Torres v. INS*, 790 F.2d 1433 (9th Cir. 1986) (petition granted); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (petition denied); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985) (granting petition on asylum claim and remanding); *Sangabi v. INS*, 763 F.2d 374 (9th Cir. 1985) (petition denied); *Samimi v. INS*, 714 F.2d 992 (9th Cir. 1983) (granting petition).

Cross-reference: Relief from Removal; Asylum, Withholding and the Convention Against Torture.

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

“Denial of a motion to reopen to present a claim under the Convention qualifies as a final order of removal. We therefore have jurisdiction to address [the] petition for review.” *Hamoui v. Ashcroft*, 389 F.3d 821, 826 (9th Cir. 2004).

Note, however, that the court has held that it lacks jurisdiction to review the denial of a CAT claim that is unrelated to an order of removal. See *Navarrete v. Bondi*, 170 F.4th 1214, 1225 (9th Cir. 2026) (“An order denying CAT protection is not a final order of removal, nor does it merge into a final order of removal. Accordingly, we hold that a petition advancing a standalone claim for review of a CAT order is not sufficient to invoke our jurisdiction under 8 U.S.C. § 1252(a)(1). Such claims can only be considered as part of the review of a final order of removal, a requirement that presupposes the existence of a claim for review of the final order of removal.” (citations and internal quotation marks omitted)).

To obtain CAT protection, a petitioner is not required to produce “quantitative evidence.” See *Calderon v. Blanche*, No. 24-7433, 2026 WL 2543389, at *5 (9th Cir. Aug. 28, 2026) (“The plain text of CAT’s implementing regulations confirms that quantitative or statistical evidence is not required. . . . Congress did not create a bespoke evidentiary standard whereby noncitizens must come into court armed with reports prepared by statisticians and country conditions experts prognosticating about the noncitizen’s exact numerical likelihood of being tortured.” (citing 8 C.F.R. § 1208.16(c)(3))); *id.* at *8 (“The BIA erred by imposing a quantitative evidence requirement in this case.”).

“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) (“To prevail on her motion to reopen, Kaur 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, e.g., *Calderon v. Blanche*, No. 24-7433, 2026 WL 2543389, at *8–9 (9th Cir. Aug. 28, 2026) (BIA abused its discretion in denying motion to reopen to pursue CAT relief by (1) failing to give reasoned consideration of the petitioner’s three experts and (2) concluding that the petitioner failed to offer prima facie evidence that he was more likely than not to be tortured if returned to El Salvador);

Silva v. Garland, 993 F.3d 705, 719 (9th Cir. 2021) (BIA did not abuse its discretion where petitioner failed to establish a prima facie case for CAT protection based on fear of torture in Philippines) (petition denied), *abrogated on other grounds as recognized in Lopez v. Garland*, 116 F.4th 1032, 1039 (9th Cir. 2024); *Agonafer v. Sessions*, 859 F.3d 1198, 1203–04 (9th Cir. 2017) (“The changed country conditions exception [to the 90-day deadline for motions to reopen] likewise applies to motions to reopen to assert CAT claims.”) (petition granted); *Go v. Holder*, 744 F.3d 604, 609 (9th Cir. 2014) (“[W]e hold that the procedural requirements specified in 8 C.F.R. § 1003.2(c) apply to CAT claims.”) (petition denied); *Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) (BIA abused its discretion by rejecting new evidence on claim for CAT relief); *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, 1120–23 (9th Cir. 2004) (the time limitations set forth in 8 C.F.R. § 208.18(b)(2) (2004) for motions to reopen CAT claims apply to both withholding and deferral of removal; “the window for moving to reopen removal orders that became final before March 22, 1999 applies to any alien seeking protection under CAT”); *Azanor v. Ashcroft*, 364 F.3d 1013, 1018–21 (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 denying motion to reopen by failing to address eligibility for deferral of removal under CAT); *Abassi v. INS*, 305 F.3d 1028, 1030–32 (9th Cir. 2002) (petition granted in relevant part); *Kamalthas v. INS*, 251 F.3d 1279, 1282–84 (9th Cir. 2001) (vacated and remanded); *Khourassany v. INS*, 208 F.3d 1096, 1100 (9th Cir. 2000) (“Motions to reopen for consideration of claims under the Convention on Torture may not be urged in the first instance before our court; an applicant must first exhaust his or her administrative remedies before the BIA.”); *Cano-Merida v. INS*, 311 F.3d 960, 965–66 (9th Cir. 2002) (BIA did not abuse its discretion in denying motion to reopen where petitioner did not make a prima facie showing that he was entitled to CAT relief).

Cross-reference: Relief from Removal; 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, 1044–45 (9th Cir. 2010) (citing 8 U.S.C. § 1255(e)) (denying petition where petitioner failed to prove by clear and convincing evidence that her marriage was bona fide).

See, e.g., *Rubalcaba v. Garland*, 998 F.3d 1031, 1041 (9th Cir. 2021) (holding that the departure bar, 8 C.F.R. § 1003.23(b)(1), does not apply to sua sponte reopening and, therefore, that the IJ erred by denying motion to reopen for purposes of applying for adjustment of status); *Bonilla v. Lynch*, 840 F.3d 575, 583–84 (9th Cir. 2016) (denying 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 motion to reopen to apply for adjustment of status as untimely where petitioner filed the motion within 90 days of learning of prior counsel’s ineffective assistance in pursuing adjustment of status); *Malilia v. Holder*, 632 F.3d 598, 604–07 (9th Cir. 2011) (agency abused its discretion in denying request for continuance in connection with application for adjustment of status); *Sharma v. Holder*, 633 F.3d 865, 872–74 (9th Cir. 2011) (BIA did not abuse its discretion in denying motion to reopen where evidence was 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) (granting petition and 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, 992–93 (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, 531–32 (9th Cir. 2004) (petition granted where the BIA erred in considering the strength of the stepparent-stepchild relationship); *de*

Martinez v. Ashcroft, 374 F.3d 759, 761–64 (9th Cir. 2004) (petition denied); *Manjiyani v. Ashcroft*, 343 F.3d 1018, 1019–20 (9th Cir. 2003) (petition remanded); *Malhi v. INS*, 336 F.3d 989, 993–95 (9th Cir. 2003) (denying petition) (BIA did not abuse its discretion in denying motion to remand where petitioner failed to make out a prima facie case of a bona fide marriage); *Zazueta-Carrillo v. INS*, 322 F.3d 1166, 1174–75 (9th Cir. 2003) (granting petition and remanding where the BIA denied a 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, 1037–38 (9th Cir. 2002) (granting petition where the BIA incorrectly concluded that the Immigration Marriage Fraud Amendments of 1986 barred the petitioner from simultaneously filing both a petition for an immigrant visa and an application for adjustment of status); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002) (court lacked jurisdiction under *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002), to review the BIA’s exercise of discretion in denying sua sponte reopening); *Konstantinova v. INS*, 195 F.3d 528, 530–31 (9th Cir. 1999) (granting petition where BIA arbitrarily denied motion to remand on the grounds that INS did not affirmatively join the motion); *Eide-Kahayon v. INS*, 86 F.3d 147, 149–51 (9th Cir. 1996) (petition denied); *Caruncho v. INS*, 68 F.3d 356, 360–62 (9th Cir. 1995) (petition denied); *Dielmann v. INS*, 34 F.3d 851, 852–54 (9th Cir. 1994) (petition denied where the BIA denied the motion to reopen on the grounds that the relative visa petition had not been adjudicated and that petitioner could not establish by clear and convincing evidence that marriage was entered into in good faith); *Ng v. INS*, 804 F.2d 534, 540 (9th Cir. 1986) (granting petition where the BIA abused its discretion in denying motion to reopen); *Israel v. INS*, 785 F.2d 738, 740–43 (9th Cir. 1986) (granting petition where the BIA denied the motion to reopen based on petitioner’s post-deportation-proceedings marriage to a U.S. citizen).

Cross Reference: Jurisdiction Over Immigration Petitions, Procedural Rules, and Standards of Review, Limitations of Review of Discretionary Decisions, Enumerated Forms of Discretionary Relief.

E. Motion to Reopen Reasonable Fear Proceeding

An IJ has authority to reopen reasonable fear proceedings. See *Bartolome v. Sessions*, 904 F.3d 803, 815 (9th Cir. 2018) (“Nothing in this regulation [8 C.F.R. § 1003.23] precludes an alien from filing a motion to reopen before an IJ. To the contrary, § 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.’”); *id.* (“The IJ’s failure to recognize that he had at least *sua sponte* jurisdiction to reopen proceedings was an

abuse of discretion.”); *cf. Ayala v. Sessions*, 855 F.3d 1012, 1020 (9th Cir. 2017) (holding that the IJ abused his discretion by denying motion to reconsider decision affirming a negative reasonable fear determination).

F. Motions to Reopen to Apply for Other Relief

1. Suspension of Deportation

See, e.g., INS v. Rios-Pineda, 471 U.S. 444, 449–52 (1985) (Attorney General did not abuse discretion in denying motion to reopen); *INS v. Wang*, 450 U.S. 139, 144–46 (1981) (per curiam) (BIA did not abuse discretion in denying motion to reopen); *Chete Juarez v. Ashcroft*, 376 F.3d 944, 947–50 (9th Cir. 2004) (petition granted); *Ordonez v. INS*, 345 F.3d 777, 783–87 (9th Cir. 2003) (petition granted); *Iturribarria v. INS*, 321 F.3d 889, 897–903 (9th Cir. 2003) (petition denied); *Guzman v. INS*, 318 F.3d 911, 912–13 (9th Cir. 2003) (BIA did not abuse its discretion in denying motion to reopen where “new” information regarding date of entry was available and capable of discovery prior to deportation hearing); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223–27 (9th Cir. 2002) (petition granted); *Arrozal v. INS*, 159 F.3d 429, 432–35 (9th Cir. 1998) (petition granted); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1318–19 (9th Cir. 1997) (petition granted); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997) (petition denied); *Watkins v. INS*, 63 F.3d 844, 847–52 (9th Cir. 1995) (reversed and remanded); *Limsico v. INS*, 951 F.2d 210, 213–14 (9th Cir. 1991) (petition denied); *Gonzalez Batoon v. INS*, 791 F.2d 681, 684–86 (9th Cir. 1986) (en banc) (discretionary denial of reopening was arbitrary).

2. NACARA Relief

See, e.g., 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 by person falsely claiming to be an attorney); *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1095–1100 (9th Cir. 2005) (equitable tolling of the deadline for filing a motion to reopen deportation proceedings to seek NACARA § 203(c) special rule cancellation).

3. 212(c) Relief

See, e.g., Avila-Sanchez v. Mukasey, 509 F.3d 1037, 1040–41 (9th Cir. 2007) (motion to reopen to obtain waiver of inadmissibility; petition denied); *Briseno v. INS*, 192 F.3d 1320, 1322–23 (9th Cir. 1999) (court lacks jurisdiction to review

denial of aggravated felon's motion to reopen to apply for former § 212(c) relief; dismissing petition); *Foroughi v. INS*, 60 F.3d 570, 575–76 (9th Cir. 1995) (former § 212(c) relief; petition granted); *Butros v. INS*, 990 F.2d 1142, 1144–46 (9th Cir. 1993) (en banc) (former § 212(c) relief; petition granted); *Torres-Hernandez v. INS*, 812 F.2d 1262, 1264–65 (9th Cir. 1987) (former § 212(c) relief; petition denied); *Avila-Murrieta v. INS*, 762 F.2d 733, 734–36 (9th Cir. 1985) (former § 212(c) relief; petition denied).

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

4. Miscellaneous Relief

See, e.g., *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) (motions to reopen to consider U visa; petition denied); *Cruz Pleitez v. Barr*, 938 F.3d 1141, 1143 (9th Cir. 2019) (motion to reopen seeking to rescind the deportation order entered in absentia; petition denied); *Miller v. Sessions*, 889 F.3d 998, 1003 (9th Cir. 2018) (motion to reopen to rescind a removal order entered in absentia; petition granted); *Navarro v. Mukasey*, 518 F.3d 729, 733–37 (9th Cir. 2008) (motion to reopen on the basis that petitioners qualified for benefits under the *Barahona-Gomez* class action settlement; petition granted); *Pedroza-Padilla v. Gonzales*, 486 F.3d 1362, 1364–65 (9th Cir. 2007) (legalization application; petition denied); *Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (petitioner failed to exhaust equitable tolling argument relating to citizenship claim; petition dismissed); *Virk v. INS*, 295 F.3d 1055, 1057–61 (9th Cir. 2002) (section 241(f) waiver of deportation; petition granted); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (motion to reopen to request a humanitarian waiver of deportability under § 241(a)(1)(E)(ii); petition denied); *Alquisalas v. INS*, 61 F.3d 722, 724–25 (9th Cir. 1995) (waiver of deportation under 8 U.S.C. § 1251(f)(1); petition granted); *Platero-Reymundo v. INS*, 807 F.2d 865, 867–68 (9th Cir. 1987) (reinstatement of voluntary departure; petition denied); *Desting-Estime v. INS*, 804 F.2d 1439, 1440–41 (9th Cir. 1986) (motion to reopen to redesignate country of deportation; petition denied); *Williams v. INS*, 795 F.2d 738, 745–46 (9th Cir. 1986) (reinstatement of voluntary departure; denying habeas relief where BIA did not abuse its discretion in denying reopening).