A Guide to Assisting Asylum-Seekers with *In Absentia* Removal Orders

ASYLUM SEEKER ADVOCACY PROJECT

CLINIC

CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

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This guide is intended to assist lawyers and fully accredited DOJ representatives and is not a substitute for independent legal advice in a client's case. The cases cited herein do not constitute an exhaustive search of relevant case law in all jurisdictions.

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I. INTRODUCTION

The Asylum Seeker Advocacy Project (ASAP) and Catholic Legal Immigration Network, Inc. (CLINIC) prepared this guide after representing dozens of families who received *in absentia* removal orders and successfully reopening their cases in the wake of increased enforcement by Immigration and Customs Enforcement (ICE) in 2016. ASAP and CLINIC updated this guide in 2019.[1]

In the course of our work, ASAP and CLINIC have encountered several common reasons why families failed to appear at their immigration court hearings:

(1) not receiving any notice of the hearing from the government;
(2) believing that a change of address with Immigration and Customs Enforcement (ICE) or ICE contractors changes their address with the Immigration Court because of the assumption that they are the same agency;
(3) receiving incomplete or confusing information about the Immigration Court hearing and how to change venue;
(4) transportation, health, or other personal problems; and
(5) ineffective assistance of counsel.

ASAP and CLINIC have also published a report about *in absentia* removal orders, *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum*.[2] The report describes ASAP and CLINIC's overwhelmingly successful challenges of *in absentia* removal orders and analyzes immigration court data regarding legal representation rates and the government's use of *in absentia* removals.

The report's findings reveal that the government ordered the removal of high numbers of unrepresented families through *in absentia* orders, despite many of those families having passed a credible fear interview with an asylum officer.[3] Passing a credible fear interview means that the asylum seeker has shown a "significant possibility" that they could establish in a full hearing before an Immigration Judge (IJ) that they have been persecuted or have a well-founded fear of persecution or harm if returned to their country on account of their race, religion, nationality, membership in a particular social group, or political opinion. However, families ordered removed *in absentia* never get the opportunity to present their asylum case in a full hearing before the IJ unless they file, and an IJ grants, their Motion to Rescind and Reopen (MTRR). Without an MTRR, the families are at risk of ICE detaining them and swiftly enforcing the *in absentia* removal order

[1] To supplement the information in this guide, please visit https://asylumadvocacy.org/resource/in-absentia-removal-guide/ for sample motions. To request a template Motion to Rescind *In Absentia* Removal Order and Reopen Removal Proceedings for Formerly Separated Families authored by ASAP and CLINIC, please visit https://cliniclegal.org/template-mtrr-for-formerly-separated-families.

[2] ASAP & CLINIC, *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum*, 2018, available at https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court.pdf and https://cliniclegal.org/resources/denied-day-court.

[3] EOIR Adjudication Statistics: *In Absentia* Removal Orders in Cases Originating with a Credible Fear Claim Statistics, Apr. 23, 2019, available at https://www.justice.gov/eoir/page/file/1116666/download.

without the family ever having the opportunity to see the IJ. Those with *in absentia* orders are thus easy targets for enforcement actions.[4]

Motions to Rescind and Reopen (MTRR) and Motions to Reopen (MTR)[5] are critical tools for assisting families who have received *in absentia* removal orders. This guide provides a comprehensive overview of whether and how to file an MTRR and/or MTR in these cases.[6]

First, the guide provides an overview of relevant law and potential claims. Second, the guide tackles frequently asked questions and discusses the factors the respondent should consider when deciding whether it is in their best interest to file an MTRR and/or MTR in response to an *in absentia* removal order. Third, the guide provides guidance on interviewing clients and drafting declarations. Finally, the guide provides a checklist that covers the necessary documents and steps for filing a MTRR and/or MTR as well as a motion to change venue if necessary. Sample motions to supplement the guide are available on ASAP's and CLINIC's websites.[7]

With this guide, ASAP and CLINIC seek to support pro bono attorneys, fully accredited Department of Justice Representatives, and other legal workers representing asylum-seeking families who an IJ ordered removed *in absentia* and who thus require an MTRR and/or MTR. In all cases, please review relevant statutes, regulations, and case law as opposed to relying on the advice and samples in this guide alone.

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[4] On June 20, 2019, the Trump administration announced forthcoming raids against those with *in absentia* orders of removal. Bobby Allyn and John Burnett, *'We Have No Choice': Acting ICE Director Defends Planned Immigration Raids*, NPR, June 21, 2019, available at https://www.npr.org/2019/06/21/734744871/we-have-no-choice-acting-ice-director-defends-planned-immigration-raids. In January of 2016, the Obama administration initiated raids that targeted immigrant families in Georgia, Texas, and North Carolina. Josh Gersten and Seung Min Kim, *Obama Administration Kicks Off Family Deportation Raids*, Politico, Jan. 4, 2016, available at https://www.politico.com/story/2016/01/obama-family-deportation-raids-217329. In May of 2016, Obama administration sources stated that immigrant families who arrived after January 1, 2014 were a priority for raids and removal. Julia Edwards, *Exclusive: U.S. plans new wave of immigrant deportation raids*, Reuters, May 12, 2016, available at www.reuters.com/article/us-usa-immigration-deportation-exclusive-idUSKCN0Y32J1.

[5] This guide refers to a Motion to Rescind and Reopen (MTRR) when citing INA § 240(b)(5)(C) (describing the circumstances under which an IJ removal order for failure to appear can be rescinded and proceedings reopened). The guide refers to motions to reopen (MTR) when citing the IJ's *sua sponte* authority under 8 CFR § 1003.2(a) and 8 CFR §1003.23(b)(1), as well as general MTRs filed under INA § 240(c)(7), changed country conditions MTRs under INA § 240(c)(7)(C)(ii), and special rule motions for qualifying survivors of domestic violence under INA § 240(c)(7)(C)(iv).

[6] While this guide primarily focuses on reopening *in absentia* orders for asylum seekers, much of the information provided will also be useful for reopening *in absentia* orders more generally.

[7] Please visit https://asylumadvocacy.org/resource/in-absentia-removal-guide/ for sample Motions to Rescind and Reopen. To request a template Motion to Rescind *In Absentia* Removal Order and Reopen Removal Proceedings for Formerly Separated Families authored by ASAP and CLINIC, please visit https://cliniclegal.org/template-mtrr-for-formerly-separated-families.

II. MOTIONS TO REOPEN IN GENERAL

This guide will address Motions to Rescind and Reopen *in absentia* removal orders (MTRRs), as well as related Motions to Reopen (MTRs). The statutory basis for reopening and rescinding *in absentia* removal orders is different from other types of Motions to Reopen in removal proceedings.[8]

In general, strict rules apply to Motions to Reopen in removal proceedings and these rules differ from the rules in the *in absentia* context. A Motion to Reopen in removal proceedings must "state the new facts that will be proven at a hearing to be held if the motion is granted," and "be supported by affidavits or other evidentiary material."[9] A Motion to Reopen filed in order to apply for relief must include the "appropriate application for relief and all supporting documentation."[10] The Motion to Reopen must establish 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."[11] A Motion to Reopen to apply for discretionary relief must be based on circumstances that arose after the hearing, or establish that the respondent was not fully apprised of their right to apply for such relief or provided the opportunity to do so at the former hearing.[12]

The strict general rules for MTRs also include a filing deadline and numerical limitations. A respondent may file only one MTR. Additionally, a respondent must file the motion within 90 days of the date on which the IJ rendered the final administrative decision.

However, there are important exceptions to the general MTR deadline and numeral limitations. A few of these exceptions apply to *in absentia* removal orders, the topic of this guide.

[8] INA § 240(c)(7) (MTRs); INA § 240(b)(5)(C) (MTRRs); INA § 240(c)(7)(C)(ii) (motions to reopen based on changed country conditions); INA § 240(c)(7)(C)(iv) (special rule motions to reopen for qualifying survivors of domestic violence).
[9] INA § 240(c)(7)(B); *see also* 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).
[10] 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).
[11] 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).
[12] 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).

III. ENTRY OF *IN ABSENTIA* REMOVAL ORDERS AND DHS'S BURDEN

An *in absentia* removal order is a final administrative removal order that is issued by the IJ during a hearing at which the respondent is not present "if the Service establishes by clear, unequivocal, and convincing evidence . . . that the alien is removable"[13]—meaning that the Department of Homeland Security (DHS) has the burden of proving removability. To meet its burden of establishing removability, DHS often presents documents, like Form I-213, Record of Deportable/Inadmissible Alien, that contain admissions of alienage by the respondent.

Even if the respondent is absent from the hearing, DHS must present "clear, unequivocal, and convincing evidence" and the IJ must ensure that DHS meets this burden before issuing an *in absentia* order. However, IJs may unintentionally skip this required step of putting DHS to its burden, especially if the IJ is trying to move through the docket quickly. If the IJ does put DHS to its burden, DHS may present unreliable documentary evidence of alienage that the IJ accepted as reliable.[14] Practitioners should examine the record of proceedings and if possible listen to the audio recording of the *in absentia* hearing to determine whether the IJ failed to hold DHS to its burden and if DHS failed to meet its burden to prove removability.[15]

If the record of proceedings or audio recording of the *in absentia* hearing demonstrates either failure by the IJ or DHS, practitioners may argue that the IJ should rescind the removal order, reopen the proceedings, *and* terminate the proceedings because DHS did not meet its burden of proving removability by clear, unequivocal, and convincing evidence. Note that it takes time to receive the audio recording of the *in absentia* hearing, as described in section VII. Thus, where time is of the essence, practitioners may choose to file the MTRR with the statutory arguments that trigger the automatic stay of removal provision and then include this argument if applicable as a supplement to the MTRR.

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[13] INA § 240(b)(5)(A).

[14] *Jordan Omar Nunez-Zepeda*, A097-315-824 (BIA Sept. 29, 2017) (reopening where respondent was seven or eight years old at the time the IJ ordered removal *in absentia*, and the only evidence supporting removability came from a Form I-213 that "contained false information and was not reliable"), unpublished decision available at https://www.scribd.com/document/362583713/Jordan-Omar-Nunez-Zepeda-A097-315-824-BIA-Sept-29-2017.

[15] *Al Mutarreb v. Holder*, 561 F.3d 1023 (9th Cir. 2009) (vacating the removal order and concluding that the IJ had no statutory authority to order removal *in absentia* where "the record contains not an iota of evidence, let alone substantial evidence, to support the IJ's removability finding" that the respondent had violated the terms of his student visa).

IV. COMMON CLAIMS FOR *IN ABSENTIA* MOTIONS

When an IJ issues an *in absentia* order of removal, a respondent may seek reopening of the removal proceedings in one of three ways. The Immigration and Nationality Act (INA) at § 240(b)(5)(C) provides two statutory bases to seek rescission and reopening: (1) lack of notice and (2) exceptional circumstances (including ineffective assistance of counsel). The regulations also provide a third avenue to reopening via the IJ's *sua sponte* authority.[16]

The proper filing of an MTRR of an *in absentia* order based on lack of notice or exceptional circumstances within the relevant time and numeric limitations stays the removal of the respondent pending disposition of the motion by the IJ.[17]

The following sections explore common claims arising under each statutory or regulatory basis. However, this guide does not comprehensively cover all possible MTRR and MTR claims, instead focusing on outlining common arguments for MTRRs and/or MTRs related to *in absentia* removal orders. In most cases, a respondent should advance multiple arguments in the alternative as opposed to offering only one argument under a single legal or regulatory basis.[18]

Please note that respondents with *in absentia* removal orders pre-dating the enactment of The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 must refer to the law at the time of their removal orders, as this Guide solely discusses post-IIRAIRA law and regulations.[19] Generally, the pre-IIRAIRA law is more generous than the current law.

A. No Notice of the Hearing

A respondent has a right to receive written notice of the hearing in Immigration Court in accordance with INA § 239(a)(1) and (2). If a respondent "did not receive notice in accordance with INA 239(a)(1) and (2)" then they can move to reopen pursuant to INA § 240(a)(5)(C)(ii).[20]

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[16] 8 CFR § 1003.23(b)(1).

[17] INA § 240(b)(5)(C) ("The filing of the Motion to Reopen described in [INA § 240(b)(5)(C)((i) and (ii)] shall stay the removal of the alien pending disposition of the motion by the immigration judge."); *see also* INA § 242B(c)(3) (pre-IIRAIRA); 8 CFR § 1003.23(b)(4)(ii) (removal orders); 8 CFR § 242B(c)(3) (deportation orders, pre-IIRAIRA).

[18] Moreover, this guide does not go into the statutory and regulatory specifics related to MTRRs and MTRs for individuals who were ordered removed *in absentia* while in withholding of removal proceedings under INA § 241. When representing an individual who received an *in absentia* removal order while in withholding-only proceedings, we recommend even more careful research of statutes, regulations, and case law in your circuit. 8 CFR § 1208.2(c)(3)(ii) relates to persons not entitled to INA § 240 proceedings and indicates that a Motion to Reopen following a failure to appear must be filed within 90 days. However, INA § 240(b)(5)(C)(i) establishes that the normal deadline for a Motion to Reopen based on failure to appear is 180 days while INA § 241 has no provisions related to deadlines for motions to reopen. If DHS argues 8 CFR § 1208.2(c)(3)(ii) limits the MTRR filing deadline to 90 days, practitioners may argue that the regulation is *ultra vires* to the statute.

[19] For deportation proceedings initiated with an Order to Show Cause (OSC) and service of the hearing notice occurred after June 12, 1992, but prior to April 1, 1997, former INA § 242B(c) controls. For exclusion proceedings initiated with Form I-122 or "old" deportation proceedings initiated with an OSC and the service of hearing notice occurred prior to June 13, 1992, former INA § 242(b) controls.

[20] *See Matter of G-Y-R-,* 23 I&N Dec. 181, 189-90 (BIA 2001) (holding an *in absentia* order of removal is inappropriate where the record reflects that the alien did not receive an NTA by certified mail); *Valle Cardona*, A 206 434 992 (BIA Feb. 2, 2018) (rescinding *in absentia* removal order where neither respondent nor attorney were aware

An MTRR of an *in absentia* order based on lack of notice may be filed at any time.[21] Although there is no deadline for filing a no notice claim and the INA does not require a showing of diligence, some IJs and the BIA may consider diligence in filing the MTRR as a positive factor in determining whether a no notice claim is supported by the respondent's actions.[22]

While DHS has the burden of proof during the *in absentia* hearing, the respondent has the burden of demonstrating that they did not receive notice on an MTRR based on lack of notice.[23] A respondent may have a notice-based MTRR argument if the respondent did not actually receive written notice of either the NTA or the Notice of Hearing in Removal Proceedings despite having the correct address on file, or the respondent provided their new address to ICE before ICE filed the NTA with the Immigration Court, as discussed below in Section IV.A.4.

1. Notice of an Immigration Court hearing: the general process

Removal proceedings commence when DHS files the Notice to Appear (NTA) that was served on a noncitizen with an Immigration Court.[24] DHS may serve NTAs in person or, if personal service is not practicable, by mail.[25] The NTA must specify, *inter alia*, the immigration law charges against the individual, the individual's responsibilities, such as providing the Attorney General with a written record of a change of address, and the consequences of failing to meet these responsibilities.[26] The INA requires that the Immigration Court allow 10 days to elapse between DHS service of the NTA and the date of the first removal hearing.[27]

Per the INA, the NTA must also contain certain information including the hearing date, time, and location. Historically, the NTA has lacked the hearing date and time information, but after the U.S. Supreme Court decision in *Pereira v. Sessions*, NTAs now more regularly include this information.[28] However, NTAs containing time and date post-*Pereira* have sometimes included

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proceedings had been re-calendared and attorney did not receive notice of rescheduled hearing), unpublished decision available at https://www.scribd.com/document/371997783/Kelvy-Valle-Cardona-A206-434-992-BIA-Feb-2-2018?secret_password=mSR4WRB6Z97T3OuVeAP8; *but see e.g.*, *Dominguez v. U.S. Att'y Gen.*, 284 F.3d 1258, 1259-60 (11th Cir. 2002) ("Due process is satisfied so long as the method of notice is conducted in a manner reasonably calculated to ensure that notice reaches the alien."); *Matter of M-D-*, 23 I&N Dec. 540, 545 (BIA 2002) (holding that it is not reasonable to allow a respondent to defeat service by neglecting to collect mail or by the postal service returning certified mail for being "unclaimed"), unpublished decision available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3485.pdf.

[21] INA § 240(b)(5)(C)(ii).

[22] For example, if there is a factual dispute or the respondent is trying to rebut the notice presumption, an IJ could consider evidence of a respondent diligently taking action upon learning of the *in absentia* order.

[23] INA § 240(b)(5)(C)(ii).

[24] 8 CFR § 1003.14(a).

[25] INA § 239(c).

[26] INA § 239(a)(1).

[27] INA § 239(b)(1).

[28] During oral argument in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), Justice Kennedy asked the Assistant to the Solicitor General Fredrick Liu how many NTAs omit the date and time of the hearing and Liu responded, "almost 100 percent." Transcript of Oral Argument at 52, *Pereira*, 138 S. Ct. 2105 (2018), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-459_1bn2.pdf.

fake hearing dates.[29] Even with NTAs that lack the hearing date and time information, the Immigration Court will take jurisdiction over the respondent.[30] The BIA and some U.S. Courts of Appeals have held that the Immigration Court has jurisdiction over the respondent despite the NTA not complying with INA § 239(a)(1)(G)(ii).[31]

If there is a change in the time or date of the Immigration Court hearing that was originally contained in the NTA, there must be notice of such change.[32] This change in time or date occurs through a Notice of Hearing in Removal Proceedings issued by the Immigration Court. The Notice of the Hearing in Removal Proceedings must inform the respondent of the consequences of failing to attend the hearing.[33]

The Immigration Court sends the Notice of the Hearing containing the time and place information to the address the respondent provided DHS at the time of NTA service or to the address the respondent updated with the Immigration Court by filing of a Form EOIR-33/IC, Notice of Change of Address.[34] If a legal representative entered their appearance with the Immigration Court, the Immigration Court would send the Notice of Hearing to the legal representative. Notices of Hearing do not need to be mailed by certified mail.[35]

If the respondent has a new address, the respondent is responsible for updating the Immigration Court with their current address within five days from the date of such change, assuming the respondent was properly notified of this requirement.[36] If the respondent does not update their

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[29] *See, e.g.,* Maria Sacchetti & Francisco Alvarado, *Hundreds Show Up for Immigration Court Hearings that Turn Out Not to Exist*, Washington Post, Jan. 31, 2019, available at https://www.washingtonpost.com/local/immigration/hundreds-show-up-for-immigration-court-hearings-that-turn-out-not-to-exist/2019/01/31/e82cc61c-2566-11e9-90cd-dedb0c92dc17_story.html?utm_term=.23ef8b4e6a1b.

[30] *See* Memorandum from James R. McHenry III, Director EOIR, *Acceptance of Notices to Appear and Use of the Interactive Scheduling System*, PM 19-08, Dec. 28, 2018, available at https://www.justice.gov/eoir/file/1122771/download.

[31] *See Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018) (holding that an NTA that does not specify the time and place of an individual's initial removal hearing *does* vest an IJ with jurisdiction over the removal proceedings and meets the requirements of INA § 239(a), so long as notice of hearing specifying this information is later sent to the individual); *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019); *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019); *Ali v. Barr*, --- F.3d ---, 2019 WL 2147246 (8th Cir. May 17, 2019); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Soriano-Mendosa v. Barr*, No. 18-9535, 2019 WL 1531499 (10th Cir. Apr. 9, 2019); *Leonard v. Whitaker*, 746 F. App'x 269 (4th Cir. 2018); *see also Matter of Mendoza-Hernandez,* 27 I&N Dec. 520 (BIA 2019) (distinguishing *Pereira,* following *Matter of Bermudez-Cota,* and holding that an Immigration Judge properly exercised jurisdiction where information regarding the time and place of the hearing, which was missing from the notice to appear, was provided in a notice of hearing that was subsequently issued). Practitioners should nonetheless consider preserving the jurisdictional argument for appeal to the U.S. Court of Appeals. Note, however, that some U.S. Courts of Appeals have ruled on this issue and held that an NTA that does not specify the time and place of an individual's initial removal hearing vests jurisdiction with the Immigration Court. *See infra* Section IV.A.6 (regarding arguments that can be raised in MTRRs based on *Pereira v. Sessions*).

[32] INA § 239(a)(2)(A)(i).

[33] INA § 239(a)(2)(A)(ii).

[34] 8 CFR § 1003.18.

[35] *See Matter of M-R-A-,* 24 I&N Dec. 665 (BIA 2008) (noting that Congress set forth new procedures allowing notice through service by regular mail when it enacted section 304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-587).

[36] INA § 239(a)(1)(F)(ii); 8 CFR § 1003.15(d)(2).

address with the Immigration Court, then "the Government shall not be required to provide [them] with written notice of [the] hearing."[37] If the respondent fails to update their address with the Immigration Court, the Immigration Court will send the Notice of Hearing to the respondent's last known address, even if the respondent no longer lives there.[38]

There is no requirement that the NTA or Notice of Hearing be in a language other than English.[39]

2. Notice of an Immigration Court hearing: the process for asylum-seeking families

For families who seek asylum at the Mexico-U.S. border, DHS will usually serve the NTAs in person, although this process may vary by jurisdiction.[40] DHS then decides whether to release the family, place the family in a detention facility, or separate the family among different detention facilities. DHS often places mothers and minor children in family detention facilities. If the family includes a father or sons or daughters who are 18 years old or older, DHS often separates these family members from the mother and any minor children by placing them in ICE adult detention facilities.

For fathers and adult sons and daughters, DHS generally will file the NTA with the Immigration Court with jurisdiction over the ICE detention facility and the Immigration Court will issue the Notice of Hearing in Removal Proceedings while the adult family members are detained. Unless the father and adult sons and daughters obtain humanitarian parole or obtain and post a low bond, they will remain detained for the duration of their immigration proceedings. Generally, those released from detention must file a Motion to Change Venue to the Immigration Court with jurisdiction over their new place of residence.[41] If a Motion to Change Venue is not filed or is not granted, the asylum seeker will be required to travel back to the Immigration Court where proceedings were initiated or else face an *in absentia* removal order.

However, pursuant to the *Flores* Settlement Agreement,[42] which applies to both unaccompanied and accompanied children, DHS may not detain families in detention for the duration of their

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[37] INA § 239(a)(2)(B).

[38] INA §§ 239(a)(2)(B), 242B(a)(2), (b)(2) (pre-IIRAIRA). *See Gomez-Palacios v. Holder*, 560 F.3d 354, 360–61 (5th Cir. 2009) (holding that a respondent's failure to receive actual notice of a removal hearing due to their address does not mean that the alien did not receive the statutorily required notice).

[39] *See, e.g.*, *Khan v. Ashcroft*, 374 F.3d 825, 828 (9th Cir. 2004) (distinguishing translation requirement for expedited removal proceedings); *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1155 n.4 (9th Cir. 2004) (discussing congressional intent to vest discretion for translation in the agency).

[40] For asylum seekers applying affirmatively before the Asylum Office (part of United States Citizenship and Immigration Services (USCIS)), who are not granted asylum and are instead referred to Immigration Court, the process by which USCIS serves the NTA may vary. Sometimes USCIS will mail the NTA to the address in the "Alien File." In those cases, when service of the NTA is accomplished by mail and the respondent fails to appear at a removal hearing, a respondent can make a notice-based challenge to an *in absentia* removal order if DHS mailed the NTA to an outdated address that the asylum applicant provided before removal proceedings commenced and thus before receiving notice of the requirement to update the address for removal proceedings purposes. *See Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001).

[41] For a toolkit on pro se motions to change venue with sample motions, visit www.asylumadvocacy.org/resources.

[42] After years of litigation, including an appeal to the U.S. Supreme Court, immigrant and child advocates reached a settlement agreement with the government in 1997 regarding the detention, treatment, and release of immigrant children known as the *Flores* Settlement Agreement. The settlement agreement imposes obligations on the

immigration proceedings because family detention centers are not "licensed programs" for children.[43] Instead, DHS must release or transfer the family to a licensed program within three or five days, or "as expeditiously as possible" in the event of an emergency or influx, meaning within 20 days.[44]

Unlike the general practice in adult detention centers, when DHS releases families from family detention, DHS generally files the NTA with the Immigration Court with jurisdiction over the residential address the family provided to ICE upon release.[45] If DHS filed the NTA with the Immigration Court having jurisdiction over the family detention facility, DHS generally informs the Immigration Court regarding the family's release from family detention and files a Motion to Change Venue to the Immigration Court with jurisdiction over the residential address the family provided DHS. However, on the NTAs for formerly separated family cases,[46] DHS listed the temporary welcoming shelter address located along the Mexico-U.S. border instead of the address of intended residence with loved ones.[47]

When DHS releases a family, the family has certain obligations to uphold. The family may have an obligation to report to the local ICE Enforcement and Removal Operations (ERO) Office.[48]

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government with respect to the treatment of children in immigration detention and established a general policy favoring children's release from immigration detention.

[43] *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (Order, C.D. Cal. July 9, 2018), available at https://www.politico.com/f/?id=00000164-8176-d66b-a166-8bf6cdaa0000.

[44] Order Denying Defendant's' *Ex Parte* Application for Limited Relief from Settlement Agreement, *Flores v. Sessions*, No. 2:85-CV-04544 (C.D. Cal. July 9, 2018). Note, however, that the Department of Homeland Security and the Department of Health and Human Services' published a Notice of Proposed Rulemaking entitled "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children" on September 7, 2018 that describes a self-licensing scheme that would transform family detention centers into "licensed programs" in which the government could keep children beyond 20 days. *See* CLINIC's Comments to Department of Homeland Security and the Department of Health and Human Services' Notice of Proposed Rulemaking entitled "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," Nov. 6, 2018, available at https://cliniclegal.org/resources/clinic-submits-comments-opposing-proposed-regulations-would-expand-detention-children.

[45] *See Fuentes-Pena v. Barr,* 917 F.3d 827, 828 (5th Cir. 2019) ("Accompanying the NTA was a notice from ICE, an agency within DHS, stating that the NTA would "be filed with the Office of the Immigration Judge with jurisdiction over the residential address [she] provided to ICE upon [her] release.").

[46] In 2018, the Trump Administration implemented a "zero tolerance" policy, separating asylum seekers from their children, and prosecuting asylum seekers who entered without inspection for the federal misdemeanor of improper entry. Though the family separation policy formally ended in June 2018, reports of ongoing separation continue to surface. *See, e.g.,* Miriam Jordan and Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, New York Times, March 9, 2019, available at https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html.

[47] DHS included the temporary shelter address despite the families providing the address of intended residence with loved ones, which DHS used to schedule a check-in appointment with the local ICE ERO office with jurisdiction over the intended residence. For this reason, ASAP and CLINIC have been assisting formerly separated families with *pro se* changes of venue. *See* Adriana C. Zambrano, *CLINIC's Response to Family Separation Makes a Difference*, Apr. 2, 2019, available at https://cliniclegal.org/news/clinics-response-family-separation-makes-difference. *See also* www.asylumadvocacy.org/resources for sample pro se motions to change venue.

[48] In general, noncitizens who post bond are not required to report to the local ICE ERO office. However, ICE has been known to issue Orders of Supervision to some families who posted bond.

Families who must report to ICE ERO also have an obligation to alert ICE ERO of any change of address within 10 days of moving to the new address.[49]

If the family has a hearing scheduled with the Immigration Court, the family also has an obligation to change their address with the Immigration Court using a Form EOIR-33/IC, Alien's Change of Address Form/ Immigration Court.[50] However, families who do not have a hearing scheduled with the Immigration Court may have difficulty updating their addresses with the Immigration Court unless and until ICE files the NTA with the Immigration Court. There is no formal process to update an address with the Immigration Court before the NTA has been filed, and the Immigration Court may reject a Form-33/IC, Alien's Change of Address Form/ Immigration Court if no case exists in their records.[51] Moreover, some families only update their addresses with ICE because of confusion. For example, some families often mistakenly think that updating one's address with ICE automatically updates their address with the Immigration Court.[52] Families who do not or cannot update their address with the Immigration Court directly will not receive a Notice of Hearing from the Immigration Court at their new address, and thus will likely not learn about the haring or appear in immigration court.

Those families who remain at the same address or successfully update their address with the Immigration Court may nonetheless fail to receive the hearing notice from the Immigration Court because of a problem with the U.S. Postal Service, the mailbox system, or miscommunication within the household. Even those families who are able to obtain legal representation may not receive notice of their hearing if legal counsel fails to communicate the hearing date to the family. Furthermore, families who receive notice of the hearing often are unable to appear at the hearing because of circumstances outside of their control.[53]

3. The respondent did not actually receive written notice despite having the correct address on file

If the respondent states they did not receive either the NTA or the Notice of Hearing and did not appear because they did not know of the date and place of the hearing, first check the Immigration Court file to see if the NTA or the Notice of Hearing was mailed to the wrong address. Sometimes, there is an error in the address, such as a misspelling or incomplete address, so that the NTA or Notice of Hearing either could not be delivered or was delivered to the wrong address. If so, then there is a basis for a MTRR based on lack of notice under INA § 240(a)(5)(C)(ii).[54]

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[49] 8 CFR § 265.1. ICE may require those on an Order of Supervision to seek permission to seek permission before moving to another state or traveling outside the geographic area of residence.

[50] INA § 265(a). EOIR-33 forms for different courts are available at https://www.justice.gov/eoir/form-eoir-33-eoir-immigration-court-listing.

[51] 8 CFR § 1003.15(d).

[52] *See Oneyda Carolina Sierra-Manca*, A206-835-344 (BIA June 17, 2016) (reopening removal order for a woman and child with *sua sponte* authority because mother assumed the ICE officer was going to inform court of the change of address), unpublished decision available at https://www.scribd.com/document/318710279/Oneyda-Carolina-Sierra-Manca-A206-835-344-BIA-June-17-2016.

[53] *See infra* Section IV.B.

[54] *Matter of M-R-A-*, 24 I&N Dec. 665, 669-74 (BIA 2008).

The respondent can also challenge the service of the NTA that is sent to the correct address if they did not actually receive it, but they must rebut the "presumption of effective delivery." Even when the Immigration Court sends notice by regular mail, there is a presumption of effective delivery, although the presumption is weaker for regular mail as opposed to certified mail.[55] The asylum seeker is required to rebut this presumption in order to reopen an *in absentia* order based on lack of notice.

In determining whether the asylum seeker has overcome the presumption of effective delivery, the IJ must consider both circumstantial and corroborating evidence.[56] The IJ may consider the following non-exhaustive types of evidence and information:

- The respondent's declaration that discusses the respondent's actions upon learning about the *in absentia* order and whether they exercised due diligence in seeking redress;
- Declarations from family members and other individuals who are knowledgeable about the relevant facts relating to notice of the hearing;
- Prior application for removal relief or protection from removal such as asylum, withholding under the INA, or protection under the Convention Against Torture (CAT) (to establish an incentive to appear);
- Previous attendance at Immigration Court hearings (to establish record of attendance);
- Other circumstances or evidence indicating possible non-receipt.[57]

Practitioners should check the asylum seeker's Immigration Court file for any evidence that the mail was not delivered, such as an envelope stamped as undeliverable by the post office.

This type of challenge will not succeed if the Immigration Court mailed the Notice of Hearing in Removal Proceedings to the correct address but the asylum seeker failed to collect their mail, or if the asylum seeker did not receive the Notice of Hearing in Removal Proceedings "through some failure in the internal workings of the household."[58]

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[55] *Id.* at 673 (BIA 2008); *see also Matter of C-R-C-,* 24 I&N Dec. 677, 679 (BIA 2008) (holding that presumption of delivery sent by regular mail is also overcome by submitting an affidavit stating respondent did not receive mail and has continued to reside at address, and by providing other circumstantial evidence such as an incentive to appear and proof of due diligence).
[56] *M-R-A-*, 24 I&N Dec. at 674 (BIA 2008).
[57] *Id.*
[58] *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002) ("It is not reasonable to allow the respondent to defeat service by neglecting or refusing to collect his mail."); *G-Y-R-*, 23 I&N Dec. at 189 (citing *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995)).

4. The respondent provided a new address to ICE before ICE filed the NTA with the Immigration Court

If DHS releases an asylum seeker from detention prior to DHS filing the NTA with the Immigration Court and the family subsequently communicates a change of address to ICE, but not to the Immigration Court, the respondent can make a notice-based challenge to an *in absentia* removal order.[59] It is common for there to be a long delay between the asylum seeker's receipt of an NTA and the filing of the NTA in immigration court.[60]

The Fifth Circuit held in *Fuentes-Peña v. Barr* that notifying ICE of a change of address before DHS files the NTA with the Immigration Court satisfies the statutory obligation to provide notice of a change of address and thus excuses a failure to attend the removal hearing.[61] Specifically, the Fifth Circuit examined section 239(a)(1)(F) of the INA, which requires respondents to "provide the Attorney General immediately with a written record of any change" of address. The Fifth Circuit explained that "Attorney General" refers to the former Immigration and Naturalization Service (INS), which prior to the creation of DHS was responsible for both serving the NTA and filing the it with the Immigration Court.[62] However, since DHS's creation, ICE now serves and files the NTA.[63] The Fifth Circuit reasoned that reading INA § 239 "through the lens of 6 U.S.C. § 557," the statute discussing Homeland Security transfer of functions, a respondent is required to provide a change of address to ICE at least until the NTA has been filed with the immigration court.[64]

Therefore, practitioners should assess whether the asylum seeker met the obligation to provide the new address to the "Attorney General" by notifying ICE of the change of address before DHS filed the NTA with the Immigration Court. If so, practitioners should argue that the respondent did not have notice of the hearing and seek reopening under INA § 240(a)(5)(C)(ii) by relying on the Fifth Circuit's reasoning in *Fuentes-Peña v. Barr*.

5. The attorney of record received notice but failed to inform the respondent

The Notice of Hearing in Removal Proceedings is typically considered served on the respondent even if it has only been served on the Attorney or Representative of Record.[65] The Attorney or

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[59] *Fuentes-Pena v. Barr*, 917 F.3d 827 (5th Cir. 2019). An alternative issue (uncommon scenario for recent asylum seekers apprehended at the border) would arise if an asylum seeker applied for asylum before USCIS and then USCIS sent the NTA to a former, now out-of-date address, such as the address provided on the I-589. In such a scenario, the asylum seeker would have never received the NTA and therefore would not be on notice of how to update their address. *See Matter of G-Y-R-,* 23 I&N Dec. 181 (BIA 2001).

[60] *See* Transactional Records Access Clearinghouse (TRAC), *Immigration Court Filings Take Nose Dive, While Court Backlog Increases* (October 30, 2017), available at https://trac.syr.edu/immigration/reports/487/.

[61] *Fuentes-Pena v. Barr*, 917 F.3d 827 (5th Cir. 2019).

[62] *Id.*

[63] 6 USC § 557.

[64] *Fuentes-Pena,* 917 F.3d 827.

[65] INA §§ 239(a)(1), (a)(2)(A); *Matter of M-R-A-*, 24 I&N Dec. 665, 670 (BIA 2008). Note however that the Ninth Circuit has held that "serving a hearing notice on an alien, but not on the alien's counsel of record, is insufficient when an alien's counsel of record has filed a notice of appearance with the immigration court." *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009).

Representative of Record is one who previously filed an EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court on behalf of the respondent, as long as the legal representative has not filed a motion to substitute counsel or a motion to withdraw from the case.

Sometimes a legal representative fails to provide notice of the hearing to the respondent, or forgets to file a motion to substitute counsel or withdraw from a case even if they are no longer representing the respondent. This can lead to the respondent not receiving notice of the removal hearing and being ordered removed *in absentia*. If the legal representative failed to provide notice of the hearing under such circumstances, consider making an ineffective assistance of counsel claim under INA § 240(a)(5)(C)(i) as discussed in Section IV.B.2 below.

6. The respondent received inadequate written notice because of a defective NTA

If the respondent's NTA lacks information regarding the hearing time and date, or other information required by statute,[66] practitioners can consider making an argument for reopening under INA § 240(a)(5)(C)(ii) based on the defective NTA.

The U.S. Supreme Court held in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) that a putative NTA that does not specify the time and place of removal proceedings does not trigger the stop-time rule for calculating a non-citizen's period of residence in the United States, which is relevant to a form of relief known as cancellation of removal.[67] The Supreme Court explained, "when the term 'notice to appear' is used elsewhere in the statutory section, including as the trigger for the stop-time rule, *it carries with it the substantive time-and-place criteria required by INA §239(a).*"[68]

Like the stop-time provision, the no-notice reopening provision references INA § 239(a): a respondent who "did not receive notice in accordance with INA 239(a)(1) and (2)" can move to reopen pursuant to INA § 240(a)(5)(C)(ii). The substantive time-and-place criteria of INA §239(a) therefore applies to INA § 240(a)(5)(C)(ii) under the logic of *Pereira*.

Nonetheless, most respondents do not receive an NTA that satisfies the substantive time-and-place criteria of INA §239(a)(1). During oral argument in *Pereira*, Justice Kennedy asked the Assistant to the Solicitor General Fredrick Liu how many NTAs omit the date and time of the hearing and Liu responded, "almost 100 percent."[69]

Based on the reasoning in *Pereira v. Sessions*, practitioners should consider notice arguments when a respondent has a defective NTA that lacks the information that INA § 239(a)(1) requires. However, this is a rapidly developing area of law, and practitioners invoking the argument should

[66] *See* INA § 239(a)(1)-(2).
[67] *See* 138 S. Ct. at 2110, 2113–16.
[68] *Id*. at 2116 (emphasis added).
[69] Transcript of Oral Argument at 52, *Pereira*, 138 S. Ct. 2105 (2018), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-459_1bn2.pdf.

(1) consult other, more detailed guides[70] and (2) research the latest legal precedents on this issue. As of the date of publication of this guide, the BIA and several U.S. Courts of Appeal have issued decisions holding that rescission of an *in absentia* order of removal is not required when DHS serves a respondent with an NTA lacking the time or place of the hearing if the Immigration Court subsequently issues a Notice of Hearing containing the missing information.[71]

Aside from the NTA lacking the hearing time and date, practitioners should inspect the NTA for other deficiencies or errors such as an illegible date, a date that falls on a weekend or holiday, a time when the Immigration Court is not open (e.g. midnight), an incorrect Immigration Court address, or lack of an address for the Immigration Court altogether.[72]

B. Exceptional Circumstances Preventing Appearance

The respondent may file an MTRR of an *in absentia* order if they failed to appear because of "exceptional circumstances."[73] Such motions are generally due within 180 days of the final removal order, but U.S. Courts of Appeal have recognized that the filing deadlines for motions to reopen are subject to equitable tolling.[74]

1. Exceptional circumstances in general

The INA and implementing regulations define the term "exceptional circumstances."[75] The INA states that the "term 'exceptional circumstances' refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."[76] According to the regulation, exceptional circumstances must be "beyond the control of the [respondent]."[77]

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[70] Other helpful resources include practice advisories from the National Immigration Project, *Practice Advisory Challenging the Validity of Notices to Appear Lacking Time-and-Place Information*, July 16, 2018, available at https://nationalimmigrationproject.org/pract_advisories/gen/2018_05Jul_Pereira.html and CLINIC and the American Immigration Council, *Strategies and Considerations in the Wake of Pereira v. Sessions Practice Advisory,* Dec. 21, 2018, available at https://cliniclegal.org/resources/practice-advisory-strategies-and-considerations-wake-pereira-v-sessions.

[71] *See Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019); *Mauricio-Benitez v. Sessions*, 908 F.3d 144 (5th Cir. 2018); *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019); *Molina-Guillen v. U.S. Att'y Gen.*, 758 F. App'x 893 (11th Cir. 2019).

[72] Some IJs in the U.S. Court of Appeals for the Ninth Circuit are relying on *Karingithi v. Whitaker*, 913 F.3d 1158, 1158-60 (9th Cir. 2019) to terminate proceedings for lack of jurisdiction, thus distinguishing *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), which held that lack of the date and time on the NTA is not fatal to Immigration Court jurisdiction. Practitioners can argue that the address of the Immigration Court is a required element of 8 CFR 1003.15(b) and that an NTA that lacks this required element does not meet the 8 CFR 1003.15(b)(6) regulatory requirement needed to vest jurisdiction with the Immigration Court. For a sample IJ written decision based on this reasoning, please email mmendez@cliniclegal.org.

[73] INA § 240(b)(5)(C)(i); 8 CFR § 1003.23(b)(4)(ii).

[74] *See infra* Section IV.B.3 on equitable tolling.

[75] 8 CFR § 1003.23(b)(4)(ii).

[76] INA § 240(e)(1).

[77] 8 CFR § 1003.23(b)(4)(ii).

Immigration Courts generally employ a "totality of the circumstances" test to determine whether the respondent's reason for not attending the hearing is an exceptional circumstance.[78] U.S. Courts of Appeal opinions verify that this is the correct test.[79] The BIA and Courts of Appeal have articulated various factors immigration courts must consider under the totality of the circumstances test. According to the BIA, such factors include supporting documentary evidence, the respondent's efforts in contacting the immigration court, and the respondent's promptness in filing the MTRR.[80] Other possible factors articulated by U.S. Courts of Appeal include the strength of the respondent's underlying claim, the harm the respondent would suffer if the MTRR were denied, and the inconvenience the government would suffer if the MTRR were granted.[81] U.S. Courts of Appeal have repeatedly given considerable weight in the totality of the circumstances test to situations where nothing in the respondent's record reflected an intent to avoid a hearing or delay removal.[82] As such, the respondent should include all the factors that contributed to the failure to appear and argue that in the "totality of the circumstances," there were exceptional circumstances.

"Exceptional circumstances" is a stricter standard than reasonable cause, which is the standard for reopening *in absentia* removal orders in exclusion proceedings and deportation cases filed prior to June 13, 1992.[83] However, U.S. Courts of Appeal case law suggests that the "exceptional

[78] *Matter of W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) (*citing* H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 132 (1990)); *see also Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996) (considering counsel's misdirection and respondent's LPR status in evaluation of exceptional circumstances).
[79] *Murillo-Robles v. Lynch,* 839 F.3d 88 (1st Cir. 2016); *accord Herbert v. Ashcroft*, 325 F.3d 68, 72 (1st Cir. 2003) ("We think this is one of those rare cases in which exceptional circumstances exist. The totality of the circumstances must be considered."); *Denko v. INS*, 531 F.3d 717, n.3 (6th Cir. 2003) ("An IJ considers the totality of the circumstances when making a determination that exceptional circumstances exist."); *Gjokaj v. INS*, 96 F. App'x 301, 305 (6th Cir. 2004) ("In determining whether exceptional circumstances exist in any given case, the IJ shall consider the totality of the circumstances."); *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002) ("This court must look to the "particularized facts presented in each case" in determining whether the petitioner has established exceptional circumstances.").
[80] *Matter of B-A-S,* 22 I&N Dec. 57, 58-59 (BIA 1998).
[81] *See Murillo-Robles*, 839 F.3d at 91 (citing *Kaweesa v. Gonzales*, 450 F.3d 62, 68-69 (1st Cir. 2006); *see also Singh v. INS*, 295 F.3d 1037, 1039-40 (9th Cir. 2002) (finding that if a respondent has no reason to try to delay their hearing and denying a Motion to Reopen would lead to the "unconscionable result" of deporting a noncitizen who is eligible for relief, the totality of the circumstances approach would weigh in favor of a finding of exceptional circumstances.).
[82] *See, e.g.*, *Kaweesa*, 450 F.3d at 70; *Murillo-Robles*, 839 F.3d at 93-94; *Milton Mauricio Medina-Hernandes*, A098 -993-235 (BIA Mar. 15, 2016), unpublished decision available at https://www.scribd.com/document/307726386/Milton-Mauricio-Medina-Hernandes-A098-993-235-BIA-March-15-2016; *Margarita Sanchez-Perez*, A087-148-850 (BIA May 9, 2012), unpublished decision available at https://www.scribd.com/document/210299550/Margarita-Sanchez-Perez-A087-148-850-BIA-May-9-2012; *Hector Fransua Mach-Chavez*, A206-888-919 (BIA March 14, 2016), unpublished decision available at https://www.scribd.com/document/307459548/Hector-Fransua-Mach-Chavez-A206-888-919-BIA-March-14-2016.
[83] *Matter of N-B-,* 22 I&N Dec. 590, 593 (BIA 1999).

circumstances" standard is not as restrictive as "beyond one's control" suggests.[84] Unpublished BIA decisions granting reopening on exceptional circumstances illustrate this.[85]

Examples of exceptional circumstances can include:[86]

- Battery or extreme cruelty to the respondent or any child or parent of the respondent;
- Serious illness;
    - Illness can be an exceptional circumstance, but the practitioner should provide adequate documentation to show that illness is an "exceptional circumstance;"[87]
- Serious illness or death of a spouse, child, or parent;[88]

[84] *See, e.g., Kaweesa v. Gonzales*, 450 F.3d 62 (1st Cir. 2006) (holding that respondent demonstrated exceptional circumstances through affidavits showing that respondent mistook the May 13 hearing date for May 17, because the record lacked any suggestion that the respondent was trying to delay proceedings, and because respondent's asylum claim indicated that the harm of returning to Uganda was great).

[85] *See, e.g.*, *Miriam Awuku*, A206-266-819 (BIA Sept. 20, 2017) (rescinds *in absentia* removal order where respondent and her attorney appeared on correct date but at incorrect time), unpublished decision available at https://www.scribd.com/document/362582841/Miriam-Awuku-A206-266-819-BIA-Sept-20-2017; *Oneyda Carolina Sierra-Manca*, A206-835-344 (BIA June 17, 2016) (reopening proceedings *sua sponte* under the totality of the circumstances for a mother and minor son who were ordered removed *in absentia* after failing to report a change of address because she assumed an immigration officer monitoring her case would do so), unpublished decision available at https://www.scribd.com/document/318710279/Oneyda-Carolina-Sierra-Manca-A206-835-344-BIA-June-17-2016; *Hector Fransua Mach-Chavez*, A206-888-919 (BIA Mar. 14, 2016) (overturning IJ denial of Motion to Reopen because respondent's mistaken belief that the location of his hearing had been changed was an exceptional circumstance), unpublished decision available at https://www.scribd.com/document/307459548/Hector-Fransua-Mach-Chavez-A206-888-919-BIA-March-14-2016; *Jose Manuel Oliva-Ramirez*, A206-700-849 (BIA Dec. 22, 2015) (holding that respondent's inability to secure transportation to out-of-state hearing constituted exceptional circumstances), unpublished decision available at https://www.scribd.com/document/295147536/Jose-Manuel-Oliva-Ramirez-A206-700-849-BIA-Dec-22-2015. *Cf. Jorge Antonio Haro Pena*, A095-727-770 (BIA Dec. 17, 2013) (holding that exceptional circumstances must be established through review of the particularized facts, not general per se rules), unpublished decision available at https://www.scribd.com/document/193871497/Jorge-Antonio-Haro-Pena-A095-727-770-BIA-Dec-17-2013.

[86] INA § 240(e)(1).

[87] *See Matter of J-P-*, 22 I&N Dec. 33, 34 (BIA 1998) (denying relief for severe headache due in part to lack of documentation); *Matter of Singh*, 21 I&N Dec. 998, 1000 (BIA 1997) (finding stepson's illness to qualify as an exceptional circumstance). *But see Lonyem v. U.S. Att'y Gen.*, 352 F.3d 1338, 1341 (11th Cir. 2003) (upholding the IJ's determination that a nurse's affidavit stating that petitioner had been treated for malaria the day before the hearing was not credible in the absence of further documentation and because he had failed to contact the Immigration Court on the day of the hearing); *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 890 (9th Cir. 2002) (finding inadequate a hospital form that failed to indicate that petitioner's asthma attack was a "serious health condition").

[88] *See, e.g., Rocio Alida Valencia Barragan*, A209-138-515 (BIA Feb. 5, 2018) (rescinding an *in absentia* order of removal because the respondent gave birth via a caesarian section 10 days before the hearing at which she failed to appear), unpublished decision available at https://www.scribd.com/document/371997958/Rocio-Alida-Valencia-Barragan-A209-138-515-BIA-Feb-5-2018?secret_password=Kteexsnn86ni8GfFcPsG; *R-D-G-*, AXXX-XXX-498 (BIA Nov. 3, 2017) (rescinding an *in absentia* order of removal upon finding the respondent, a minor, failed to appear because he was seriously ill at the time of his hearing and was diagnosed with cancer and hospitalized the following

- Ineffective assistance of counsel that interfered with attendance at the hearing;[89]

- Confusion about the hearing date and time;[90]

This is not an exhaustive list of what constitutes exceptional circumstances. Subscribing to the Immigrant and Refugee Appellate Center's Index of Unpublished BIA decisions[91] provides important insight into what the BIA has recently found to constitute exceptional circumstances. As noted above, recent unpublished BIA case law suggests that that the confusion asylum-seeking families face while *pro se* navigating the removal system may qualify as an exceptional circumstances factor. Unpublished BIA decisions are not binding on the Immigration Courts, but proper citation and inclusion of the decision with the filing of an MTRR of an *in absentia* order may be persuasive and helpful in guiding the IJ.[92]

As suggested by BIA unpublished decisions, it is especially important to include information on the respondent's attempts to contact the Immigration Court or explain why the respondent could not do so.[93] One reason the respondent may not have been able to contact the Immigration Court is the lack of a phone number on the documents issued by DHS and the Immigration Court, combined with the respondent's inability to search the internet for this information. Similarly, although a showing of diligence in filing the MTRR based on exceptional circumstances is not required under the INA, some IJs and the BIA have noted diligence as a positive factor when issuing a decision based on an exceptional circumstances argument.[94] Therefore, an IJ is likely to look favorably upon an MTRR of an *in absentia* order if the asylum seeker takes steps toward filing an MTRR as soon as they become aware of a removal order or if the MTRR explains why the asylum seeker delayed in filing the MTRR after becoming aware of the removal order.[95]

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month), unpublished decision available at https://www.scribd.com/document/365732785/R-D-G-AXXX-XXX-498-BIA-Nov-3-2017.

[89] *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996).

[90] *See, e.g., Isaias Sanchez,* A202-049-962 (BIA July 19, 2018) (rescinding *in absentia* order where respondent misunderstood attorney's instruction to appear at the hearing, his attorney could not reach him on the day of his hearing, he had no incentive to not appear at the hearing, and he filed his Motion to Reopen with diligence), unpublished decision available at https://www.scribd.com/document/386773299/Isaias-Sanchez-A202-049-962-BIA-July-19-2018.

[91] Immigrant and Refugee Appellate Center's Index of Unpublished BIA decisions, available at http://www.irac.net/unpublished/.

[92] Immigration Court Practice Manual, (ICPM) at Appendix J, available at https://www.justice.gov/eoir/page/file/1084851/download.

[93] *Celis-Castellano v. Ashcroft*, 298 F.3d 888, 892 (9th Cir. 2002) (finding that the BIA properly considered respondent's failure to notify the Immigration Court when the respondent did not assert any justification for the failure); *Morales v. INS*, 116F.3d 145, 149 (5th Cir. 1995) (faulting respondent for failing to contact the Immigration Court until over two weeks after the hearing); *Matter of J-P-*, 22 I&N Dec. 33, 35 (BIA 1998) (observing that giving notice of respondent's inability to attend hearing was a "minimal and logical step").

[94] *See Christian-Rudolf-Pflugler*, A095-721-949, (BIA March 31, 2016) (rescinding an *in absentia* order under the totality of the circumstances presented in the case, including the respondent's diligence in filing the motion and the absence of opposition from the DHS), unpublished decision available at https://www.scribd.com/document/309715566/Christian-Rudolf-Pflugler-A095-721-949-BIA-March-31-2016.

[95] One significant reason for a delay in filing the MTRR is the lack of affordable competent counsel on MTRRs. Although asylum seekers may submit a pro se MTRR using EOIR's pro se template, submitting an MTRR requires

2. Ineffective assistance of counsel

Ineffective assistance of counsel that causes a respondent to fail to appear for their hearing can be an "exceptional circumstance" warranting reopening of an *in absentia* removal order.[96]

As described in detail below in Section IV.B.3, MTRRs are subject to equitable tolling of the time and numerical limits, including MTRRs related to ineffective assistance of counsel. Nearly every U.S. Court of Appeals has recognized that the MTRR deadline may be equitably tolled where failure to meet the deadline was caused by ineffective assistance of counsel and the respondent pursued their claims diligently.[97] Thus, consider filing an MTRR of an *in absentia* order based on ineffective assistance of counsel outside of the 180-day filing deadline for MTRRs based on exceptional circumstances.

Ineffective assistance of counsel claims generally must establish both that:

(1) Counsel's performance was deficient, and

(2) Counsel's performance caused prejudice to the client.

The standard for prejudice varies among the U.S. Courts of Appeal, though generally the respondent must show a reasonable probability that the results of the proceedings would be different had counsel's performance not been deficient.[98] However, in *Matter of Grijalva*, the BIA noted that a showing of prejudice is not required to rescind an *in absentia* removal order.[99] Some

written English proficiency that many asylum seekers lack. *See* EOIR Self-Help Materials, *Missed Hearing,* available at https://www.justice.gov/sites/default/files/pages/attachments/2016/01/14/did_you_miss_your_hearing.pdf

[96] *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996).

[97] *See, e.g.*, *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000); *Mahmood v. Gonzales*, 427 F.3d 248, 251-52 (3d Cir. 2005); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Pervaiz v. Gonzales*, 405 F.3d 488, 490-91 (7th Cir. 2005,; *Valencia v. Holder*, 657 F.3d 745, 748 (8th Cir. 2011); *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Ruiz-Turcios v. U.S. Atty. Gen*., 717 F.3d 847, 851 (11th Cir. 2013); *see also Davies v. INS*, 10 F. App'x 223, 224 (4th Cir. 2001).

[98] *See, e.g.*, *Contreras v. Att'y Gen*., 665 F.3d 578, 584 (3d Cir. 2012) (denying the petition for review based on respondent ineligibility and unlawful presence that would have made it extremely unlikely or impossible to win relief); *Dakane v. Att'y Gen.*,399 F.3d 1269, 1274 (11th Cir. 2004) (denying the petition for review based on respondent's failure to put forth evidence of how his attorney's inactions prejudiced his proceedings); *Morales Apolina v. Mukasey*, 514 F.3d 893, 898 (holding that prejudice requires showing that deficient performance "may have affected the outcome of the proceedings," and noncitizen "need only show plausible grounds for relief ") (quotations omitted); *Rabiu v. INS,* 41 F.3d 879, 882 (2d Cir. 1994) (holding that alien must show that his attorney's failure to file for § 212(c) relief caused him actual prejudice by making a prima facie showing that he would have been eligible for the relief); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994) ("[P]roving prejudice requires the Petitioner to make a *prima facie* showing that had the application been filed, he would have been entitled to relief from deportation…"). *But see Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) ("[A noncitizen] must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States.").

[99] *Matter of Grijalva*, 21 I&N Dec at 473 n.2; *see also Matter of Rivera-Claros,* 21 I&N Dec. 599, 603 n.1 (BIA 1996).

U.S. Courts of Appeal have cited *Matter of Grijalva* for that proposition.[100] Practitioners should therefore review case law in their circuit specific to ineffective assistance of counsel claims in the *in absentia* removal order context. However, note that the prejudice prong *is* required for an equitable tolling argument based on ineffective assistance of counsel.

An MTRR based on ineffective assistance of counsel must also comply with a set of procedural requirements set out by the BIA in *Matter of Lozada*,[101] in addition to the general requirements set forth in the statute and the regulations at INA § 240(c)(7); 8 CFR §§ 1003.2(c), 1003.23(b). *Lozada* requires:

(1) an affidavit or declaration by the respondent detailing 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;

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

(3) that the motion reflects 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.

To prove *Lozada* compliance, it is important to include the following with the MTRR:

(1) an affidavit from the respondent describing the actions of prior counsel that were ineffective;

(2) a copy of a letter or email from the respondent or the respondent's attorney to the prior counsel (a) stating the intention to file a MTRR and a disciplinary complaint based on ineffective assistance of counsel, (b) explaining the allegations against the prior counsel, and (c) requesting a response before the filing of the MTRR;

(3) evidence that the prior counsel was given an opportunity to respond to the allegations;

(4) any response received from prior counsel,[102] and;

(5) a copy of the disciplinary complaint and proof that the complaint was filed with the appropriate state disciplinary authority, or an explanation of why a complaint could not be filed.

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[100] *See, e.g., Galvez-Vergara v. Gonzales*, 484 F.3d 798, 803 n.6 (5th Cir. 2007); *Lo v. Ashcroft*, 341 F.3d 934, 939 n.6 (9th Cir. 2003).

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

[102] As a practitioner, consider generally addressing issues raised by the prior legal representative in your MTRR or, if filing the response from the legal representative after the MTRR has been filed, address the issues in that supplemental filing.

While U.S. Courts of Appeal generally have upheld *Lozada*'s requirements,[103] in limited circumstances, some courts have excused respondents' failure to strictly comply with one or more of the procedural requirements set forth in the case and instead have allowed a showing of substantial compliance with the procedural requirements.[104] The BIA in unpublished decisions has recently found that strict compliance with *Matter of Lozada* is unnecessary in cases in which counsel admitted the allegations and ineffectiveness was plain on the face of the record.[105] However, fully complying with *all* of the *Lozada* requirements whenever possible is always the best practice to ensure the best chances before the IJ and the best record for appeal, if needed.[106]

3. Equitable tolling

In some cases, an asylum seeker may not become aware of the removal order until after the 180-day MTRR filing deadline. In such cases, the asylum seeker may argue that the IJ equitably toll

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[103] *See, e.g.*, *Zheng v. U.S. Dept. of Justice*, 409 F.3d 43 (2d Cir. 2005) (holding that the BIA did not abuse its discretion by following *Lozada*'s requirements); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005) (affirming denial of ineffective assistance of counsel claim on *Lozada* grounds); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269 (11th Cir. 2004) (citing with approval, including requirement that prejudice must be shown); *Azanor v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004) (requiring affidavit regarding attorney conduct where facts are not plain on the record, as well as a showing of prejudice); *Gbaya v. U.S. Att'y Gen.*, 342 F.3d 1219 (11th Cir. 2003) (holding that the BIA did not abuse its discretion by using *Lozada*'s requirements as a threshold screening process for ineffective assistance of counsel claims); *Hamid v. Ashcroft*, 336 F.3d 465 (6th Cir. 2003) (upholding BIA determination that failure to comply with *Lozada* requirements results in forfeiture of ineffective assistance claims); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1072 (9th Cir. 2003) (citing with approval, but noting that the requirements are not "sacrosanct"); *Lara v. Trominski*, 216 F.3d 487 (5th Cir. 2000) (citing with approval); *Hernandez v. Reno*, 238 F.3d 50 (1st Cir. 2001) (citing with approval).

[104] *E.g.*, *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007); *Fadiga v. Att'y Gen*., 488 F.3d 142, 156 (3d Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002); *cf. N'Diom v. Gonzales*, 442 F.3d 494, 505 (6th Cir. 2006) (Gilman, J., dissenting) (noting that majority adjudicated the case with no reference to noncitizen's failure to comply with *Lozada* requirements); *Dakane v. Att'y Gen*., 399 F.3d 1269, 1274 (11th Cir. 2004) (requiring noncitizens to demonstrate "substantial, if not exact, compliance with the procedural requirements of *Lozada*").

[105] *G-W-O-G-,* AXXX-XXX-283 (BIA May 20, 2019), unpublished decision available at https://www.scribd.com/document/414382272/G-W-O-G-AXXX-XXX-283-BIA-May-20%202019?secret_password=95gnSJ1r443mHw8RWNrt. *See also J-A-G-,* AXXX-XXX-316 (BIA Apr. 3, 2019) (strict compliance with *Lozada* not required where ineffective assistance was apparent from the record because attorney submitted applications that contained errors and omissions regarding biographical information), unpublished decision available at https://www.scribd.com/document/406502463/J-A-G-AXXX-XXX-316-BIA-April-3-2019?secret_password=8AaOhc7dQYRPKV6bB5ud*; M-A-R-B-,* AXXX-XXX-007 (BIA Apr. 16, 2019) (finds prior attorney provided ineffective assistance by failing to file evidence by court-imposed deadline or with request to accept late-filed evidence and finds current counsel provided reason for not filing bar complaint thereby substantially complying with *Lozada*), unpublished decision available at https://www.scribd.com/document/411260635/M-A-R-B-AXXX-XXX-007-BIA-April-16-2019?secret_password=3LLmljl7urdtmuCiZxqY.

[106] Though this is the current standard, on July 28, 2016, in response to *Matter of Compean*, 25 I&N Dec.1 (AG 2009), EOIR published a proposed rule for amending the *Lozada* framework to be included at 8 CFR § 1003.48. The provisions of the proposed rule would apply only to motions to reopen filed with the Immigration Court or the BIA on or after the effective date of the final rule. The provisions of the proposed rule would cover conduct that occurred only after the removal proceedings have commenced at the Immigration Court. If and once this proposed regulation is adopted as a final rule, we will update this Guide to include guidance on this new rule.

the applicable deadline or numerical limit of one MTRR.[107] Equitable tolling is an equitable principle that excuses failure to meet a deadline and allows for late filing if certain circumstances are present.[108]

Multiple U.S. Courts of Appeal have recognized that the 90-day MTR deadline under INA § 240(c)(7) is subject to equitable tolling.[109] Generally, equitable tolling is also recognized for the 180-day deadline under INA § 240(b)(5)(C)(i).[110] Practitioners should rely on the Courts of Appeal cases to invoke equitable tolling in MTRRs involving the 180-day deadline, or to argue that tolling is appropriate in the jurisdiction where the issue remains unresolved, based on the same principles of equitable tolling that apply in the 90-day deadline context. Furthermore, the U.S. Supreme Court has also held that the 180-day deadline is a non-jurisdictional claim-processing rule, which is subject to equitable tolling.[111] Therefore, practitioners should argue that equitable tolling applies to the 180-day deadline in cases where the deadline has passed.[112]

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[107] Practitioners may also wish to consult recent, unpublished BIA decisions concluding that equitable tolling is appropriate in making this argument. *See, e.g.*, *Ramirez Calderon*, A034-338-426 (BIA Nov. 27, 2017) (equitably tolling deadline for filing a Motion to Reopen where attorney informed respondent of incorrect deadline for filing the Motion to Reopen), unpublished decision available at https://www.scribd.com/document/369893813/Sergio-Lugo-Resendez-A034-450-500-BIA-Dec-28-2017?secret_password=942c7cnCQvJeqHp4pb4T; *Fierro-Garcia*, A043-791-852 (BIA Dec. 19, 2016) (equitably tolling MTRR deadline where attorney failed to advise respondent of availability of a form of relief from removal), unpublished decision available at https://www.scribd.com/document/342622208/Roy-Alberto-Ramirez-Calderon-A200-423-316-BIA-March-9-2017.

[108] *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014) (Equitable tolling is a well-established doctrine "when a litigant has pursued [her] rights diligently but some extraordinary circumstance prevents [her] from bringing a timely action.").

[109] *See, e.g.*, *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Avila-Santoyo v. Att'y Gen*., 713 F.3d 1357 (11th Cir. 2013) (en banc); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000) (Sotomayor, J.); *see also Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013) (noting, without deciding the issue, that "every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen.").

[110] Several Courts of Appeal have held equitable tolling applies to the 180-day deadline, and while a number of Courts of Appeal have not explicitly reached the issue, none has found that equitable tolling does not apply in this context. *See Aris v. Mukasey,* 517 F.3d 595 (2d Cir. 2008); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Fajardo v. INS*, 300 F.3d 1018, 1022 (9th Cir. 2002); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *see also Avila-Santoyo v. U.S. Att'y Gen.,* 713 F.3d 1357, 1364 n.4 (11th Cir. 2013) (en banc).

[111] *See Henderson v. Shinseki*, 562 U.S. 428 (2011); *see also Avila-Santoyo*, 713 F.3d at 1364 n.4.

[112] Sometimes DHS argues that equitable tolling does not apply, citing *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998). Although in *Matter of A-A-* the BIA held that a respondent may not file a MTRR beyond the 180-day deadline where the reason for missing the deadline was ineffective assistance of counsel, that case analyzes the pre-IIRAIRA law. Furthermore, in subsequent unpublished cases the BIA has recognized equitable tolling of the 180-day deadline for *in absentia* MTRRs. *See Trejo*, A205-215-507 (BIA Mar. 10, 2017) (equitably tolling 180-day deadline and rescinds *in absentia* removal order where prior attorney provided ineffective assistance of counsel by failing to notify respondent of hearing), unpublished decision available at https://www.scribd.com/document/342625896/Alejandro-Gonzalo-Trejo-A205-215-507-BIA-March-10-2017; *Luis Alfredo Castro*, A200-226-899 (BIA Oct. 29, 2015) unpublished decision available at https://www.scribd.com/document/290079633/Luis-Alfredo-Castro-A200-226-899-BIA-Oct-29-2015; *Seidi Elda Sandoval Landero*, A088-056-174 (BIA Nov. 20, 2015) unpublished decision available at https://www.scribd.com/document/293444660/Seidi-Elda-Sandoval-Landero-A088-056-174-BIA-Nov-20-2015.

For MTRR purposes, if the asylum seeker made diligent efforts yet did not discover the *in absentia* removal order until after the 180-day filing deadline, equitable tolling should extend the deadline to allow for filing within a reasonable time of learning about the *in absentia* removal order. A long passage of time between the *in absentia* order and filing the MTRR alone is not a determinative marker for diligence, so long as the legal requirements for tolling are met.[113] Practitioners should *always* consider arguing for equitable tolling if the MTRR is past the 180-day deadline, especially when the only other option is a *sua sponte* MTR (further discussed in Section IV.C below).[114]

Although the standard for equitable tolling varies slightly among U.S. Courts of Appeal, most courts require that a respondent invoking equitable tolling demonstrate (1) due diligence in pursuing their rights, and (2) that some "extraordinary circumstance" stood in their way that prevented timely filing.[115] Examples of the types of extraordinary circumstances that have qualified for purposes of equitable tolling include:

- ineffective assistance of counsel;[116]
- fraud;[117]

[113] Note that even a long period of time, including numerous years, may be equitably tolled, if the legal requirements for tolling are met. *See, e.g., Lugo-Resendez v. Lynch*, 831 F.3d 337, 339-43 (5th Cir. 2016) (despite eleven years passing between the date of the removal order and the filing of the Motion to Reopen, the court of appeals held that "the BIA abused its discretion by ignoring Lugo–Resendez's equitable tolling argument," and remanded the case); *Sergio Lugo-Resendez*, A034-450-500 (BIA Dec. 28, 2017) (reversing the IJ, reopening the proceedings, and remanding to allow further proceedings), unpublished decision available at https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/posts/unpub-bia-equitable-tolling-victory-matter-of-lugo-resendez-dec-27-2017.

[114] *See, e.g. Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 356 n.1 (5th Cir. 2018) ("[m]otions to reopen are not 'collateral;' they are attempts to revisit an order made within the same matter, akin to an appeal or motion for reconsideration"). *See also Kucana v. Holder*, 558 U.S. 233, 242 (2010) ("[f]ederal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916"); *Rodriguez-Saragosa v. Sessions*, 904 F.3d 349, 356 n.1 (2018) ("[n]otably, Congress has ensured that statutory motions to reopen are limited to one per alien, *see* 8 U.S.C. § 1229a(c)(7), and the BIA's decision to reopen proceedings *sua sponte* (or not) is left to the BIA's discretion").

[115] *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Lugo-Resendez*, 831 F.3d at 344; *Kuusk v. Holder*, 732 F.3d 302, 306 (2013) ("[E]ach of our sister circuits applies, in immigration cases, its general standard for equitable tolling."); *Borges v. Gonzales*, 402 F.3d 398, 405–06 (2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176,1184-85 (2001).

[116] *See, e.g., Avagyan v. Holder*, 646 F.3d 672, 682 (9th Cir. 2011) (tolling warranted in recognition of fact that "many, many immigrants fall victim to incompetent or fraudulent counsel" preventing timely or adequate filing); *Mezo v. Holder*, 615 F.3d 616 (6th Cir. 2010) (remanding for further fact-finding); *Zhao v. INS*, 452 F.3d 154, 160 (2d Cir. 2006); *Roy Alberto Ramirez Calderon*, A200-423-316 (BIA Mar. 9, 2017), unpublished decision available at https://www.scribd.com/book/342622208/Roy-AlbertoRamirez-Calderon-A200-423-316-BIA-March-9-2017; *Maria Guadalupe Silva Ramirez*, A205-527-911 (BIA Feb. 11, 2016), unpublished decision available at https://www.scribd.com/document/303204084/Maria-Guadalupe-Silva-Ramirez-A205-527-911-BIA-Feb-11-2016; *Carlos Alberto Zambrano*, A088-741-973 (BIA Sept. 5, 2014), unpublished decision available at https://www.scribd.com/document/239443314/Carlos-Alberto-Zambrano-A088-741-973-BIA-Sept-5-2014. If raising an ineffective assistance of counsel claim that includes equitable tolling, the respondent must still comply with *Matter of Lozada* as discussed above in Sec. IV.B.2.

[117] *See, e.g., Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

- government interference;[118]
- due process violation at the prior removal hearing;[119]
- a respondent's severe mental health issues or lack of mental competence;[120]
- a respondent's age;[121] and
- a court precedent issued after the removal proceeding creates a change in the prevailing interpretation of a ground of removal, rendering the individual's charge of inadmissibility or deportability no longer sustainable or making the individual eligible for relief.[122]

Practitioners should conduct research for precedent in their jurisdiction to ensure application of the current case law. In all cases, equitable tolling "will be granted 'only sparingly,'" and a respondent requesting equitable tolling should therefore document the reasons for the filing delay and diligently file the MTRR.[123]

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[118] *See, e.g., Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008) (allegations that BIA never sent notice of its decision and petitioner relied on assurances from DHS officers); *cf. Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016) (noting that "[g]overnment's wrongful conduct" could be grounds); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011) (noting that "governmental interference" could be a ground for equitable tolling).

[119] *See Valdovinos-Lopez v. Att'y Gen*., 628 F. App'x 817 (3d Cir. 2015) (unpublished) (remanding to BIA to consider equitable tolling argument); *Juvenal Valdovinos-Lopez*, A200-684-816 (BIA June 29, 2016) (noting that the respondent may have been misinformed of his rights and possible eligibility for relief at the prior hearing), unpublished decision available at https://www.scribd.com/document/318828163/Juvenal-Valdovinos-Lopez-A200-684-816-BIA-June-29-2016.

[120] *See*, *e.g., Rajwayi v. Sessions*, 692 F. App'x 815 (9th Cir. 2017) (unpublished) (remanding for consideration of equitable tolling based on argument that petitioner could "not credibly testify during her immigration proceedings because she suffered from severe mental conditions"); *Saul Rincon-Garcia*, A034-338-426 (BIA Nov. 27, 2017) ("In light of the unique factors presented by this case, including the fact that the respondent suffers from severe mental illness, the lack of resources he faced following his removal, and the actions he took upon learning of the [change in law], we find that the respondent has demonstrated both the existence of exceptional circumstances and that he has exercised due diligence such that equitable tolling is warranted."), unpublished decision available at https://www.scribd.com/document/367642745/Saul-Rincon-Garcia-A034-338-426-BIA-Nov-27-2017; *see also Kim Stevens*, A035-172-124 (BIA Oct. 12, 2011) (concluding that the respondent was not barred due to lack of diligence where he was not mentally competent to take action), unpublished decision available at https://www.scribd.com/document/199185203/Kim-Stevens-A035-172-124-BIA-Oct-12-2011.

[121] *See* 8 CFR § 208.4(a)(5)(ii); *see also* USCIS, RAIO Combined Training Course, *Children's Claims*, at 78 (Aug. 21, 2014), available at https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/RAIO_Directorate_Officer_Training_Manual.pdf ("The same logic underlying the legal disability ground listed in the regulations is relevant also to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults."); *see also A-D-,* AXXX-XXX-526, at 5 (BIA May 22, 2017) (holding that those under 18 years of age categorically qualify for the extraordinary circumstances exception to the one-year asylum filling deadline), unpublished decision available at https://www.scribd.com/book/351904250/A-DAXXX-XXX-526-BIA-May-22-2017.

[122] *See, e.g., Jose Guerrero-Soto*, A091-225-150 (BIA Nov. 17, 2015) (remanding to consider whether deadline should be tolled), unpublished decision available at https://www.scribd.com/book/291132258/Jose-Guerrero-Soto-A091-225-150-BIA-Nov-17-2015. *But see Omar v. Lynch*, 814 F.3d 565, 570 (1st Cir. 2016) (tolling of motion to reconsider deadline not warranted based on change in law rendering petitioner eligible for section 212(c) relief).

[123] *Kuusk v. Holder*, 732 F.3d 302, 306 (4th Cir. 2013).

C. Motions to Reopen Under *Sua Sponte* Authority

Absent lack of notice or exceptional circumstances, or as an alternative argument, respondents may request that an IJ reopen an *in absentia* removal order based on the IJ's regulatory authority to reopen a case *sua sponte*. An IJ relying on *sua sponte* authority may reopen or reconsider a removal order regardless of any time and number restrictions that may exist.[124] The BIA has characterized *sua sponte* authority as "an extraordinary remedy reserved for truly exceptional situations."[125] The BIA has recognized that it may exercise its own *sua sponte* authority "to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone [do] not preclude such action."[126] However, the BIA has found that an IJ's *sua sponte* authority should not be used as "a general cure for filing defects or to otherwise circumvent the regulations, when enforcing them might result in hardship."[127]

To make a successful argument to the IJ, respondents must meet the *sua sponte* standard. The standard for *sua sponte* authority is a type of "exceptional circumstances-plus" standard, which is subject to the "totality of the circumstances." This standard takes into consideration equities of the case, the strength of the asylum claim, and negative factors.[128] For example, the BIA exercised *sua*

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[124] 8 CFR § 1003.2(a) (providing IJs with authority for *sua sponte* reopening); 8 CFR § 1003.23(b)(1) (providing IJs with authority to reopen any proceedings in which the IJ made a decision); 8 CFR §1003.1(d)(7) (granting the BIA authority to return any case to an IJ "for further action as may be appropriate, without entering a final decision on the merits of the case.").

[125] *Matter of G–D–*, 22 I&N Dec. 1132, 1134 (BIA 1999).

[126] *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997).

[127] *Matter of J–J–* 21 I&N Dec. 976, 984 (BIA 1997).

[128] *Janet Gertudis Casillas,* A045-627-330 (BIA Aug. 30, 2016) (holding that an attorney failing to give the respondent a hearing notice is cause for *sua sponte* reopening), unpublished decision available at https://www.scribd.com/document/324800678/Janet-Gertrudis-Casillas-A045-627-330-BIA-Aug-30-2016; *E-A-R-C-*, AXXX-XXX-125 (BIA June 30, 2016) (holding that an interpreter saying the hearing was on wrong date despite DHS opposing by saying court issued correct written hearing notice, was cause for *sua sponte* reopening), unpublished decision available at https://www.scribd.com/document/318844238/E-A-R-C-AXXX-XXX-125-BIA-June-30-2016; *Ajla Vricic*, A071-727-572 (BIA June 22, 2016) (reopening *sua sponte* where respondent contended that she failed to appear for her hearing because of troubles with her brother who suffers from schizophrenia, her husband's disability caused by a stroke, her appointment at a methadone clinic, moving to a new residence, and the demands of being a working mother with three small children), unpublished decision available at https://www.scribd.com/document/318755563/Ajla-Vricic-A071-727-572-BIA-June-22-2016; *Adriana Elizabeth Arevalo Lopez*, A098-121-311 (BIA June 14, 2016) (reopening 2004 order based on *sua sponte* authority because abusive ex destroyed docs), unpublished decision available at https://www.scribd.com/document/318586699/Adriana-Elizabeth-Arevalo-Lopez-A098-121-311-BIA-June-14-2016; *Kalolaine Taunaholo*, A073-974-004) (BIA May 25, 2016) (finding *sua sponte* authority to reopen case for respondent who lost hearing notice and misremembered hearing date), unpublished decision available at https://www.scribd.com/doc/315705366/Kalolaine-Taunaholo-A073-974-004-BIA-May-25-2016; *Anna May de Leon Galono*, A089-528-341 (BIA Sept. 25, 2015) (reopening case with *sua sponte* authority for respondent who failed to appear because of family related stress), unpublished decision available at https://www.scribd.com/document/348650769/Anna-May-de-Leon-Galono-A089-528-341-BIA-Sept-29-2015; *Mrina Molinas-Pena*, A097-318-251 (BIA Nov. 10, 2015) (reopening case with *sua sponte* authority for 16 year old respondent who missed the hearing because she didn't have transportation to get there), unpublished decision available at https://www.scribd.com/document/290747835/Mirna-Molinas-Pena-A097-318-251-BIA-Nov-10-2015; *Henry Noe Hernandez Diaz*, A088-347-822 (BIA Apr. 11, 2016) (reopening case with *sua sponte* authority for respondent based on the totality of the circumstances, including that he was abandoned by his sponsor at age 17), unpublished

sponte authority in an *in absentia* matter in which the respondents, a woman and her child, received an *in absentia* removal order because they mistakenly assumed that changing their address with an ICE officer during a check-in would also inform the Immigration Court of their change of address.[129] Furthermore, the BIA has found that a fundamental change in the law also qualifies as an exceptional situation that merits the BIA's use of *sua sponte* authority.[130]

Additional examples of types of scenarios where the BIA exercised *sua sponte* authority include:

- respondent or a close family member has a medical condition, such as Down Syndrome, congenital heart disease, leukemia;[131]
- vacating of a criminal conviction that formed the basis for removal;[132] and
- erroneous advice of counsel.[133]

In an MTRR of an *in absentia* order, consider proposing in the alternative, an argument that the IJ should exercise their *sua sponte* authority to rescind an *in absentia* removal order.[134] It is important that practitioners offer the *sua sponte* argument in the alternative as opposed to this being the only argument, because U.S. Courts of Appeals lack judicial review authority over such regulatory arguments and may only review statutory-based arguments.[135]

Strategically, the *sua sponte* ground allows practitioners to highlight sympathetic factors in the case that are not relevant to the notice or exceptional circumstance statutory ground. For example, if the asylum seeker volunteers at the child's school or in the community and is attending English classes, these are positive facts, but these facts are not relevant to the statutory arguments. The *sua sponte* ground also renders photographs of the respondent and the family relevant. Therefore, practitioners can use the *sua sponte* ground to humanize the asylum seeker to the IJ since these adjudicators adjudicate the motion without meeting the asylum seeker in person.

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decision available at https://www.scribd.com/document/309724385/Henry-Noe-Hernandez-Diaz-A088-347-822-BIA-April-11-2016.

[129] *Oneyda Carolina Sierra-Manca*, A206-835-344 (BIA June 17, 2016) (reopening removal order for a woman and child with *sua sponte* authority because mother assumed the ICE officer was going to inform court of the change of address), unpublished decision available at https://www.scribd.com/document/318710279/Oneyda-Carolina-Sierra-Manca-A206-835-344-BIA-June-17-2016.

[130] *Matter of G–D–*, 22 I&N Dec. 1132 (BIA 1999).

[131] *See Elisa Candelariq-Nogueda,* AXXX-XX6-816*,* 2007 WL 4699909 (BIA Nov. 19, 2007) (considering respondent's daughter's leukemia diagnosis), unpublished decision.

[132] *See Ashton Jason Meade,* AXXX-XX1-481*,* 2005 WL 1111841 (BIA Apr. 21, 2005), unpublished decision.

[133] *See Lesy Erenio Sanchez-Matute,* AXXX-XX8-848, 2015 WL 3932292 (BIA May 14, 2015), unpublished decision.

[134] 8 CFR § 1003.23(b)(1).

[135] *See, e.g.*, *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999) (abrogated by *Avila-Santoyo v. US Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013)).

D. Changed Country Conditions Motions to Reopen

Changes in the conditions of the country to where the IJ ordered the asylum seeker removed *in absentia* provide a basis for reopening to seek asylum, withholding of removal, or protection under the Convention Against Torture (CAT).[136] Changed country conditions can be a series of events, such as a political coup or new government policies, that greatly change conditions in the respondent's country of nationality and their ability to be safe upon return. Changes in personal circumstances are generally not sufficient, unless the applicant can also show that there are changed country conditions.[137] The changes in country conditions must have materially worsened, and not be merely "more of the same."[138] However, the changes do not have to be dramatic.[139] The changes must have occurred between the *in absentia* order date and the MTR filing date.

A changed country conditions MTR differs from an MTRR of an *in absentia* order in very significant ways. In *Matter of J-G-*, the BIA articulated that:

> (1) respondents who seek to reopen proceedings based on changed country conditions may do so even when they do not satisfy the requirements for rescinding an *in absentia order*; and
>
> (2) MTRs based on changed country conditions are not subject to the time or number limits on MTRRs.[140]

Because neither the deadline nor numerical limitations of the MTRR statutory framework apply to changed country conditions MTRs, the issue in changed country conditions MTRs is whether the asylum seeker presented 1) material evidence of a change in conditions in the country listed on the *in absentia* order of removal, and 2) *prima facie* eligibility for relief. As suggested by this standard, a changed country conditions MTR will turn more on current or future asylum eligibility as opposed to reasons why the asylum seeker missed the prior hearing.

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[136] INA § 240(c)(7)(C)(ii); 8 CFR § 1003.23(b)(4)(i).

[137] *See, e.g.*, *Ming Chen v. Holder*, 722 F.3d 63, 67 (1st Cir. 2013); *Xiu Zhen Zheng v. Holder*, 548 F. App'x 869, 870 (4th Cir. 2013); *Averianova v. Holder*, 592 F.3d 931, 937 (8th Cir. 2010); *Almarez v. Holder*, 608 F.3d 638, 641 (9th Cir. 2010); *Chen v. Att'y Gen.*, 565 F.3d 805, 809-10 (11th Cir. 2009) (per curiam); *Liu v. Att'y Gen.*, 555 F.3d 145, 151 (3d Cir. 2009); *Bi Feng Liu v. Holder*, 560 F.3d 485, 492 (6th Cir. 2009); *Qi Hua Li v. Holder*, 354 F. App'x 46, 48 (5th Cir. 2009); *Wei v. Mukasey*, 545 F.3d 1248, 1254-57 (10th Cir. 2008); *Yuen Jin v. Mukasey*, 538 F.3d 143 (2d Cir. 2008); *Cheng Chen v. Gonzales*, 498 F.3d 758 (7th Cir. 2007); *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007). At least in some jurisdictions, practitioners may be able to surmount this hurdle by arguing that the changed country conditions were "made relevant by a change in the petitioner's personal circumstances." *See, e.g.*, *Chandra v. Holder*, 751 F.3d 1034, 1038 (9th Cir. 2014).

[138] *See Yang Zhao-Cheng v. Holder*, 721 F.3d 25, 28-29 (1st Cir. 2013) (reasoning that "that slight temporal fluctuation in the level of ever-prevailing persecution is, itself, a continuing circumstance—not a 'changed circumstance[ ]' as required by the regulation"). However, in arguing that there has been sufficient change in circumstances, practitioners may examine "whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution." *Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004).

[139] *See Joseph v. Holder*, 579 F.3d 827, 831-35 (7th Cir. 2009).

[140] *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013).

To prove changed conditions, the asylum seeker must ensure that the submitted evidence is material to the changes.[141] The changed country conditions evidence must "not [have been] available and would not have been discovered or presented at the previous proceeding."[142]
The practitioner must include evidence showing a change from the time of the last hearing, which in the context of *in absentia* orders is the hearing where the IJ issued the removal order, and the time of filing the MTR.[143]

Practitioners filing an MTR based on changed country conditions must also include new evidence or information that would demonstrate respondent(s) have a *prima facie* case for asylum or withholding or CAT and must include a copy of the Form I-589.[144] The Immigration Court and BIA Practice Manuals state that a MTR based on changed country conditions "must contain a complete description of the new facts that comprise those circumstances and articulate how those circumstances affect the party's eligibility for relief."[145]

One strategy in attempting to meet both the material evidence of a change in conditions and the *prima facie* eligibility is through an expert declaration that covers both requirements.[146] Practitioners should include the proposed expert's *curriculum vitae* along with the declaration to ensure that the IJ recognizes their relevant expertise.[147]

Note that IJs and the BIA often misunderstand or misapply the changed country conditions reopening standard, so practitioners should be ready to appeal.[148] Misunderstanding and misapplication of this standard seems to arise more frequently when practitioners include an MTRR statutory argument in addition to a changed country conditions MTR argument. Practitioners should thus keep these standards separate and clear within the MTRR and/or MTR. Unlike a timely MTRR of an *in absentia* order under INA § 240(b)(5)(C), an MTR based on a change in country conditions does not automatically stay the removal of the respondent(s).[149]

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[141] The U.S. Courts of Appeal review findings of fact as to country conditions underlying that decision for substantial evidence. *See, e.g., Jian Hui Shao v. Mukasey*, 546 F.3d 138, 169 (2d Cir. 2008).
[142] INA § 240(c)(7)(ii); 8 CFR § 1003.23(b)(4)(i).
[143] *See, e.g., Norani v. Gonzales*, 451 F.3d 292, 294 (2d Cir. 2006); *Filja v. Gonzales*, 447 F.3d 241, 252-54 (3d Cir. 2006); *see also* ICPM Ch. 5.7(e)(i); BIA Practice Manual Ch. 5.6(e)(i).
[144] *See Matter of J-G-*, 26 I&N Dec. 161, 169 (BIA 2013); *see also Trujillo Diaz v. Sessions*, 880 F.3d 244, 249 (6th Cir. 2018) (noting that a changed country conditions Motion to Reopen is "required to be 'supported by evidence that ... demonstrates *prima facie* eligibility for relief,' which does not require a 'conclusive showing' that [petitioner] will ultimately obtain relief.") (internal citations omitted).
[145] ICPM Ch. 5.7(e)(i); BIA Practice Manual Ch. 5.6(e)(i).
[146] *See Indradjaja v. Holder*, 737 F.3d 212 (2d Cir. 2013) ("expert affidavit, articles, and reports documenting increased attacks against Chinese Christians in Indonesia are plainly relevant to Indradjaja's pattern and practice claim and thus to her Motion to Reopen.")
[147] *See Matter of D-R-,* 25 I&N Dec. 445, 459-60 (BIA 2011) ("An expert witness is broadly defined as someone who is 'qualified as an expert by knowledge, skill, experience, training, or education' and has 'scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.'") (quoting Fed. R. Ev. 702).
[148] Pro bono legal representatives representing *Hamama v. Adducci* class members on MTRs experienced misunderstanding or misapplication of the changed country conditions MTR standard by IJs. However, most represented class members who appealed to the BIA received proper application of this standard from the BIA.
[149] 8 CFR § 1003.23(b)(4)(i) ("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 Immigration Judge, the alien shall not be removed pending disposition of the motion by the Immigration Judge.").

V. INCLUDING ASYLUM AND/OR OTHER CLAIMS FOR RELIEF

A. Why to Include Asylum and/or Other Claims for Relief

Certain MTRs require including an application for relief. MTRs filed pursuant to INA § 240(c)(7) and INA § 240(c)(7)(C)(ii) require an application for relief.[150] Section 240(c)(7)(C)(iii) of the INA for *in absentia* MTRRs does not require an application for relief. However, practitioners should consider filing an application for relief with an MTRR. An asylum seeker filing an MTRR who demonstrates *prima facie* eligibility for asylum or other relief or protections and files an application for relief shows their incentive to appear at Immigration Court hearings and obtain that relief, which supports the argument that the asylum seeker would have appeared in court had they been able to do so. Such a showing also demonstrates that the asylum seeker is *prima facie* eligible for relief or protection in reopened proceedings.

In *all cases*, the MTRR and/or MTR of an *in absentia* order and any evidence that is attached becomes part of the record once it is filed. Thus, practitioners should prepare the statement of facts in the MTRR and/or MTR and the associated affidavit or declaration with an understanding of how the asylum seeker's experience fits into a legal claim for asylum or other relief.

B. Exploring the Asylum Claim and/or Other Claims for Relief

The practitioner who is representing a respondent who seeks reopening of an *in absentia* order should always inquire whether the respondent has a fear of returning to their home country. The practitioner should explore whether the respondent is unable or unwilling to return to their country of origin because of past persecution or a well-founded fear of future persecution on account of:

(1) race;

(2) religion;

(3) nationality;

(4) membership in a particular social group; or

(5) political opinion.[151]

If the respondent has already passed a credible fear interview (CFI) or reasonable fear interview (RFI), then it is clear that they have already met a threshold to be able to apply for asylum or related relief. Furthermore, if there are no concerns that there are inaccuracies or misinterpretations in the respondent's CFI or RFI, the practitioner may also include the transcript as an exhibit in the MTRR and/or MTR as proof of eligibility for asylum and related relief.

[150] An MTR filed in order to apply for relief must include "appropriate application for relief and all supporting documentation." 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).
[151] *See* INA § 101(a)(42).

For information on asylum law, the details of which are beyond the scope of this guide, consult one of these excellent existing resources:

- Dree K. Collopy, *AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* (8th Ed. 2019).[152]

- National Immigrant Justice Center, *Basic Procedural Manual for Asylum Representation Affirmatively and In Removal Proceedings* (October 2017), https://www.unhcr.org/5aa6cfac4.pdf.

- Chapter 9 of AILA's *Representing Clients in Immigration Court* (5th Ed. 2018), Authored by CLINIC's Defending Vulnerable Populations Program.[153]

- The Center for Gender & Refugee Studies (CGRS) also has a variety of publications on Gender Asylum, Children's Asylum, Gang Asylum, and Gender-Based Violence claims, which can be found at: http://cgrs.uchastings.edu/publications. In particular, consult with CGRS for materials regarding *Matter of A-B-,* 27 I&N Dec. 316 (A.G. 2018), which restricted claims for asylum based on domestic violence. Practitioners should be especially sure to conduct research on the latest legal developments in this area of law.[154]

- CLINIC, *Practice Advisory: LGBTI DACA Recipients and Options for Relief under Asylum Law* (May 2018), https://cliniclegal.org/sites/default/files/LGBTI-DACA-Recipients-and-Possible-Options-for-Relief-under-Asylum-Law-Final.pdf.

C. The One-Year Asylum Filing Deadline

An asylum applicant must file their application, or I-589, within one year of entering the United States, unless the applicant meets an exception to this rule.[155] Typically, in cases where an asylum seeker was ordered removed *in absentia*, practitioners should submit the respondent's I-589 asylum application along with the MTRR and/or MTR of an *in absentia* order, even if the IJ issued the order after the one-year filing deadline. Submitting the I-589 with the MTRR may help

[152] Practitioners may order this resource through AILA at https://agora.aila.org/product/detail/3952.
[153] Practitioners may order this resource through AILA at https://agora.aila.org/product/detail/3694.
[154] *See also Grace v. Whitaker,* 344 F.Supp.3d 96 (D.C. Cir. 2018). For additional information on *Matter of A-B-* and *Grace v. Whitaker,* please consult the following resources: Penn State Law, Center for Immigrants' Rights Clinic, *Case Summary: Grace v. Whitaker,* last updated Dec. 21, 2018, available at https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/Grace%20v.%20Whitaker.pdf and CLINIC, *New Government Guidance on Matter of A-B- Incorporates Grace v. Whitaker*, Jan. 28, 2019, available at https://cliniclegal.org/resources/new-government-guidance-matter-b-incorporates-grace-v-whitaker?utm_source=CLINIC+Mail&utm_campaign=2184c7ac7f-Affiliate_Newsletter_Jan_2019&utm_medium=email&utm_term=0_a33179621a-2184c7ac7f-284012201.
[155] INA § 208(a)(2)(B). For a much more detailed look at the one-year filing deadlines and possible exceptions, see CLINIC, *Overcoming the Asylum One-Year Filing Deadline for DACA Recipients*, Apr. 13, 2018, available at https://cliniclegal.org/sites/default/files/DACA-and-the-One-Year-Filing-Deadline-.pdf.

establish a *prima facie* asylum case for asylum and lay the foundation for a stronger one-year filing deadline argument.[156] Filing the I-589 with the MTRR and/or MTR also demonstrates diligence in filing the I-589 as soon as reasonably possible. Exceptions to the one-year filing deadline include extraordinary circumstances or a material change in circumstances, but the applicant must also show that even in light of these circumstances, the delay in filing the asylum application is reasonable.[157]

Previously, the I-589 had to be filed in open court, but as of September 14, 2016, pursuant to a Department of Justice EOIR Operating Policies and Procedures Memorandum (OPPM),[158] the I-589 may be filed in person at the Immigration Court clerk's window or via mail at the Immigration Court with jurisdiction over the case. Therefore, inclusion of the I-589 as an attachment to the MTRR and/or MTR filed in person at the window or via mail should suffice to constitute the filing of the application for purposes of calculating the one-year filing deadline.[159]

In addition, practitioners should be aware that in March 2018, a federal district court held in *Mendez Rojas v. Johnson* that DHS's failure to provide asylum seekers with notice of the one-year filing deadline after releasing them from detention, with or without CFI determinations, violated the INA and the Due Process Clause of the U.S. Constitution and ordered EOIR to accept as timely all I-589s filed by class members so long as they are filed within a year of the court's order.[160] As a result, respondents who are in the class defined in *Mendez Rojas* and are filing an MTRR and/or MTR past the one-year filing deadline should argue the asylum application is timely filed based on two arguments: first, by arguing that the asylum seeker meets a statutory exception to the deadline, such as extraordinary circumstances,[161] and second, by contending that the Immigration Court must accept the application because of the *Mendez Rojas* decision. As with all other matters, practitioners should keep abreast of developments on the one-year filing deadline, particularly because the government has appealed the district court decision in *Mendez Rojas* to the U.S. Court of Appeals for the Ninth Circuit.

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[156] *See* 8 CFR § 1208.4(b)(3) ("Asylum applications shall be filed directly with the Immigration Court having jurisdiction over the case in the following circumstances: . . . (ii) After completion of exclusion, deportation, or removal proceedings, and in conjunction with a Motion to Reopen pursuant to 8 CFR part 1003 where applicable, with the Immigration Court having jurisdiction over the prior proceeding. Any such motion must reasonably explain the failure to request asylum prior to the completion of the proceedings."). The Form I-589 and instructions are available on USCIS's website at https://www.uscis.gov/i-589.

[157] *See* INA § 208(a)(2)(D); *see also* 8 CFR § 208.4(a)(5).

[158] Michael C. McGoings, Chief Immigration Judge (Acting), *Operating Policies and Procedures Memorandum 16-01: Filing Application for Asylum*, Sept. 14, 2016, available at https://www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf.

[159] 8 CFR § 1208.4 (b)(3)(ii). However, practitioners may need to re-submit the I-589 once the case is reopened in order to start the asylum clock.

[160] 305 F. Supp. 3d 1176, 1179-88 (W.D. Wa. 2018), *appeal filed sub nom Mendez Rojas v. Nielsen*, No. 18-35443 (9th Cir. May 25, 2018). During the appeal, pursuant to a joint interim stay agreement, Defendants have agreed to treat as timely filed all pending and newly filed asylum applications that are filed by class members who do not have final orders of removal. *See* American Immigration Council, Dorbin & Han, PC, and Northwest Immigrant Rights Project, *Court Decision Ensures Asylum Seekers Notice of the One-Year Filing Deadline and an Adequate Mechanism to Timely File Applications*, updated Aug. 2, 2018, available at https://www.americanimmigrationcouncil.org/sites/default/files/mendez_rojas_v_johnson_faq.pdf.

[161] 8 CFR § 208.4(a)(5).

For those whose one-year filing deadline preceded the September 14, 2016 OPPM, they may argue that the unique circumstances they faced amount to "extraordinary circumstances" relating to the delay in filing the I-589.[162] For example, the BIA issued a favorable unpublished decision involving a mother from El Salvador fleeing domestic violence who filed her application after the one-year filing deadline.[163] In that case, the mother's first master calendar hearing was scheduled several months after her one-year filing deadline. The mother submitted her completed I-589 at that master calendar hearing. The BIA ruled that she was not barred from asylum by the one-year filing deadline because she "had filed the I-589 at the earliest opportunity at her initial master calendar hearing, the scheduling of which was outside of her control." These circumstances thus amounted to "extraordinary circumstances."[164]

[162] INA § 208(a)(2)(D).
[163] *S-V-C-*, AXXX-XXX-431 (BIA Nov. 1, 2016) (respondent qualified for "extraordinary circumstances" exception to one-year filing deadline because timing of initial master calendar hearing was beyond her control), unpublished decision available at https://www.scribd.com/document/334139459/S-V-C-AXXX-XXX-431-BIA-Nov-1-2016.
[164] INA § 208(a)(2)(D).

VI. APPEAL OF AN IMMIGRATION JUDGE'S DECISION

An IJ's decision to deny an MTRR and/or MTR of an *in absentia* order may be appealed to the BIA. There is no automatic stay of removal or deportation pending the BIA's determination; however, the BIA can adjudicate a stay motion filed in conjunction with any appeal of an IJ's denial of an MTRR and/or MTR of an *in absentia* order.

If the BIA denies an appeal of an MTRR and/or MTR of an *in absentia* order, the individual may file a petition for review (PFR) with the U.S. Court of Appeals with jurisdiction over the Immigration Court where the *in absentia* removal order was issued.[165] There is no automatic stay at the U.S. Court of Appeals, although a motion for a stay of removal may be filed with the court.

[165] For a map displaying the Immigration Courts under the jurisdiction of each of the eleven U.S. Courts of Appeal jurisdictions, please refer to CLINIC's U.S. Immigration Courts and U.S. Courts of Appeals Map, available at https://cliniclegal.org/resources/us-immigration-courts-and-districts.

VII. FREQUENTLY ASKED QUESTIONS (FAQs)

Q: How can a respondent ascertain whether an IJ has issued a removal order?

If the asylum seeker is unsure whether or when an IJ has issued a removal order in their case, call the Executive Office of Immigration Review (EOIR) Hotline (1-800-898-7180) with the asylum seeker's "alien registration number" (A#) and follow the instructions to check their case status and the date of the order of removal, if applicable.[166] Option #3 will provide prior removal order information. However, the EOIR Hotline will not communicate if the order was an *in absentia* order. Besides the respondent not remembering attending a hearing in immigration court, one indication that the IJ issued the removal order *in absentia* could be a date of issuance soon after the date of entry into the United States, especially if the removal order stems from an Immigration Court located along the Mexico-U.S. border.

Q: I have the "alien number" for one of the family members, but I lack an "alien number" for the other family members. How can I retrieve the unknown "alien numbers"?

Families who entered the United States for the first time together will typically have A#s that are one digit apart. For example, if the mother's A# is 209-999-998, the child's A# may be 209-999-997 or 209-999-999. As such, if you do not have the A# for the child, try entering an A# that is one digit apart from the mother's A#. Note that a parent who previously entered the United States and came into contact with immigration officials will likely have an A# with a lower numerical sequence reflected in the first three digits. For example, the parent's A# may be 205-999-999 instead of 209-999-998.

Q: How can I get access to the Immigration Court's record for the respondent?

Three ways exist to obtain a respondent's Immigration Court record.

The first manner of obtaining a respondent's Immigration Court record is by submitting a request for the audio recordings of the prior proceedings from the Immigration Court that issued the removal order. Submit this request in writing by mail. In this same request, the practitioner may

[166] Even if the "Alien Number" is not in the system, it is possible the person has an expedited removal order or a reinstated order of removal. Ask the client about any prior attempted entries through the border and file a CBP FOIA and/or FBI fingerprints check to ascertain whether this could be an issue in the case. For further information about expedited removal orders, which is beyond the scope of this Guide, see American Immigration Council, National Immigration Project of the National Lawyers Guild, and ACLU, *Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (issued on Jan. 27, 2017)*, Feb. 20, 2017, available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf. *See also* Asylum Seeker Advocacy Project, *Vindicating the Rights of Asylum Seekers at the Border and Beyond: A Guide to Representing Asylum Seekers in Expedited Removal and Reinstatement of Removal Proceedings*, available at https://asylumadvocacy.org/resource/expedited-removal/.

request, and the Immigration Court could send, a copy of the removal order. What the Immigration Court is willing to send seems to vary by Immigration Court. When seeking a copy of the removal order, include a self-addressed, pre-paid envelope. The Immigration Court will send by mail the Digital Audio Recording (DAR) of the proceedings in the form of a CD. If the IJ issued the removal order prior to approximately 2010,[167] the Immigration Court may not have a DAR and will instead have cassette tapes of the proceedings. In this case, the Immigration Court will request blank cassette tapes in order to copy their audio recordings onto the blank cassette tapes.

The second option is in-person review of the Immigration Court file. However, this too will take some time to achieve. It will take time for the Immigration Court to request the respondent's closed file from the storage facility where the Immigration Court sent the file once the Immigration Judge issued the removal order. Each Immigration Court has its own procedures governing requests to review files/documents. Check with the relevant Immigration Court to learn more about that court's request procedures. Generally, the Immigration Court will require the respondent's written permission to review the record. An Immigration Court may request an E-28 in order to review the file. Note that because the request is for a closed file and the practitioner seeks the file for investigative purposes, service of the EOIR-28 to DHS should not be required. As such, practitioners may note "N/A" on the EOIR-28 certificate of service. Instead of an EOIR-28, the respondent could sign an authorization form or a Form DOJ-361, Certification of Identity, to be submitted to the Immigration Court with the respondent's original signature stating that the legal representative or the agent of the legal representative is investigating the case and has permission to review the Immigration Court file.[168]

Some Immigration Courts may provide copies of the documents in the file or allow cell phone photos of the documents in the file, but if an Immigration Court does not allow either of these, be prepared to take detailed notes during the file review.[169] Practitioners who wish to review the Immigration Court file in person should consider seeking in-person review before filing a Freedom of Information Act (FOIA) request or after receiving the FOIA disclosures.[170] Otherwise, the

[167] Some Immigration Courts transitioned to digital audio recording as early as 2007. By September 2, 2010, all of the Immigration Courts in the country were using digital audio recording. *See* News Release, EOIR, *EOIR Completes Digital Audio Recording Implementation*, Sept. 2, 2010, available at https://www.justice.gov/sites/default/files/pages/attachments/2015/08/20/eoircompletesdar09022010.pdf

[168] If the legal representative is located far away from the Immigration Court that issued the *in absentia* removal order, the legal representative may ask a trusted, local ally to review the file at the Immigration Court. That trusted, local ally should have the authorization form issued to their name,

[169] If Practitioners do not have a copy of the documents they are referencing for the MTRR and/or MTR, they can add a footnote explaining that the information stemmed from their initial review of the file at the Immigration Court.

[170] IJs who receive an MTRR may lack the Immigration Court "Alien File" because the FOIA unit requested the file to comply with the FOIA request. IJs should wait for the FOIA unit to return the file before deciding the MTRR. However, if the IJ seemingly decides the MTRR and/or MTR without having the full record of proceedings, the practitioner may consider a Motion to Reconsider to the IJ and/or include this issue in the BIA appeal. Practitioners could attempt to call the Immigration Court to ask when the Immigration Court sent the file to the FOIA unit and when the FOIA unit returned the file. Compare those dates to the date of the IJ decision on the MTRR and/or MTR.

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Immigration Court will have likely sent the file to the FOIA unit for production of the FOIA disclosures and the file will not be available for in-person review.

Lastly, the practitioner may file a FOIA request with EOIR. Filing a FOIA request with EOIR is perhaps the easiest manner to obtain a copy of the respondent's Immigration Court file, but not the fastest manner. Under the FOIA statute, the EOIR is mandated to provide a copy of the respondent's documents within 20 days (excepting Saturdays, Sundays, and legal public holidays) of the request.[171] EOIR has 10 additional business days in cases of "unusual circumstances" if written notice is provided setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.[172] However, EOIR often fails to meet these FOIA deadlines. Send EOIR FOIA requests for documents to: EOIR.FOIARequests@usdoj.gov.[173] Practitioners may also file a FOIA request with USCIS. However, respondents who have already been ordered removed cannot benefit from Track 3 fast-track FOIA processing.

Q: Should I await the Digital Audio Recording (DAR) and FOIA disclosures if doing so risks putting the respondent beyond the 180-day exceptional circumstance filing deadline?

If receiving the DAR or FOIA disclosures puts the respondent beyond the 180-day exceptional circumstance filing deadline for an MTRR, file the MTRR before the deadline and file the DAR and FOIA requests. Since the asylum seeker's recollection may be the only source of the facts, consider including a similar footnote on the "Facts" heading of the motion: "These dates are based on [respondent's] recollection. Undersigned counsel has submitted a request for the DAR and a FOIA to confirm these dates." If the DAR or FOIA results reveal facts different from the facts included in the motion, submit a "motion to amend previously filed Motion to Reopen *in absentia* removal order." Furthermore, if DHS opposes this motion or otherwise objects, argue that the numerical limitation should be equitably tolled because this information was not available to the representative, despite their diligence, within the relevant time period.

Q: When might an MTRR and/or MTR be appropriate in an *in absentia* removal order case?

An asylum seeker who has received an *in absentia* removal order might file an MTRR if they are at risk of removal and

(1) have a qualifying exceptional circumstance that caused them to miss their hearing; or

[171] 5 U.S.C. § 552(a)(6)(A)(i).
[172] 5 U.S.C. § 552(a)(6)(B)(i).
[173] For more information, visit U.S. Department of Justice, Executive Office for Immigration Review, Freedom of Information Act, https://www.justice.gov/eoir/foia-facts. *See also* American Immigration Council, *FOIA for Immigration Lawyers*, Updated Feb. 2017, available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_foia_for_immigration_lawyers.pdf.

(2) did not receive legally sufficient notice of their Immigration Court hearing before the IJ.

Filing a timely MTRR under one of these two grounds will automatically stay the respondent's removal while the motion is pending before the IJ.[174] However, if the asylum seeker is in danger of imminent removal, you must contact the local ICE office to alert them that you have filed an MTRR that triggers an automatic stay of removal.[175] Offer to email or fax the deportation officer proof of filing of the MTRR.

Asylum seekers may choose to file an MTRR even if they are not at imminent risk of removal if it is close to the 180-day deadline and an MTRR for "exceptional circumstances" would not be timely otherwise. Asylum seekers may also wish to file an MTRR and/or MTR if the one-year filing deadline for filing the asylum application is approaching. If an asylum seeker has a removal order in place and an MTRR and/or MTR is not granted before the one-year filing deadline, mailing or attempting to file an I-589 with the Immigration Court and lodging the I-589 with USCIS may help preserve the best asylum one-year filing deadline argument. However, the Immigration Court may not consider an asylum application to be filed until it is re-submitted after the IJ grants the MTRR and/or MTR.

Q: Why would an asylum seeker opt not to file an MTRR and/or MTR in an *in absentia* removal case?

Respondents usually only have one opportunity to file an MTR and/or MTRR[176] as the INA and the regulations for MTRs contain a numerical limitation of "only one motion."[177] An asylum seeker should make their first motion as strong as possible through the assistance of competent legal counsel. However, affordable and competent legal counsel can be difficult for asylum seekers to find. Those who have been lucky to find affordable and competent legal counsel for representation for an MTRR and/or MTR of an *in absentia* order may want guarantees that counsel will provide representation on the appeal if the IJ denies the MTRR and/or MTR, or at their merits hearing should the IJ rescind the *in absentia* order and reopen the case.

In the absence of affordable, competent, and committed legal counsel, an asylum seeker may choose to not place themselves in further uncertainty or risk of detention by ICE. While those with outstanding orders are always at risk of detention and removal, filing an MTRR and/or MTR may

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[174] INA § 240(b)(5)(C) ("The filing of the Motion to Reopen described in [INA §240(b)(5)(C)((i) and (ii)] shall stay the removal of the alien pending disposition of the motion by the immigration judge."); *see also* INA § 242B(c)(3) (pre-IIRAIRA); 8 CFR § 1003.23(b)(4)(ii) (removal orders); 8 CFR § 242B(c)(3) (deportation orders, pre-IIRAIRA).

[175] If your client is at risk of removal, you must contact the local ICE office to alert them that you have filed an MTRR, which automatically stays a removal. You should obtain a stamped copy of the MTRR cover at the window of the Immigration Court and send that page by fax to ICE to demonstrate that they must stop your client's imminent deportation. Even though an individual or family has 180 days to file an MTRR to reopen an *in absentia* removal order, ICE will often begin the process of deportation before the end of the 180 days. For this reason, it is critical to ask your client whether they have received a notice from ICE asking them to report for their deportation.

[176] 8 CFR § 1003.23(b)(1). Some circuits have held that this numeric limitation is subject to equitable tolling. *See, e.g.*, *Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003); *Davies v. U.S. I.N.S*, 10 F. App'x. 223 (4th Cir. 2001) (per curiam). Some practitioners have further argued that MTRRs related to *in absentia* removal orders are not subject to this numerical limitation because the numerical bar is not mentioned as it pertains to MTRRs for *in absentia* orders in section § 240(b) (5)(C) of the INA.

[177] INA § 240(c)(7)(A); 8 CFR § 1003.23(b)(4)(ii).

highlight the person to DHS and increase the chances of detention and removal if the MTRR and/or MTR is not successful and the person does not seek and obtain a stay of removal when appealing the MTRR and/or MTR denial to the BIA.

Q: What are factors respondents should consider when deciding whether to file an MTRR and/or MTR in an *in absentia* removal case?

Some factors to consider are:

- **Strength of the MTRR and/or MTR:** was there an exceptional circumstance or insufficient notice?

- **Timing:** if the asylum seeker did receive sufficient notice, are they within 180 days of the entry of the removal order? If not, is there a viable argument that the 180-day deadline should be equitably tolled?

- **Strength of the underlying asylum case:** is it likely the asylum seeker would be granted asylum or other relief if proceedings were reopened?

- **Likelihood of removal:** is the asylum seeker at present a likely target of government enforcement operations?[178]

- **Country condition changes:** have there been changes in the asylum seeker's home country that materially impact their asylum claim since their last hearing, including changed country conditions directly related to the asylum seeker, such as threats or harm to their family?

- **Other changed circumstances:** have the asylum seeker's circumstances in the United States changed in a way that makes it more dangerous to return to their country of origin? For example, developing a debilitating illness making it difficult to travel or avoid persecution.

Q: When can an MTRR and/or MTR be filed in an *in absentia* removal case?

An MTRR of an *in absentia* order in which a respondent demonstrates that they did not receive *notice* of the hearing can be filed at any point after the IJ issues a final order of removal. This means that there is no time limit for an MTRR of an *in absentia* order alleging insufficient notice.[179]

An MTRR of an *in absentia* order in which a respondent claims *exceptional circumstances* generally must be filed within 180 days after a final order of removal.[180] However, ten U.S. Courts

[178] *Supra* fn. 4.
[179] INA § 240(b)(5)(C)(ii).
[180] INA § 240(b)(5)(C)(i).

of Appeal have held that filing deadlines may be equitably tolled in certain circumstances.[181] If the asylum seeker has a colorable argument for both exceptional circumstances and insufficient notice, as discussed in prior sections, practitioners should include both claims in the MTRR and file within the 180-day deadline (or argue that the deadline should be equitably tolled).[182]

Note that under certain circumstances, such as changed country conditions, IJs and the BIA can reopen proceedings beyond this 180-day deadline to allow a respondent to apply for relief even if the standards for an MTRR are not otherwise met.[183]

Q: Where should I file the MTRR and/or MTR?

File the MTRR and/or MTR of an *in absentia* order with the Immigration Court that issued the order of removal, *not* the BIA. If the IJ denies the MTRR and/or MTR, appeal that denial to the BIA.

Q: What documents must accompany the MTRR and/or MTR of an *in absentia* order?

Any time Immigration Court practice is implicated, look to the Immigration Court Practice Manual (ICPM) for guidance. It is very important to ensure that the MTRR and/or MTR filing complies with the ICPM. Failure to comply with the ICPM may lead to the Immigration Court rejecting the filing, which could affect compliance with the 180-day filing deadline. The ICPM explains in detail the MTRR and MTR requirements. The main requirement for an MTRR of an *in absentia* order is a detailed affidavit or declaration from the lead respondent describing the facts that support the basis for the MTRR (for example, no notice, exceptional circumstances, *sua sponte* authority).

Note that Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court, may not be filed online using the EOIR eRegistry system for *in absentia* removal cases because the case is technically closed with EOIR and eRegistry only supports active case filings. Therefore, file the Form EOIR-28 as a hard copy along with the MTRR and/or MTR of an *in absentia* order package. If the respondent has yet to file Form I-589, they should file the I-589 asylum application along with the MTRR and/or MTR.

Also, to best protect the respondent, prepare and sign a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, early in the case because, if ICE takes the respondent into custody, ICE will request this form as opposed to the Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court. Not having a Form G-

[181] Equitable tolling is a long-recognized legal principle through which courts can waive the application of a filing deadline where a person acted diligently, but nonetheless was unable to comply with a deadline. The Courts of Appeals have generally recognized that the filing deadlines at INA §§ 240(b)(5)(C)(i) and/or 240(c)(7)(C)(i) are subject to tolling. *See supra* Section IV.B.3.

[182] Under Supreme Court precedent, an individual is "entitled to equitable tolling" if "'(1) . . . he has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Most courts have recognized that ineffective assistance of counsel that prevented timely filing of a Motion to Reopen constitutes an "extraordinary circumstance." *See supra* Section IV.B.2.

[183] *See, e.g., Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013); *Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998) (en banc).

28 signed by your client may lead to ICE claiming inability to discuss your client's case by citing confidentiality reasons all while preparing for respondent's removal.

For more information on how to file an MTRR and/or MTR of an *in absentia* order, see Section IX, "MTRR / MTR and Change of Venue Checklist," at the end of this Guide.

Q: Is a fee required for an MTRR and/or MTR of an *in absentia* order?

The typical MTR/MTRR fee is $110.[184] However, not all MTRs or MTRRs require a fee. There is no fee if the basis for the motion is lack of notice, or if the motion is based exclusively on an application for relief that does not require a fee, such as asylum.[185] The ICPM further states that "[f]or purposes of determining filing fee requirements, the term 'asylum' here includes withholding of removal ("restriction on removal"), withholding of deportation, and claims under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment."[186]

Many asylum seekers have received a positive Credible Fear Interview (CFI) or Reasonable Fear Interview (RFI). Such asylum seekers should not require an MTR filing fee because the positive CFI or RFI demonstrates an intention to pursue an MTR for purposes of applying for asylum and related relief. Those families with a positive CFI or RFI finding can include this decision with the filing and include in the declaration that the respondent intends to seek asylum and related relief. While the regulation does not require an I-589, respondents should consider including the I-589 with the MTRR and/or MTR.

If the respondent does not plan to seek asylum or related relief but cannot afford to pay the filing fee, the IJ can waive the fee if the respondent can show inability to pay.[187] Eligibility for a fee-waiver is demonstrated by submitting an executed affidavit or unsworn declaration made pursuant to 28 U.S.C. § 1746, substantiating the inability to pay the fee.[188] However, if the IJ denies the fee waiver request, the motion will not be deemed properly filed and the respondent may fall outside the 180-day deadline for an MTRR of an *in absentia* order if filing pursuant to exceptional circumstances.[189]

Q: What if the local USCIS Field Office makes it difficult to submit the fee for the MTRR and/or MTR?

Because the Immigration Court does not collect fees, legal representatives must pay "any fees relating to any EOIR proceeding" to "any USCIS office authorized to accept fees."[190] USCIS Field

[184] 8 CFR § 1103.7(b)(2). The Motion to Reopen fee must be paid in advance to the Department of Homeland Security (the local CIS District office) in accordance with 8 CFR § 103.7. The fee receipt must accompany the motion when it is filed with the Immigration Court.
[185] 8 CFR §1003.24(b)(2); ICPM at 3.4(b).
[186] ICPM at 3.4(b).
[187] 8 CFR § 1003.24(d).
[188] *Id.*
[189] *Id.*
[190] 8 CFR § 103.7.

Offices are authorized to accept fees.[191] In the past, USCIS Field Offices accepted MTRR and/or MTR fee payments on a walk-in basis. However, recently, certain USCIS Field Offices began making the fee payment process more difficult by requiring an InfoPass appointment. This limitation on the fee payment process prejudices noncitizens who are detained and facing imminent removal because without paying the MTRR and/or MTR fee and obtaining the receipt, the Immigration Court may reject the MTRR and/or MTR filing. Without a properly filed statutory-based MTRR that triggers an automatic stay of removal, ICE may remove the detained asylum seeker. Similarly, without a properly filed *sua sponte* MTRR and/or MTR, the Immigration Court does not have jurisdiction over the asylum seeker to adjudicate a stay of removal motion.

Legal representatives may consider the following strategies when facing MTRR and/or MTR payment barriers at the local USCIS Field Office:

- The regulation says *any* USCIS office is authorized to accept fees. Legal practitioners could partner with another practitioner to pay the fee at a USCIS Field Office that still allows walk-in payments or has InfoPass appointments immediately available. That practitioner would then email the legal representative the receipt of the fee payment for inclusion with the MTRR and/or MTR filing.

- Mail the fee payment to the local USCIS Field Office along with an explanation with the reason for the mailing and a self-addressed envelope. The USCIS Field Office will then send you the receipt using the self-addressed envelope. If you do not receive the fee payment receipt in time to file the MTRR and/or MTR, file a declaration discussing your attempts to pay the fee, along with a copy of the check, with the MTRR and/or MTR.

- File a fee waiver with the MTRR and/or MTR with evidence of being "unable to pay fee" pursuant to the ICPM.[192] Traditionally, the "unable to pay fee" standard hinged on the noncitizen's ability to pay the fee. However, the ICPM does not define the "unable to pay fee" standard and thus should allow for practical impossibility reasons presented by USCIS's current MTRR/MTR fee payment policy. Prepare a "Motion for Leave to Submit the Motion Without a Fee Receipt" that explains the circumstances and reasons for the motion. Contact the USCIS Field Office Director as well as the local Assistant United States Attorney in charge of defensive civil matters and share the motion with each. Contact the Immigration Court Administrator to inform them of your intention to file a MTRR and/or MTR without fee and why. If no one responds to your efforts, document the lack of response within the "Motion for Leave to Submit the Motion Without a Fee Receipt" and file this along with the MTRR and/or MTR.

- Section 1003.24(b)(2) of the regulations has a list of the circumstances as to when a fee is not required. Section 1003.24(b)(2)(viii) of the regulations states that a fee is not required for "[a] motion filed under a law, regulation, or directive that specifically does not require a filing fee." Consider arguing that the new local directive regarding MTRR/MTR fee payment procedures has rendered fee payment impossible and, as such, a fee payment is

[191] USCIS Field Office locations may be found through the USCIS website at https://www.uscis.gov/about-us/find-uscis-office/field-offices.
[192] *See* ICPM 3.4.(d).

not required. Include correspondence from the local USCIS Field Office Director notifying practitioners that there is a new directive in place that requires scheduling an InfoPass appointment in order to pay the MTRR/MTR fee. Note on the cover page "No Fee Required Pursuant to 8 CFR § 1003.24(b)(2)(viii)" and include a footnote or a couple of sentences in the introduction of the motion that explains the new fee payment barriers before USCIS.

Q: What happens after the IJ ruling?

Take note that while an IJ is adjudicating an MTRR based on statutory no notice or exceptional circumstances arguments, there is an automatic stay of removal or deportation pending the IJ's decision.[193] What happens after the IJ decides the MTRR and/or MTR will depend on whether the IJ granted or denied the MTRR and/or MTR.

- The IJ grants the motion: If an MTRR and/or MTR of an *in absentia* order is successful, the IJ will issue an order granting the MTRR and/or MTR, and then the Immigration Court will schedule a new master calendar hearing. If you did not file Form I-589 with the MTRR and/or MTR, you should be prepared to file the I-589 as soon as possible after the case is reopened and before the one-year filing deadline.[194]

- The IJ denies the motion: If an MTRR and/or MTR of an *in absentia* order is unsuccessful, the order of removal remains in place and the asylum seeker must appeal.

Q: How do I appeal an IJ denial of an MTRR and/or MTR?

An IJ's decision denying an MTRR and/or MTR of an *in absentia* order may be appealed to the BIA. Appeal to the BIA by filing a Form EOIR-26, Notice of Appeal with the Board of Immigration Appeals, within thirty days of the IJ's denial of the Motion to Reopen. An appeal to the BIA requires a fee or a Form EOIR-26A, Request for Fee Waiver, executed by both the client, and attorney, if any, and filed with the BIA. The legal representative must also file a Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals. The BIA requires the EOIR-27 even if the legal representative previously appeared before the Immigration Court. For more information about appellate practice, refer to the BIA Practice Manual.

You may also file a motion to reconsider with the IJ, but this strategy will turn on timing considerations and the likelihood of the IJ reconsidering their decision. Note that once the BIA accepts your appeal, the IJ will lose jurisdiction over the case and will thus be unable to issue a decision on a motion to reconsider.

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[193] INA § 240(b)(5)(C) ("The filing of the Motion to Reopen described in [INA §240(b)(5)(C)((i) and (ii)] shall stay the removal of the alien pending disposition of the motion by the immigration judge."); *see also* INA § 242B(c)(3) (pre-IIRAIRA); 8 CFR § 1003.23(b)(4)(ii) (removal orders); 8 CFR § 242B(c)(3) (deportation orders, pre-IIRAIRA).

[194] Michael C. McGoings, Chief Immigration Judge (Acting), *Operating Policies and Procedures Memorandum 16-01: Filing Application for Asylum*, Sept. 14, 2016, available at https://www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf.

If the BIA denies an appeal of an MTRR and/or MTR of an *in absentia* order, file a petition for review (PFR) with the U.S. Court of Appeals with jurisdiction over the Immigration Court where the IJ issued the *in absentia* removal order. [195]

Q: Is there an automatic stay of removal during an appeal of an IJ denial of an MTRR and/or MTR?

There is no automatic stay of removal when appealing an IJ denial of an MTRR and/or MTR.[196] However, the BIA will adjudicate a motion for a stay of removal in conjunction with the appeal if your client is detained and facing imminent removal.[197] Call the BIA emergency stay unit at 703-306-0093 to alert them that your client faces imminent removal so that the unit rules on the motion for a stay of removal.[198] Do not assume that ICE will obtain notice of a pending or approved stay of removal. Instead, submit proof of the motion for a stay of removal to the deportation officer or the ICE ERO office with jurisdiction over your client's place of detention. Alternatively, or in addition to a stay of removal motion filed with the BIA, practitioners may also file ICE Form I-246, Application for a Stay of Deportation or Removal, with the ICE ERO office with jurisdiction over your client's place of detention.

Q: What happens if the IJ rescinds the removal order and/or reopens the case but later denies asylum and related relief?

If an MTRR and/or MTR of an *in absentia* order is successful, but the respondent then loses the case on the merits in reopened proceedings, the IJ will enter a new order of removal, which can then be appealed to the BIA within 30 days.[199] Review the BIA Practice Manual to ensure proper and timely submission of the Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge, to the BIA.

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[195] *See* CLINIC's U.S. Immigration Courts and U.S. Courts of Appeals Map, available at https://cliniclegal.org/sites/default/files/ resources/maps/US-Immigration-Courts-and-Districts.pdf.

[196] Guidance on filing a stay of removal is beyond the purview of this guide. For more information on stays of removal before the BIA and the U.S. Courts of Appeals, please refer to: CLINIC, *Stays of Removal for DACA Recipients with Removal Orders*, Mar. 9, 2018, available at https://cliniclegal.org/sites/default/files/Stay-PA_1.pdf and American Immigration Council, National Immigration Project of the National Lawyers Guild, and Immigrant Rights Clinic at NYU School of Law, *Practice Advisory: Seeking a Judicial Stay of Removal in the Court of Appeals*, Jan. 21, 2014, available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/seeking_a_judicial_stay_of_removal_fin_1-21-14.pdf.

[197] 8 CFR § 1003.6(b).

[198] U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet: BIA Emergency Stay Requests*, Mar. 2018, available at https://www.justice.gov/eoir/page/file/1043831/download.

[199] *See Matter of Liadov,* 23 I&N Dec. 990 (BIA 2006) (holding that although the Board may certify a case to itself under 8 CFR §1003.1(c) if the 30-day deadline has expired, exceptional circumstances must be present). Several U.S. Courts of Appeals have held that filing after the 30-day deadline is not fatal to a direct appeal. *See, e.g., Zhong Guang Sun v. U.S. Dept. of Justice*, 421 F.3d 105, 111 (2d Cir. 2005) (finding the BIA abused its discretion in denying a motion to reconsider because the untimely appeal merited consideration based on error of Airborne Express overnight delivery service); *Liadov v. Mukasey,* 518 F.3d 1003, 1009 (8th Cir. 2008) (holding that the Attorney General has discretion as to whether to require a mandatory time limit); *Irigoyen– Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011) (finding discretion in time limit since it is in purview of the agency, not jurisdictional); *Huerta v. Gonzalez*, 443 F.3d 753, 755–56 (10th Cir. 2006) (holding that the BIA has jurisdiction and authority to accept late filings because timeline is not jurisdictional).

VIII. INTERVIEWING CLIENTS AND DRAFTING DECLARATIONS

A. Building Client Rapport

The central purpose of the interview with your client is to gather detailed information for the declaration. To that end, it is essential to begin by building a rapport with them. Understand that the asylum seeker may not be immediately trusting or comfortable with giving you detailed information about their life.

Take the time to ease your client's mind by fully explaining your role as their representative. Assure the client that any information they provide will be confidential and will not be shared with anyone without their consent. This assurance may require an explanation of the legal representative-client relationship in the U.S. legal system and the duties that an attorney or accredited representative owes clients as the client will be unfamiliar with these concepts. Also assure your client you will not file the MTRR and/or MTR you are working on without their consent, and that the MTRR and/or MTR that is filed will not be publicly available. This explanation communicates your client's involvement in the case and helps assuage any concerns regarding a persecutor or potential persecutor learning about their life and whereabouts.

Here are some strategies to help make the client comfortable:

- Discuss a neutral topic before delving into your client's story;
- Share a piece of your own private life or similarities from your own background;
- Let your client know that they are in control of the meeting and invite them to ask questions or interrupt you whenever they would like;
- Pause periodically and ask your client how they are doing and whether or not they would like a break;
- Offer them a beverage or food that will remind them of home to help make them feel more comfortable;
- Ensure that your office is not cluttered;
- Turn off your cellphone in front of your client and let them know that for the next two hours they have your full attention;
- Preface difficult questions by indicating that you recognize the sensitivity of the question and letting your client know they can take their time to answer or that they can request to continue at another moment that same day or on a different day;
- Ensure that your client knows why you are asking for specific details and that the more specific information you have the more accurate your motion will be.

B. Beginning the Interview

Begin by describing the purpose of your interview to your client. Explain that this declaration and motion are meant to convince the IJ to rescind the *in absentia* removal order received and reopen immigration proceedings. Inform your client that the declaration and motion will have to establish that their failure to appear was due to either lack of notice or other exceptional circumstances. Reassure them that the reason the IJ issued a removal order was due to the asylum seeker's failing

to appear and not because the IJ did not believe they had an asylum claim. Indeed, the IJ did not review the merits of the case during the *in absentia* hearing.

C. Explain the Questions You Will Ask

You should also warn your client that you may be asking difficult questions but explain that their answers are important because this declaration will be the basis for the MTRR and/or MTR of their case. However, reassure your client that it is okay to request a break from a certain category of questions if feeling upset, overwhelmed, or anxious.

Additionally, communicate to your client that if you ask them for more details or follow-up information, it is not because you doubt anything but because you want to do your best to understand and effectively convey their story in the declaration. Explain that you will be asking for the information in chronological order, or the order in which it occurred and that you will continue to review the timeline of events with them to ensure it is accurate. Explain that if unable to remember specific dates, it is best to not guess but rather to provide an estimate in relation to some other important event in their life, like the birth of a child, a parent's birthday, or a holiday.

Finally, explain to your client that you may be asking about things that do not seem important (or not asking about things that do seem important) because you are tailoring your questions to the legal arguments that you intend to make in the motion. Specifically, you should inform your client that this declaration will primarily focus on why they did not attend their hearing rather than the merits of their underlying asylum claim (although this declaration should include an explanation of your client's underlying claim, as discussed in Section V). Encourage your client to share any additional information they think may be relevant, even if you do not ask the specific question.

D. Questions to Ask

Although you will eventually need to ask specific questions to gather detailed information for the affidavit or declaration, begin by asking the lead respondent (for a family unit of a mother and children, the lead respondent is the mother) more open-ended and general questions about why they missed their hearing. The affidavit or declaration should usually come from the lead respondent unless there are other issues to consider, such as competency issues. Affidavits for the non-lead respondent or family members or friends may be useful as corroborating evidence.

1. General questions

Asking more generalized questions at the beginning of your interview will not only help build up your client's comfort level and make them feel listened to, but it will also give you a better sense of what information the declaration should include. To avoid sounding accusatory or judgmental when asking open-ended questions about why they missed their hearing, it may be useful to list common reasons for missing hearings, including lack of notice or exigent family circumstances. Also, many people are understandably confused by the differences between ICE and Immigration Court, so it is worth explaining and asking follow-up questions to clarify what you are discussing at any point.

Do not assume, however, that your client will immediately identify every reason for missing their court date. Your client may not realize which circumstances could be relevant to explaining their absence from court.

Try to identify any additional issues that may have contributed to their missed court date by asking some general follow-up questions, including:

- Did DHS issue an NTA containing the date, time and location of the hearing?
- Did you ever receive a written notice in the mail regarding your court date?
- If you did receive a notice in the mail, were you able to read it and understand it? Did you have someone else who could read it and/or translate it for you? Who was this person and why did you think that this person could read and translate the notice accurately?
- Did anyone ever tell you about your court date in your primary language?
- Did you have any family or personal matters or physical impediments that prevented you from attending court?

2. Document collection

Request copies of all of your client's immigration documents (in person, by e-mail, by fax, by mail, or by taking pictures of documents on their cell phone and texting them). Document collection may require the filing of a FOIA, a request to review court file, or a request for the audio recording from the immigration court, but if the client has any documents in their possession, you should ask the client to send those.

3. Specific background questions

Once you have a general idea of why your client was not present for their hearing, you should move on to asking more specific questions.

The final affidavit or declaration should be very detailed and thorough. Below are some useful background questions that you may ask, as well as questions that may be more specific to your client's failure to appear. Additionally, compare the final affidavit or declaration to any prior known statements made by the respondent or any other documentation from the client's immigration history. If you discover discrepancies in the client's version of what happened and the immigration documents, you should investigate further and figure out why such inconsistencies exist, since they could raise problems for your MTR or ultimate form of relief your client is seeking.[200]

[200] *See Matter of J-C-H-F-,* 27 I&N Dec. 211 (BIA 2018) (holding that when deciding whether to consider a border or airport interview in making a credibility determination, an immigration judge should assess the accuracy and reliability of the interview based on the totality of the circumstances).

4. Conditions of detention

- When did you arrive in the United States?
- Where did you arrive?
- Did you arrive alone or with any children/family members?
- Did CBP take you to the "hielera"or icebox? If so, for how long?
- Did CBP take you to the "perrera" or dog cages? If so,for how long?
- Were you taken to a family detention facility?
    - If so, how long were you there for?
    - Do you remember what was it called?
- Please describe the circumstances of your detention.
    - Where were you taken?
    - How were you treated?
- Were you ever separated from your children or family while you were detained?
    - For how long?
    - How did you feel during this separation?
- Please describe the conditions when you were detained by the government?
    - Did you and your family have enough food while you were detained?
    - Did you or any of your family members experience any medical problems while you were detained? If so, what was the nature of your medical problem(s)? How did the medical staff treat your medical problem(s)? Were you taken to a clinic or hospital outside of the detention center? If so, please describe the treatment at that clinic or hospital. How long were you at that clinic or hospital? Did the medical staff at that clinic or hospital say anything about the treatment you received at the detention center prior to your arrival at the clinic or hospital?
    - How did being detained affect you and your children? Have you noticed any changes in your children since their release from detention?
- How long were you detained?

- While you were detained, did you have an interview with an asylum officer?
    - Did you pass the interview the first time?
    - Do you have those documents? If you do not have the documents, how do you know the outcome of the interview with the asylum officer?

5. Bond hearing and release

- When were you released?
- What address did you give immigration for where you were going when you were released?
- Were you released on an ankle monitor?
    - If not, did immigration ever put one on you after release?
    - If you left detention with an ankle monitor, do you still have it on? If not, how long did you have it on for?
- Did you ever go to Immigration Court while you were detained (for your bond hearing or any other hearing)?
    - Did the IJ appear in person or on a televisions screen?
    - Did the judge speak to you in your primary language?
    - If not, was there anyone present to interpret and help you understand your proceeding?
    - Were you provided an interpreter?
    - If so, was the interpreter present in person or over the phone?
    - Was the interpreter clear, audible, and understandable?
- Did you have a bond hearing before an IJ?
- Were you released on bond?
    - How much was your bond?
    - Who was your sponsor?
    - What is your relationship to your sponsor?

- Why did you choose this sponsor?
- Were you ever—incorrectly—told that your sponsor had to be a U.S. citizen or legal permanent resident? From whom did you hear this information?
- Did you intend to live with that sponsor upon being released from detention?

- Were you ever informed about any upcoming dates you needed to appear in court or for a check-in by anyone prior to your release?
  - Were you told to report to ICE? Was it on a specific day?
  - Were you informed of a future court date?

- Were you given any documents upon your release?
  - Did any of those documents contain dates for upcoming court dates or ICE check-ins?
  - Do you still have those documents? If so, can you please show them to me (in person, send by fax or even by taking a photograph and texting the image).

6. ICE check-ins

- Which immigration office(s) have you reported to? *(Note: asylum-seeking families often have to report not only to ICE but also to private contractors such as BI (Behavioral Interventions), a company responsible for ankle monitors and other forms of supervised release. This can be confusing, and it may help to ask where the offices were located, to determine whether they reported to an ICE office or a private company).*
  - Is it close to where you are living now?

- How many times have you attended an ICE check-in?
  - Can you describe the details of each of those check-ins?
  - How long did they take?
  - Who did you speak to and what did they say?
  - Did they speak your primary language?
  - Was there a translator available?

- Have you missed any appointments with ICE?

- Why?

- Did any ICE official ever mention or remind you of your upcoming court date?

- Did you keep your address updated with ICE?

7. Excusable tardiness

- When you arrived at the building housing the immigration court, did someone direct you to the courtroom? Who directed you? What did they look like? Were these directions correct? If the directions were incorrect, how long did it take you to find the courtroom?

- Did you arrive late to the hearing? If so, did you check in at the window?

- What did the court staff say when you checked in?

- When you entered the courtroom, was the IJ still on the bench? If so, what did the IJ say? If not, who, if anyone, was in the courtroom?

8. Insufficient notice

- Did you provide immigration officials with an address where you would reside and could receive mail upon your release?

    - What was that address?

    - Is this where you lived? If not, where did you live instead and why?

- Did you ever move or change addresses?

    - Where to?

    - Why?

    - Were you ever informed about how to update your address and contact information with ICE or the Immigration Court?

    - Did you ever receive a copy of the Immigration Court change of address form (Form EOIR-33)?

    - Did you know you had to separately change your address with the court in addition to changing it with immigration?

    - If you moved, was there someone you know who continued to check the mail at that address?

- How often did you (or others) check your mail?
- Has mail to this address been lost or sent somewhere else by accident? Have you had any other problems with mail to this address?
- Did you ever receive any mail relating to your case at that address?
    - Could you read and understand those letters?
    - Were those letters in your primary language?
    - Was there anyone you knew who could read and translate the letters?
    - Who?
    - What is your relationship to them?
    - What is their level of proficiency in both languages?
    - Did this person translate the letter word-for-word, or did they only tell you what the letter was about generally?
    - Did you have any trouble understanding the dates listed on the letters because of their month/day/ year format?
- Did you ever receive notice of meetings with ICE?
    - How many notices did you receive?
    - Have you received a notice asking you to report for your deportation? If so, what date did it say you needed to report?
- Did you ever receive a notice about a hearing in court?
    - Did that Notice to Appear contain a hearing date or hearing location?
    - How many times did you receive this notice?
    - Did you ever receive a Notice of Hearing from the Immigration Court?
    - When was the last time you received any notice from the Immigration Court?

9. Exceptional circumstances

This set of questions will vary depending on the case, but here are some questions to keep in mind.

- Did you try to attend your hearing? What steps did you take to try to attend your hearing?

- Did you have problems arranging transportation to court? What steps did you take to try to arrange transportation? Was there some personal or family matter that prevented you from going to court on the date of your hearing?

- Were you or any of your family members sick or in the hospital?

- Was there a death in your family?

- Did you have any serious physical or psychological impediments that prevented you from attending court?

- Have you ever been represented by an attorney, accredited representative, or a "notario" before? If so, what happened?

- Did you call the court when you realized you could not attend the hearing? What happened when you called the court?

10. Removal order

- When and how did you realize that you missed your court date?

- How did you learn you missed your court date if you did not know about the hearing?

- When and how did you learn a removal order had been issued against you?

- Did you take any action when you learned that you had missed your hearing and that a removal order had been issued?

    - Did you reach out to an immigration legal representative?

    - What is the name of the legal representative you reached out to (even if s/he did not take your case)?

    - Did that legal representative give you any advice?

    - Did you continue to attend your ICE check-ins?

    - Why or why not?

IX. MTRR / MTR AND CHANGE OF VENUE CHECKLIST

A. Evaluate Whether it is in the Client's Best Interest to File an MTRR and/or MTR

A respondent with an *in absentia* removal order may choose to file an MTRR and/or MTR or opt not to file. See Section VII, "Frequently Asked Questions (FAQs)." Questions to consider when advising your client on this decision include:

- Does the client face imminent removal and need the MTRR and/or MTR to prevent deportation?
- What does the Immigration Court's file on the respondent reflect regarding notice?
- Is an MTRR likely to succeed on the grounds of either (1) a qualifying exceptional circumstance within 180 days of the entry of the order of removal, or (2) lack of sufficient notice of the hearing? (3) any other reopening basis?
- If the case is successfully reopened, what are the client's chances of winning the underlying asylum or related claim? (Considerations may include: whether the family will have legal representation, how strong the legal precedent is supporting their claim, what corroborating evidence is available, the reputation of the IJ, etc.).

B. Prepare the MTRR and/or MTR Filing

It is very important to ensure that the MTRR and/or MTR filing complies with the Immigration Court Practice Manual (ICPM).

Note: Some immigration courts may have specific additional requirements, such as separate motions for the parent and the minor children. If you are not familiar with local immigration court practice, we recommend that you call the immigration court clerk before filing to check on any additional requirements.

1. Cover Letter
2. EOIR-28 Forms, Notice of Entry of Appearance as Attorney, https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir28.pdf
    - Signed by attorney or accredited representative
    - Must include EOIR # of attorney or accredited representative
    - Submit separate forms for the parent and each minor child
    - Ensure that no prior attorney or accredited representative has previously entered an appearance, which will cause the motion to be rejected. If a previous attorney or accredited representative entered an appearance, you will need to submit a motion to substitute counsel.

3. Cover page that includes the following notices if applicable:
    - "No Fee Required per 8 CFR §§ 1003.24(b)(2) as Motion is based on Asylum"
    - MTRR only: "Automatic Stay of Removal per INA § 240(b)(5)(C)"
4. If applicable, receipt of $110 Motion to Reopen fee paid to your local USCIS District Office per 8 CFR § 1003.24(a). See Section VII for fee payment guidance.
5. Motion to Rescind and Reopen and/or Motion to Reopen *in absentia* order signed by the legal representative
    - If using a template, ensure you have changed all names to your clients' names
    - Ensure you have put in citations to the exhibits
    - Ensure accuracy of the A#s
6. Table of Contents of Exhibits
    - Include page numbers in the table of contents and paginate your exhibits
7. Exhibits to Motion to Rescind and Reopen and/or Motion to Reopen usually including:
    - Declaration of Client signed by client (with certificate of interpretation signed by interpreter)
    - Credible or Reasonable Fear Interview Transcript(s)
    - Any other corroborating evidence to support the facts asserted in your client's declaration
    - If filing an Ineffective Assistance of Counsel MTRR and/or MTR, include:
        - Letter to Former Legal Representative;
        - Letter to Applicable State Disciplinary Authority;
        - Response from Former Attorney, if any
    - Any other important immigration documents, such as hearing notices
    - Any unpublished BIA decisions that may be persuasive
    - Supporting country conditions information

8. I-589, Asylum Application (optional but recommended)
    - Signed by client
    - Signed by preparer
9. Proposed Order of the IJ
10. Certificate of Service
    - Signed by person who served the motion on DHS

C. Prepare a Change of Address Form and if Necessary, a Motion to Change Venue

- Regardless of whether or not your client has recently moved, prepare an EOIR-33, Change of Address Form to ensure that the Immigration Court has the correct address on file.[201] Ensure that:
    - the EOIR-33 is signed by the client *or* legal representative
    - the proof of service section is signed by the person who served on DHS
    - Note that separate EOIR-33 Forms must be completed for each family member.

- If the client has moved outside of the jurisdiction of the Immigration Court where the MTR and/or MTRR is or will be pending, submit a Motion to Change Venue,[202] including:

    1. Cover Letter
    2. Motion to Change Venue signed by legal representative
    3. Copy of Form(s) EOIR-33
    4. Evidence of the address such as a utility bill or postmarked envelope received at the new address. If the client does not have such evidence and time allows, the practitioner could send the client correspondence in the mail and the client can take a photo of the envelope to send to the practitioner.
    5. Proposed Order of the IJ
    6. Certificate of Service signed by person who served on DHS

[201] *See* ICPM 5.7(b)(i). EOIR-33 forms for different courts are available at https://www.justice.gov/eoir/form-eoir-33-eoir-immigration-court-listing.
[202] Sample motions to change venue are available on ASAP's website at https://asylumadvocacy.org/resources/.

- Consider filing the Motion to Change venue with the MTR and/or MTRR as a Motion to Change Venue communicates that the case will not remain on their docket and thus may be a positive factor in the IJ's decision on the MTR and/or MTRR. However, if the Motion to Change Venue was not filed with the MTR and/or MTRR and the IJ grants the MTR and/or MTRR, do not delay in filing the Motion to Change Venue.

D. File the Motion(s) in Immigration Court

Ideally, find someone to hand-file your packet at the window of the Immigration Court if possible, to ensure that the motion is accepted and received on time. When you file an MTRR and/or MTR at the window, be sure to take a copy of the cover page of the MTRR and/or MTR, first page of EOIR-28 and first page of the I-589 in order to ask the clerk to stamp these pages.[203]

Motions may also be submitted by mail. If you file by mail, include a copy of the cover page of the MTRR and/or MTR, first page of EOIR-28 and first page of the I-589 in order to ask the clerk to stamp these pages and include a self-addressed stamped envelope for the clerk to send you those documents for your records. Unfortunately, there is no electronic filing available in Immigration Court for MTRs/MTRRs. Legal representatives may not submit their EOIR-28 electronically for MTRRs or MTRs as eRegistry cannot match the EOIR-28 to closed cases.

The motion must be filed with the Immigration Court where the *in absentia* order was entered, even if the client now lives elsewhere. If you do not know the name of the IJ who entered the removal order, call the court to ask. If you cannot determine the name of the IJ, list as unknown.

E. Serve the Motion(s) on the Department of Homeland Security

Send a full copy of all filings to the relevant DHS Office of Chief Counsel – see https://www.ice.gov/contact/legal for a list of addresses.

F. Save a Copy of the Filing(s) for your Records and send a Full Copy to your Client

G. Respond to any DHS Opposition, as Appropriate

Responses to motions must comply with the deadlines and requirements for filing.[204] "A motion is deemed unopposed unless timely response is made."[205] Responses to motions to reopen and motions to reconsider with the Immigration Court are due within 10 days after the motion was received by the Immigration Court. DHS therefore has 10 days to respond to a Motion to Reopen and failure to submit a response by this 10-day deadline renders the Motion to Reopen unopposed.

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[203] A stamped copy of an MTRR cover page may be helpful to fax or demonstrate to ICE to stop an imminent deportation. Even though an individual or family has 180 days to file an MTRR to reopen an *in absentia* removal order based on exceptional circumstances, ICE will often beginthe process of deportation before the end of the 180 days.

[204] *See* 8 CFR § 1003.23(a), Chapter 3 (Filing with the Immigration Court).

[205] 8 CFR § 1003.23(b)(1)(iv); ICPM § 5.12 (Response to Motion).

You could consider filing a notice to the IJ that MTRR and/or MTR is deemed unopposed given that DHS did not file a reply within 10 days.

H. Respond to the IJ's Decision, as Necessary

The length of time it takes an IJ to decide an MTRR and/or MTR varies widely. Note that the Executive Office for Immigration Review Performance Measures states that "Eighty-five percent (85%) of all motions should be adjudicated within 40 days of filing."[206]

If the IJ grants the motion, the client should receive a new master calendar hearing date.

If the IJ denies the motion, you may appeal the decision to the BIA. Within 30 days of the IJ's decision or sooner if the client faces imminent removal, you will need to file a notice of appeal (Form EOIR-26—be sure to request briefing), along with new legal representative appearance forms (Form EOIR-27), and either the filing fee (check online for the most updated fee amount) or a fee waiver request (Form EOIR-26a).

You may also file a motion to reconsider with the IJ, but this strategy will turn on timing considerations and the likelihood of the IJ reconsidering their decision. Note that once the BIA accepts your appeal, the IJ will lose jurisdiction over the case and will thus be unable to issue a decision on a motion to reconsider.

I. If the IJ Reopens the Case, Send the Asylum Application (if Applicable) to USCIS to Generate the Biometrics Appointment[207]

Mail to:

USCIS Nebraska Service Center
Defensive Asylum Application with Immigration Court
P.O. Box 87589
Lincoln, NE 68501-7589

Include:

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[206] Memorandum from James R. McHenry III, Director EOIR, *Case Priorities and Immigration Court Performance Measures*, Jan. 17, 2018, available at https://www.justice.gov/eoir/page/file/1026721/download.

[207] Even if you include an I-589 with the MTRR and/or MTR filed at the window or by mail to the Immigration Court, be sure to mail the I-589 to USCIS in order to trigger the scheduling of an appointment for the purposes of fingerprinting respondent(s). USCIS will produce a receipt and schedule the respondent for a biometrics appointment at an Application Support Center. The appointment notice will arrive in the mail. Generally, at the biometrics appointment, the official will take fingerprints and obtain basic biographic information, and then stamp the notice and sign that both "biometrics" and "ten-prints" have been completed. The ten-prints, which are required for respondents in removal proceedings, are only valid for 15 months. However, ICE can update the fingerprint results with information already available in either an ICE or USCIS system. *See* USCIS, *Fingerprint Check Update Request: Agreement between USCIS and ICE,* available at https://www.uscis.gov/forms/fingerprints/fingerprint-check-update-request-agreement-between-uscis-and-ice. All of these background checks must be completed before the IJ can rule on an application for relief in Immigration Court.

- A copy of the first three pages of the I-589 (only the first three pages containing basic biographic information are necessary; USCIS will follow up with a receipt notice and to schedule a biometrics appointment)

- A copy of the Form G-28

- A copy of the Pre-Filing instructions for applications in immigration court (including I-589s) (https://www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf)

- If the client changes the home address after sending the I-589 to USCIS, submit the USCIS Form AR-11, Alien's Change of Address Card.

Note that you may also need to re-submit the asylum application to the Immigration Court in order to start the asylum clock after the case is reopened.

X. SOURCES AND ADDITIONAL RESOURCES

Much of the above information was synthesized from the following resources:

- Executive Office for Immigration Review, U.S. Dept. of Justice, *Motions to Reopen Guide*, https://www.justice.gov/eoir/page/file/988061/download.

- Ninth Circuit Court of Appeals, *Motions to Reopen or Reconsider Immigration Proceedings*, Ninth Circuit Immigration Outline, http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/C.pdf.

- Executive Office for Immigration Review, U.S. Dept. of Justice, *BIA Precedent Chart M-Rec* (August 21, 2015), https://www.justice.gov/eoir/bia-precedent-chart-m-rec.

- Kristin Macleod-Ball and Beth Werlin, American Immigration Council, *Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases* (January 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_remedies_for_ineffective_assistance_of_counsel_in_immigration_cases_practice_advisory.pdf.

- Asylum Seeker Advocacy Project and the Catholic Legal Immigration Network, Inc., *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum* (2018), https://asylumadvocacy.org/resource/denied-a-day-in-court/

- Michelle Mendez and Rebecca Scholtz, the Catholic Legal Immigration Network, Inc., *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (2018), https://cliniclegal.org/sites/default/files/Motion-to-Reopen-PA_1.pdf.

- Trina Realmuto and Kristin Macleod-Ball, American Immigration Council, *Practice Advisory: The Basics of Motions to Reopen EOIR-Issued Removal Orders* (February 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf.

- Beth Werlin, American Immigration Council, *Practice Advisory: Rescinding an In Absentia Order of Removal* (March 2010), http://www.legalactioncenter.org/sites/default/files/lac_pa_092104.pdf.

- American Immigration Council and Penn State Law, *Practice Advisory: Notices to Appear: Legal Challenges and Strategies* (Updated February 27, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf.

- Center for Human Rights and International Justice at Boston College Post-Deportation Human Rights Project, *Post-Departure Motions to Reopen or Reconsider* (December 2012),

https://www.law.yale.edu/system/files/area/conference/ilroundtable/ILR13_AABostonCollegeLawSchoolPostDeparture.pdf.

- Vikram K. Badrinath, Helen Parsonage, and Jenna Peyton, *Time-Barred Motions to Reopen—Tips and Tricks for Success*, American Immigration Lawyers Association's Immigration Practice Pointers (2015–16 Ed.), http://www.aila.org/File/Related/14072246b.pdf.