**DEPARTMENT OF JUSTICE**

**Executive Office for Immigration Review**

**8 CFR Parts 1001 and 1003**

**[EOIR Docket No. 18–0503; Dir. Order No. 01–2021]**

**RIN 1125–AB01**

## Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Justice (''Department'') proposes to amend Executive Office for Immigration Review (''EOIR'') regulations governing the filing and adjudication of motions to reopen and reconsider and to add regulations governing requests for discretionary stays of removal.

**DATES:** Written or electronic comments must be submitted on or before December 28, 2020. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight Eastern Time at the end of that day.

**ADDRESSES:** You may submit comments, identified by EOIR Docket No. 18–0503, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 18–0503 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. Contact Telephone Number (703) 305–0289.

**FOR FURTHER INFORMATION CONTACT:** Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call), or email *PAO.EOIR@usdoj.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. EOIR also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. To provide the most assistance to EOIR, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that support the recommended change.

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 18–0503. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the information of which you seek redaction.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the confidential business information of which you seek redaction. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.* Personally identifiable information and confidential business information provided as set forth above will be placed in the agency's public docket file, but not posted online. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for the agency counsel's contact information specific to this rule.

The Department may withhold from public viewing information provided in comments that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

### II. Background

Under the Immigration and Nationality Act (''INA'' or ''Act''), parties to proceedings before EOIR may file a motion to reopen or reconsider certain decisions of immigration judges or the Board of Immigration Appeals (''BIA'' or ''Board''). *See* INA 240(c)(6)–(7), 8 U.S.C. 1229a(c)(6)–(7); 8 CFR 1003.2, 1003.23. Each such motion must be filed with the immigration court with administrative control over the record of proceeding or with the BIA. *See* 8 CFR 1003.2, 1003.23. These motions are ''separate and distinct motions with different requirements.'' *Matter of Cerna,* 20 I&N Dec. 399, 402 (BIA 1991) (quoting *Chudshevid* v. *INS,* 641 F.2d 780, 783 (9th Cir. 1981)).

A motion to reconsider requests ''that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked.'' *Cerna,* 20 I&N Dec. at 399. A party may file only one motion to reconsider any given decision, and such motion must be filed within 30 days of a final administrative order of removal. INA 240(c)(6)(A)–(B), 8 U.S.C. 1229a(c)(6)(A)–(B); *see also* 8 CFR 1003.2(b)(2), 1003.23(b)(1). The motion must specify the errors of law or fact in the prior decision, supported by relevant authority. INA 240(c)(6)(C), 8 U.S.C. 1229a(c)(6)(C); *see also* 8 CFR 1003.2(b)(1), 1003.23(b)(2).

A motion to reopen is a party's filing to request to reopen proceedings ''so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing.'' *Cerna,* 20 I&N Dec. at 403. Subject to certain exceptions, a party may file only one motion to reopen proceedings, and such motion must generally be filed within 90 days of the date of entry of a final administrative order of removal. INA 240(c)(7)(A), (C), 8 U.S.C. 1229a(c)(7)(A), (C); *see also* 8 CFR 1003.2(c)(2), 1003.23(b)(1).[1] The motion must state new facts that will be proven at a hearing if the motion is granted and include supporting

[1] There are exceptions to the general timing and numerical limitations for certain motions to reopen (1) to apply for asylum under section 208 of the Act, 8 U.S.C. 1158, or withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or under the Convention Against Torture based on changed country conditions; (2) to rescind *in absentia* orders entered in removal, deportation, or exclusion proceedings; (3) to apply for discretionary relief as a battered spouse, child, or parent; and (4) that are agreed to by all parties and jointly filed. *See* INA 240(c)(7)(C)(ii)–(iv), 8 U.S.C. 1229a(c)(7)(C)(ii)–(iv); 8 CFR 1003.2(c)(3), 1003.23(b)(4). Certain motions to reopen filed by the Department of Homeland Security in removal proceedings are also not subject to the timing and numerical limitations. *See* 8 CFR 1003.2(c)(2), 1003.2(c)(3)(iv), 1003.23(b)(1).

affidavits or other evidentiary material. INA 240(c)(7)(B), 8 U.S.C. 1229a(c)(7)(B); *see also* 8 CFR 1003.2(c)(1), 1003.23(b)(3).

The Department last significantly amended the immigration court and BIA regulations regarding motions to reopen and reconsider over twenty years ago. In 1996, the Department issued a final rule to establish time and number limitations on such motions pursuant to section 545(d) of the Immigration Act of 1990, Public Law 101–649, 104 Stat. 4978, 5066. *See* 61 FR 18900 (Apr. 29, 1996). In 1997, the Department issued a second regulation to implement sections 240(c)(6) and (7)[2] of the INA,[3] which Congress enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208, sec. 304(a), 110 Stat. 3009–546, 3009–593 (1996). *See* 62 FR 10312, 10330–33 (Mar. 6, 1997); *see also* 62 FR 444, 449 (Jan. 3, 1997) (proposed rule).

Since these changes, the Department has issued multiple Notices of Proposed Rulemaking related to motions to reopen and reconsider, *see* 81 FR 49556 (July 28, 2016); 67 FR 31157 (May 9, 2002); 63 FR 47205 (Sept. 4, 1998), and the federal courts have elaborated on the relevant regulatory provisions, *see, e.g., Dada* v. *Mukasey,* 554 U.S. 1, 12–15 (2008). Further, the Department has maintained multiple entries on its Unified Agenda that reference such motions, such as *Immigration Courts and the Board of Immigration Appeals: Motions to Reopen and Reconsider; Effect of Departure or Removal* (RIN: 1125–AA74), and *Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel* (RIN: 1125–AA68).

### *A. Failure To Surrender and Fugitive Disentitlement*

The Department previously proposed changes to the regulations that would have established procedures for aliens subject to a final order of removal to surrender to the Immigration and Naturalization Service (''INS'') and imposed consequences on aliens who failed to surrender as required. *See* 67 FR 31157 (May 9, 2002) (supplementary proposed rule); 63 FR 47205 (Sept. 4, 1998) (proposed rule); *see also Matter of Barocio,* 19 I&N Dec. 255, 258 (BIA 1985) (''[A]n alien who has violated a lawful order of deportation by failing to report to the Service following notification that his deportation has been scheduled does not merit the favorable exercise of discretion required for reopening of deportation proceedings.''). Under the proposed rule, an alien who was not detained when an order of removal became final had an affirmative legal obligation to surrender thereafter for removal. 67 FR at 31158. The rule would have incented compliance by denying future discretionary relief to absconding aliens who had failed to comply with their removal obligations. *Id.*

The proposed regulation provided that aliens would receive notice of the duty to surrender and consequences of failing to surrender in the Notice to Appear, as well as from the immigration judge or the BIA, upon release from government custody, and at the time of a grant of voluntary departure. *Id.* at 31163. An alien who failed to surrender as required would then have been ineligible for discretionary relief under sections 208(b), 8 U.S.C. 1158(b), 212(h), 8 U.S.C. 1182(h), 212(i), 8 U.S.C. 1182(i), 240A, 8 U.S.C. 1229b, 240B, 8 U.S.C. 1229c, 245, 8 U.S.C. 1255, 248, 8 U.S.C.1258, and 249, 8 U.S.C. 1259, of the Act for the period the alien remained in the United States and 10 years after the alien's subsequent departure. *Id.* at 31158, 31163. The regulation further provided that the immigration judge and the BIA would similarly not grant a motion to reopen in the case of an alien who had failed to surrender. *Id.* at 31158, 31161. The regulation crafted some exceptions to the prohibitions if the alien first demonstrated by clear and convincing evidence exceptional circumstances for his failure to surrender, as defined in section 240(e)(1) of the INA, 8 U.S.C. 1229a(e)(1), and that he actually surrendered as soon as possible after the circumstances passed. *Id.* at 31158.

Following the dissolution of the INS and the establishment of the Department of Homeland Security (''DHS''), neither DHS nor EOIR has finalized the supplementary proposed rule.

### *B. Ineffective Assistance of Counsel*

Removal proceedings are civil in nature; aliens in removal proceedings have no Sixth Amendment constitutional right to counsel appointed at government expense, nor do they possess a statutory right to such counsel.[4] *Compare* U.S. Const. amend. VI, *and Gideon* v. *Wainwright,* 372 U.S. 335 (1964), *with INS* v. *Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984), *and* INA 240(b)(4)(A), 8 U.S.C. 1229a(b)(4)(A). Nevertheless, for more than thirty years, the Department has allowed aliens to file a motion to reopen proceedings based on allegations of ineffective assistance of counsel. *See Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988); *see also Matter of Assaad,* 23 I&N Dec. 553, 556–57 (BIA 2003). Allowing aliens to seek to reopen proceedings based upon ineffective assistance of counsel balances the public interest in ensuring fairness with the public interest in ensuring finality of decisions in removal proceedings. *See, e.g., INS* v. *Abudu,* 485 U.S. 94, 107 (1988) (''There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.'').

*Lozada* set forth standards governing motions to reopen based on claims of ineffective assistance of counsel. *See Lozada,* 19 I&N Dec. at 639; *see also Assaad,* 23 I&N Dec. at 556–57 (affirming *Lozada*'s application in removal proceedings). Under *Lozada,* an alien must meet three procedural requirements for filing such a motion: (1) Provide an affidavit stating the agreement with counsel, including what representations were and were not made; (2) give notice to counsel and an opportunity for counsel to respond; and (3) file a disciplinary complaint with the appropriate authorities or provide an explanation if no complaint has been filed. *Lozada,* 19 I&N Dec. at 639. In January 2009, Attorney General Mukasey replaced the *Lozada* framework. *See Matter of Compean, Bangaly and J–E–C–,* 24 I&N Dec. 710, 727, 732 (A.G. 2009) (''*Compean I*''). In June 2009, Attorney General Holder vacated *Compean I* and reinstated the *Lozada* framework. *See Matter of Compean, Bangaly and J–E–C–,* 25 I&N Dec. 1 (A.G. 2009). Attorney General Holder also instructed the Department to initiate rulemaking procedures to evaluate the *Lozada* framework. *See id.* at 2.

In 2016, the Department proposed to amend EOIR's regulations by adding filing and adjudication standards for

[2] At the time, current sections 240(c)(6)– and (7) of the Act (8 U.S.C. 1229a(c)(6)–(7)) were numbered 240(c)(5)– and (6) (8 U.S.C. 1229a(c)(5)–(6)). These provisions were renumbered following the REAL ID Act of 2005, which added a new section 240(c)(4) of to the Act (8 U.S.C. 1229a(c)(4)). *See* Real ID Act of 2005, Public Law 109–13, div. B, 119 Stat. 231, 304–05.

[3] At the time, current sections 240(c)(6) and (7) of the Act were numbered 240(c)(5) and (6). These provisions were renumbered following the REAL ID Act of 2005, which added a new section 240(c)(4) to the Act. *See* Real ID Act of 2005, Public Law 109–13, div. B, 119 Stat. 231, 304–05 (2005).

[4] There is a circuit split regarding whether aliens in removal proceedings have a Fifth Amendment due process right to effective assistance of counsel if they choose to employ counsel. *See Contreras* v. *Att'y Gen.,* 665 F.3d 578, 584 n.3 (3d Cir. 2012) (discussing Circuit split and citing cases); *see also Flores-Moreno* v. *Barr,* No. 19–60017, 2020 WL 4931651, at *3 n.2 (5th Cir. Aug. 24, 2020) (assuming without deciding that aliens have such a right).

motions to reopen before an immigration judge and the BIA based upon a claim of ineffective assistance of counsel. 81 FR at 49556. At the time of the proposed rule, courts had variously understood and applied the *Lozada* framework. The proposed rule sought to establish standard procedural and substantive requirements for filing such motions.

Primarily, the proposed rule would have allowed an individual to file a motion to reopen an immigration proceeding upon establishing that he ''was subject to ineffective assistance of counsel and that, with limited exceptions, he or she suffered prejudice as a result.'' *Id.* at 49557. The proposed rule would have provided standards for determining ''ineffectiveness'' and ''prejudice.'' *See id.* at 49561, 49565–67. The proposed rule would have required the following documents be included with the motion: ''(1) An affidavit or written statement executed under penalty of perjury, providing certain information; (2) a copy of any applicable representation agreement; (3) evidence that prior counsel was notified of the allegations and of the filing of the motion; and (4) evidence that a complaint was filed with the appropriate disciplinary authorities.'' *Id.* at 49557.

Regarding motions to reopen and rescind an *in absentia* order based upon a claim of ineffective assistance of counsel, the proposed rule would have codified BIA precedent in *Matter of Grijalva,* 21 I&N Dec. 472 (BIA 1996). In *Grijalva,* the BIA provided that an *in absentia* order may be rescinded upon a motion to reopen in which an alien establishes exceptional circumstances or reasonable cause based upon a claim of ineffective assistance ofcounsel. *Id.* at 473–74; *see* 81 FR at 49568–69. The alien, however, would not have to establish prejudice. *Grijalva,* 21 I&N Dec. at 473 n.2; *see* 81 FR at 49568–69.

The proposed rule also provided for the equitable tolling of filing deadlines in certain circumstances based upon a claim of ineffective assistance of counsel. *See* 81 FR at 49569. Finally, the proposed rule authorized the BIA, in its discretion, to reopen proceedings based upon counsel's failure to file a timely petition for federal appellate review. *See id.* at 49566.

EOIR received comments on the 2016 rulemaking but did not publish a final rule. Accordingly, the agency currently lacks standardized regulations for such claims, and judicial treatment continues to vary among circuits. For example, the Fifth, Sixth, Seventh, and Tenth Circuits require strict compliance with the *Lozada* factors. *See Hernandez-Ortez* v. *Holder,* 741 F.3d 644, 647 (5th Cir. 2014) (rejecting as ''without merit'' the argument ''that strict compliance with the *Lozada* requirements is not necessary''); *Pepaj* v. *Mukasey,* 509 F.3d 725, 727 (6th Cir. 2007) (''An alien who fails to comply with *Lozada*'s requirements forfeits her ineffective-assistance-of-counsel claim.'') (citing *Hamid* v. *Ashcroft,* 336 F.3d 465, 469 (6th Cir. 2003)); *Marinov* v. *Holder,* 687 F.3d 365, 369 (7th Cir. 2012) (reaffirming the *Lozada* requirements as ''a necessary condition to obtaining reopening on the basis of ineffective assistance of counsel'') (quoting *Lin Xing Jiang* v. *Holder,* 639 F.3d 751, 755 (7th Cir. 2011)); *Infanzon* v. *Ashcroft,* 386 F.3d 1359, 1363 (10th Cir. 2004) (''[A] motion based on claim of ineffective assistance of counsel *must* be supported as outlined in *Lozada*.'') (citing *Mickeviciute* v. *INS,* 327 F.3d 1159, 1161 n.2 (10th Cir. 2003)). Similarly, the First Circuit has repeatedly held that ''[t]he BIA acts within its discretion in denying motions to reopen that fail to meet the *Lozada* requirements as long as it does so in a non-arbitrary manner.'' *Taveras-Duran* v. *Holder,* 767 F.3d 120, 123 (1st Cir. 2014) (quoting *Asaba* v. *Ashcroft,* 379 F.3d 9, 11 (1st Cir. 2004)); *see also Garcia* v. *Lynch,* 821 F.3d 178, 181 n.4 (1st Cir. 2016) (noting ''consistent[ ]'' practice of upholding BIA orders denying motions to reopen when ''the *Lozada* requirements have been flouted'').

By contrast, the Second, Third, Fourth, Ninth, and Eleventh Circuits require substantial compliance. *See Piranej* v. *Mukasey,* 516 F.3d 137, 142 (2d Cir. 2008) (''[T]his Court has 'not required a slavish adherence to the [*Lozada*] requirements.' '') (quoting *Yi Long Yang* v. *Gonzales,* 478 F.3d 133, 142–43 (2d Cir. 2007)); *Rranci* v. *Att'y Gen.,* 540 F.3d 165, 173–74 (3d Cir. 2008) (warning of ''inherent dangers . . . in applying a strict, formulaic interpretation of *Lozada*'') (quoting *Xu Long Yu* v. *Ashcroft,* 259 F.3d 127, 133 (3d Cir. 2001)); *Barry* v. *Gonzales,* 445 F.3d 741, 746 (4th Cir. 2006) (''We will reach the merits of an ineffective assistance of counsel claim where the alien substantially complies with the *Lozada* requirements, such that the BIA could have ascertained that the claim was not frivolous and otherwise asserted to delay deportation.''); *Correa-Rivera* v. *Holder,* 706 F.3d 1128, 1131 (9th Cir. 2013) (''These requirements 'are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance.' '') (quoting *Rodriguez-Lariz* v. *INS,* 282 F.3d 1218, 1227 (9th Cir. 2002)); *Flores-Panameno* v. *Att'y Gen.,* 913 F.3d 1036, 1040 (11th Cir. 2019) (requiring ''substantial, if not exact compliance'' with *Lozada*) (citing *Dakane* v. *Att'y Gen.,* 399 F.3d 1269, 1274 (11th Cir. 2005)).

Finally, the Eighth Circuit appears not to have staked out any definitive position. *See Habchy* v. *Gonzales,* 471 F.3d 858, 863 (8th Cir. 2006) (''Our circuit has not ruled on whether a strict application of those [*Lozada*] requirements could constitute an abuse of discretion in certain circumstances, and we need not do so here. At the very least, an IJ does not abuse his discretion in requiring substantial compliance with the *Lozada* requirements when it is necessary to serve the overall purposes of *Lozada*[.]''); *Avitso* v. *Barr,* 975 F.3d 719, 722 (8th Cir. 2020) (citing *Habchy* and stating both that the alien ''must . . . satisfy the procedural requirements of *Lozada*'' and that he ''did not substantially comply with these requirements'').

Further, circuit courts use various standards to evaluate prejudice. The First, Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits require a finding of reasonable probability that the error impacted the outcome of the proceeding. *See Zeru* v. *Gonzales,* 503 F.3d 59, 72 (1st Cir. 2007); *Fadiga* v. *Att'y Gen.,* 488 F.3d 142, 158–59 (3d Cir. 2013); *Diaz* v. *Sessions,* 894 F.3d 222, 228 (5th Cir. 2018); *Kada* v. *Barr,* 946 F.3d 960, 965 & n.1 (6th Cir. 2020); *Ortiz-Punetes* v. *Holder,* 662 F.3d 481, 485 n.2 (8th Cir. 2011) (citing *Obleshchenko* v. *Ashcroft,* 392 F.3d 970, 972 (8th Cir. 2004)); *Mena-Flores* v. *Holder,* 776 F.3d 1152, 1169 & n.25 (10th Cir. 2015) (citing *United States* v. *Aguirre-Tello,* 353 F.3d 1199, 1209 (10th Cir. 2004)); *Flores-Panameno,* 913 F.3d at 1040 (citing *Dakane,* 399 F.3d at 1274). The Third Circuit, however, has instructed that the ''reasonability probability'' standard requires ''merely a 'significant possibility.' '' *Calderon-Rosas* v. *Att'y Gen.,* 957 F.3d 378, 387 (3d Cir. 2020) (quoting *United States* v. *Payano,* 930 F.3d 186, 193 n.5 (3d Cir. 2019)).

The Seventh and Ninth Circuits maintain a more lenient standard, requiring a finding that the error may have affected the outcome of the proceeding. *See Garcia-Arce* v. *Barr,* 946 F.3d 371, 378 (7th Cir. 2019) (''The prejudice prong requires a showing that counsel's errors actually had the potential for affecting the outcome of the proceedings.'') (quoting *Sanchez* v. *Sessions,* 894 F.3d 858, 862–63 (7th Cir. 2018)); *Flores* v. *Barr,* 930 F.3d 1082, 1088–89 (9th Cir. 2019) (''[T]he 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.' '') (quoting *Morales Apolinar* v. *Mukasey,* 514 F.3d 893, 898 (9th Cir. 2008)).

The Second Circuit, for its part, has stated that, in the context of an application for relief, to establish prejudice the alien must show *prima facie* eligibility and that he ''could have made a strong showing in support of his application.'' *Scarlett* v. *Barr,* 957 F.3d 316, 326 (2d Cir. 2020) (quoting *Rabiu* v. *INS,* 41 F.3d 879, 882 (2d Cir. 1994)).

Given these diverse judicial interpretations and the need for uniform direction on this subject, this rule proposes new changes to establish standardized procedures for adjudicating motions to reopen on the basis of claims of ineffective assistance of counsel in the context of broader rules regarding motions to reopen. As discussed below, this rule also addresses a number of larger issues related to all types of motions to reopen that go beyond the scope of the 2016 proposed rule, which was limited only to motions alleging ineffective assistance of counsel. Accordingly, this broader, more comprehensive rule would withdraw the narrower 2016 proposed rule.[5]

*C. Departure Bar*

Both the BIA and immigration court regulations contain restrictions on the filing of motions to reopen or reconsider following an alien's departure from the United States—commonly referred to as the ''departure bar.'' *See* 8 CFR 1003.2(d), 1003.23(b)(1). Specifically, the regulations prohibit an alien from filing a motion to reopen or reconsider following the alien's departure from the United States if the alien is subject to a final administrative order of removal, deportation, or exclusion. *Id.* The regulations further instruct that a departure from the United States constitutes the withdrawal of a previously filed motion to reopen or motion to reconsider. *Id.*

The departure bar regulations predate Congress's inclusion of a statutory right to file a motion to reopen and a motion to reconsider in section 240(c)(6) and (7) of the INA, 8 U.S.C. 1229a(c)(6)–(7). *See, e.g., Matter of G–Y–B-,* 6 I&N Dec. 159, 159–60 (BIA 1954) (discussing the 1952 version of the departure bar regulations). This has led some to question whether the departure bar regulations are, in effect, superseded by the statute. The BIA held over a decade ago that ''the departure bar rule remains in full effect.'' *Matter of Armendarez,* 24 I&N Dec. 646, 660 (BIA 2008). More recent federal circuit court decisions, however, have found that the departure bar now ''clearly conflicts'' with the INA, or that its application ''impermissibly restricts'' the BIA's jurisdiction. *Toor* v. *Lynch,* 789 F.3d 1055, 1057 n.1 (9th Cir. 2015) (noting decisions from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits).

While the Department has previously stated that it would initiate rulemaking to address the departure bar, *see* 77 FR 59567, 59568 (Sept. 28, 2012), no relevant regulation has been proposed to date. This rule would address the matter.

**III. Regulatory Changes**

Over the past twenty years, the Department has issued multiple Notices of Proposed Rulemaking related to motions to reopen and reconsider. *See* 81 FR at 49556; 67 FR at 31157 (supplementary proposed rule); 63 FR at 47205 (proposed rule). Further, the Department has maintained multiple entries on its Unified Agenda that reference such motions, such as *Immigration Courts and the Board of Immigration Appeals: Motions to Reopen and Reconsider; Effect of Departure or Removal* (RIN: 1125–AA74), and *Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel* (RIN: 1125–AA68). None of these rulemakings has ever been finalized, and rather than continue to assess these related issues in a piecemeal fashion, the Department believes that a more comprehensive rulemaking would be the most efficient way to consolidate and address them. Accordingly, the Department now proposes to consolidate and address all of these issues in the proposed rulemaking.

The proposed rule would amend 8 CFR 1001.1, 1003.2, and 1003.23 and add a new section 1003.48 in subpart C. The proposed regulation would also amend the headings and table of contents of subpart C so that proposed section 1003.48 would apply to motions to reopen and related issues before both the BIA and the immigration courts. The proposed rule would also codify a clear definition of ''depart'' and ''departure'' applicable to various contexts, including those related to a grant of advance parole. The proposed changes are as follows:

*A. Revision of the Departure Bar*

Consistent with precedent from every circuit court to have addressed the issue, and in accordance with the Department's commitment to initiate rulemaking to address the departure bar, the Department now proposes to remove the departure bar from 8 CFR 1003.2(d) and 1003.23(b)(1). Specifically, the Department proposes to remove the prohibition on the submission of motions to reopen or reconsider by an alien subject to a final order of removal, deportation, or exclusion following the alien's removal or departure from the United States. An alien would be allowed to file a motion to reopen or reconsider whether or not the alien is physically present in the United States, though whether that motion could be granted would remain subject to applicable law, and whether an alien is physically present in the United States may determine their *prima facie* eligibility for relief.[6] *See, e.g., Sadhvani* v. *Holder,* 596 F.3d 180 (4th Cir. 2009) (holding that the Board did not abuse its discretion in denying a motion to reopen an asylum application from an alien outside of the United States because presence in the United States is required for asylum eligiblity). The Department also proposes to remove the provision that treats an alien's non-volitional departure as a withdrawal of a motion to reopen or reconsider.

In lieu of the existing departure bar, this rule proposes to add a narrow withdrawal provision stating that an alien's volitional departure from the United States, while a motion to reopen or reconsider is pending, constitutes a withdrawal of that previously filed motion to reopen or motion to reconsider. Further, the proposed rule would define ''depart'' and ''departure,'' so that this provision would apply only to volitional physical departures of an alien from the United States. *See* 8 CFR

[5] Because the Department is withdrawing the previous proposed rule, the Department does not directly address the comments received on that proposed rule; all commenters are encouraged to resubmit relevant comments for the Department's response in the context of this proposed rule.

[6] In addition, EOIR does not have the authority to order DHS to parole or admit an alien physically outside the United States into the United States following the grant of a motion to reopen or reconsider. Consequently, the granting of a motion to reopen or reconsider for an alien outside the United States would not necessarily mean that the alien would return to the United States. It may, however, undo a previous termination of an alien's status as a lawful permanent resident (LPR). *See* 8 CFR 1001.1(p) (''Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission.''); *Matter of Lok,* 18 I&N Dec. 101, 106 (BIA 1981). In such a case, the alien may be eligible to enter the United States as a returning LPR, though that determination will ultimately be made by DHS in the first instance, upon the alien's physical return to the United States and application for admission.

1001.1(cc) and (dd) (proposed). This includes aliens who leave the United States after a final removal order is entered but still without having DHS enforce the order. However, the physical removal, deportation, or exclusion from the United States at the direction of DHS, or a return of the alien to a contiguous territory by DHS in accordance with section 235(b)(2)(C) of the Act, 8 U.S.C. 1225(b)(2)(C), is specifically excluded from the definition and would not constitute a departure for purposes of deeming a motion withdrawn.

The Department believes that this narrow withdrawal provision does not implicate the concerns that have led the federal circuit courts to refuse to apply the existing departure bar. First, the proposed withdrawal provision would not prevent aliens from filing motions to reopen or reconsider based on the alien's geographic location. The circuit courts have held that sections 240(c)(6) and (c)(7) of the Act, 8 U.S.C. 1229a(c)(6) and (c)(7), do not impose any geographic restrictions on the filing of motions to reopen or reconsider. *See, e.g., Santana* v *Holder,* 731 F.3d 50, 56 (1st Cir. 2013) (holding that the statute ''nowhere prescribes, or even suggests, a geographic restriction on 'an alien [who] may file' the motion''). Consistent with these holdings, this withdrawal provision would allow an alien to file a motion to reopen or reconsider from abroad, regardless of how the alien left the United States before filing the motion.

Additionally, this proposed rule merely treats an already-filed motion as withdrawn upon the alien's volitional departure from the United States, and such a motion would be denied accordingly. In this way, this proposed rule would function identically to how an alien's right to appeal is waived if the alien volitionally departs the United States prior to taking an appeal and how an alien's appeal, other than for an arriving alien, is withdrawn if the alien volitionally departs the United States while the appeal is pending. *See* 8 CFR 1003.3(e), 1003.4; *see also Aguilera-Ruiz* v. *Ashcroft,* 348 F.3d 835, 838 (9th Cir. 2003) (holding that a volitional departure—even one that is ''brief, casual, and innocent''constitutes a withdrawal of an appeal pursuant to 8 CFR 1003.4); *Madrigal* v. *Holder,* 572 F.3d 239, 244–45 & n.5 (6th Cir. 2009) (interpreting 8 CFR 1003.3(e) and 1003.4 as having an implicit volitional element to their waiver provisions); *cf.* 8 CFR 1208.8(a) (''An applicant [for asylum] who leaves the United States without first obtaining advance parole . . . shall be presumed to have abandoned his or her application.'').

Second, the proposed withdrawal provision eliminates any tension between the alien's right to file a motion to reconsider or reopen within 30 or 90 days, respectively, and DHS's requirement to remove the alien within 90 days of a final removal order. *Compare* INA 240(c)(6)–(7), 8 U.S.C. 1229a(c)(6)–(7), *with* INA 241(a)(1), 8 U.S.C. 1231(a)(1). The majority of circuit courts have held that the existing departure bar conflicts with an alien's statutory right to file a motion to reopen or reconsider because the alien's non-volitional removal by DHS would trigger the departure bar even if the removal occurred within the time periods allowed to file the motions. *See, e.g., Prestol Espinal* v. *Att'y Gen.,* 653 F.3d 213, 223 (3d Cir. 2011) (''If aliens are permitted to file motions to reconsider but are then removed by the government before the time to file has expired, the right to have that motion adjudicated is abrogated''); *Coyt* v. *Holder,* 593 F.3d 902, 907 (9th Cir. 2010) (''The only manner in which we can harmonize the provisions simultaneously affording the petitioner a ninety day right to file a motion to reopen and requiring the alien's removal within ninety days is to hold. . . . that the physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen.''). The proposed withdrawal provision addresses this concern by limiting the provision only to an alien's volitional departure, which the Department believes evidences the alien's intention to abandon the motion or to otherwise fail to prosecute it.[7]

By definition, an alien who would be subject to the proposed volitional departure bar would already be subject to an administratively final order of removal. Therefore, the alien would know the consequences of departing the United States and, thus, executing that removal order. *See Mansour* v. *Gonzales,* 470 F.3d 1194, 1198 (6th Cir. 2006) (''It is well settled that when an alien departs the United States while under a final order of deportation, he or she executes that order pursuant to the law. . . . Once an alien departs, thereby executing the order of deportation, he loses his right to contest the lawfulness of the proceedings.'' (internal quotation omitted)); *see generally* 8 CFR 241.7, 1241.7 (providing that an alien executes an outstanding removal order or ''self-removes'' when he departs the United States). Moreover, the alien would also know that if he were to illegally re-enter the United States after executing that order, he may be ineligible to seek to reopen that original order. INA 241(a)(5), 8 U.S.C. 1231(a)(5). Thus, an alien's volitional departure notwithstanding these consequences would represent a conscious decision by the alien to forgo further presence in the United States and evince an effort to abandon or stop pursuing efforts at remaining. Such a decision to depart of the alien's own accord would be generally inconsistent with an effort to undo a removal order that, if successful, would allow an alien to remain.

Moreover, although a motion to reopen is provided for by statute, INA 240(c)(7), 8 U.S.C. 1229a(c)(7), whereas an appeal to the Board is not, a motion to reopen nevertheless functions similarly to an appeal to the Board of a removal order issued by an immigration judge. In both situations, an alien is mounting a challenge to the denial of the alien's request to remain in the United States. As discussed, an alien's departure after the filing of an appeal but before a decision has been issued by the Board usually serves as a withdrawal of the appeal, 8 CFR 1003.4,[8] and federal courts have generally affirmed the validity of this departure bar for appeals, *see, e.g., Aguilera-Ruiz,* 348 F.3d at 838.

Further, multiple courts have read an implicit volitional requirement into the application of 8 CFR 1003.4, similar to the one proposed by the Department in this rule for motions to reopen or reconsider. *See, e.g., Madrigal,* 572 F.3d at 244–45 & n.5; *Lopez-Angel* v. *Barr,* 952 F.3d 1045, 1048–49 (9th Cir. 2019) (following *Madrigal*); *see also Coyt,* 593 F.3d at 907 (agreeing with *Madrigal* and reaching a similar conclusion with respect to 8 CFR 1003.2(d)). Finally, at least one court has noted that the Department could simply engage in rulemaking to establish a volitional departure bar to motions to reopen or reconsider as a categorical discretional determination. *Marin-Rodriguez* v. *Holder,* 612 F.3d 591, 593 (7th Cir.

[7] Any departure resulting from a DHS removal would no longer constitute a departure that results in a withdrawal of the motion under the regulations.

[8] There is a regulatory exception to the withdrawal provision in 8 CFR 1003.4 for an ''arriving alien'' as defined in 8 CFR 1001.1(q) that appears to be based on a historical distinction between deportation proceedings for aliens who had entered the United States and exclusion proceedings for aliens who were stopped at a port of entry. *See* 8 CFR 1003.4; *Matter of Keyte,* 20 I&N Dec. 158, 159 (BIA 1990) (''The departure pending appeal of an alien who has been stopped at the border and ordered excluded is not necessarily incompatible with a design to prosecute the appeal to a conclusion.'').

2010) (''An agency may exercise discretion categorically, by regulation, and is not limited to making discretionary decisions one case at a time under open-ended standards.''). To that end, the proposed rule reflects the Department's discretionary determination that a motion to reopen or reconsider should be deemed withdrawn when an alien volitionally departs the United States after filing the motion but before it is decided.

While nearly every circuit has opined on the apparent tension between the existing departure bar and the statutory right to file a motion to reopen and reconsider, *see Toor,* 789 F.3d at 1060 n.3 (collecting cases), no court has decided whether the voluntary or involuntary nature of an alien's departure should determine if a previously filed motion to reopen is deemed withdrawn under 8 CFR 1003.2(d) or 1003.23(b). The Ninth Circuit has stated that the departure bar is ''invalid irrespective of how the noncitizen departed the United States,'' but its analysis was limited to the departure bar provisions that this proposed regulation would remove—that an alien may not *file* a motion to reopen following his departure from the United States. *Id.* at 1059, 1064. Under the proposed regulation, an alien may file a motion to reopen orreconsider following departure from the United States regardless of whether the departure was volitional. But under the proposed rule, a motion would be deemed withdrawn when an alien has volitionally departed the United States after filing the motion but before it is decided. Therefore, for the purposes of this rule, the terms ''depart'' and ''departure'' are defined to mean the voluntary physical departure of an alien from the United States. *Cf. Lopez-Angel,* 952 F.3d at 1050 (Lee, J., concurring) (''The ordinary meaning of the word 'departure' refers to a volitional act. . . . The context of the word 'departure' [in 8 CFR 1003.4] also suggests that it does not include forcible removals.'').

*B. Definition of ''Depart'' and ''Departure''*

As stated above, the proposed rule would define the terms ''depart'' and ''departure'' consistent with their ordinary meaning, which includes any voluntary physical departure from the United States. The INA does not define ''depart'' or ''departure,'' but such a definition is also consistent with existing regulations and a precedential decision of the BIA.

Regulations controlling the departure of aliens in parts 215 and 1215 of 8 CFR define the phrase ''depart from the United States'' to mean, *inter alia,* to ''depart by land, water, or air . . . [f]rom the United States for any foreign place.'' 8 CFR 215.1(h), 1215.1(h). These regulations reflect a common-sense, geography-based understanding of the meaning of departure. Although this definition applies only to the concept of departure in parts 215 and 1215, the BIA nevertheless relied on it, in part, in analyzing the status of an alien who left the United States, was denied refugee status in Canada, and then returned to the United States, concluding that the alien had ''departed'' the United States and was therefore an ''arriving alien'' not removable under section 237(a)(1)(B) of the INA, 8 U.S.C. 1227(a)(1)(B). *See Matter of R-D-,* 24 I&N Dec. 221, 223 (BIA 2007). In *Matter of Lemus,* the BIA also recognized that there was a ''plain and ordinary meaning'' of the term ''departure,'' which was defined broadly. 24 I&N Dec. 373, 376–77 (BIA 2007) (''*Lemus-Losa I*''). Further, the BIA held that leaving the United States pursuant to a grant of advance parole is a ''departure'' for purposes of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. 1182(a)(9)(B)(i)(II). *See id.* In 2012, prior to deciding *Arrabelly,* the BIA affirmed *Lemus-Losa I. See Matter of Lemus-Losa,* 25 I&N Dec. 734 (2012). In contrast, in *Matter of Arrabally,* 25 I&N Dec. 771 (BIA 2012), the BIA held that leaving the United States pursuant to a grant of advance parole is not a ''departure'' under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. 1182(a)(9)(B)(i)(II). *See Arrabally,* 25 I&N Dec. at 778–80. The BIA relied heavily on what it surmised was ''Congress' intent'' and the ''manifest purpose'' of the statutory provision. *Id.* at 776.[9] Yet the decision did not address the BIA's prior view of the concept of departure in *Matter of R-D-,* unpersuasively disregarded earlier precedential decisions on all fours, and failed to engage the regulatory text of 8 CFR 215.1(h) and 1215.1(h). Despite acknowledging that parole is never guaranteed, it found that a departure following a grant of advance parole was qualitatively different than other types of departures. In doing so, it disregarded the plain text of the statute, BIA precedent in *Matter of R-D-* and *Lemus-Losa I,* the text of 8 CFR 215.1(h) and 1215.1(h), and over twenty years of policy and practice to the contrary in lieu of a previously-unidentified ''Congressional intent.'' *Id.* at 774–77. The BIA's decision in *Arrabally* departed from a common-sense understanding of the term ''departure'' and disregarded a significant body of law and policy without a strong justification.

In order to appropriately administer the law, the Department must have a uniform definition of ''depart'' and ''departure'' to apply. The definition contained in the proposed rule is consistent with the INA, with other regulations, with historical practice, and with relevant case law, except for *Arrabally,* which represents an unsupported outlying view. Accordingly, as a adjunct of the Department's consideration of the effect of departures on certain motions, the proposed rule would overrule the BIA's decision in *Arrabally.*

*C. Failure To Surrender and Fugitive Disentitlement*

The proposed regulation would provide that the moving party shall include in any motion to reopen or reconsider: (1) Whether or not the subject of the order of removal, deportation, or exclusion was notified to surrender to DHS for removal, deportation, or exclusion; and (2) whether the subject, if so ordered, has complied. This rule does not propose any restrictions on the format of the surrender notification or when the notification must be given; it provides only that the immigration judge or BIA will consider all relevant information regarding any notification and the corresponding compliance or non-compliance in determining whether to grant a motion to reopen or to reconsider as a matter of discretion.

When adjudicating the motion, the judge or the BIA ''is required to weigh both favorable and unfavorable factors by evaluating all of them, assigning weight or importance to each one separately and then to all of them cumulatively.'' *Franco-Rosendo* v. *Gonzales,* 454 F.3d 965, 966–67 (9th Cir. 2006) (citing *Arrozal* v. *INS,* 159 F.3d 429, 433 (9th Cir.1998)). After being given notice of the surrender requirement, an alien's failure to surrender would generally be treated as an unfavorable factor in this determination, consistent with longstanding case law holding that an alien's failure to report for removal represents a ''deliberate flouting of the immigration laws'' and therefore counts as a ''a very serious adverse factor which warrants the denial'' of a

[9] In *Matter of Lemus-Losa,* 24 I&N Dec. 373 (BIA 2007) (''*Lemus-Losa I*''), the BIA held that leaving the United States pursuant to a grant of advance parole is a ''departure'' for purposes of section 212(a)(9)(B)(i)(II) of the INA, 8 U.S.C. 1182(a)(9)(B)(i)(II). *See Lemus-Losa I,* 24 I&N Dec. at 376–77. In 2012, prior to deciding *Arrabelly,* the BIA affirmed *Lemus-Losa I. See Matter of Lemus-Losa,* 25 I&N Dec. 734 (2012).

discretionary motion, such as a motion to reopen or reconsider. *Matter of Barocio,* 19 I&N Dec. 255 (BIA 1985); *see Franco-Rosendo,* 454 F.3d at 966–67 (citing cases in support of the proposition).

In the same vein, this proposed change adapts the fugitive disentitlement doctrine, according to which a court dismisses an appeal if the subject absconds while it is pending, from the federal court system to the immigration courts by explicitly providing that failure to surrender is an adverse factor for consideration. The fugitive disentitlemlent doctrine has existed ''for well over a century'' in the criminal law because it ''serves an important detterence function'' and protects ''the enforceability of a court's judgments.'' *Martin* v. *Mukasey,* 517 F.3d 1201, 1204–05 (10th Cir. 2008); *see also Degen* v. *United States,* 517 U.S. 820, 823–24 (1996) (explaining the doctrine). It has been extended to the immigration context, where ''the petitioners are fugitive aliens who have evaded custody and failed to comply with a removal order.'' *Giri* v. *Keisler,* 507 F.3d 833, 835 (5th Cir. 2007); *see also Martin,* 517 F.3d at 1204; *Sapoundjiev* v. *Ashcroft,* 376 F.3d 727, 728–29 (7th Cir. 2004) (''A litigant whose disappearance makes an adverse judgment difficult if not impossible to enforce cannot expect favorable action.''); *Bar-Levy* v. *Dep't. of Justice, INS,* 990 F.2d 33, 35 (2d Cir. 1993) (''Although an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he is nonetheless a fugitive from justice. Like the fugitive in a criminal matter, the alien who is a fugitive from a deportation order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims.'').

The Department believes that the proposed requirement to notify the immigration judge or the BIA whether the alien has complied with an order to surrender would appropriately balance an alien's statutory right to file a motion to reopen reconsider with the government's interests in ''encourage[ing] voluntary surrenders'' and avoiding ''the difficulty of enforcing a judgment against a fugitive.'' *Bright* v. *Holder,* 649 F.3d 397, 399 (5th Cir. 2011). It is also fully consistent with the Department's position for over thirty years that ''the incentives for an alien to voluntarily depart from the United States or to submit to a deportation order are abated by the availability of procedures which provide a seemingly endless opportunity to seek relief from deportation'' and that adjudicators should ''decline to reward [such] disdain for the law by exercising [their] discretion to reopen proceedings.'' *Barocio,* 19 I&N Dec. at 258.

In light of the revised approach set forth above, the Department does not intend at this time to pursue finalization of either of the previous proposed rules regarding the effect of failure to surrender, as published at 67 FR at 31157 and 63 FR at 47205.

*D. Standards for Motions To Reopen or Reconsider Generally*

The Department proposes to add general standards to further clarify the requirements for the adjudication of motions to reopen or reconsider by the immigration courts and the BIA.

Currently, the regulations require that an alien who files a motion to reopen in order to submit an application for relief must include the application, and any supporting documents, together with the motion. *See* 8 CFR 1003.2(c)(1), 1003.23(b)(3). The proposed rule would provide additional guidance regarding the impact that the nature of the relief the alien seeks may have on the adjudication of the motion to reopen or reconsider. If an alien's motion to reopen or reconsider is premised upon relief that the immigration judge or the BIA lacks authority [10] to grant, the judge or the BIA may only grant the motion if another agency has first granted the underlying relief. Neither an immigration judge nor the BIA may reopen proceedings due to a pending application for relief with another agency if the judge or the BIA would not have authority to grant the relief in the first instance,[11] though the alien may seek a stay of removal in such a circumstance with DHS pursuant to 8 CFR 241.6. In other words, there is neither a legal nor an operational basis for the BIA or an immigration judge to reopen proceedings in which neither can offer redress to the alien on an underlying application, and the inability to offer redress does not prejudice the alien because the alien can always apply to DHS for a stay of removal while DHS adjudicates the underlying application.

This proposed rule is also fully consistent with longstanding precedent, discussed below, that both requires an alien to demonstrate *prima facie* eligibility for relief in order to have a motion to reopen granted and allows a motion to reopen to be denied as a matter of discretion even when *prima facie* eligibility has been shown. In short, this change would codify *Matter of Yauri,* 25 I&N Dec. 103, 107–10 (BIA 2009), in chapter V of the regulations and make clear that neither the Board nor an immigration judge will exercise discretion to reopen proceedings in cases in which neither the Board nor an immigration judge has authority over the application the alien is ultimately pursuing.[12]

[10] Recognizing that the word ''jurisdiction'' is one of ''many, too many meanings,'' *Union Pacific Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 558 U.S. 67, 81 (2009), and that its use in the context of both motions and underlying applications may be confusing, the Department believes this point is better framed in terms of authority rather than jurisdiction. There are many immigration applications which the Department lacks authority to adjudicate because such authority is committed to DHS. *See, e.g.,* 8 U.S.C. 1255(l)(1) (stating that DHS has exclusive authority to grant adjustment of status to an alien with a T visa); *Matter of Sanchez-Sosa,* 25 I&N Dec. 807, 811 (BIA 2012) (''The [DHS] has exclusive [authority] over U visa petitions and applications for adjustment of status under section 245(m) of the Act.''); *Matter of Martinez-Montalvo,* 24 I&N Dec. 778, 778–89 (BIA 2009) (stating that immigration judges have no authority to adjudicate an application filed by an arriving alien seeking adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966, with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application); *Matter of Singh,* 21 I&N Dec. 427, 433–34 (BIA 1996) (stating that EOIR lacks authority to adjudicate legalization applications pursuant to section 245A of the INA).

[11] Many reasons militate against granting a motion to reopen based on an underlying application over which an immigration judge and the Board lack authority. Chief among those reasons is the finite nature of the agency's resources, which should be allocated to matters over which EOIR adjudicators have authority. Expending adjudicative and administrative reources on matters over which the agency has no authority results in more unnecessary and time-consuming continuances, difficulty maintaining open cases that rely on outside considerations, and the need to enter orders that simply restate another's findings and holdings. *See Matter of Yauri,* 25 I&N Dec. 103, 110–11 (BIA 2009).

[12] In *Singh* v. *Holder,* 771 F.3d 647 (9th Cir. 2014), the Ninth Circuit held that the Board possessed *sua sponte* authority to reopen a proceeding involving an application over which it lacked authority and to effectively grant a stay of removal, notwithstanding the decision in *Yauri. See Singh,* 771 F.3d at 652. *Singh,* however, did not address the Board's determination in *Yauri* that it would not exercise its discretion—even acting within its *sua sponte* authority—to reopen cases involving applications over which it lacked authority. *Compare id.* at 653 (''Because the BIA denied Singh's motion only for lack of authority, we grant the petition and remand to the BIA.''), *with Yauri,* 25 I&N Dec. at 110 (''Finally, and separately from any question of jurisdiction, with regard to untimely or number-barred motions to reopen, we conclude that *sua sponte* reopening of exclusion, deportation, or removal proceedings pending a third party's adjudication of an underlying application that is not itself within our [authority] ordinarily would not be warranted as a matter of discretion.''). *Singh* also did not address the availability of a stay of removal from DHS in circumstances in which DHS has sole authority over the application at issue. *See* 8 CFR 241.6. Consequently, the extent to which the Board has discretion to deny motions in support of

Similarly, under the proposed rule, if the alien seeks relief that the immigration judge or the BIA would have authority to grant, the immigration judge or the BIA would be able to grant the motion only if the alien first establishes *prima facie* eligibility for that relief. In other words, a lack of *prima facie* eligibility would be sufficient for an immigration judge or the BIA to deny a motion to reopen or reconsider. Such *prima facie* eligibility must include evidence that the alien has the relevant approved, current visa, if a visa is required. This proposed rule would therefore codify and explicate the same longstanding rule widely recognized in case law. *See INS* v. *Abudu,* 485 U.S. 94, 104 (1988) (''There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought.'').

The proposed rule would not alter the authority of the Board and immigration judges to deny a motion to reopen as a matter of discretioneven when the alien has established a *prima facie* case for the underlying substantive relief. *See* 8 CFR 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.''); 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.''); *see also INS* v. *Doherty,* 502 U.S. 314, 333 (1992) (Scalia, J., concurring in part and dissenting in part), (''[T]he Attorney General's power to grant or deny, as a discretionary matter, various forms of non-mandatory relief includes within it what might be called a 'merits-deciding' discretion to deny motions to reopen, even in cases where the alien is statutorily eligible and has complied with the relevant procedural requirements.''); *Abudu,* 485 U.S. at 104–05 (''[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 . . . and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.''); *Mendias-Mendoza* v. *Sessions,* 877 F.3d 223, 227 (5th Cir. 2017) (quoting and applying *Abudu*); *Poniman* v. *Gonzales,* 481 F.3d 1008, 1011 (8th Cir. 2007) (same). The provisions would therefore help deter and efficiently resolve frivolous motions to reopen or reconsider, promoting the ''strong public interest'' in the completion of removal proceedings ''as promptly as is consistent with giving the adversaries a fair opportunity to develop and present their respective cases.'' *Abudu,* 485 U.S. at 107; *cf. INS* v. *Jong Ha Wang,* 450 U.S. 139, 143 n.5 (1981) (per curiam) (''If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.'') (quoting *Villena* v. *INS,* 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc) (Wallace, J. dissenting)).

Consistent with current practice in immigration courts and the BIA,[13] the proposed regulation would also clarify that immigration judges and the BIA may not automatically grant a motion to reopen or reconsider that is jointly filed, that is unopposed, or that is deemed unopposed because a response was not timely filed.[14] As explained, the BIA is vested with broad discretion to grant or deny these motions; no authority requires the BIA to grant such a motion when it is jointly filed or unopposed, or when no timely response is made. *See Doherty,* 502 U.S. at 322–23; *see also Abudu,* 485 U.S. at 105–06; *Jong Ha Wang,* 450 U.S. at 143 n.5. The proposed rule would further specify that neither an immigration judge nor the BIA may grant a motion to reopen or reconsider for the purpose of terminating or dismissing the proceeding, unless the motion satisfies the standards for both the motion, including the *prima facie* requirement discussed above if applicable,[15] and the requested termination or dismissal. *See* 8 CFR 1239.2(c), (f); *see also Matter of S–O–G– & F–D–B–,* 27 I&N Dec. 462 (A.G. 2019) (holding that the authority to dismiss or terminate proceedings is constrained by the regulations and is not a ''free-floating power''). To facilitate this inquiry, the proposed regulation provides a definition of ''termination'' and explains that termination includes both the termination and the dismissal of proceedings, wherever those terms are used in the regulations. *Cf. id.* at 467 (''Although 'dismissal' and 'termination' have distinct meanings and different requirements under the regulations, they are similar concepts in the context of concluding removal proceedings . . . .'').

The proposed rule would also offer clarity regarding how the Board or an immigration judge should evaluate allegations and arguments made in a motion to reopen or motion to reconsider and the evidence supporting such a motion. The Board—and, by extension, immigration judges—have ''broad discretion'' to weigh the credibility of evidence offered in support of a motion to reopen. *Dieng* v. *Barr,* 947 F.3d 956, 961 (6th Cir. 2020). Although the Supreme Court has explained that a summary judgment standard is not appropriate for evaluating a motion to reopen, and that evidence in favor of the movant need not be accepted as true, the regulations provide little guidance as to when allegations should be accepted or disregarded. *Abudu,* 485 U.S. at 109 (''We have never suggested that all ambiguities in the factual averments [in a motion to reopen] must be resolved in the movant's favor, and we have never analogized such a motion to a motion for summary judgment. The appropriate analogy is 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.''); *Dieng,* 947 F.3d at 963 (''Comparing the BIA's adjudicatory role to that of a trial judge reviewing a motion for summary judgment is inappropriate where 'every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.' '' (quoting

applications over which it has no authority remains unsettled. The proposed rule would codify the intent of *Yauri* and the procedures and standards to be used for considering requests for a stay of removal. Additionally, the Department notes that it has proposed eliminating *sua sponte* reopening authority by the Board in most instances, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure,* 85 FR 52491 (Aug. 26, 2020), undermining *Singh*.

[13] *See* U.S. Dep't of Justice, Executive Office for Immigration Review, *Board of Immigration Appeals Practice Manual,* ch. 5.11 (Oct. 19, 2018 update) (''*BIA Practice Manual*''), *https://www.justice.gov/eoir/page/file/1103051/download;* U.S. Dep't of Justice, Executive Office for Immigration Review, *Immigration Court Practice Manual,* chs. 3.1(b) & (d)(ii), 5.12 (Aug. 2, 2018 update) (''*Immigration Court Practice Manual*''), *https://www.justice.gov/eoir/page/file/1084851/download*.

[14] As explained, the BIA is vested with broad discretion to grant or deny these motions; no authority requires the BIA to grant such a motion when it is jointly filed or unopposed, or when no timely response is made. *See Doherty,* 502 U.S. at 322–23; *see also Abudu,* 485 U.S. at 105–06 (quoting *Jong Ha Wang,* 450 U.S. at 143 n.5).

[15] For example, the *prima facie* requirement discussed above would not apply to motions to reopen filed for purposes of dismissal pursuant to 8 CFR 239.2(c) and 1239.2(c).

*Doherty,* 502 U.S. at 323)); *see also M.A.* v. *INS,* 899 F.2d 304, 309–10 (4th Cir. 1990) (en banc) (Wilkinson, J.) (''The term 'prima facie case' is not a buzzword that requires us to ignore the procedural posture of the case . . . . There is nothing incongruous about the Board interpreting its regulations to require that a prima facie showing in a reopening context be more demanding than the statutory standard in an original proceeding.'').

The proposed rule clarifies that factual assertions that are contradicted, unsupported, conclusory, ambiguous, or otherwise unreliable should not be accepted as true, consistent with current standards. *See, e.g., Dieng,* 947 F.3d at 963–64 (affidavits that are ''self-serving and speculative,'' statements concerning changed country conditions that are not ''based on personal knowledge,'' and letters from petitioners' family members that are ''speculative, and not corroborated with objective evidence,'' may be discredited as ''inherently unbelievable''). Consistent with *Abudu,* it would further make clear that the Board is not required to take all assertions in a motion to reopen at face value. *Contra Ghahremani* v. *Gonzales,* 498 F.3d 993, 999 (9th Cir. 2007) (''Our case law establishes, however, that the BIA was under an affirmative obligation to 'accept as true the facts stated in Ghahremani's affidavit [in support of his motion] in ruling upon his motion to reopen unless it finds those facts to be inherently unbelievable.' '') (quoting *Maroufi* v. *INS,* 772 F.2d 597, 600 (9th Cir. 1985)). The proposed rule further clarifies that an adjudicator is not required to accept the legal arguments of either party as correct. It also codifies longstanding law that assertions made in a filing by counsel, such as a motion to reopen or motion to reconsider, are not evidence and should not be treated as such. *See Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980) (holding that counsel's ''mixed factual and legal'' assertions ''are not evidence'').

This rulemaking would also make changes to provide clearer standards for adjudicating motions to reopen and reconsider. First, the rule would relocate language concerning criminal aliens and the requirements for such aliens to include information about pending criminal prosecutions from 8 CFR 1003.2 and 1003.23 to the new regulation at 8 CFR 1003.48. Relocating this language would consolidate pertinent information into one section. In addition, the proposed rule would add a new requirement regarding disclosures of any convictions that occurred between the order of removal and the filing of the motion to reopen, to ensure that immigration judges or the Board have all relevant information about the alien's circumstances. Further, the proposed rule would require the disclosure of any reinstated order of removal pursuant to section 241(a)(5) of the Act, 8 U.S.C. 1231(a)(5). Without such a requirement, the adjudicator may inappropriately consider a motion to reopen that is otherwise prohibited by statute. All of these requirements will assist adjudicators in making proper decisions based on a current record.

The proposed rule would also prohibit the Board or an immigration judge from granting a motion to reopen or reconsider filed by an alien unless the alien has provided appropriate contact information for further notification or hearing. This proposal is similar to the requirements for a change of venue, 8 CFR 1003.20(c), and ensures that proceedings are not reopened only to be delayed because the Board or an immigration court lacks a current address for the alien. *See Degen,* 517 U.S. at 824 (explaining a court's authority to dismiss an appeal or writ of certiorari when the party seeking relief is a fugitive while the matter is pending because if ''the party cannot be found, the judgment on review may be impossible to enforce''); *cf. Sapoundjiev,* 376 F.3d at 729 (''When an alien fails to report for custody, this sets up the situation that *Antonio-Martinez* called 'heads I win, tails you'll never find me[.]' '') (quoting *Antonio-Martinez* v. *INS,* 317 F.3d 1089, 1093 (9th Cir. 2003)).

The proposed rule would add a new paragraph in 8 CFR 1003.2(c)(3) to align that regulation with both the statutory language in INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii), and the provision applicable to immigration judges in 8 CFR 1003.23(b)(4)(i) relating to motions to reopen based on changed country conditions. Following INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii), 8 CFR 1003.23(b)(4)(i) includes an exception to the general time and number limitations applicable to motions to reopen if the motion seeks to file a new application for asylum, statutory withholding of removal, or protection under the Convention Against Torture based on changed county conditions and supported by evidence that is material and was not available and could not have been discovered or presented at the previous proceeding. It also includes additional language related to stays of removal and the implications of finding a prior asylum application to have been frivolous. *See* 8 CFR 1003.23(b)(4)(i). No similar regulation for removal proceedings exists for the Board, however.[16]

The Department believes that immigration judges and the Board should adjudicate motions to reopen removal proceedings related to changed country conditions under the same standards. Nothing in the INA suggests that the standards should be different. Further, the Board is just as likely—if not more so—to consider stay requests in conjunction with motions to reopen in this context and to consider the implications of a prior finding of frivolousness for a motion to reopen as immigration judges are. *See, e.g., Matter of H–Y–Z-,* 28 I&N Dec. 156, 160 (BIA 2020) (''Therefore, the subsequent filing of a motion to reopen [with the Board], even one that challenges a frivolousness finding, has no effect on the statutory bar to immigration benefits. . . . This is consistent with the regulation regarding motions to reopen before the Immigration Judge. . . .''). Consequently, to harmonize the standards applied by both immigration judges and the Board to motions to reopen in this context, the Department proposes to insert the language of 8 CFR 1003.23(b)(4)(i), which tracks the statutory provisions of INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii), into regulations applicable to the Board by adding a new paragraph 8 CFR 1003.2(c)(3)(v).

In addition, the proposed rule would clarify that an alien who files a motion to reopen and applies for asylum or related relief based on changed country conditions need not submit a copy of the record of proceedings or administrative file with the motion. Finally, the proposed rule would delete outdated alternate deadlines in 8 CFR 1003.23(b), 1003.2(b)(2), and 1003.2(c)(2) for filing motions to reopen or reconsider.

[16] Two provisions applicable to the Board cross-reference 8 CFR 1003.23(b)(4)(ii) and 1003.23(b)(4)(iii), but no regulation cross-references 8 CFR 1003.23(b)(4)(i). *See* 8 CFR 1003.2(c)(3) and (3)(i). Further, although 8 CFR 1003.2(c)(3)(ii) contains language broadly analogous to 8 CFR 1003.23(b)(4)(i), it appears to apply to deportation proceedings rather than removal proceedings and, accordingly, uses language different from that of the statute applicable to removal proceedings. *Compare* 8 CFR 1003.2(c)(3)(ii) (referencing ''withholding of *deportation* based on *changed circumstances* arising in the country of nationality or in the country to which *deportation* has been ordered'') (emphasis added), *with* INA 240(c)(7)(C)(ii), 8 U.S.C. 1229a(c)(7)(C)(ii) (referencing ''*changed country conditions* arising in the country of nationality or the country to which *removal* has been ordered'') (emphasis added).

*E. Specific Standards for Motions To Reopen Due to Ineffective Assistance of Counsel*

1. Overview of the Proposed Rule

As noted in section II.B, although courts have broadly endorsed the framework of *Lozada* in considering motions to reopen based on claims of ineffective assistance of counsel, several courts have declined to give full effect to the *Lozada* requirements where, in the court's view, compliance is not necessary. *See, e.g., Morales Apolinar* v. *Mukasey,* 514 F.3d 893, 896 (9th Cir. 2008) (''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.''). In addition, courts have adopted varying standards for establishing prejudice.

The proposed rule would therefore establish uniform procedural and substantive requirements for the filing of motions to reopen based upon a claim of ineffective assistance of counsel which will, in turn, provide a uniform standard for adjudicating such motions. The proposed rule would provide an ''objective basis from which to assess the veracity of the substantial number of ineffective assistance claims,'' would ''hold attorneys to appropriate standards of performance,'' and would ''ensure both that an adequate factual basis exists in the record for an ineffectiveness [motion] and that the [motion] is a legitimate and substantial one.'' *Tamang* v. *Holder,* 598 F.3d 1083, 1090 (9th Cir. 2010) (internal quotation marks omitted). The filing requirements described in the proposed rule would also guide an alien alleging ineffective assistance of counsel in providing evidence necessary to adjudicate the claim. As the Board noted in *Lozada,* ''[t]he high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. Where essential information is lacking, it is impossible to evaluate the substance of such claim.'' *Lozada,* 19 I&N Dec. at 639. In short, the proposed rule will protect aliens from incompetent or unscrupulous attorneys, protect attorneys from improper or unfounded allegations of professional misconduct, and product the integrity of EOIR's immigration proceedings as a whole.

The proposed rule would provide standards for filing and adjudicating motions to reopen or reconsider based upon a claim of ineffective assistance of counsel, generally following the BIA's instruction and current requirements under *Lozada,* 19 I&N Dec. at 639; section 240(c)(7) of the Act, 8 U.S.C.1229a(c)(7); and the applicable regulations at 8 CFR 1003.2 and 1003.23. The standard for adjudication would require such motion to demonstrate that the counsel's conduct was ineffective and prejudiced the individual. The proposed rule would allow for possible relief due to ineffective assistance of counsel, which the rule would define as attorneys or accredited representatives under 8 CFR 1292.1(a)(1) and (a)(4), or any other person who represented the alien in proceedings before the immigration court or the BIA and who the alien reasonably but erroneously believed was authorized to do so. In evaluating counsel's conduct, the proposed regulation would require that the conduct be unreasonable based on the facts of the case, viewed at the time of the conduct at issue. The proposed rule would also require the alien to demonstrate prejudice based on that conduct.

The proposed rule would not enumerate specific conduct that amounts to ineffective assistance in immigration proceedings; rather, the proposed rule would adopt a standard similar to the one rooted in *Strickland* v. *Washington,* 466 U.S. 668 (1984).[17] For an attorney's representation to constitute ineffective assistance, the representation ''must . . . [fall] below an objective standard of reasonableness,'' *id.* at 688, judged ''on the facts of the particular case, [and] viewed as of the time of counsel's conduct,'' *id.* at 690.

Under the proposed rule, a tactical decision could not amount to ineffective assistance if the decision was reasonable when it was made, even if it proved unwise in hindsight. *See id.* at 689 (''A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight[.]''); *Mena-Flores* v. *Holder,* 776 F.3d 1152, 1169 (10th Cir. 2015) (''An attorney's objectively reasonable tactical decisions do not qualify as ineffective assistance.''); *cf. Matter of Velasquez,* 19 I&N Dec. 377, 383 (BIA 1986) (stating that attorney's ''decision to concede deportability was a reasonable tactical decision'' and thus was binding). Finally, under the proposed rule, the Department expects there would be ''a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'' *Strickland,* 466 U.S. at 689.

The proposed rule would require the individual to establish that he or she was prejudiced by counsel's conduct, and an immigration judge or the BIA shall consider whether a reasonable probability exists that, absent counsel's ineffective assistance, the outcome of the proceedings would have been different.[18] This reasonable probability standard well established; adopting it would provide clarity and make more uniform the way courts evaluate prejudice. *See id.* at 694 (''The [movant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.''). The proposed rule would provide that eligibility for relief or protection arising after the conclusion of proceedings will typically not affect the determination whether the individual was prejudiced during such proceedings. *Cf. Snethen* v. *State,* 308 NW2d 11, 16 (Iowa 1981) (''Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel.'').

The proposed rule would require three items to support a motion to reopen based on ineffective assistance of counsel. First, it would require an affidavit or written statement executed under penalty of perjury that details the

[17] Although immigration proceedings are civil in nature and *Strickland* applies to criminal proceedings, the use of standards imported from *Strickland* should provide greater protection to aliens since criminal defendants possess greater rights and protections than aliens in removal proceedings. The Department notes, however, that its use of *Strickland* in this context is simply a policy determination for purposes of administering the proposed regulation and should not be construed as an assertion that aliens should have the same rights afforded to criminal defendants, including the right to counsel at government expense.

[18] As with the determination of ineffective assistance of counsel, this proposed rule would not enumerate any circumstances that necessarily constitute prejudice. *See generally Assaad,* 23 I&N Dec. at 562 (rejecting the argument that counsel's failure to file an appeal is per se prejudicial). *But see Siong* v. *INS,* 376 F.3d 1030, 1037 (9th Cir. 2004) (applying a rebuttable presumption of prejudice where counsel's error deprived an individual of any appeal). Rather, each case would rest on its particulars, with the recognition that some conduct will more typically yield prejudice, but that the individual filing the motion always carries the burden to establish that prejudice does in fact exist. Additionally, the rescission of an in absentia order of removal generally requires either a showing of exceptional circumstances or a lack of notice. INA 240(b)(5)(C), 8 U.S.C. 1229a(b)(5)(C). Although prejudice would not be presumed for a motion to rescind an in absentia removal order based on ineffective assistance of counsel, the Department expects that in the ordinary case an alien who demonstrates ineffective assistance of counsel leading to the issuance of an in absentia order of removal would also likely demonstrate prejudice.

agreement between counsel and the individual. The affidavit or written statement must include the actions to be taken by counsel and the representations counsel did or did not make regarding such actions. Moreover, to ensure that the alien fully understands what he is alleging, the affidavit or written statement must also identify who drafted it, if the alien did not, and contain an acknowledgment by the alien that the affidavit or written statement had been read to the alien in a language the alien speaks and understands, and that the alien, by signing, affirms that he understands and agrees with the language of the affidavit or written statement.

A copy of any representation agreement must be included with the affidavit or written statement, or the individual should explain its absence and provide any reasonably available evidence regarding the scope of the agreement and reasons for its absence. The proposed rule would allow the BIA or an immigration judge to excuse the requirement to submit an affidavit or written statement, and accompanying evidence regarding the representation agreement, as a matter of discretion in the case of a motion filed by a *pro se* alien.

Second, the proposed rule would require evidence of the individual's notice to counsel informing him the allegations and that a motion to reopen based on such allegations will be filed. The individual must provide evidence of the date and manner in which he or she provided such notice, as well as counsel's response, if any. If there were no response, the individual must say so. The proposed rule would provide two exceptions to this requirement: When prior counsel is deceased, or when the alien exercised reasonable diligence in the attempt to locate prior counsel but was unable to do so.

Third, the proposed rule would require that the alien file a complaint with the appropriate disciplinary authorities and with EOIR disciplinary counsel. For attorneys in the United States, the alien must file a complaint with the disciplinary authority of a State, possession, territory, or Commonwealth, or of the District of Columbia, that licensed the attorney to practice law.[19] For accredited representatives as defined in 8 CFR part 1292, the individual must file a complaint with the EOIR disciplinary counsel pursuant to 8 CFR 1003.104. For persons whom the individual reasonably but erroneously believed to be an attorney or accredited representative as defined in 8 CFR part 1292, and who was retained for the purpose of representation in immigration proceedings, the individual must file a complaint with an appropriate federal, State, or local law enforcement agency that has authority to address matters involving unauthorized practice of law or immigration-related fraud. In all cases, the individual must file a complaint with EOIR disciplinary counsel. The individual must include with the motion to reopen a copy of the complaint(s) and any subsequent related correspondence, unless the counsel is deceased.[20]

In short, the proposed rule codifies the requirements of *Lozada* and reaffirms particular aspects of those requirements that have been disregarded to varying degrees by federal circuit courts. It provides a uniform standard for assessing prejudice and clear guidance that will both aid and protect respondents, practitioners, and adjudicators.[21]

2. The Current Proposed Rule's Enhancements to the Previous Proposed Rule

As previously stated, the Department withdraws its previous proposed rule regarding motions to reopen based upon ineffective assistance of counsel at 81 FR at 49556 in order to address broader issues regarding motions to reopen in a more comprehensive manner and to consolidate multiple other proposed rulemakings related to such motions. The new proposed rule nevertheless retains, either in whole or in part, many of the provisions from the previous proposed rule, including the standard for adjudication in 8 CFR 1003.48(h)(1) (proposed), the standard for evaluating counsel's ineffectiveness in 8 CFR 1003.48(h)(3) (proposed), the reasonable probability standard for prejudice in 8 CFR 1003.48(h)(4) (proposed), and the required items to support the motion in 8 CFR 1003.48(h)(5) (proposed).

The current proposed rule also enhances the previous proposed rule in several ways. First, it clarifies the regulation's applicability to proceedings before the BIA and the immigration courts by renaming subpart C. The previous proposed rule retained subpart C's name, ''Immigration Court—Rules of Procedure,'' although the rule would have applied to proceedings at the BIA and the immigration courts.

Second, the current proposed rule expands the previous proposed rule's definition of ''counsel.'' The previous proposed rule did not expressly include the conduct of attorneys retained without remuneration, but the proposed rule does. *See* 8 CFR 1003.48(h)(1)–(4) (proposed). Thus, it expands the rule's afforded protections to a broader set of individuals, though it would not extend beyond EOIR proceedings.

Third, regarding the requirement to submit the representation agreement and an affidavit or written statement detailing the agreement between counsel and the individual, the proposed rule provides that the BIA or immigration judge may, in their discretion, grant an exception if the person is not represented by counsel, explains the absence of documentation, and presents other independent evidence to support the motion. The BIA or immigration judge may not grant exceptions for the affidavit or written statement if the person has retained counsel, but, in the absence of a representation agreement, the person may explain its absence and provide reasonably available supporting evidence. Regarding the notice to counsel, the proposed rule provides specific exceptions if counsel is deceased or if the person tried to locate previous counsel with reasonable diligence but was unsuccessful.

Fourth, the earlier proposed rule would have required the individual filing the motion to reopen to notify appropriate disciplinary authorities, as listed in the regulation. This proposed

[19] If an attorney is licensed in more than one jurisdiction, a complaint need only be filed with the disciplinary authority of one jurisdiction.

[20] Although *Lozada* indicated that an alien could file a statement as to why no complaint was filed, the Department sees no reason why an alien alleging ineffective assistance of counsel would not file a complaint, unless counsel was deceased. Indeed, because the alleged ineffective assistance necessarily occurred during an EOIR proceeding, the Department can think of no logical reason why a complaint would not be filed with, at the least, the EOIR disciplinary counsel.

[21] The proposed rule would not apply to motions to reopen proceedings based on counsel's conduct before another administrative or judicial body, including before, during the course of, or after the conclusion of immigration proceedings. This includes conduct that was immigration-related or that occurred before DHS or another government agency. *Cf. Contreras* v. *Att'y Gen.,* 665 F.3d 578, 585–86 (3d Cir. 2012) (declining to find ineffective assistance of counsel in the preparation and filing of a visa petition where counsel's conduct ''did not compromise the fundamental fairness of'' subsequent removal proceedings); *Balam-Chuc* v. *Mukasey,* 547 F.3d 1044, 1051 (9th Cir. 2008) (same). One reason for this limitation is that the Board and immigration judges are generally not in a position to provide a remedy in a situation where an attorney's performance before another administrative or judicial body is alleged to be ineffective. Rather, a request for a remedy in such a situation would be more appropriately directed to that administrative or judicial body before which the alleged ineffective assistance occurred. At the same time, nothing in the proposed rule prohibits a respondent from filing a motion requesting that the Board reissue a decision in a case in which the respondent's counsel missed a deadline for filing a petition for review.

rule maintains that notification requirement in its entirety, but it adds a second notification requirement—to notify EOIR disciplinary counsel in every case in accordance with the current regulation at 8 CFR 1003.104. This ensures that all claims of ineffective assistance are reviewed for potential disciplinary action. The EOIR Disciplinary Program helps the Department ensure fairness and integrity in immigration proceedings. Through the program, EOIR regulates the professional conduct of immigration attorneys and representatives to protect the public, preserve the integrity of immigration proceedings and adjudications, and maintain high professional standards for practitioners. Consequently, it is crucial that the EOIR Disciplinary Counsel be aware of claims of ineffective assistance by practitioners so that it may take appropriate action.

By clarifying and expanding the application of these regulations, clarifying exceptions that promote consistency, uniformity, and finality in immigration proceedings, and ensuring that claims of ineffective assistance are reviewed for potential disciplinary action, this proposed rule builds upon the earlier proposed rule. Accordingly, and for the reasons discussed above, the Department withdraws its previous proposed rule at 81 FR at 49556 and proposes this rule to standardize motions to reopen immigration proceedings based upon a claim of ineffective assistance of counsel.

*F. Motions To Reopen To Submit or Update an Application for Asylum or Protection*

Under current regulations, an alien who files a motion to reopen in order to submit an application for relief must submit the appropriate application and the application's supporting documentation together with the motion. 8 CFR 1003.2(c)(1) (''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 CFR 1003.23(b)(3) (same). *See also, e.g., Gen Lin* v. *Att'y Gen.,* 700 F.3d 683, 689 (3d Cir. 2012) (concluding that the failure to include a new asylum application with the motion to reopen was a sufficient basis to deny a petition for review); *Romero-Ruiz* v. *Mukasey,* 538 F.3d 1057, 1064 (9th Cir. 2008) (concluding that the BIA ''did not abuse its discretion in determining that Romero–Ruiz did not satisfy the procedural requirements'' for filing a motion to reopen because, among other things, he failed to file an accompanying application for cancellation of removal); *Waggoner* v. *Gonzales,* 488 F.3d 632, 639 (5th Cir. 2007) (holding that the BIA did not abuse its discretion in denying a motion to reopen based on changed country conditions when the alien failed to include her application for asylum and supporting documentation).

The proposed rule would further clarify that, if the immigration court or the Board grants the motion, the immigration court or the Board would further accept the application submitted with the motion to reopen. For example, an alien who submits a motion to reopen based on changed country conditions is required to submit the accompanying asylum application. 8 CFR 1003.2(c)(1), 1003.23(b)(3). Under the proposed rule, that new asylum application would be considered filed as of the date the immigration court grants the motion to reopen, and the alien would not be able to later avoid filing the application.

This change would foreclose the use of changed country conditions, which relate to a claim for asylum or withholding of removal, for the purpose of gaining reopening to pursue other claims that could not themselves have been a basis for reopening due to time- or number-bars ordinarily applicable to motions to reopen. In such circumstances, the penalty for filing a false or frivolous asylum application would continue to apply. *See* INA 208(d)(6), 8 U.S.C. 1158(d)(6); 8 CFR 1208.20. So too would civil monetary penalties for document fraud. *See* INA 274C(a), 8 U.S.C. 1324c(a).

*G. Limiting the Scope of Reopened Proceedings to the Issues Upon Which Reopening Was Granted*

Under current practice, a grant to reopen a case effectively reopens the case for any purpose, regardless of the motion's articulated basis. For example, a respondent may file a motion to reopen based on changed country conditions that may affect the respondent's eligibility for asylum. Under section 240(c)(7)(C)(ii) of the Act, 8 U.S.C. 1229a(c)(7)(C)(ii), changed country conditions excuse untimely filing of a motion to reopen, while changed personal circumstances do not. A respondent seeking relief based on changed personal circumstances may therefore move to reopen based on changed country conditions, and then, if the motion is granted, withdraw or fail to submit the asylum application based on changed country conditions, and, instead, pursue an alternative form of relief, such as adjustment of status, based on changed personal circumstances. Essentially, respondents commonly allege specific grounds that warrant reopening a case but then use the reopened proceedings as an opportunity to apply for other unrelated forms of relief from removal that are otherwise unavailable.

This practice undermines the Department's commitment to efficient and fair case processing because respondents who engage in such practices receive additional opportunities to raise unrelated issues or apply for relief, thereby circumventing current law and regulations providing time-based deadlines and prolonging their cases. Use of an asylum claim to reopen a case for other claims treats unfairly those aliens who have the same non-asylum claims barred by the time and number limitations but who lack an asylum claim with which to shoehorn their otherwise barred claims into reopened proceedings. To curb this practice, the Department proposes to revise the scope of reopened proceedings at 8 CFR 1003.48(d)(3). The proposed rule would limit the reopened proceeding to consider only those issues or issues upon which reopening or reconsideration was granted, as well as matters directly related, except as otherwise provided by statute, regulation, or judicial or administrative precedent. Accordingly, the respondent would be required to establish in the motion to reopen or reconsider each basis upon which the respondent intends to apply for relief.

*H. Standards for Evaluating Requests for Discretionary Stays*

The current regulations regarding motions to reopen and motions to reconsider provide only that an immigration judge, the BIA, or an authorized DHS officer may grant a stay of removal. *See* 8 CFR 1003.2(f), 1003.23(b)(1)(v). The current regulations lack detailed guidance pertaining to the filing and adjudication of such requests, and neither the BIA nor the Attorney General has published a decision addressing the appropriate standards for stays of removal.

The proposed regulation would provide a list of factors that the immigration judge or BIA must consider when determining whether to grant an alien's requested stay of removal as a matter of discretion: The likelihood of success on the merits; the likelihood of irreparable injury; harm that the stay may cause to other parties interested in the proceeding; and the public interest. These factors are well established in existing law and have been set out in decisions regarding the consideration of discretionary stays. *See, e.g., Nken* v.

*Holder,* 556 U.S. 418, 425–26 (2009); *Sofinet* v. *INS,* 188 F.3d 703, 706 (7th Cir. 1999); *Ignacio* v. *INS,* 955 F.2d 295, 299 (5th Cir. 1992). The inclusion of these provisions in the regulations will promote consistency in the adjudication of discretionary stay requests.

The proposed regulation would provide specific instructions regarding the requirements for submitting a motion for a discretionary stay in conjunction with a motion to reopen or reconsider. These provisions in the proposed regulation act as additional tools for case management, the importance of which the Attorney General emphasized in *Matter of L–A–B–R–,* 27 I&N Dec. 405, 406 (A.G. 2018) (''Efficiency is . . . a common theme in the immigration courts' procedural regulations, which promote the 'timely' and 'expeditious' resolution of removal proceedings.''). One such provision would codify in the regulations the current EOIR practice that an immigration judge and the BIA may not grant a motion for a stay of removal if the alien has not also filed an underlying motion to reopen or reconsider. *See Immigration Court Practice Manual,* ch. 8.3; *BIA Practice Manual,* ch. 6.3.

Another provision would prohibit an immigration judge or the BIA from granting a request for a discretionary stay unless the motion is accompanied by proof that the individual initially filed for a stay of removal with DHS, the agency ultimately responsible for carrying out an order of removal, deportation, or exclusion, pursuant to 8 CFR 241.6; DHS must have subsequently denied or failed to respond to the request within five business days. Requiring an individual to first file a stay request with DHS, and then subsequently be denied or receive no response in order to file with EOIR, is a commonsense procedural mechanism that ensures an alien multiple opportunities to have a stay request considered. It also promotes efficiency, as DHS, the agency seeking to remove the alien, is in the best position to evaluate a stay request in the first instance. DHS maintains the requisite personnel, expertise, and necessary information to handle such requests expeditiously because DHS is both the custodian of a removable alien and ultimately the executor of an order of removal. Further, a requirement that stays should be directed to DHS initially will encourage the filing of stay requests at the earliest possible opportunity and reduce the likelihood of dilatory gamesmanship in filing for a stay at the last moment. Consequently, stay requests are most appropriately directed to DHS in the first instance. If that request is not approved, however, an individual may still obtain a *de novo* determination from EOIR on a stay request, provided that the individual complies with other regulatory requirements.

The proposed regulation would prohibit an immigration judge or the BIA from granting a request unless the opposing party is notified and has an opportunity to respond and either affirmatively consents, joins the motion, or fails to respond to the request in three business days from the date of filing the request. Both parties in immigration proceedings are entitled to fair process, and notice to the opposing party is a tenet of fair process. Accordingly, to ensure fair consideration of all requests and consistency with how it addresses other motions, the Department proposes to require notice and an opportunity to respond before it will grant any motion for a discretionary stay. For genuinely exigent situations, nothing in this proposed rule prevents a party for moving for expedited treatment of its stay request or for the parties to file a joint request for a stay.

Ultimately, the proposed rule would emphasize that a discretionary stay is an extraordinary remedy. *See Nken,* 556 U.S. at 437 (Kennedy, J., concurring) (''A stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right.''). The Department believes that the implementation of discretionary stay procedures will ensure that stays are not abused or used to circumvent the statutory and regulatory structure for proceedings before EOIR. Further, these changes would ensure that EOIR's regulations are generally aligned with existing precedents.

## IV. Regulatory Requirements

### *A. Regulatory Flexibility Act*

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6). Only individuals, and not entities, are eligible to file motions to reopen or to reconsider or to seek a stay of removal.

### *B. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *C. Congressional Review Act*

This proposed rule is not a major rule as defined by section 804 of the Congressional Review Act, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

### *D. Executive Order 12866 and Executive Order 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). The Office of Information and Regulatory Affairs of the Office of Management and Budget (''OMB'') has determined that this proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866. It will neither result in an annual effect on the economy greater than $100 million nor adversely affect the economy or sectors of the economy. It does not pertain to entitlements, grants, user fees, or loan programs, nor does it raise novel legal or policy issues. It does not create inconsistencies or interfere with actions taken by other agencies. Accordingly, this rule is not a significant regulatory action subject to review by OMB pursuant to Executive Order 12866.

Executive Order 13563 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 13563.

The proposed rule would help ensure the fairness and integrity of immigration proceedings by setting out requirements for reopening proceedings, allowing for reopening where an individual was genuinely subjected to ineffective assistance of counsel and suffered prejudice as a result. It would also establish requirements for requests for stays of removal. The Department is unaware of any monetary costs on public entities that the rule would impose. Further, the Department does not believe that, broadly speaking, the proposed rule could be said to burden the parties in EOIR proceedings, as the rule simply changes adjudicatory standards used in those proceedings.[22] At most, the Department notes that the proposed rule may result in fewer motions to reopen being granted; however, because motions to reopen are disfavored already as a matter of law, because motions to reopen are inherently fact-specific, because there may be multiple bases for denying a motion to reopen, and because the Department does not track individual bases for denying motions to reopen, it cannot quantify precisely the potential decrease.

*E. Executive Order 13132 (Federalism)*

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

[22] The Department acknowledges that the proposed rule would require two additional statements for motions to reopen for potential fugitive aliens, one additional statement for a motion to reopen filed by an alien subject to a reinstated removal order, and the filing of a complaint with EOIR disciplinary counsel for motions to reopen based on claims of ineffective assistance of counsel. To the extent these additional statements or actions, which largely mirror existing requirements, could be said to constitute burdens on the parties, such ''burdens'' are de minimis. Moreover, they are easily outweighed by the benefits to the Government and the improved functioning of the overall immigration system obtained through better identification of fugitive aliens, better identification of aliens statutorily ineligible to have a motion to reopen granted due to a reinstated removal order, and better identification of attorneys who have engaged in appropriate practices or provided ineffective assistance warranting discipline.

*F. Executive Order 12988 (Civil Justice Reform)*

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*G. Paperwork Reduction Act*

This rule does not propose new or revisions to existing ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

**List of Subjects**

*8 CFR Part 1001*

Administrative practice and procedure, Immigration.

*8 CFR Part 1003*

Administrative practice and procedure, Aliens, Immigration.

Accordingly, for the reasons set forth in the preamble, and by the authority vested in the Director, Executive Office for Immigration Review, by the Attorney General Order Number 4910–2020, the Department proposes to amend 8 CFR parts 1001 and 1003 as follows:

**Title 8 of the Code of Federal Regulations**

## PART 1001—DEFINITIONS

■ 1. The authority citation for part 1001 continues to read as follows:

**Authority:** 5 U.S.C. 301; 8 U.S.C. 1101, 1103; Pub. L. 107–296, 116 Stat. 2135; Title VII of Pub. L. 110–229.

■ 2. Section 1001.1 is amended by adding paragraphs (cc) and (dd) to read as follows:

**§ 1001.1 Definitions.**

* * * * *

(cc) The terms *depart* or *departure,* unless otherwise specified, refer to the physical departure of an alien from the United States to a foreign location. A departure shall not include the physical removal, deportation, or exclusion of an alien from the United States under the auspices or direction of DHS or a return of the alien to a contiguous foreign territory by DHS in accordance with section 235(b)(2)(C) of the Act, but shall include any other departure from the United States, including a departure outside of the direction of DHS by an alien subject to an order of removal, deportation, or exclusion and including a departure following the approval of an application for advance parole.

(dd) Unless otherwise specified, the terms *terminate* and *termination* refer to either termination or dismissal of proceedings under 8 CFR 1239.2(f), or termination or dismissal under any other provision of law.

## PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 3. The authority citation for part 1003 continues to read as follows:

**Authority:** 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 4. Section § 1003.2 is amended by:
■ a. Revising paragraphs (b)(2) and (c)(2);
■ b. Adding paragraph (c)(3)(v); and
■ c. Revising paragraphs (d) and (e).

The additions and revisions read as follows:

**§ 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.**

* * * * *

(b) * * *

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision. 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. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

* * * * *

(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) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the immigration judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) * * *

(v) If the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, 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 could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien may request a stay and, if granted by the Board, the alien shall not be removed pending disposition of the motion by the Board. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(d) *Departure.* Any departure by an alien from the United States while a motion to reopen or motion to reconsider is pending shall constitute a withdrawal of the motion, and the motion shall be denied.

(e) *Judicial proceedings.* Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status.

* * * * *

■ 5. Section § 1003.23 is amended by revising the introductory text of paragraph (b)(1); and paragraph (b)(1)(I) to read as follows

**§ 1003.23 Reopening or reconsideration before the immigration court.**

* * * * *

(b) * * * (1) *In general.* 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. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion. Any departure from the United States while a motion to reopen or reconsider is pending shall constitute a withdrawal of such motion, and the motion shall be denied. The time and numerical limitations set forth in this paragraph do not apply to motions by DHS in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by DHS in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

(i) *Form and contents of the motion.* The motion shall be in writing and signed by the affected party or the attorney or representative of record, if any. The motion and any submission made in conjunction with it must be in English or accompanied by a certified English translation. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status.

* * * * *

## Subpart C—Rules of Procedure

■ 6. Revise the heading of subpart C to read as set forth above:

■ 7. Add § 1003.48 to subpart C to read as follows:

**§ 1003.48 Motions to reopen or reconsider; stays.**

(a) *In general.* The provisions of this section apply to all motions to reopen or reconsider filed with either an immigration court or the Board on or after [the effective date of this section]. The failure of a motion to reopen or reconsider to comply with any provision of this section or any other applicable requirement may result in the denial of that motion.

(b) *Allegations of fact.* (1) Section 1003.1(d)(3)(i) does not apply to the Board's consideration of the factual allegations in any affidavit or written statement offered to support a motion to reopen or reconsider, except to the extent that the facts had previously been determined by an immigration judge.

(i) Allegations of fact contained in a motion to reopen or motion to reconsider are not evidence and shall not be treated as evidence. Allegations of fact contained in a motion to reopen or motion to reconsider that is filed on behalf of the moving party by counsel or an accredited representative shall not be relied on as evidence by either the Board or an immigration judge. Such allegations made by counsel or an accredited representative shall not be accepted as true for purposes of adjudicating the motion.

(ii) Alleged conclusions of law contained in a motion to reopen or motion to reconsider are not evidence and shall not be treated as evidence nor relied on as evidence by either the Board or an immigration judge. Neither the Board nor an immigration judge shall accept alleged conclusions of law contained in a motion to reopen or motion reconsider as true, but shall conduct its own legal analysis in adjudicating the motion.

(iii) There is no presumption that factual allegations offered in support of a motion to reopen or motion to reconsider are true.

(2) Neither the Board nor an immigration judge shall accept factual allegations as true in support of a motion to reopen or motion to reconsider if:

(i) Those allegations are contradicted by other evidence of record;

(ii) Those allegations are contradicted by evidence described in § 1208.12(a);

(iii) Those allegations are conclusory, uncorroborated, or unsupported by other evidence in the record or are otherwise based principally on hearsay;

(iv) Those allegations are made solely by the respondent regarding individuals who are not presently within the United States; or

(v) Those allegations are otherwise inherently unbelievable or unreliable.

(c) *Fugitive aliens.* In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order has been notified to surrender to DHS for exclusion, deportation, or removal and, if so ordered, whether the subject has complied with the notification to surrender. The alien's failure to comply with a notification to surrender may result in the denial of the alien's motion.

(d) *Criminal aliens and aliens subject to a reinstated removal order.* Any motion to reopen or reconsider filed on behalf of an alien who has an exclusion, deportation, or removal order in effect shall include a statement by or on behalf of the alien declaring whether the alien is also the subject of any conviction after the date of the final order or any pending criminal proceeding under the Act, and, if so, the current status of that conviction or proceeding. Any motion to reopen or reconsider filed on behalf of an alien who has an exclusion, deportation, or removal order in effect shall include a statement by or on behalf of the alien declaring whether that removal order has been reinstated pursuant to section 241(a)(5) of the Act.

(e) *Underlying eligibility.* (1) Neither an immigration judge nor the Board

shall grant a motion to reopen or reconsider based on an application for relief from removal over which the immigration judge or Board lacks authority unless that application for relief has been granted by another agency, the granted application provides complete relief from removal, the motion is not otherwise barred by applicable law, and the motion otherwise warrants being granted under applicable law.

(i) For purposes of this paragraph (e)(1), a grant of an application for relief does not include interim relief, *prima facie* determinations, parole, deferred action, bona fide determinations or any similar dispositions short of final approval of the application for relief.

(ii) Nothing in this section shall preclude an alien from applying for an administrative stay of removal from DHS pursuant to 8 CFR 241.6 while an application over which the immigration judge or the Board lacks authority is pending with DHS.

(2) Neither an immigration judge nor the Board shall grant a motion to reopen or reconsider based on an application for relief or protection over which the immigration judge or Board does have authority, but for which the alien has not established *prima facie* eligibility for that relief or protection. For purposes of this section, for an application for relief that requires an immediately-available immigrant visa, an alien must establish, in addition to any other eligibility requirements, (i) that he has an approved, relevant immigrant visa and (ii) that the immigrant visa is in a category not subject to a numerical limitation or has a priority date earlier than the relevant ''Date for Filing Applications'' listed in the U.S. Department of State Visa Bulletin for the month in which the motion is filed.

(3) Except as otherwise provided by statute or regulation, or a binding judicial or administrative precedent, further proceedings in a case that is reopened or reconsidered pursuant to a respondent's motion described in paragraph (e)(1) or (e)(2) of this section shall be limited to the issues upon which reopening or reconsideration was sought and granted, and issues directly related.

(4) Nothing in this paragraph (e) shall preclude an immigration judge or the Board from granting a motion to reopen or reconsider that is jointly filed if the motion otherwise warrants being granted.

(f) *Joint or unopposed motions.* A motion to reopen or reconsider to which a response is not timely filed may be deemed unopposed, provided that neither an unopposed motion nor a joint motion may be automatically granted without any further consideration. An immigration judge or the Board retains discretion to deny a joint motion or an unopposed motion if warranted.

(g) *Termination.* A motion to reopen or reconsider and to terminate proceedings may be granted only if it satisfies the requirements both for reopening or reconsideration and for termination.

(h) *Motions. based on changed country conditions.* When filing a motion to reopen to apply for asylum, withholding of removal under the Act, or protection under the Convention Against Torture, based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, the alien filing the motion does not need to file a copy of his or her record of proceedings or administrative file (A-file) with the motion.

(i) *Ineffective assistance of counsel.*—(1) *Standard for adjudication.* The Board or an immigration judge shall adjudicate a motion to reopen based upon a claim of ineffective assistance of counsel in accordance with applicable law. The alien filing the motion must demonstrate that counsel's conduct was ineffective and prejudiced the individual. Unless otherwise expressly provided in this paragraph, the Board or an immigration judge shall not waive or excuse any requirement for a motion to reopen based upon a claim of ineffective assistance of counsel.

(2) *Counsel.* The term ''counsel,'' as used in this section, only applies to the conduct of:

(i) An attorney or an accredited representative as defined in part 1292; or

(ii) A person whom the individual filing the motion reasonably but erroneously believed to be an attorney or an accredited representative and who was retained with or without remuneration, to represent him or her in the proceedings before the BIA or an immigration judge and who did represent him or her in those proceedings.

(3) *Standard for evaluating counsel's ineffectiveness.* A counsel's conduct constitutes ineffective assistance of counsel if the conduct was objectively unreasonable, based on the facts of the particular case, viewed at the time of the conduct.

(4) *Standard for evaluating prejudice.* In evaluating whether an individual has established that he or she was prejudiced by counsel's conduct, the BIA or the immigration judge shall determine whether there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different. Eligibility for relief or protection occurring after the conclusion of proceedings will ordinarily have no bearing on the determination of whether the individual was prejudiced during the course of proceedings.

(5) *Form, contents, and procedure for filing a motion to reopen based upon a claim of ineffective assistance of counsel.* A motion to reopen based upon a claim of ineffective assistance of counsel shall include the following items to support the claim of ineffective assistance of counsel and that the alien suffered prejudice as a result:

(i) *Affidavit or written statement executed under penalty of perjury.* (A) The alien filing the motion must, in every case, submit an affidavit by the alien or a written statement executed by the alien under the penalty of perjury as provided in 28 U.S.C. 1746, setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken by counsel and what representations counsel did or did not make to the individual in this regard. The affidavit or written statement must also identify who drafted it, if the alien did not, and contain an acknowledgment by the alien that the affidavit or written statement had been read to the alien in a language the alien speaks and understands and that the alien, by signing, affirms that he or she understands and agrees with the language of the affidavit or written statement.

(B) In addition, the individual filing the motion must submit a copy of any applicable representation agreement in support of the affidavit or written statement. If no representation agreement is provided, the individual must explain its absence in the affidavit or written statement and provide any reasonably available evidence on the scope of the agreement and the reason for its absence.

(C) The Board or an immigration judge shall not waive the requirement to submit an affidavit or written statement executed under penalty of perjury under paragraph (i)(5)(i)(A) or the representation agreement or the explanation of the absence of the agreement and evidence of the scope of the agreement under paragraph (i)(5)(i)(B), except, in an exercise of discretion committed solely to the agency, the requirement may be excused in the case of an alien who filed the motion *pro se* and without any assistance from counsel and whose motion is accompanied by other independent evidence indicating the

nature, scope, and alleged deficiency of counsel's representation.

(ii) *Notice to counsel.* The alien filing the motion must provide evidence that he or she informed counsel whose representation is claimed to have been ineffective of the allegations leveled against that counsel and that a motion to reopen alleging ineffective assistance of counsel will be filed on that basis. The individual must provide evidence of the date and manner in which he or she provided notice to prior counsel and include a copy of the correspondence sent to the prior counsel and the response from the prior counsel, if any, or state that no such response was received. The requirement that the individual provide a copy of any response from prior counsel continues until such time as a decision is rendered on the motion to reopen. The Board or an immigration judge may excuse failure to provide the required notice only if the alien establishes that the prior counsel is deceased or that the alien has tried with reasonable diligence to locate the prior counsel but has been unable to do so.

(iii) *Complaint filed with the appropriate disciplinary authorities and with EOIR.* (A) The alien filing the motion must file a complaint with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and provide a copy of that complaint and any correspondence from such authorities. In all cases the alien must also file a complaint with EOIR disciplinary counsel in accordance with § 1003.104. The fact that counsel has already been disciplined, suspended from the practice of law, or disbarred does not, on its own, excuse the individual from filing the required disciplinary complaint with the appropriate disciplinary authorities and with EOIR. The appropriate disciplinary authorities are as follows:

(*1*) With respect to attorneys in the United States: The disciplinary authority of a State, possession, territory, or Commonwealth of the United States, or of the District of Columbia that has licensed the attorney to practice law. If an attorney is licensed in more than one jurisdiction, a complaint need only be filed with one jurisdiction.

(*2*) With respect to accredited representatives: The EOIR disciplinary counsel pursuant to § 1003.104(a).

(*3*) With respect to a person described in 8 CFR 1003.48(i)(2)(ii): The appropriate federal, State, or local law enforcement agency with authority over matters relating to the unauthorized practice of law or immigration-related fraud.

(B) The Board or an immigration judge shall not waive the requirement to file a complaint with the appropriate disciplinary authorities and with EOIR unless the counsel is deceased.

(6) *Prejudice.* The alien filing the motion shall establish that he or she was prejudiced by counsel's conduct. The standard for prejudice is set forth in paragraph (i)(4) of this section. The Board or an immigration judge shall not waive the requirement to establish prejudice. Allegations of fact establishing the background and nature of prejudice by counsel's conduct shall be contained in the affidavit or written statement submitted under penalty of perjury.

(j) *Address.* Neither an immigration judge nor the Board shall grant a motion to reopen or reconsider filed by an alien unless the alien has provided the information in § 1003.20(c) where the alien may be reached for further notification or hearing.

(k) *Discretionary stay of removal.* (1) A discretionary stay of removal is an extraordinary remedy and is not a matter of right. Neither the Board nor an immigration judge shall grant a discretionary stay of removal except as provided in this section.

(i) An alien may submit a motion for a discretionary stay of removal at any time after an alien becomes subject to a final order of removal, provided that such a motion may be filed only while a motion to reopen or reconsider is pending before an immigration judge or the Board or in conjunction with the filing of a motion to reopen or reconsider before an immigration judge or the Board.

(ii) Neither the Board nor an immigration judge shall grant a motion for a discretionary stay of removal without the filing of an underlying motion to reopen or reconsider.

(iii) Neither the Board nor an immigration judge shall grant a motion for a discretionary stay of removal unless the underlying motion to reopen or reconsider is *prima facie* grantable.

(iv) Neither the Board nor an immigration judge shall grant a motion for a discretionary stay of removal unless the alien exercised reasonable diligence in seeking a stay and filing a motion to reopen or reconsider after the circumstances underlying the motion arose

(v) Neither the Board nor an immigration judge shall grant a motion for a discretionary stay of removal unless the alien has first applied for a stay of removal with DHS under 8 CFR 241.6 and either (A) that application has been denied or (B) the alien has not received a decision on the application within five business days after it was filed.

(vi)(A) Neither the Board nor an immigration judge shall grant a motion for a discretionary stay of removal unless the opposing party:

(*1*) Has been notified and joins or affirmatively consents to the motion or

(*2*) Has been given three business days from the date of filing to respond to the motion.

(B) Notwithstanding the provisions of § 1003.32, service of a motion for a discretionary stay of removal on an opposing party shall be simultaneous to the filing of the motion and shall be accomplished by the same method by which the motion is filed with an immigration court or the Board. A certificate of service shall accompany the filing of the motion certifying that service was effectuated on the opposing party in an identical manner to the filing of the motion. Neither the Board nor an immigration judge shall excuse this service requirement, and any motion for a discretionary stay of removal failing to conform to this service requirement shall be summarily denied.

(2) An alien requesting a discretionary stay of removal before the immigration court or the Board must submit a motion in writing stating the complete case history and all relevant facts. The motion must include a copy of the stay application filed with DHS under 8 CFR 241.6 and the decision on that application, if any. The motion must also include a copy of the order of removal that the alien seeks to have stayed, if available, or a description of the ruling and reasoning, as articulated by the immigration judge or the BIA. If facts are in dispute, the alien must provide appropriate evidence.

(3)(i) Subject to the other provisions of this section, the Board or an immigration judge, in the exercise of discretion, may grant a stay of removal if consideration of all of the following factors supports granting the stay:

(A) Whether the alien stay applicant has made a strong showing that he or she is likely to succeed on the merits of the underlying motion to reopen or reconsiderincluding the applicability of any time or numbers bars;

(B) Whether the alien stay applicant will be irreparably injured absent a stay;

(C) Whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(D) Where the public interest lies.

(ii) For purposes of paragraph (k)(3)(i) of this section, neither an immigration judge nor the Board shall presume that

the balance of factors weighs in favor of granting a discretionary stay.

**James R. McHenry III,**

*Director, Executive Office for Immigration Review, Department of Justice.*

[FR Doc. 2020–25912 Filed 11–25–20; 8:45 am]

**BILLING CODE 4410–30–P**

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 30

**[Docket No. PRM–30–66; NRC–2017–0159; NRC–2017–0031]**

### Naturally-Occurring and Accelerator-Produced Radioactive Materials

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) will consider in its rulemaking process issues raised in a petition for rulemaking submitted by Matthew McKinley on behalf of the Organization of Agreement States (OAS, the petitioner. The petitioner requests that the NRC amend its decommissioning financial assurance regulations for sealed and unsealed byproduct material not listed in a table that sets out radionuclide possession values for calculating these financial assurance requirements. The NRC will also examine ways to make the table's values and other NRC decommissioning funding requirements more risk-informed.

**DATES:** The docket for the petition for rulemaking, PRM–30–66, is closed on November 27, 2020.

**ADDRESSES:** Please refer to Docket ID NRC–2017–0031 when contacting the NRC about the availability of information related to the future rulemaking. Please refer to Docket ID NRC–2017–0159 when contacting the NRC about the availability of information for this petition closure. You may obtain publicly-available information related to this action by any of the following methods:

• *Federal Rulemaking Website:* Public comments and supporting materials related to this petition can be found at *https://www.regulations.gov* by searching on the petition Docket ID NRC–2017–0159. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the reader's convenience, instructions about obtaining materials referenced in this document are provided in Section VI, ''Availability of Documents.''

• *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Torre Taylor, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7900, email: *Torre.Taylor@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**



## I. Summary of the Petition

The NRC received a petition for rulemaking dated April 14, 2017, filed by Matthew McKinley on behalf of the Organization of Agreement States. On August 23, 2017, the NRC published a notification of docketing and request for comment on the petition (82 FR 39971).

The petitioner requests that the NRC amend its existing regulations in appendix B, ''Quantities of Licensed Material Requiring Labeling,'' in part 30 of title 10 of the *Code of Federal Regulations,* ''Rules of General Applicability to Domestic Licensing of Byproduct Material,'' to add appropriate unlisted radionuclides and their corresponding values. Section 30.35, ''Financial Assurance and Recordkeeping for Decommissioning,'' uses multiples of the applicable quantities of material listed in appendix B to determine the need for decommissioning financial assurance for sealed and unsealed radioactive materials. Licensees using radionuclides not specifically listed in this appendix must use generic default values that the petitioner believes result in overly burdensome requirements.

Without this rulemaking, the petitioner asserts, ''regulators are forced to evaluate new products against these [default appendix B] criteria and apply overly burdensome financial assurance obligations or to evaluate case-by-case special exemptions . . . . Rather than issuing exemptions on a case by case basis, the more appropriate way to address the inconsistency in Appendix B['s treatment of listed and unlisted radionuclides] is to amend it to add appropriate nuclides and their corresponding activities, as determined by a rulemaking working group.''

The petitioner also notes that the NRC did not update appendix B when the Energy Policy Act of 2005 amended the Atomic Energy Act of 1954 to give the NRC regulatory authority over discrete sources of naturally-occurring and accelerator-produced radioactive material (NARM). A significant number of medical radionuclides are accelerator-produced. Although the NRC did update schedule B of part 30, which lists possession values of byproduct material exempt from the requirements for a license, to add some NARM, it did not do the same for appendix B, the petitioner points out, even though appendix B is ''the driver'' for decommissioning financial assurance.

The petition is available in ADAMS under Accession No. ML17173A063.

## II. Background

To determine the amount of decommissioning financial assurance required to possess a given radionuclide with a half-life greater than 120 days, a licensee must multiply the appendix B value for that radionuclide by the applicable number in §§ 30.35 or 70.25. Sections 30.35(a) and 70.25(a) require a license-specific decommissioning funding plan (DFP) to possess a quantity of radionuclides greater than provided in the corresponding tables set forth in §§ 30.35(d) and 70.25(d). These tables require specific amounts of funding for specified ranges in the quantity of the radionuclide possessed. Both tables' funding amounts and quantity ranges are identical, but § 30.35 applies to byproduct material and § 70.25 applies to special nuclear material. Although the petition addressed only byproduct material licensed under part 30, appendix B has an identical use for special nuclear material licensed under part 70.

Section 30.35 sets a series of thresholds for decommissioning funding for possession and use of byproduct material. If the license authorizes