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MOTIONS

I. MOTIONS BEFORE ENTRY OF A DECISION

An Immigration Judge may be required to resolve a number of legal issues by motion either before, during, or after the proceedings.

Unless otherwise permitted by the Immigration Judge, motions submitted prior to the final order of an Immigration Judge shall be in writing and shall state with particularity the grounds, the relief sought, and the jurisdiction. 8 C.F.R. § 1003.23(a).

The Immigration Judge may set and extend time limits for the making of motions and replies thereto. Id.

A motion shall be deemed unopposed unless timely response is made. Id.

An Immigration Judge must state the reasons for ruling on a motion irrespective of whether the ruling is oral or in writing; otherwise parties are deprived of a fair opportunity to contest the Immigration Judge's determination, and on appeal the BIA is unable to meaningfully exercise its responsibility of reviewing a decision in light of the arguments on appeal. Matter of M-P-, 20 I&N Dec. 786 (BIA 1994).

A. MOTION TO TERMINATE

1. Prior to the commencement of proceedings, DHS may cancel an Order To Show Cause (OSC), a Notice to Appear (NTA), or terminate proceedings for the reasons set forth in 8 C.F.R. § 242.7 (1997) [OSC] or in 8 C.F.R. § 239.2(a) and (b)(1997) . Proceedings are commenced when the charging document is filed with the Immigration Court.

2. After the commencement of the hearing, only an Immigration Judge may terminate proceedings upon the request or motion of either party. Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998); see also 8 C.F.R. § 1239.2(c).

3. The alien may request termination on grounds such as: the charging document is defective, e.g., not signed; incongruity between charge and allegations; the DHS has not met its burden of proof; or so that the alien can pursue an application for naturalization. This defense is available where the alien “has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors.” See 8 C.F.R. § 1239.2(f); Matter of Acosta-Hidalgo, 24 I&N. Dec. 103 (BIA 2007). This defense can also be raised by members of the Armed Forces of the United States. See INA §§ 318, and 328-329. In many cases, DHS will ask that proceedings be terminated because it has issued two charging documents with different alien numbers.

4. A termination order is without prejudice to the DHS to file the same charge or a new charge at a later time. 8 C.F.R. § 242.7(b) (1997) (Orders to Show Cause); 8 C.F.R. § 1239.2(c), unless res judicata applies. See Ramon-Sepulveda v. INS, 743 F.2d 1307 (9th Cir. 1984).

5. An immigration judge does not err in terminating a removal case as improvidently begun where the respondent was subject to reinstatement of his prior order of deportation. Matter of W-C-B-, 24 I&N Dec. 118 (BIA 2007).

B. MOTION TO SUPPRESS

1. Motions to suppress are available only in a limited context.

2. Statements in a motion to suppress must be specific and detailed and based on personal knowledge. Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980).

3. An alien who questions the legality of evidence presented against him or her must come forward with proof establishing a prima facie case before the DHS will be called upon to assume the burden of justifying the manner in which it obtained the evidence. Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988).

4. Even if an arrest or interrogation is unlawful, it may have no bearing on resulting immigration proceedings because the Fourth Amendment exclusionary rule is not applicable to the civil proceeding. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979). However, where there are egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the value of the evidence obtained, DHS will be precluded from using such evidence. INS v. Lopez-Mendoza, supra; Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

5. Compliance with regulatory requirements is relevant in assessing the voluntariness of statements and thus their admissibility into evidence. See 8 C.F.R. §§ 1287.1, 1287.3, and 1287.5. In order to exclude evidence based upon the noncompliance with DHS regulations, the alien must meet a heavy burden of proving: (1) that the regulation was not adhered to; (2) that the regulation was intended to serve a purpose of benefit to the alien; and (3) that the violation prejudiced the alien's interest in that it affected the outcome of the proceedings. Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980); see also Martinez-Camargo v. INS, 282 F.3d 487 (7th Cir. 2002).

6. The exclusionary rule is not applicable, but evidence is nevertheless inadmissible, if it was obtained in violation of the alien's privilege against self-incrimination, or if the statement was involuntary or coerced. Matter of Garcia, 17 I&N Dec. 319 (BIA 1980).

7. The alien bears the burden of proving that DHS's evidence was unlawfully obtained. Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980).

8. The amendments to the Act enhanced the enforcement authority of the DHS officers by allowing them to make arrests, without warrants, for any federal offense committed in their presence, or for any federal felony, if there are grounds to believe that the person in question has committed, or is committing, a felony. INA § 287(a)(4)-(5); 8 C.F.R. § 1287.5(c). The DHS officer must be performing enforcement duties at the time of the arrest, and it must be likely that the arrested person could escape before an arrest warrant could be obtained. See INA § 287(a)(2), 8 C.F.R. § 1287.5.

9. Section 287(c) of the Act empowers immigration officers to search, without warrant, the person and personal effects of any person seeking admission to the United States, if they have reasonable cause for suspecting that such a search would disclose grounds for denial of admission from the United States.

a. Any immigration officer has the power, without warrant, to interrogate any alien or person believed to be an alien as to his or her right to be or remain in the United States. INA § 287(a)(1); 8 C.F.R. § 1287.5; Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959); Matter of Pang, 11 I&N Dec. 213 (BIA 1965).

b. There is no requirement that the officer must have probable cause for such an inquiry. Matter of Perez-Lopez, 14 I&N Dec. 79 (BIA 1972).

10. The Miranda requirements are not controlling in deportation or removal proceedings, as they are civil, not criminal, in nature. Matter of Pang, 11 I&N Dec. 213 (BIA 1965); Matter of Argyros, 11 I&N Dec. 585 (BIA 1966); see also Matter of Lavoie, 12 I&N Dec. 821 (BIA 1968) (no requirement that alien be advised of right to counsel when taking preliminary statement); Matter of Baltazar, 16 I&N Dec. 108 (BIA 1977). After the examining officer has determined that formal proceedings will be instituted, an alien arrested without warrant of arrest shall be

advised of the reason for his or her arrest and shall also be advised that any statement made may be used against him or her in a subsequent proceeding. 8 C.F.R. § 1287.3(c).

11. The regulations at 8 C.F.R. § 1287.3 provide that an alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer, with limited exceptions.

12. Except at the border or its functional equivalents, officers on roving patrol may stop vehicles to question the occupants about their citizenship and immigration status only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

The Supreme Court has distinguished United States v. Brignoni-Ponce, 422 U.S. 873 (1975), as it relates to stopping of vehicles, from stopping and questioning of persons. INS v. Delgado, 466 U.S. 210 (1984). The Supreme Court ruled that detaining a person for questioning on a suspicion of alienage alone would diminish the privacy and security interests of both citizens and aliens legally in this country and would grant the INS impermissible discretion to detain and question an individual at whim. The Supreme Court ruled that there was no need for individualized suspicion to support the questioning by immigration officers of all workers in a factory entered by the officers on a warrant of consent, unless the questioned person had a reasonable basis for believing that he or she was not free to leave.

13. An immigration officer may ask questions to which a person responds voluntarily, provided there is no use of force, display of a weapon, the threatening presence of several officers, or other circumstances leading the questioned person reasonably to believe that he or she is not free to leave. Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. 1983), rehr'g granted and opinion modified, 752 F.2d 1309 (9th Cir. 1984) (concluding that the seizure of the alien violated the Fourth Amendment but statements obtained from the alien as a result of the illegal arrest were admissible at the deportation hearing).

14. Trained and experienced immigration officers may draw inferences and make deductions based on an assessment of the whole picture, which can supply a basis for a valid investigatory stop predicated on a reasonable suspicion of illegal activity. United States v. Cortez, 449 U.S. 411 (1981).

a. An investigatory stop cannot support prolonged interrogation without probable cause to believe that a violation has occurred, particularly if the detained person is required to accompany the officers to their office. Dunaway v. New York, 442 U.S. 200 (1979).

b. The Court in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), upheld the power of immigration officers to stop automobiles and question their occupants concerning their immigration status at reasonably located traffic checkpoints even in the absence of individualized suspicion of any impropriety. It is also constitutional to refer motorists selectively to a secondary inspection area for further inquiry on the basis of criteria that would not sustain a roving-patrol stop even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry. Factors that may be taken into account in determining whether stopping a vehicle in a border area is justified: characteristics of the area; proximity to the border; patterns of traffic on the particular road; previous illegal traffic; information about recent illegal border crossings in the area; behavior of the driver (such as erratic driving or obvious attempts to evade officers); appearance of the vehicle (load, compartments, large number of passengers); occupants trying to hide. The government argued that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. The Court however found that Mexican ancestry would not in itself support a reasonable suspicion that the occupants in the vehicle were aliens, but that it could be taken into account as a relevant factor. In all situations the officer is entitled to assess the facts in light of his or her experience detecting illegal entry and smuggling.

c. A brief "investigatory stop" of a suspicious individual in order to determine his or her identity or to maintain the status quo momentarily while obtaining more information may be reasonable. Adams v. Williams, 407 U.S. 143 (1972).

15. Under appropriate circumstances, a proper interrogation may involve some measure of restraint, short of arrest, to complete the interrogation. Matter of Yau, 14 I&N Dec. 630 (BIA 1974); Matter of Wong and Chan, 13 I&N Dec. 141 (BIA 1969).

Forcible temporary restraint incidental to interrogation is valid, and any resulting evidence is admissible, if the officer acted reasonably, in the light of the surrounding circumstances. Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971).

16. A search conducted with the consent of a person who is not in custody is valid if the consent is voluntarily given, without any duress or coercion, express or implied. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The government has the burden of showing that such consent was voluntary, based on the totality of all the surrounding circumstances.

C. MOTION TO REDETERMINE BOND OR CUSTODY

DETERMINATION

Pursuant to 8 C.F.R. § 1003.19(e), after an initial bond redetermination, a request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination. See Bond/Custody for more information.

Also, for procedures in automatic stay cases where DHS intends to invoke an automatic stay of an IJ’s decision ordering an alien’s release in any case in which a DHS official has ordered that the alien be held without bond or has set a bond of $10,000 or more, see Interim Operating Policies and Procedures Memorandum 06-03, Procedures for Automatic Stay Cases, dated October 31, 2006.

D. MOTION TO WITHDRAW AS COUNSEL OF RECORD

1. Once a notice of appearance has been filed with the Immigration Court, a withdrawal or substitution of counsel may only be permitted by an Immigration Judge only upon an oral or written motion without a fee. 8 C.F.R. § 1003.17(b).

2. Whether to grant a motion to withdraw as counsel is a matter left to the discretion of the Immigration Judge. It is suggested that the Immigration Judge use the common sense test to determine whether or not to grant a motion to withdraw.

a. The Immigration Judge should expect counsel to explain the reasons for the withdrawal, if the reasons in the motion are vague, in order to protect the rights of the alien. The Immigration Judge must develop a complete record.

b. A difference of opinion over direction of the case between

counsel and the alien may be a valid reason to grant a motion for a withdrawal.

c. An alien failing to cooperate with an attorney in preparing his

or her case may be a sufficient ground to grant a withdrawal.

3. An alien failing to keep his or her attorney apprized of his or her whereabouts and failing to appear for a hearing is probably also a valid reason to grant a withdrawal on a conditional basis. See Matter of Rosales, 19 I&N Dec. 655 (BIA 1988). Under these circumstances, a grant of withdrawal can be either conditional or unconditional. Id. (alien failed to keep the INS or his attorney apprized of his whereabouts). The Board in Rosales stated that where an attorney asks to withdraw, his request should include evidence that he attempted to advise the respondent, at his last known address, of the date, time, and place of the scheduled hearing. Counsel should also provide the Immigration Judge with the respondent's last known address, assuming it is more current than any address previously provided to the Immigration Judge. Unless these requirements have been met, a request to withdraw from representation should not be unconditionally granted since counsel is responsible for acceptance of service of documents pursuant to 8 C.F.R. § 1292.5(a). Such precautions help insure that proper notice of a hearing is given and increase the likelihood that a respondent receives notice and appears for a scheduled hearing. If these steps have not been taken, counsel's withdrawal should only be conditionally granted; i.e., granted for all purposes except for the receipt of an in absentia order.

4. If the Immigration Judge is convinced that the attorney has done all he or she can to contact his client and advise him or her of the hearing date and the consequences of failing to appear, then he or she can grant an unconditional withdrawal. However, if the Immigration Judge believes that the attorney could have done more to contact the alien, then he or she should grant a conditional withdrawal, requiring that the attorney accept service of documents, and perhaps be able to contact the alien.

5. If the withdrawal is granted, the Immigration Judge must again be aware of the need to protect the alien's rights. The Immigration Judge should again advise the alien of the right to obtain counsel and that in fact it might be in their best interest to obtain counsel. [When a withdrawal of counsel is granted, the name of prior counsel must be deleted immediately from the CASE system.]

E. MOTIONS TO RECUSE

1. There are certain circumstances where recusal is warranted. The test is an objective one, such that an Immigration Judge should recuse him or herself "when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned." Operating Polices and Procedures Memorandum 05-02, Procedures For Issuing Recusal Orders In Immigration Proceedings, March 21, 2005. See also Liteky v. U.S., 510 U.S. 540 (1994); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988); U.S. v. Winston, 613 F.2d 221 (9th Cir. 1980); Davis v. Board of Sch. Comm'rs of Mobile County, 517 F.2d 1044, 1052 (5th Cir. 1975).

2. The BIA has noted three instances that warrant recusal: (1) when the alien demonstrates that he was denied a constitutionally fair proceeding; (2) when the Immigration Judge has a personal bias stemming from an "extrajudicial" source; and (3) when the Immigration Judge's judicial conduct demonstrates "such pervasive bias and prejudice." Matter of Exame, 18 I&N Dec. 303, 305 (BIA 1982) (quoting Davis v. Board of Sch. Comm'rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975); see also Matter of R-S-H, 23 I&N Dec. 629, 638 (BIA 2003) (finding no indication in the record that the IJ had "prejudged the case or that his decision was motivated by issues outside the evidence of record").

3. An Immigration Judge has an obligation not to recuse himself or herself based upon mere allegations or threats. Therefore, all requests for recusal shall be made on the record, or filed in writing, and supported by specific reasons why recusal is warranted, or alternatively, why the Immigration Judge is objective and not biased and therefore should go forward with the case. See Operating Polices and Procedures Memorandum 05-02, Procedures For Issuing Recusal Orders In Immigration Proceedings, March 21, 2005.

a. If, at any time prior to the hearing, an Immigration Judge issues a decision on a recusal matter, he or she must render it in writing and serve it upon the parties to ensure that the parties have sufficient notice that their hearing will be rescheduled with another IJ. The written decision must

contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal. Moreover, the judge must issue a written decision in every case, regardless if the recusal was sua sponte or predicated upon a motion by one of the parties. Simple form or blanket orders will not suffice unless the immigration judge had a role in the case as a DHS attorney or private attorney. In that case, the order shall simply state that the IJ had a role in the case as a DHS attorney or private attorney. Operating Polices and Procedures Memorandum 05-02, Procedures For Issuing Recusal Orders In Immigration Proceedings, dated March 21, 2005.

b. There may be circumstances where the grounds for a recusal may not become apparent until the actual hearing. In these situations, the judge must go on record and issue an oral decision describing the reasons behind the grant or denial of the recusal motion. The decision must contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal. Operating Polices and Procedures Memorandum 05-02, Procedures For Issuing Recusal Orders In Immigration Proceedings, March 21, 2005.

F. MOTIONS TO CHANGE VENUE

1. Venue lies at the Immigration Court where the charging document is filed by the Service. 8 C.F.R. §§ 1003.14(a), and 1003.20(a).

2. The Immigration Judge, for good cause shown, may upon his or her discretion, change venue only upon motion by one of the parties. 8 C.F.R. § 1003.20(b); Matter of Dobere, 20 I&N Dec. 188 (BIA 1990) (regulations authorize Immigration Judge to direct change of venue in exclusion, deportation, and removal cases).

3. Good cause for change of venue is determined by balancing the relevant factors affecting fundamental fairness, including administrative convenience, expeditious treatment of the case, location of witnesses, and cost of transporting witnesses to new location. Matter of Rahman, 20 I&N Dec. 480 (BIA 1992); Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986).

4. In exclusion cases, the place of interrupted entry into the United States may have little relevance to the venue of the hearing. Matter of Rahman, 20 I&N Dec. 480 (BIA 1992). An Immigration Judge may not change venue without giving the Service an opportunity to respond.

5. While the applicant's place of residence may be relevant, it may be outweighed by demonstration that the DHS would be prejudiced by such a change of venue. Matter of Rahman, 20 I&N Dec. 480 (BIA 1992).

6. The convenience of counsel may also be relevant, but this factor may be outweighed by the availability of experienced counsel in the area of detention and by prejudice to the DHS. Matter of Rahman, 20 I&N Dec. 480 (1992).

7. The Immigration Judge may grant a change of venue only after the other party has been given notice and an opportunity to respond to the motion to change venue. 8 C.F.R. § 1003.20(b); Matter of Rahman, 20 I&N Dec. (BIA 1992).

8. No change of venue shall be granted without identification of a fixed street address, including city, state and ZIP code, where the respondent/applicant may be reached for further hearing notification. 8 C.F.R. § 1003.20(c).

9. Before a change of venue is granted, the alien should plead to the charging document. See Matter of Rivera, 19 I&N Dec. 688 (BIA 1988). In addition, the Immigration Judge should attempt to resolve the issue of deportability or inadmissibility, and determine what forms of relief will be sought. The Immigration Judge may set a date certain by which the relief applications, if any, must be filed with the sending court, and state on the record that failure to comply with the filing deadline will constitute abandonment of the relief applications and may result in the Immigration Judge rendering a decision on the record as constituted. A copy of the asylum application submitted to support a motion for change of venue is not a definitive filing. The actual filing must occur in open court, at the court to which the case is transferred. The warnings for filing frivolous applications for asylum must be given orally and in writing to the alien at the time of filing in front of you. (FORM U-9).

10. The mere submission of a motion for a change of venue does not relieve an alien or his or her attorney from the responsibility to attend a hearing of which they have been given notice. It may not be assumed that the motion will be granted. Matter of Patel, 19 I&N Dec. 260 (BIA 1985).

11. Other factors to be considered in determining a change of venue include: (1) nature of evidence and its importance to the alien's claim; (2) whether the request is due to unreasonable conduct on the alien's part; and (3) the number of prior continuances granted. Matter of Seren, 15 I&N Dec. 590 (1976).

12. The respondent's request for change of venue to present expert witness testimony was properly denied where the respondent made no attempt to submit an offer of proof related to the witness, identity, qualifications, and testimony, or to state his opinion by way of an affidavit to the Immigration Judge. Matter of Bader, 17 I&N Dec. 525 (BIA 1980).

13. For additional guidance, see Operating Policy and Procedure Memorandum 01-02, Changes of Venue, October 9, 2001.

G. MOTION FOR CONTINUANCE

1. The Immigration Judge may grant a motion for a reasonable continuance, either at his or her own instance or for good cause shown, upon application by the alien or the Service. 8 C.F.R. §§ 1003.29.

2. A continuance may be requested at a master calendar hearing, individual calendar hearing or at any time during the pendency of the proceedings.

3. Local operating procedures may include a requirement for the submission of applications for continuances of a scheduled hearing. Sometimes they will require the submission of a written motion, when time permits. A sudden medical or other emergency, or unusual circumstance may justify a telephone request to the Immigration Court for such a continuance to be made, but that may also depend on the existence of Local Operating Procedures.

4. The sound discretion of the Immigration Judge to grant or deny requests for continuances is very broad. An Immigration Judge may grant a continuance only for "good cause" shown.

5. The issue for the Immigration Judge is whether the alien would be prejudiced by the denial of a continuance. The courts are divided on how liberally an Immigration Judge should exercise discretion in granting a continuance. Baires v. INS, 856 F.2d 89 (9th Cir. 1988) (holding that the insistence upon expeditiousness in the face of a justifiable request for delay can render the alien's statutory rights merely an empty formality); Molina v. INS, 981 F.2d 14 (lst Cir. 1992) (Immigration Judge has broad legal power to decide whether to grant or deny a continuance); Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983) (alien must establish by full and specific articulation of the facts involved or evidence which he or she would have presented, that the denial caused actual prejudice and harm and materially affected the outcome of the case).

6. Situations under a which a continuance may be warranted:

a. Attorney recently retained and not familiar with the case.

b. To obtain witnesses or documents crucial to the case.

c. Visa petition pending, which if approved will dispose of the case.

d. Pending FOIA request (but remember, no right of

discovery).

e. DHS does not have "A" file.

f. Serious illness or death of alien or attorney.

7. A motion for continuance based upon an asserted lack of preparation and request for additional time must be supported, at a minimum, by a reasonable showing that the lack of preparation occurred despite a diligent effort to be ready to proceed. Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983).

8. Parties must appear unless the motion has been granted. Matter of Rivera, 19 I&N Dec. 688, 690 (BIA 1988); Matter of Patel, 19 I&N Dec. 260 (BIA 1985).

H. MOTION TO WAIVE THE PRESENCE OF THE PARTIES

The Immigration Judge may for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian or friend. 8 C.F.R. § 1003.25(a).

II. MOTIONS AFTER ENTRY OF A DECISION

A. MOTIONS TO RECONSIDER

1. Motions to reconsider and motions to reopen are separate and distinct motions with different requirements. 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. Matter of Ramos, 23 I&N Dec. 336, 338 (BIA 2002); Matter of Cerna, 20 I&N Dec. 399 (BIA 1991).

2. The Immigration Judge may reconsider the grant of any discretionary relief before it becomes final. Matter of Vanisi, 12 I&N Dec. 616 (BIA 1968).

3. A motion to reconsider must specify the errors of law or fact in the previous order and must be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. §§ 1003.23(b)(2); Matter of O-S-G-, 24 I&N Dec. 56 (BIA 2006).

4. Evidence submitted in support of a motion to reconsider must establish a prima facie case that the respondent is eligible for the relief sought. Matter of Heidari, 16 I&N Dec. 203 (BIA 1977).

5. A motion to reconsider a decision rendered by an Immigration Judge that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed by the Board to be a motion to

remand the decision for further proceedings before the Immigration Judge from whose decision the appeal was taken. 8 C.F.R. § 1003.2.

6. An alien may file one motion to reconsider a decision that he is removable from the United States. INA § 240(c)(6)(A); 8 C.F.R. § 1003.23(b); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

a. An alien may not seek reconsideration of a decision denying a previous motion to reconsider. 8 C.F.R. 1003.23(b)(2).

b. The motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation or exclusion. INA § 240(c)(6)(B); 8 C.F.R. §§ 1003.23(b)(1); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

c. A motion to reconsider a decision of the Board must be filed not later than 30 days after the mailing of the decision. 8 C.F.R. 1003.2(b)(2); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

7. A motion to reconsider a decision of the BIA must include the following: (1) an allegation of material or factual legal errors in the prior decision that is supported by pertinent authority; (2) in the case of an affirmance without opinion (AWO), a showing that the alleged errors and legal arguments were previously raised on appeal and a statement explaining how the Board erred in affirming the IJ's decision under the AWO regulations; and (3) if there has been a change in law, a reference to the relevant statute, regulation, or precedent and an explanation of how the outcome of the Board's decision is materially affected by the change; Matter of O-S-G-, 24 I&N Dec. 56 (BIA 2006).

B. MOTIONS TO REOPEN

1. Motions to reconsider and motions to reopen are separate and distinct motions with different requirements. A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. Matter of Cerna, 20 I&N Dec. 399 (BIA 1991).

2. A party seeking reopening bears a heavy burden because motions for reopening are disfavored. Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

3. There is a need for strict compliance with the regulations. INS v. Jong Ha Wang, 450 U.S. 139 (1981) (motion to reopen to apply for suspension of deportation denied where the allegations of hardship were conclusory and unsupported by affidavit).

4. In general, a motion to reopen shall state new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material. INA § 240(c)(7)(B); 8 C.F.R. § 1003.2(c)(1); INS v. Wang, 450 U.S. 139 (1981) (unsupported statements by counsel or the alien in the motion itself have no evidentiary value); Matter of Barrera, 19 I&N Dec. 837 (BIA 1989); Wolf v. Boyd, 238 F.2d 249 (9th Cir. 1957), cert. denied, 353 U.S. 936 (1957); Matter of Escalante, 13 I&N Dec. 223 (BIA 1969) (denied for lack of supporting evidence showing eligibility for any relief).

5. A motion to reopen can also be filed if there is new law or intervening circumstances that might change the result in the case. INS v. Rios-Pineda, 471 U.S. 444 (1985); Matter of S-Y-G-, 24 I&N Dec. 247 (BIA 2007); Matter of X-GW-, 22 I&N Dec. 71 (BIA 1998), superceded in Matter of G-C-L-, 23 I&N Dec. 359 (BIA 2002) (withdrawing policy of granting untimely motions to reopen by applicants claiming eligibility for asylum based solely on coercive population control policies).

6. A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. §§ 1003.23(b)(3); INS v. Wang, 450 U.S. 139 (1981); Matter of Coehlo, 20 I&N Dec. 464 (BIA 1992); Matter of Barrera, 19 I&N Dec. 837 (BIA 1989); Matter of Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972); Matter of Lam, 14 I&N Dec. 98 (BIA 1972).

7. A motion to reopen will not be granted for the purpose of providing the alien an opportunity to apply for any form of discretionary relief if the alien's rights to make such application were fully explained to him or her by the Immigration Judge and he or she was afforded an opportunity to apply at the hearing, unless the relief is sought on the basis of circumstances that have arisen

subsequent to the hearing. 8 C.F.R. §§ 1003.23(b)(3); Matter of Barrera, 19 I&N Dec. 837 (1989).

8. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. 8 C.F.R. §§ 1003.23(b)(3), 1208.4(b)(3)-(4). But see Matter of Yewondwosen, 21 I&N Dec. 1025 (BIA 1997) (holding that where an alien has not strictly complied with 8 C.F.R. § 3.2(c)(1) (1997) by having failed to submit an application for relief in support of a motion to reopen or remand, and the INS affirmatively joins the motion, the BIA or an Immigration Judge may still grant the motion in the interests of fairness and administrative economy). Further, an alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. Matter of Chavez-Martinez, 24 I&N Dec. 272 (BIA 2007).

9. An alien must show prima facie eligibility for the requested relief and that relief is warranted in the exercise of discretion. INS v Abudu, 485 U.S. 94 (1988); INS v. Wang, 450 U.S. 139 (1981); Matter of C-C-, 23 I&N Dec. 899 (BIA 2006) (finding no prima facie showing of relief in alien's motion to reopen based on forced sterilization practices in China where evidence and country information do not establish forced sterilization of other Chinese nationals with foreign-born children returning to the alien's home province); Matter of Coelho, 20 I&N Dec. 464 (BIA 1992); Matter of Barrera, 19 I&N Dec. 837 (1989); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) (could properly deny motion to reopen if it did not present prima facie case); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir.1985) (reopening to apply for asylum improperly denied since there was an adequate prima facie showing which required a hearing); Marquez-Medina v. INS, 765 F.2d 673 (7th Cir. 1985) (same; suspension of deportation); Samini v. INS, 714 F.2d 992 (9th Cir. 1983) (prima facie showing of eligibility based on totality of circumstances warranting hearing); Matter of Escobar, 18 I&N Dec. 412 (BIA 1983) (no prima facie showing of eligibility for suspension of deportation or asylum); Matter of Patel, 16 I&N Dec. 600 (BIA 1978) (no prima facie showing of hardship where conclusory assertions of hardship insufficient). A prima facie showing has been described as proof sufficiently strong to suffice on its own until it is contradicted or overruled by other evidence. Conclusory and conjectural allegations are insufficient to establish eligibility for reopening. Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981), aff'd, 692 F.2d 595 (9th Cir. 1982); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972).

10. A prima facie showing of apparent eligibility entails statutory eligibility and that the relief may be warranted as a matter of discretion. INS v. Wang, 450 U.S. 139 (1981); INS v. Bagamasbad, 429 U.S. 24 (1976); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982); Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981), aff'd, 692 F.2d 595 (9th Cir. 1982); Matter of Lett, 17 I&N Dec. 312 (BIA 1980); Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980); Matter of

Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979) (discretion clearly unwarranted since applicant was serving sentence for recent murder of wife); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972); Matter of Lam, 14 I&N Dec. 98 (BIA 1972).

11. Equities acquired after a final order of deportation may be given less weight than those acquired before the alien was found deportable. Matter of Correa, 19 I&N Dec. 130, (BIA 1984). But see Matter of Rodarte, 21 I&N Dec. 150 (BIA 1996) (motion to reopen granted and remanded to Immigration Judge for a hearing on adjustment of status and 212(c) applications; the new evidence requirement for reopening was satisfied by the presentation of equities acquired since respondent's deportation hearing).

12. Even if a prima facie case of apparent eligibility is shown, the

motion to reopen can be denied in the exercise of discretion. 8 C.F.R. § 1003.23(b)(3); INS v. Rios-Pineda, 471 U.S. 444 (1985) (Board has broad discretion to deny reopening even if a prima facie case of eligibility shown); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982).

a. The grant of reopening or reconsideration is a matter of discretion. 8 C.F.R. § 1003.23; Greene v. INS, 313 F.2d 148 (9th Cir. 1963), cert. denied, 374 U.S. 828 (1963) (no statute requires reopening or fixes the conditions on which it is to be granted).

b. The alien must be eligible for reopening as a matter of discretion. If he or she failed to surrender to the INS for deportation, the motion can be denied as a matter of discretion. See Matter of Barocio, 19 I&N Dec. 255 (BIA 1985). But see In re Zmijewska, 24 I&N Dec. 87 (BIA 2007) (holding that an alien is not barred from discretionary relief for failing to depart under section 240B(d)(1) where alien through no fault of their own was unaware of a voluntary departure order or was physically unable to depart within the time granted).

c. A motion may be denied in the exercise of discretion because of adverse circumstances not offset by counterbalancing equities, without otherwise addressing statutory eligibility for the relief being sought. INS v. Wang, 450 U.S. 139 (1981); INS v. Abudu, 485 U.S. 94 (1988); INS v. Bagamasbad, 429 U.S. 24 (1976); Matter of Barocio, 19 I&N Dec. 255 (BIA 1985); Matter of Reyes, 18 I&N Dec. 249 (BIA 1982); Matter of Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979).

d. A motion to reopen can be denied on discretionary grounds alone where there are significant reasons for denying reopening. INS v. Rios-Pineda, 471 U.S. 444 (1985); INS v. Phinpathya, 464 U.S. 183 (1984); INS v. Wang, 450 U.S. 139 (1981); INS v. Bagamasbad, 429 U.S. 24 (1976); Matter of Barrera, 19 I&N Dec. 837 (1989). The Attorney General has broad discretion to grant or deny motions to reopen. INS v. Doherty, 502 U.S. 314 (1992). Where the ultimate relief is discretionary, the Immigration Judge may conclude that he or she would not grant the relief in the exercise of discretion; therefore the moving party must establish that he or she warrants the relief sought as a matter of discretion. Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

e. The deliberate flouting of the immigration laws is a very serious adverse factor in the exercise of discretion. Matter of Barocio, 19 I&N Dec. 255 (BIA 1985) (failure to report for deportation following notification by the INS).

13. An alien may file one motion to reopen proceedings (whether before the Board or the Immigration Judge) with limited exceptions relating to asylum and in absentia orders found at 1003.23(b)(4). INA § 240(c)(7)(A); 8 C.F.R. §§ 1003.2(c)(2)-(3) and 1003.23(b)(1) and (4); Matter of Mancera, 22 I&N Dec. 79 (BIA 1998); Matter of X-G-W-, 22 I&N Dec. 71 (BIA 1998), superceded in Matter of G-C-L-, 23 I&N Dec. 359 (BIA 2002) (withdrawing policy of granting untimely motions to reopen by applicants claiming eligibility for asylum based solely on coercive population control policies)); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

14. 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. INA § 240(c)(7)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1). An order becomes administratively final under one of three circumstances, whichever occurs first: (1) Appeal is waived by the parties at which time the order becomes administratively final immediately. Matter of Shih, 20 I&N Dec. 697 (1993); (2) It is administratively final when the time expires for filing an appeal; (3) When the BIA has dismissed an appeal that was timely filed.

a. There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving adversaries a fair opportunity to develop and present their respective cases. INS v. Abudu, 485 U.S. 94 (1988).

b. These limitations do not apply, however, to motions to reopen filed by the DHS in removal proceedings pursuant to INA § 240. 8 C.F.R. § 1003.23(b)(1).

c. These time and number limits on the filing of a motion to reopen likewise do not apply if the basis of the motion is:

• to rescind an order of deportation/removal entered in absentia pursuant to INA § 242B(c)(3); INA § 240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(iii); or

• to apply or reapply for asylum or withholding of deportation or removal and is based on changed country conditions arising in the country of nationality or the country to which removal, deportation or exclusion has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. See also INA § 240(c)(7)(C)(ii); 8 C.F.R. §§ 1003.2(c)(3)(ii) and 1003.23(b)(4)(i); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997). 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. 8 C.F.R. § 1003.23(b)(4)(i); or

• agreed upon by all parties and jointly filed. 8 C.F.R. § 1003.23(b)(4)(iv). Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding. See 8 C.F.R. § 1003.2(c)(3)(iii) (motions to reopen before Board of Immigration Appeals). DHS may not waive statutory bars to relief by joining in a motion. An Immigration Judge may not reopen a matter for relief despite the fact that the parties have jointly moved in the face of a statutory bar. Former INA § 242B; or

• filed by the DHS in removal proceedings pursuant to section 240 of the Act; or those motions filed by the Service 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 8 C.F.R. § 1208.22. See 8 C.F.R. §§ 1003.2, 1003.23(b)(1), 1208.24(f).

15. An alien in removal proceedings will not be prima facie eligible for voluntary departure, cancellation of removal, and/or adjustment of status for a period of ten years, if he or she received the section 240 warnings and failed to appear for the hearing absent exceptional circumstances. INA § 240(b)(7). An alien in removal proceedings who fails to depart as required under an order of voluntary departure shall be subject to a civil penalty of not less than $1000 and not more than $5000, and will not be prima facie eligible for voluntary departure, cancellation of removal, and/or adjustment of status for a period of ten years (specifically,

sections 240A, 245, 248, 249). However, these restrictions on relief do not apply to relief under § 240A or § 245 on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under § 240A(b)(2), or under § 244(a)(3) (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure. INA § 240B(d)(2). The statute requires that the "order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." Section 240B(d)(3) of the Act. Section 240B(d) of the Act does not refer to an excuse based on "exceptional circumstances" for failing to timely depart. Section 240B(d) of the Act also does not refer to limitations on discretionary relief for failure to report for removal as required. However, proposed rules published September 4, 1998 [63 Fed. Reg. 47208] do seek to add a 10-year bar on relief, including asylum, for failure to timely surrender for removal absent exceptional circumstances. See also In re Zmijewska, 24 I&N Dec. 87 (BIA 2007) (holding that the BIA lacks authority to apply an "exceptional circumstances" or other general equitable exception to the penalty provisions for failure to depart within the time period afforded for voluntary departure).

16. The BIA has held that an alien who during the pendency of a period of voluntary departure, files a motion to reopen in order to apply for suspension of deportation is statutorily ineligible for suspension pursuant to former section 242B(e)(2) of the Act, if he or she subsequently remains in the United States after the scheduled date of departure, provided the notice requirements of the section have been satisfied and there is no showing that failure to depart timely was due to "exceptional circumstances" as provided in section 242B(f)(2) of the Act. Matter of Shaar, 21 I&N Dec. 541 (BIA 1996), aff'd, 141 F.3d 953 (9th Cir. 1998); Mardones v. McElroy, 197 F.3d 619 (2d Cir. 1999) (citing Shaar with approval). However, in Azarte v. Ashcroft, the Ninth Circuit overruled its decision in Shaar, determining that Shaar has been superceded by statute (post-IIRIRA cases) based on the fact that Shaar relied on a pre-IIRIRA voluntary departure statutory provision, since repealed; neither the voluntary departure statute nor the regulations on motions to reopen under prior law had time limits; and prior voluntary departure grants were for much longer periods of time. Azarte v. Ashcroft, 394 F.3d 1278 (9th Cir. 2005) (voluntary departure period tolled in removal proceedings where motion to reopen filed with BIA within the voluntary departure period, with a request for a stay); Sidikhouya v. Gonzales, 407 F.3d 950 (8th Cir. 2005) (abuse of discretion to apply Matter of Shaar in post-IIRIRA case where motion filed prior to expiration of voluntary departure period granted by BIA, but period expired prior to ruling by BIA); see also Kanivets v. Gonzales, 424 F.3d 330 (3d Cir. 2005) (rejecting Shaar post-IIRIRA); Ugokwe v. U.S. Attorney General, 453 F.3d 1325 (11th Cir. 2006) (rejecting Shaar post-IIRIRA); but see Dekoladenu v. Gonzales, 459 F.3d 500 (4th Cir. 2006) (rejecting Azarte); Banda-Ortiz v. Gonzales, 445 F.3d 387 (5th Cir. 2006), rehearing and rehearing en banc denied (July 26, 2006), cert. denied, 127 S.Ct 1874 (March 26, 2007) (rejecting Azarte). NOTE: The Third Circuit has rejected Matter of Shaar even in pre-IIRIRA cases, finding that a motion to reopen filed within the voluntary departure period is an "exceptional circumstance" in failure to depart. Barrios v. Attorney General, 399 F.3d 272 (3d Cir. 2005).

More recently, the Board has held that an alien has not failed to voluntarily depart under Section 240B(d)(1) of the Act when the alien, through no fault of her own, was unaware of the voluntary departure order or was physically unable to depart within the time specified. Matter of Zmijewska, 24 I&N Dec. 87 (BIA 2007). (Alen not advised of the voluntary departure period by her attorney.) Further, an alien who fails to post the voluntary departure bond required by § 240B(b)(3) of the Act is not subjuect to the penalties for failure to depart within the time specified for voluntary departure. Matter of Diaz-Ruacho, 24 I&N Dec. 47 (BIA 2006).

17. A motion to reopen to apply for asylum must comply with additional requirements and reasonably explain the alien's failure to do so during the proceedings. 8 C.F.R. § 1208.4(b)(3)-(4); Matter of R-R-, 20 I&N Dec. 547 (1992); see also INS v. Doherty, 502 U.S. 314 (1992); INS v. Wang, 450 U.S. 139 (1981); Matter of Lam, 14 I&N Dec. 98 (BIA 1972); INS v. Abudu, 485 U.S. 94 (1988); Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981), aff'd, 692 F.2d 595 (9th Cir. 1982); Matter of Jean, 17 I&N Dec. 100 (BIA 1979).

Motions based on a request for asylum, withholding, and/or CAT relief are not subject to the same time and numerical limitations set forth in 8 C.F.R. § 1003.23(b)(1), where the motion is premised 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. 8 C.F.R. § 1003.23(b)(4)(i). Stays are not automatic for this type of motion to reopen, though the alien may request a stay, and if granted by the IJ, cannot be removed pending disposition of the motion. Id. NOTE: 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.

18. An alien whose case was administratively closed pursuant to the ABC settlement terms can obtain reopening of proceedings even where no request has been made to reinstate appeal before the BIA or to recalendar case before an Immigration Judge. Matter of Gutierrez-Lopez, 21 I&N Dec. 479 (BIA 1996).

Under prior section 212(c), certain lawful permanent residents who had departed the U.S. and were seeking readmission could apply for a waiver of inadmissibility in certain circumstances. This waiver was later limited by provisions of IMMACT 1990 and AEDPA § 440(d); and was eventually repealed by IIRIRA as of April 1, 1997, when it was replaced with § 240A(a) cancellation of removal.

In Deportation Proceedings: Motion to Reopen under Soriano Rule

a. As stated above, the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), enacted on April 24, 1996, significantly restricted the availability of section 212(c) relief. Under the Attorney General's decision in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), the AEDPA restrictions on section 212(c) relief were held to apply to all 212(c) applications filed prior to the April 24, 1996, enactment date.

However, the Attorney General also directed the Immigration Judges to reopen cases upon petition filed by aliens who conceded deportability prior to April 24, 1996, for the limited purpose of allowing them to contest deportability. See 8 C.F.R. § 1212.3(g) (Soriano rule). This rule applies to both plea agreements and convictions following a trial. The deadline to file a motion to reopen under the Soriano rule was July 23, 2001. See 8 C.F.R. § 1003.44(f) (2004).

In Removal Proceedings: Special Motion to Reopen under 8 C.F.R. § 1003.44.

b. In 2001, the U.S. Supreme Court issued INS v. St. Cyr, 533 U.S. 289 (2001). In St. Cyr, aliens in removal proceedings who received convictions through plea agreements, and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect were found to be eligible for 212(c) relief. In 2004, regulations were promulgated to reflect the Court’s decision in St. Cyr.

Individuals who pleaded guilty or nolo contendre to certain crimes before April 1, 1997, may pursue a special motion to reopen to seek section 212(c) relief under the provisions of 8 C.F.R. § 1003.44. This motion is available to certain eligible aliens who were previously lawful permanent residents, who are subject to an administratively final order of deportation or removal, and who are eligible to apply for relief under former section 212(c) of the Act and 8 C.F.R. § 1212.3 with respect to convictions obtained by plea agreements reached prior to April 1, 1997. NOTE: The deadline to file a special motion under this section was April 26, 2005, and an eligible alien is limited to one special motion under this section. See 8 C.F.R. § 1003.44(h).

The alien has the burden of establishing eligibility for relief

under this section. 8 C.F.R. § 1003.44(b). General eligibility requirements that alien must establish:

1. Prior lawful permanent resident status and is now subject to a final order of deportation or removal;

2. Agreed to plead guilty or nolo contendre to an offense rendering the alien deportable or removable, pursuant to a plea agreement made before April 1, 1997;

3. Had seven consecutive years of lawful unrelinquished domicile in the United States prior to the date of the final administrative order of deportation or removal; and

4. Is otherwise eligible to apply for section 212(c) relief under the standards that were in effect at the time the alien's plea was made, regardless of when the plea was entered by the court.

See 8 C.F.R. 1003.44(b)(1)-(4).

There are certain procedural requirements for filing a motion under this section. The motion must be filed with the IJ or BIA, whichever last held jurisdiction. The alien is required to submit a copy of the Form I-191 application, and supporting documents. The motion must contain the notation "special motion to seek section 212(c) relief." DHS has 45 days from the date of the filing of the motion to respond. No filing fee is required for this motion, although if it is later granted, and the alien has not previously filed an application for section 212(c) relief, the alien will be required to submit the appropriate fee receipt at the time the alien files the Form I-191 with the immigration court. In addition, the filing of a motion under this section has no effect on the time and number limitations for motions to reopen or reconsider that may be filed on grounds unrelated to section 212(c). See generally 8 C.F.R. § 1003.44(f)-(i).

19. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he

or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) or (a)(4) of the Act, whichever is earliest. 8 C.F.R. §1003.23(b)(3).

20. A properly filed motion to reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted in the exercise of discretion, notwithstanding the pendency of a visa petition filed on the alien's behalf, where: (1) the motion to reopen is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by Matter of Shaar, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) clear and convincing evidence is presented indicating a strong likelihood that the marriage is bona fide; and (5) the Service does not oppose the motion or bases its opposition solely on Matter of Arthur, 20 I&N Dec. 475 (BIA 1992) (holding that motions to reopen to apply for adjustment of status under section 245 of the Act will not be granted without an approved visa petition on the alien's behalf). Matter of Velarde, 23 I&N Dec. 253 (BIA 2002) (modifying Matter of H-A-, 22 I&N Dec. 728 (BIA 1999), and Matter of Arthur, supra). See also Conteh v. Gonzales, 461 F.3d 45 (1st Cir. 2006) (determining that Matter of Velarde permits granting of a motion to reopen in these circumstances as a matter of discretion, unless barred on procedural grounds); Malhi v. INS, 336 F.3d 989 (9th Cir. 2003) (citing Velarde with approval, upholding denial of motion for failure to make prima facie showing of valid marriage).

21. An Immigration Judge may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act. 8 C.F.R. § 1240.26(h). Note: In removal proceedings, there are statutory and regulatory periods prescribed for voluntary departure. There is no specific statutory or regulatory authority for either an Immigration Judge or the BIA to extend the time of voluntary departure. See 8 C.F.R. § 1240.26(f). The BIA decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), which permitted tolling of the voluntary departure period on appeal, was rendered in the absence of such periods, and was found to be superceded by statute in Matter of A-M-, 23 I&N Dec. 737 (BIA 2005).

22. An alien ordered removed in absentia may rescind the order:

a. upon a motion to reopen filed within 180 days after the date of the order of removal or deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances; OR

b. upon a motion to reopen filed at any time if the alien demonstrates:

(1) that he or she did not receive notice in accordance with INA § 239(a)(1) or (2) [removal proceedings], INA § 242B(a)(2) [deportation proceedings], or;

(2) the alien demonstrates that he or she was in Federal or State custody and the failure to appear was through no fault of the alien.

See Former INA § 242B(c)(3) [OSC]; INA § 240(b)(6)(C) [NTA]; 8 C.F.R. § 1003.23(b)(4)(ii) [removal proceedings] and 1003.23(b)(4)(iii) [deportation/exclusion proceedings].

23. A motion to rescind an in absentia order of deportation in exclusion proceedings shall be denied unless the alien provides a reasonable explanation for his or her failure to appear. See Matter of S-A-, 21 I&N Dec. 1050 (BIA 1998) (holding that traffic is not a reasonable cause to warrant the reopening of exclusion proceedings); compare with De Jiminez v. Ashcroft, 370 F.3d 783 (8th Cir. 2004) (finding that BIA abused its discretion in refusing to consider the denial of alien's motion to reopen where alien had difficulty locating building and was caring for a sick child given the fact that alien gave "a multitude of factors contributing to her failure to appear").

24. For deportation proceedings where notice of the hearing was served or attempted service was made prior to June 13, 1992, and in cases where the notice requirements were not followed in section 242B of the Act: Where an alien can demonstrate reasonable cause for his or her failure to appear, section 242(b) of the Act guarantees his right to a hearing. A prima facie showing of eligibility for relief is not a prerequisite to reopening exclusion proceedings following an in absentia hearing. Matter of Ruiz, 20 I&N 91 (BIA 1989).

25. The BIA held that Matter of Shaar, 21 I&N Dec. 541 (BIA 1996), aff'd, 141 F.3d 953 (9th Cir. 1998) is not applicable to an alien who was ordered deported at an in absentia hearing and has therefore not remained beyond a period of voluntary departure; consequently, the proceedings may be reopened upon the filing of a timely motion showing exceptional circumstances for failure to appear. Matter of Singh, 21 I&N Dec. 998 (BIA 1997); Matter of Ruiz, 20 I&N Dec. 91 (BIA 1989) (in exclusion case, motion to reopen in absentia hearing

granted upon a showing that his failure to appear was caused by illness; did not need to make a prima facie showing of eligibility for relief on the merits).

26. The proper filing of the motion to reopen an order entered in absentia stays the removal or deportation of the alien pending disposition of the motion by the Immigration Judge. INA § 242B(c)(3) (prior); INA § 240(b)(5)(C) and 240(c)(7)(C)(iii); 8 C.F.R. §§ 3.23(b)(4)(iii)(C) (2000) 1003.6(b), 1003.23(b)(4)(iii)(C) (2007) and § 242.22 (1997). The IIRIRA added the words "by the immigration judge." Compare prior INA § 242B(c)(3) with INA § 240(b)(5)(C). Before the IIRIRA's amendment, the filing of a motion to reopen an in absentia deportation order stayed the order pending a decision by the Board as well as pending a decision by the Immigration Judge. Matter of Rivera-Claros, 21 I&N Dec. 232 (BIA 1996). The regulations state that there is no automatic stay of removal or deportation pending the Board's determination of other motions to reopen. 8 C.F.R. §§ 1003.2(f) and 1003.6(b). A respondent appealing an Immigration Judge's denial of a motion to reopen can file a request for a stay with the Board. Some courts have held, however, that failure to grant a stay pending determination of a motion to reopen may raise constitutional concerns. See Castandea-Suarez v. INS, 993 F.2d 142 (7th Cir. 1993); Gutierrez-Rogue v. INS, 954 F.2d 769 (D.C. Cir. 1992).

27. The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien, or serious illness or death of the alien's spouse, child or parent, but not including less compelling circumstances) beyond the control of the alien. INA § 240(e)(1); 8 C.F.R. § 1003.23(b)(4)(iii)(A)(1).

The ineffective assistance of counsel constitutes "exceptional circumstances" excusing the failure to appear. Matter of Grijalva, 21 I&N Dec. 472 (BIA 1996). Immigration Judge's should always read and issue all warnings, advisals, dates for applications as well as the penalties that apply should applications not be timely filed directly to the alien through an interpreter so that there is no question in the mind of the alien what must be done in his or her case. This eliminates many "ineffective assistance" issues that may otherwise result in remands.

a. An alien seeking to reopen in absentia proceedings based on his or her unsuccessful communications with his or her attorney did not establish exceptional circumstances pursuant to section 242B(c)(3)(A) of the Act when she failed to satisfy all of the requirements for a claim of ineffective assistance of counsel as set out in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). Matter of Rivera-Claros, 21 I&N Dec. 599 (BIA 1996); cf. also Matter of A-A-, 22 I&N Dec. 140 (BIA 1998) (a claim of ineffective assistance of counsel does not constitute an exception to the 180-day statutory limit for the filing of a motion to reopen to rescind an in absentia order of

deportation on the basis of exceptional circumstances); Matter of Lei, 22 I&N Dec. 113 (BIA 1998) (same).

A motion to reopen or reconsider based upon a claim of ineffective assistance of counsel requires:

(1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond, and;

(3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

Matter of Lozada 19 I&N Dec. 637, 639 (BIA 1988).

This legal framework was reaffirmed by the Board in Matter of Assaad, 23 I&N Dec. 553 (BIA 2003), in light of circuit court precedent and lack of direct ruling on the issue by the Supreme Court in an immigration context. Several circuits have upheld the Lozada requirements. See, e.g., Lara v. Trominski, 216 F.3d 487 (5th Cir. 2000); Hernandez v. Reno, 238 F.3d 50 (1st Cir. 2001); Melkonian v. Ashcroft, 320 F.3d 1061 (9th Cir. 2003) (generally citing with approval, including requirement that prejudice be shown); Hamid v. Ashcroft, 336 F.3d 465 (6th Cir. 2003); Azanor v. Ashcroft, 364 F.3d 1013 (9th Cir. 2004) (requires affidavit regarding attorney conduct where facts are not plain on the record, and also prejudice must be shown); Dakane v. U.S. Attorney General, 399 F.3d 1269 (11th Cir. 2005) (citing with approval, including requirement that prejudice must be shown); Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005); Zheng v. U.S. Dept. of Justice, 409 F.3d 43 (2d Cir. 2005); Gbaya v. US Attorney General, 342 F.3d 1219 (11th Cir. 2003) (holding that strict compliance with Lozada necessary to establish an ineffective assistance of counsel claim).

Some cases have considered limitations on the reach of Lozada. See, e.g., Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000) (Lozada requirements “not sacrosanct,” substantial compliance may be sufficient); Saakian v. INS, 252 F.3d 21 (1st Cir. 2001) (agrees with 9th Cir. that requirements may not be “arbitrarily” applied); Lu v. Ashcroft, 259 F.3d 127 (3d Cir. 2001) (upholds Lozada requirements, but failure to file bar complaint not fatal if reasonably explained); Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005) (stating that alien need only show “plausible grounds” for relief with regard to prejudice requirement).

b. An alien's failure to appear at his or her rescheduled deportation hearing due to his inability to leave his or her employment on a fishing vessel was not an "exceptional circumstance." Matter of W-F-, 21 I&N Dec. 503 (BIA 1996).

28. A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia may be filed at anytime and must be supported by evidence that the alien had reasonable cause for his or her failure to appear. INA § 212(a)(6)(B); 8 C.F.R. § 1003.23(b)(4)(iii)(B).

29. Cases which have considered what constitutes "reasonable cause" for failure to appear include: Hernandez-Vivas v. INS, 23 F.3d 1557 (9th Cir. 1994); Maldonado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989); Matter of Nafi, 19 I&N Dec. 430 (BIA 1987). Remember that "reasonable cause" is different from "exceptional circumstances" which are defined by statute. See Matter of S-A-, 21 I&N Dec. 1050 (BIA 1998).

30. A motion to reopen exclusion proceedings decided in absentia is properly granted where the applicants met the requirements for an ineffective assistance of counsel claim set in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). The attorney of record failed to give the applicants notice of their hearing. Matter of N-K and V-S-, 21 I&N Dec. 879 (BIA 1997).

C. COMMONALITIES OF MOTIONS TO REOPEN AND

RECONSIDER

1. The Immigration Judge is authorized to reopen or reconsider his or her decision, on his or her own initiative, or upon motion by either party, at any time before jurisdiction has vested in the

BIA through the filing of a notice of appeal or certification of the case to it. INA § 240(c)(5)-(7) of the Act; 8 C.F.R. §§ 1003.23(b)(1) (2007) and 242.22 (1997).

2. Where the BIA dismisses an appeal from the decision of an Immigration Judge solely for lack of jurisdiction, without adjudication on the merits, the attempted appeal was nugatory and the decision of the Immigration Judge remained undisturbed. Thereafter, if a motion is made to reopen or reconsider, there is no reason why the Immigration Judge should not adjudicate it as he does in other cases where there was no appeal from his or her prior order. Matter of Mladineo, 14 I&N Dec. 591, 592 (1974).

3. The Board's power to reopen or reconsider cases sua sponte is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship. 8 C.F.R. § 1003.2(a); Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

4. Motions to reopen or reconsider are subject to the requirements and limitations set forth in 8 C.F.R. §§ 1003.23 (2007) and 242.22 (1997).

5. Motions to reopen or reconsider a decision of the Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceedings (ROP). 8 C.F.R. §§ 1003.23(b)(1)(ii), 1003.31(a). The regulations create an exception for the filing of certain motions under NACARA and the LIFE Act Amendments. See 8 C.F.R. § 1003.43. Such motions are to be adjudicated under applicable statutes and regulations governing motions to reopen. Id.

6. A motion is deemed filed when it is received at the BIA, irrespective of whether the alien is in custody. Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

7. A motion to reopen or reconsider must be in writing and signed by the affected party or the attorney or representative of record, if any, and submitted in duplicate if addressed to an Immigration Judge. 8 C.F.R. § 1003.23(b)(1)(i)-(ii).

8. A motion to reopen or a motion to reconsider, and any submission made in conjunction with such motion must be in English or accompanied by a certified English translation. 8 C.F.R. §§ 1003.2(g)(1) and 1003.23(b)(1)(i).

9. Payment of the required fee may be waived by the Immigration Judge in any case in which the alien is unable to pay the prescribed fee upon a showing of the inability to pay. 8 C.F.R. § 1103.7(c) and 1003.24(d). To qualify for such waiver, the alien must submit an executed affidavit or unsworn declaration made pursuant to 28 U.S.C. § 1746 substantiating the alien's inability to pay the fee. 8 C.F.R. § 1003.24(d). See also Matter of Alejandro, 19 I&N Dec. 75 (BIA 1984); Matter of Chicas, 19 I&N Dec. 114 (BIA 1984). If the request for a fee waiver is denied, the application or motion will not be deemed properly filed. 8 C.F.R. § 1003.24(d). Pursuant to Interim Operating Policies and Procedures Memorandum 06-01, Fee Waiver Form, June 28, 2006, fee waiver decisions must be in writing. For an example of a standard fee waiver order, see Attachment A to OPPM No. 06-01.

10. A motion to reopen or a motion to reconsider shall include proof of service on the opposing party of the motion and all attachments. 8 C.F.R. §§ 1003.2(g)(1) and 1103.5(a).

11. In general, the fee for filing a motion to reopen or reconsider is $110. 8 C.F.R. § 1103.7(b)(2); 1003.8 (fees pertaining to the BIA's jurisdiction); 1003.24 (fees pertaining to the Immigration Court's jurisdiction). In accordance with 8 C.F.R. § 1003.24(b)(2)(i)-(viii), a fee is not required for:

a. A motion to reopen based solely on an application for relief that does not require a fee;

b. A motion to reconsider that is based exclusively on a prior application for relief that did not require a fee;

c. A motion filed while proceedings are already pending before the Immigration Court;

d. A motion requesting only a stay of removal, deportation, or exclusion;

e. A motion to reopen a deportation or removal order entered in absentia if the motion is filed pursuant to section 242B(c)(3)(B) of the Act, as it existed prior to April 1, 1997, or section 240(b)(5)(C)(ii) of the Act, as amended;

f. Any motion filed by the DHS;

g. A motion agreed upon by all parties and jointly filed;

h. A motion filed under law, regulation, or directive that specifically does not require a filing fee.

12. A motion to reopen or reconsider, submitted with the required fee, may not be rejected as inadequate without a written adjudication. The written adjudication must sufficiently state the basis for the decision, so that an appellate tribunal can review it. Matter of Felix, 14 I&N Dec. 143 (1972); Matter of M-P-, 20 I&N Dec. 786 (BIA 1994).

13. If an alien files a motion asking for his or her case to be reopened or reconsidered while the case is on appeal, the BIA may deem it a motion to remand for further proceedings before the Immigration Judge from whose decision the appeal was taken. 8 C.F.R. § 1003.2(c)(4).

14. Motions to reopen or reconsider must be filed with the Immigration Court that has administrative control over the Record of Proceeding. 8 C.F.R. § 1003.23(b)(1)(ii). A certificate of service shall accompany the motion evidencing service on the opposing party. Id. If the moving party, other than the Service, is represented, a Form EOIR-28 must be filed with the motion. Id. The motion also must be accompanied by a fee receipt. Id. The Court may set and extend time limits for replies to motions to reopen or reconsider. 8 C.F.R. § 1003.23(b)(1)(iii). The motion shall be deemed “unopposed” unless timely response is made; however, the Court’s decision to grant or deny the motion is discretionary. Id.

15. The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. 8 C.F.R. § 1003.23(b)(1)(iv).

16. A motion to reopen or reconsider shall be deemed unopposed unless a timely response is made. 8 C.F.R. §§ 1003.23(a) and (b). An unopposed motion may still be denied if the requisite showings are not made.

17. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation, exclusion, or removal proceedings subsequent to his or her departure from the United States. 8 C.F.R. § 1003.2(d); Matter of Crammond, 23 I&N Dec. 179 (BIA 2001); Matter of Estrada, 17 I&N Dec. 187 (1979); Matter of Rangel-Cantu, 12 I&N Dec. 73 (BIA 1967), overruled in part by Matter of Ku, 15 I&N Dec. 712 (BIA 1976) (regarding Board's jurisdiction over interlocutory appeals). Any departure from the United States, including the deportation or removal of a person who is the subject of removal, deportation or exclusion proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion. 8 C.F.R. § 1003.2(d); Matter of Palma, 14 I&N Dec. 486 (BIA 1973) (departure executed outstanding deportation order); Mansour v. Gonzales, 470 F.3d 1194 (6th Cir. 2006) (Board had no jurisdiction to grant respondent's motion to reopen where respondent left the U.S. under a final deportation order). Some circuit courts have entertained motions to reopen made after the alien's deportation on the ground that the alien's departure was not legally executed. See Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990); Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir. 1981). Courts have held in the excepted case, the alien may be readmitted with the same status he or she held prior to departure, and will be permitted to pursue any administrative and judicial remedies to which he or she is entitled. Mendez v. INS, 563 F.2d 956 (9th Cir. 1977).

18. Motions to reopen or reconsider shall state whether the validity of the deportation, exclusion, 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 the proceeding took place or is pending, and its result or status. 8 C.F.R. §§ 1003.2(e) and 1003.23(b)(1)(i); Matter of Wong, 13 I&N Dec. 258 (BIA 1969) (motion denied as insubstantial and dilatory). In any case in which a deportation, or exclusion, 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 is also the subject of any pending criminal proceeding under the Act, and if so, the status of that proceeding. Id.

19. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. 8 C.F.R. § 1003.2(e).

20. All fees for the filing of motions and applications in connection with proceedings before the Court are paid to the DHS. The Court does not collect fees. 8 C.F.R. § 1003.24; 8 C.F.R. § 103.7 (DHS requirements for filing of fees). If an individual files a motion to reopen or reconsider concurrently with an application for relief for which a fee is chargeable, the individual initially must pay only the fee required for the motion to reopen or reconsider, unless a fee waiver has been granted. 8 C.F.R. § 1003.24(c)(2). The fee receipt shall accompany the motion. Id. If the motion to reopen or reconsider is granted, the individual then must pay the fee required for the underlying application for relief to the DHS within the time specified by the Court, unless a fee waiver has been granted. Id.

21. If the motion is opposed, the Immigration Judge in ruling on the motion must state in writing, however briefly, the reasons for his or her decision. Matter of Correa, 19 I&N Dec. 130 (BIA 1984). The ruling on the motion shall be in written form fully explaining the reasons for the decision. See Matter of M-P-, 20 I&N Dec. 786 (BIA 1994).

22. The basis for denial of a motion to reopen or reconsider must be stated with specificity. Matter of Felix, 14 I&N Dec. 143 (BIA 1982); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) (must clearly articulate the factors considered and the basis for its discretionary determination). In exercising its discretion the court must show that it has considered all factors, both favorable and unfavorable, and must state its reasons and show proper consideration of all factors when weighing equities and denying relief.

D. MOTION FOR STAY OF DEPORTATION/REMOVAL

1. Except where a motion is filed pursuant to INA § 240(b)(5)(C)(i) or (ii), or former 242B(c)(3), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. 8 C.F.R. §§ 1003.2(f), 242.22 (1997). Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Court, or an authorized officer of the DHS. 8 C.F.R. §§ 1003.2(f), 1003.6(b), 1003.23(b)(1)(v) (2007), 242.22 (1997); Matter of Valiyee, 14 I&N Dec. 710 (BIA 1974). The Immigration Judge may stay deportation pending his or her determination of the motion and also pending the taking and disposition of an appeal from such determination. 8 C.F.R. §§ 242.22 and 243.4 (1997); Matter of Correa-Garces, 20 I&N Dec. 451 (BIA 1992); Matter of Mladineo, 14 I&N Dec. 591 (BIA 1974) (BIA took case on certification and denied motion to reopen). The burden of proof for obtaining a stay of deportation is upon the alien who must show that there is a likelihood of success of the underlying basis for reopening.

2. There is no right to an evidentiary hearing on the merits of the motion. 8 C.F.R. §§ 1003.23(b) ("a motion to reopen shall state new facts that will be proven at a hearing to be held if the motion is granted"); INS v.Wang, 450 U.S. 139 (1981); Urbano de Malaluan v. INS, 577 F.2d 589 (9th Cir. 1980); see also Matter of Rivera, 21 I&N Dec. 599 (BIA 1996) (noting, in an ineffective assistance of counsel claim pursuant to Lozada, that there is a preference to make determinations on motions "to a great extent" on the documentary evidence in order to avoid an added burden on the parties and the court).

3. An alien who files a motion and submits the required fee, or a fee waiver, is entitled to an adjudication of the request. Matter of Felix, 14 I&N Dec. 143 (BIA 1972).

E. MOTION TO REMAND

1. Motions to remand are not expressly addressed by the Act or the regulations. Such motions are commonly addressed to the BIA. Motions to remand are an accepted part of appellate civil procedure and serve a useful function. Matter of Coelho, 20 I&N Dec. 464 (BIA 1992).

2. A motion to reopen a decision rendered by an Immigration Judge that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge from whose decision the appeal was taken. 8 C.F.R. 1003.2(c)(4).

3. The number and time limits do not apply to motions filed with the Board while an appeal is pending. A motion that asks the BIA to order the Immigration Judge to reopen his or her decision still can be made at any time until the BIA renders its decision on the underlying appeal and is considered a motion to remand. 8 C.F.R. § 1003.2(b)(1) and 1003.2(c)(4).