



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Motions to Reopen for DACA Recipients with Removal Orders¹

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I. Introduction

On June 15, 2012, President Obama announced the creation of the Deferred Action for Childhood Arrivals (DACA) program. The purpose of the DACA program was to implement some of the DREAM Act provisions after Congress repeatedly failed to pass that bill into law.² President Obama created DACA as a temporary protection “in the hope that Congress would eventually pass the Dream Act and broader immigration changes.”³ During DACA’s five-year existence prior to President Trump’s rescission announcement on September 5, 2017, nearly 800,000 youth were approved for DACA.⁴ Under the DACA program, certain youth who had come to the United States as children and met other requirements were able to obtain deferred action, a form of prosecutorial discretion where the government does not take action to deport a noncitizen who lacks lawful status. The DACA program was expressly available to youth with prior removal orders, so long as they met the DACA requirements. Some number of DACA recipients, whose DACA protection may now lapse if DACA rescission goes forward, have prior removal orders. When their DACA protection expires, these individuals will be subject to the possibility of swift deportation at any time despite growing up in the United States since childhood.

If and when the DACA protections expire depend on ongoing litigation. On June 18, 2020, the U.S. Supreme Court issued a decision in *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) holding that the Trump administration’s effort to end DACA had not complied with the requirements of the Administrative Procedures Act. As a result, the Supreme Court upheld a lower court ruling issuing an injunction against the DACA rescission and remanding the case for further proceedings. While this reprieve from terminating DACA was very welcome news, the Trump administration has indicated that it does not plan to restore DACA protections to its pre-September 5, 2017 status. On June 30, 2020, Attorney General William Barr withdrew a letter by his predecessor, former Attorney General Jefferson Beauregard Sessions III, that raised doubts about the legality of DACA and the 2014 Obama-era Justice Department legal opinion that concluded the program was a lawful exercise of executive authority. The Department of Homeland Security (DHS) then issued a memorandum on July 28, 2020, making immediate changes to the administration of the DACA program while it considers the Supreme Court’s ruling.⁵ Meanwhile, the legal challenges

² See Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Again Try to Legalize “Dreamers,”* N.Y. TIMES, Sept. 5, 2017, [nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html](https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html) (describing history of DREAM Act legislative failings).

³ *Id.*

⁴ See USCIS, Data Set: Form I-821D Deferred Action for Childhood Arrivals, uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals (data set for fourth quarter of fiscal year 2017 shows 798,980 cumulative initial requests approved). This webpage also provides a breakdown of the number of DACA requests accepted, pending, denied, and approved during specified time periods.

⁵ Memorandum from Chad F. Wolf, Acting Sec’y, Dep’t Homeland Sec., *Reconsideration of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children”* (July 28, 2020), dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf.

to restore DACA protections continue, and the results of the litigation and the 2020 presidential election results will determine what will happen to DACA recipients.⁶

This practice advisory discusses potential legal options available to DACA recipients with prior removal orders. Section II provides background about the DACA program and particular considerations for DACA recipients with removal orders. Section III gives an overview of common types of removal orders that DACA recipients may have. Section IV provides strategies for remedying the removal order, with practice tips tailored to the DACA context. Section V discusses practical considerations in filing motions to reopen.

II. DACA Recipients with Removal Orders

To be eligible to receive DACA, the applicant had to demonstrate that they:⁷

- Entered the United States before age 16
- Continuously resided in the United States from June 15, 2007, to the present
- Was physically present, without lawful status, and under the age of 31 on June 15, 2012
- Was currently in school or had graduated or obtained a certificate of completion from high school, or obtained a general education development (GED) certificate, or had been honorably discharged from the U.S. Coast Guard or Armed Forces, and
- Had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, nor posed a threat to national security or public safety.

Those who receive DACA obtain benefits such as an employment authorization document, a Social Security number, and the opportunity to apply for a driver's license,⁸ but they also contribute to our society. Based on a 2017 national survey of DACA recipients, 91 percent of survey respondents reported being employed, 45 percent reported being in school, 5 percent reported having started their own business after receiving DACA,⁹ 16 percent reported purchasing their first home after receiving DACA, and 65 percent reported purchasing their first car.¹⁰ Researchers have estimated

⁶ *Dep't of Homeland Sec. v. Regents of the University of California*, 140 S. Ct. 1891 (2020); *CASA de Maryland v. DHS*, 924 F.3d 684 (4th Cir. 2019).

⁷ The DACA requirements can be found on the USCIS website, uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca.

⁸ See National Immigration Law Center, *Access to Driver's Licenses for Immigrant Youth Granted DACA*, nilc.org/issues/drivers-licenses/daca-and-drivers-licenses/.

⁹ This rate of business start-ups is higher than that of both the American public as a whole—at 3.1 percent—and the entire immigrant population—at 3.6 percent. Center for American Progress, *DACA Recipients' Economic and Educational Gains Continue to Grow* (Aug. 28, 2017), americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/.

¹⁰ Center for American Progress, *DACA Recipients' Economic and Educational Gains Continue to Grow* (Aug. 28, 2017), americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/; see also Center for American Progress, *New Study of DACA Beneficiaries Shows*

that DACA recipients would contribute \$460.3 billion to the U.S. gross domestic product over the next decade if the program is permitted to continue.¹¹ As a CATO Institute policy analyst concluded, “[e]ach DACA permit canceled is like burning tens of thousands of dollars in Washington.”¹² According to the Center for American Progress, “In 42 states and Washington, D.C., DACA recipients and their households pay more than \$1 million in state and local taxes each year, with significantly higher contributions—more than \$50 million—in a dozen states.”¹³

According to United States Citizenship and Immigration Services (USCIS) data from March 31, 2020, the ten countries with the largest numbers of DACA recipients are, in descending order: Mexico, El Salvador, Guatemala, Honduras, Peru, South Korea, Brazil, Ecuador, Colombia, and Argentina.¹⁴ DACA recipients live throughout the United States; the ten states with the largest number of DACA recipients are California, Texas, Illinois, New York, Florida, North Carolina, Arizona, Georgia, New Jersey, and Washington.¹⁵

The authors do not have data on the number of DACA recipients with prior orders of removal, or the breakdown in types of removal orders. However, DACA was expressly available to youth with removal orders who otherwise qualified,¹⁶ and the Form I-821D, Consideration of Deferred Action for Childhood Arrivals, asked for information about when and where any previous removal

Positive Economic and Educational Outcomes (Oct. 18, 2016), americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes/ (reporting results of 2016 study); Migration Policy Institute, *A Profile of Current DACA Recipients by Education, Industry, and Occupation* (Nov. 2017), migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation (providing additional details about DACA population including fields of employment and degree of educational attainment).

¹¹ Center for American Progress, *A New Threat to DACA Could Cost States Billions of Dollars* (July 21, 2017), americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/.

¹² David Bier, CATO Institute, *Five Myths About DACA* (Sept. 7, 2017), cato.org/publications/commentary/five-myths-about-daca.

¹³ Nicole Prchal Svajlenka and Philip E. Wolgin, Center for American Progress, *What We Know About the Demographic and Economic Impacts of DACA Recipients: Spring 2020 Edition*, (Apr. 6, 2020), americanprogress.org/issues/immigration/news/2020/04/06/482676/know-demographic-economic-impacts-daca-recipients-spring-2020-edition/.

¹⁴ USCIS, *Approximate Active DACA Recipients: Country of Birth* (March 31, 2020), uscis.gov/sites/default/files/document/data/Approximate%20Active%20DACA%20Receipts%20-%20March%2031%2C%202020.pdf. [hereinafter “DACA Recipients: Country of Birth”].

¹⁵ USCIS, *Approximate Active DACA Recipients: State or Territory of Residence* (Mar. 31, 2020), uscis.gov/sites/default/files/document/data/Approximate%20Active%20DACA%20Receipts%20-%20March%2031%2C%202020.

¹⁶ See USCIS, *Frequently Asked Questions*, Q10, uscis.gov/archive/frequently-asked-questions (“This process is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those . . . with a final order, or with a voluntary departure order (as long as they are not in immigration detention).”).

proceedings took place.¹⁷ Any DACA recipient who was actually removed or left the United States under a voluntary departure order would have had to have departed and returned to the United States before June 15, 2007, to meet the continuous residence requirements.¹⁸

Given the eligibility requirements for DACA, it is likely that many DACA recipients with removal orders may share the following characteristics, which could be relevant to potential relief and avenues to reopening the removal order (discussed in section IV below):

- Many may have been very young children when the removal order was issued
- Many likely lacked legal representation when the removal order was issued, given the lack of government-appointed counsel in civil immigration proceedings
- All DACA recipients have resided continuously in the United States for more than ten years, since at least June 15, 2007, and
- All DACA recipients with removal orders will have other positive equities that could bear on potential relief, such as educational attainment in the United States, positive employment history, lack of serious criminal history, and strong community ties, including immediate family members who are U.S. citizens or have a lawful immigration status.

Regardless of whether the DACA program continues and on what timeline, DACA recipients with orders of removal face significant risks. DHS could terminate the DACA protections of those whose DACA has not expired and seek to enforce the removal order.¹⁹ Immigration and Customs Enforcement (ICE) could detain and deport DACA recipients simply because they have a removal order, despite their achievements, lack of a criminal record, acculturation, and contributions to U.S. society. Furthermore, if the courts allow the Trump administration to end the DACA program and Trump wins reelection, the risks for DACA recipients with removal orders would significantly increase because ICE already has their home addresses.²⁰

¹⁷ USCIS, I-821D, Consideration of Deferred Action for Childhood Arrivals, uscis.gov/i-821d. Some DACA recipients who sought to reopen their removal proceedings after obtaining DACA saw the IJ deny the motion because the removal order did not affect DACA eligibility.

¹⁸ See USCIS, Frequently Asked Questions, Q58, uscis.gov/archive/frequently-asked-questions (classifying departure under voluntary departure or removal order as not “brief, casual and innocent” and thus breaking the continuous residence period).

¹⁹ See USCIS, Frequently Asked Questions, Q27, uscis.gov/archive/frequently-asked-questions : “Can my deferred action under the DACA process be terminated before it expires? A27: Yes. DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS’s discretion.”).

²⁰ Dara Lind, *ICE Has Access to DACA Recipients’ Personal Information Despite Promises Suggesting Otherwise, Internal Emails Show*, PROPUBLICA, Apr. 21, 2020, propublica.org/article/ice-has-access-to-daca-recipients-personal-information-despite-promises-suggesting-otherwise-internal-emails-show.

The possibility of detention and swift deportation without warning leads to constant fear and anxiety that present mental and physical health risks for DACA recipients with removal orders.²¹ As noted above, DACA recipients have much to lose if deported, including their families, property, business, and in many instances, the only home they have ever known. Once detained on account of a prior order removal, there is typically no opportunity for release to wrap up one's life in the United States or say goodbye to family. To decrease the risks of detention and deportation, DACA recipients with removal orders may become insular and detached from public life. This insularity and detachment stands in stark contrast to lives DACA recipients enjoyed—and the United States benefited from— thanks to DACA protections.

III. Overview of Types of Removal Orders and Their Consequences

The Immigration and Nationality Act (INA) describes various types of removal orders. This section will briefly describe common types of removal orders and their legal consequences.²² Section IV will then describe grounds for reopening removal orders that might be most applicable to DACA recipients. As an initial matter, this section contains only a brief discussion of the legal consequences and inadmissibility bars caused by removal orders; a full discussion of these issues is beyond the scope of this advisory. Although the discussion below notes a number of serious inadmissibility consequences that various types of removal orders trigger, in some situations it may be possible for an individual to seek certain waivers of these grounds of admissibility in connection with an application for humanitarian relief such as U or T nonimmigrant status or Violence Against Women Act (VAWA) relief.²³ Whether a waiver is available will depend on the type of removal order, as well as the form of relief sought; a discussion of waivers is beyond the scope of this advisory, but practitioners are encouraged to consult existing resources.

A. Removal Orders Issued by an Immigration Judge

An immigration judge (IJ) can issue different types of orders during removal proceedings under section 240 of the INA. Three variations of IJ-issued orders are described below: (1) a removal order issued at a hearing where the respondent is present; (2) a voluntary departure order that converts to a removal order when the respondent fails to depart within the requisite time period; and

²¹ Cf. Ruben Castaneda, *DACA Recipients Cope with Health Challenges in Face of Uncertainty*, U.S. NEWS & WORLD REPORT, Oct. 12, 2017, [health.usnews.com/wellness/articles/2017-10-12/daca-recipients-cope-with-health-challenges-in-face-of-uncertainty](https://www.health.usnews.com/wellness/articles/2017-10-12/daca-recipients-cope-with-health-challenges-in-face-of-uncertainty); Karla Cornejo Villavicencio, *The Psychic Toll of Trump's DACA Decision*, N.Y. TIMES, Sept. 8, 2017, [nytimes.com/2017/09/08/opinion/sunday/mental-health-daca.html](https://www.nytimes.com/2017/09/08/opinion/sunday/mental-health-daca.html).

²² This advisory does not discuss all types of removal orders. For example, it does not discuss administrative removal orders for non-lawful permanent residents with aggravated felony convictions, stipulated removal orders, and judicial orders of removal as these types of removal orders are likely uncommon among DACA recipients.

²³ For a comparison of some of the common forms of humanitarian relief, see Krisztina E. Szabo, Spencer Cantrell & Leslye E. Orloff, Nat'l Immigrant Women's Advocacy Project, State Justice Initiative, Am. Univ. Washington College of Law, *Comparison Chart of U Visa, T Visa, Violence Against Women Act (VAWA) Self-Petition, Special Immigrant Juvenile Status (SIJS), and Deferred Action for Childhood Arrivals (DACA)* (July 10, 2015), [library.niwap.org/wp-content/uploads/IMM-Chart-U-T-VAWA-SIJS-DACA7.10.15.pdf](https://www.library.niwap.org/wp-content/uploads/IMM-Chart-U-T-VAWA-SIJS-DACA7.10.15.pdf).

(3) a removal order issued at a hearing where the respondent does not appear, called an *in absentia* order of removal.

1. Removal Orders Issued at a Hearing Where the Respondent Is Present

Description. In this situation, the respondent appears at their immigration court proceedings, and at the end of the proceedings the IJ issues a removal order. In some cases, this happens after the respondent has presented a claim for relief, a merits hearing (called an individual hearing) has been conducted, and the IJ denies the noncitizen’s application for relief and orders their removal. In other cases, the respondent never has a merits hearing, and the IJ orders removal at what is called a “master calendar” hearing. This may occur because the respondent wishes to be ordered removed and does not want to fight their case. Unfortunately, this sometimes occurs because the respondent was *pro se* and the IJ failed to develop the record²⁴ or the respondent received poor advice or ineffective assistance of counsel. There are other situations in which an IJ may order removal against the respondent’s wishes and despite the fact that they may be eligible for relief. For example, if the respondent is trying to pursue a form of relief in another forum and the IJ refuses to grant additional continuances or administrative closure, the IJ could instead order removal.²⁵

Legal Consequences. Immigration regulations specify when a removal order issued by an IJ becomes final. An IJ removal order of the type described here typically becomes final after the Board of Immigration Appeals (BIA) dismisses an appeal, when the respondent waives appeal, or after the 30-day appeal period expires if the respondent reserves appeal but does not file an appeal.²⁶ Once the order is final, ICE may take steps to remove the individual from the United States. If the noncitizen is in immigration detention, this removal will usually occur very quickly. If the noncitizen is not in detention, ICE may issue what is commonly known as a “bag-and-baggage” letter directing the noncitizen to report to ICE at a particular time for physical removal from the United States.²⁷

Once an individual departs the United States after being ordered removed, a number of immigration consequences attach.²⁸ The noncitizen will be subject to an inadmissibility bar preventing their lawful

²⁴ INA § 240(b)(1); see also *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (recognizing that IJ assistance in developing the record is “particularly” appropriate “where [a noncitizen] appears *pro se* and may be unschooled in the deportation process”).

²⁵ E.g. *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018); but see *Romero v. Barr*, 937 F.3d 282, 294 (4th Cir. 2019) (ruling that IJs and the BIA have authority to administratively close cases).

²⁶ 8 CFR § 1241.1.

²⁷ Cf. *Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007) (“[F]or an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with the letter.”).

²⁸ Individuals who have been deported may still seek reopening, provided that they have a statutory basis for seeking reopening. See CLINIC & Boston College Ctr. for Human Rights & Intn’l Justice, Post-Deportation Human Rights Project, *Practice Advisory: Post-Departure Motions to Reopen and Reconsider* (Nov. 2019), cliniclegal.org/resources/removal-proceedings/practice-advisory-post-departure-motions-reopen-and-reconsider.

return for ten years,²⁹ unless the noncitizen obtains advance permission from DHS to reenter.³⁰ A separate ten-year “unlawful presence” bar will also apply to those individuals who had been unlawfully present in the United States for a year or more before they depart the United States or are removed pursuant to an order of removal,³¹ unless the individual is eligible for and is granted a waiver of this ground of inadmissibility.³² A separate permanent bar applies regardless of age to anyone who has been unlawfully present in the United States for an aggregate period of more than one year or was ordered removed and then enters or attempts to reenter the United States without being admitted.³³ There is no waiver available for this ground of inadmissibility unless the individual has spent ten years abroad and applies for and is granted permission to apply for admission.³⁴ If an individual reenters the United States illegally after being removed, they are subject to federal criminal prosecution for illegal reentry after removal, which carries a maximum prison sentence of two years for a simple offense, and up to 20 years if the noncitizen has an aggravated felony conviction.³⁵ A noncitizen who reenters illegally after removal would also be subject to reinstatement of the removal order by DHS without the benefit of having a hearing before an IJ unless they express a fear of return to the home country and pass a “reasonable fear” interview.³⁶ Moreover, where a noncitizen has

²⁹ INA § 212(a)(9)(A)(ii) (ten-year bar if ordered removed under INA § 240 and 20-year bar if second or subsequent removal and permanent bar if the respondent has an aggravated felony conviction); INA § 212(a)(9)(A)(i) (five-year bar if ordered removed under INA § 235(b)(1) or at the end of proceedings under INA § 240 initiated upon the individual’s arrival in the United States); see USCIS Academy Training Ctr., *Instructor Guide: Inadmissibility, Deportability and Waivers*, at 87 (Jan. 2015), AILA Doc. No. 15082634, aila.org/infonet (“Emphasize that no provision of § 212(a)(9) applies until the alien departs the United States.”).

³⁰ INA § 212(a)(9)(A)(iii).

³¹ INA § 212(a)(9)(B)(i)(II) (ten-year unlawful presence bar); INA § 212(a)(9)(B)(i)(I) (three-year unlawful presence bar applies if noncitizen is unlawfully present for more than 180 days, but less than one year and then departs or is removed from the United States). For purposes of the three- and ten-year unlawful presence bars, unlawful presence does not accrue for individuals below the age of 18, see INA § 212(a)(9)(B)(iii)(I), so many DACA recipients, if they filed for DACA before turning 18, may not be subject to the separate unlawful presence bar.

³² INA § 212(a)(9)(B)(v) (a waiver is available for a noncitizen who is the spouse or son or daughter of a U.S. citizen or lawful permanent resident and the noncitizen can demonstrate extreme hardship if separated from the family member).

³³ INA § 212(a)(9)(C)(i). While the plain language of the statute applies regardless of the individual’s age, practitioners could consider making arguments that the permanent bar should not apply to minors. For possible arguments, see Brief for American Immigration Lawyers Association as Amicus Curiae, In the *Matter of L-J-C-A* (BIA filed Aug. 9, 2011), AILA Doc. No. 11081069, aila.org/infonet. However, the authors are not aware of legal precedent recognizing an exception for minors.

³⁴ INA § 212(a)(9)(C)(ii) (exception to permanent bar for those who, at least ten years after departure, obtain the advance permission of DHS to reapply for admission). See also INA § 212(a)(9)(C)(iii) (VAWA exception).

³⁵ See INA § 276 (8 USC § 1326); see also U.S. Gov’t Accountability Off., GAO-20-172, *Immigration Enforcement: Immigration-Related Prosecutions Increased from 2017 to 2018 in Response to U.S. Attorney General’s Direction 57* (2019), gao.gov/assets/710/702965.pdf. During the month of July 2020, Title 8 U.S.C Section 1326 was the lead charge for 68.4 percent of all magistrate filings making it the most frequently cited lead charge. Transactional Records Access Clearinghouse, *Immigration Prosecutions for July 2020*, trac.syr.edu/tracreports/bulletins/immigration/monthlyjul20/fil/.

³⁶ 8 CFR § 208.31; see discussion of reinstatement process *infra* at section III.B.2.

unlawfully reentered the United States and DHS has reinstated the prior order, the noncitizen may not file a motion to reopen.³⁷

On the other hand, if a noncitizen is ordered removed by an IJ and does not depart, they are subject to a number of potential consequences. ICE could detain and quickly remove that noncitizen without a hearing, thereby executing the removal order. The INA also provides for a daily fine of \$500³⁸ and a prison sentence of up to four years for certain individuals who willfully fail or refuse to depart pursuant to a removal order or to present themselves for removal as required.³⁹ Additionally, the BIA held in a 1985 decision that respondents who failed to report for deportation after receiving notice that their deportation had been scheduled did not merit discretionary reopening of proceedings.⁴⁰ Some U.S. courts of appeals have applied the “fugitive disentitlement doctrine” as the basis to dismiss a petition for review, and DHS sometimes invokes the doctrine in refusing to release FOIA records.⁴¹

DACA Example. Mario was placed in removal proceedings with his mother and older sister when he was four years old. He does not remember it, but his mother applied for asylum for herself and both children. The asylum claim was denied by the IJ and Mario was ordered removed. He never left the United States. Thus, Mario is subject to a final order of removal that could be executed by ICE. Mario requested DACA in 2013, when he was 17 years old, and that application was approved.

³⁷ INA § 241(a)(5) (“If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated . . . and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief . . .”) (emphasis added); *Cuenca v. Barr*, 956 F.3d 1079, 1082 (9th Cir. 2020) (concluding that a noncitizen whose removal order is reinstated may not reopen the prior removal proceeding, and noting that “the bar is a consequence of having reentered unlawfully”); *Rodriguez Saragosa v. Sessions*, 904 F.3d 349, 354 (5th Cir. 2018) (stating that where a noncitizen has been ordered removed and reenters the United States illegally, she forfeits the right to file a motion to reopen); *Cordova-Soto v. Holder*, 732 F.3d 789 (7th Cir. 2013).

³⁸ INA § 274D (8 USC § 1324d).

³⁹ INA § 243 (8 USC § 1253(a)(1)) (maximum prison time increases to ten years for those with specified grounds of deportability). Note that INA § 243 only applies to individuals subject to INA § 237.

⁴⁰ *Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985). *But see Matter of A-N- & R-M-N-*, 22 I&N Dec. 953 (BIA 1999) (declining to apply *Barocio* to bar reopening to seek asylum based on changed country conditions, where the respondents had failed to appear at a hearing and received an *in absentia* order).

⁴¹ For information on the fugitive disentitlement doctrine and possible arguments to argue it does not apply, see Emily Creighton, American Immigration Council, *Practice Advisory, The Fugitive Disentitlement Doctrine: FOIAs and Petitions for Review* (Apr. 29, 2013), americanimmigrationcouncil.org/practice_advisory/fugitive-disentitlement-doctrine-foia-and-petitions-review; see also Patrick J. Glen, *The Fugitive Disentitlement Doctrine and Immigration Proceedings*, 27 GEORGETOWN IMMIGR. L. REV. 749 (2013), ssrn.com/abstract=2486788; *Smith v. U.S. Immigration & Customs Enf't*, 429 F. Supp. 3d 742 (D. Colo. 2019), *appeal dismissed*, No. 20-1048, 2020 WL 4757040 (10th Cir. May 5, 2020) (holding that ICE’s policy of denying fugitive FOIA requests was an impermissible attempt to apply FOIA law-enforcement-record exemption to an entire database). A former statute, which applies to those whose deportation or exclusion proceedings started before April 1, 1997, barred various forms of relief for a five year period for individuals with final deportation orders who failed to report for deportation at the time and place ordered, unless due to exceptional circumstances. INA § 242B(e)(3)(A) (repealed).

2. Voluntary Departure Order That Converts to a Removal Order⁴²

Description. Voluntary departure refers to an order that allows a respondent to leave the United States without incurring a removal order.⁴³ As one U.S. court of appeals described it: “Voluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government.”⁴⁴ An IJ can grant voluntary departure to certain respondents in lieu of a removal order.⁴⁵ The maximum period of voluntary departure that an IJ can grant is 120 days.⁴⁶ When an IJ grants voluntary departure, they also issue an alternate order of removal.⁴⁷ If a respondent fails to depart during the voluntary departure period, the IJ’s alternate order of removal takes effect.⁴⁸ Likewise, if a respondent is ordered to pay a voluntary departure bond and fails to post it within the required five business days, the alternate order of removal is instituted.⁴⁹

While filing a BIA appeal does not terminate a voluntary departure order, it automatically terminates if the respondent files a petition for review of the final removal order with the applicable U.S. court of appeals,⁵⁰ or if the respondent files a motion to reopen or reconsider during the voluntary departure period.⁵¹ An individual who files a motion to reopen after a grant of voluntary departure but before the expiration of the departure period will not face the penalties under INA § 240B(d) for failure to depart during the voluntary departure period.⁵² However, an individual who seeks reopening after

⁴² For further information about voluntary departure and the consequences of failure to depart, see American Immigration Council, *Practice Advisory, Voluntary Departure: When the Consequences of Voluntary Departure Should and Should Not Apply* (Dec. 21, 2017), americanimmigrationcouncil.org/practice_advisory/voluntary-departure-when-consequences-failing-depart-should-and-should-not-apply [hereinafter “AIC Voluntary Departure Advisory”].

⁴³ See INA § 240B; 8 CFR § 1240.26 (voluntary departure granted by IJ), see also 8 CFR § 240.25 (voluntary departure granted by an immigration officer).

⁴⁴ *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006).

⁴⁵ INA § 240B; 8 CFR § 1240.26.

⁴⁶ INA § 240B(a)(2)(A); 8 CFR § 1240.26(e) (60 days maximum for voluntary departure at the conclusion of proceedings). DHS, but not the IJ, can extend the voluntary departure period, but the maximum total period cannot exceed 120 days (pre-conclusion voluntary departure) or 60 days (post-conclusion voluntary departure) as set forth in INA § 240B. 8 CFR § 1240.26(f).

⁴⁷ See 8 CFR § 1240.26(d) (“Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order of removal.”).

⁴⁸ 8 CFR § 1241.1(f).

⁴⁹ *Id.* However, the regulations allow for certain respondents who were granted voluntary departure at the conclusion of proceedings to retain the voluntary departure benefit despite not paying the bond on time if they depart the United States “no later than 25 days following the failure to post bond,” prove their departure to DHS, and prove to DHS that they remain outside of the United States. 8 CFR § 1240.26(c)(4).

⁵⁰ 8 CFR § 1240.26(i).

⁵¹ 8 CFR § 1240.26(e)(1). The IJ and BIA have discretion to reinstate voluntary departure after reopening removal proceedings, if the reopening happens for a reason other than solely to seek voluntary departure and the case is reopened before the original voluntary departure period ends. 8 CFR § 1240.26(f); *Matter of A-M-*, 23 I&N Dec. 737, 744 (BIA 2005).

⁵² 8 CFR § 1240.26(e)(1). The regulations do not replicate the Supreme Court’s holding in *Dada v. Mukasey*, 554 U.S. 1 (2008), allowing unilateral withdrawal of a request for voluntary departure by the respondent, but EOIR justified the automatic termination approach as more streamlined, less confusing for respondents, and consistent with the Supreme

the expiration of the voluntary departure period is subject to the penalties set forth in INA § 240B(d), such as ineligibility for certain kinds of relief from removal.⁵³

Voluntary departure carries a number of benefits. First, because it is not a removal order, leaving the United States under voluntary departure does not trigger the inadmissibility ground under INA § 212(a)(9)(A) for those ordered removed. In addition, because it is not a removal order, voluntary departure does not subject a noncitizen to reinstatement of removal should that noncitizen subsequently reenter the United States without authorization.⁵⁴ Finally, voluntary departure allows the individual to leave on their own, avoiding the stigma and dangers of being identified as a deportee from the United States.⁵⁵ Respondents who most benefit from a grant of voluntary departure in lieu of removal are those beneficiaries (or future beneficiaries) of an I-130 relative petition who are limited to consular processing because they do not qualify for adjustment of status.⁵⁶ However, an individual who departs pursuant to voluntary departure would still be subject to a ten-year bar if they accrued one year or more of unlawful presence in the United States after their 18th birthday.⁵⁷ Furthermore, if an individual reenters the United States without being admitted after departing on a grant of voluntary departure, they could be subject to the “permanent bar” found at INA § 212(a)(9)(C) if they had accrued a year or more of unlawful presence before departure, even if the unlawful presence accrued while the individual was a minor.

Some DACA recipients likely received voluntary departure orders as young children and failed to depart; those orders have since converted into removal orders with the additional penalties set forth under INA § 240B(d). As young children, these DACA recipients had no choice in requesting voluntary departure, no intention of violating the voluntary departure order, and no ability to depart the United States.

Legal Consequences. Failure to comply with the terms of a voluntary departure grant results in the alternate removal order taking effect.⁵⁸ If an individual’s voluntary departure order converts to a removal order, the same consequences of removal orders described in the section immediately above attach. In addition to these consequences, the INA penalizes those who “voluntarily fail[] to depart” after a grant of voluntary departure with a potential fine of \$1,000 to \$5,000⁵⁹ and with a

Court’s reasoning. Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76927, 76930 (Dec. 18, 2008).

⁵³ 8 CFR § 1240.26(e)(2).

⁵⁴ See 8 CFR § 241.8(a) (describing reinstatement of removal).

⁵⁵ See, e.g., Julianne Hing, *Home in Name Only, Deportees Struggle to Survive in an Unfamiliar and Unwelcoming Place: the Country of Their Birth*, COLORLINES, Oct. 20, 2009, colorlines.com/articles/home-name-only; Jennifer Hough, *Deported Guatemalans Cling to American Dream*, THE IRISH TIMES, July 27, 2015, irishtimes.com/news/world/deported-guatemalans-cling-to-american-dream-1.2297733.

⁵⁶ See USCIS, Consular Processing, uscis.gov/greencard/consular-processing.

⁵⁷ INA § 212(a)(9)(B)(i)(II).

⁵⁸ 8 CFR § 1241.1(f).

⁵⁹ The regulations further specify that a rebuttable presumption sets the fine at \$3,000 unless the IJ orders a different amount. 8 CFR § 1240.26(j).

ten-year bar to seeking “any further relief” under specified parts of the INA, including adjustment of status and cancellation of removal.⁶⁰ There is no requirement that the ten-year period be spent outside the United States. The removal order does not expire and must be reopened or executed by leaving, which will trigger the removal order consequences discussed above in section III.A.1.

If a noncitizen who fails to depart during the voluntary departure period (and thus a removal order takes effect) later departs voluntarily, the noncitizen “shall be considered to have been deported, excluded and deported, or removed.”⁶¹

DACA Example. Jane came to the United States when she was two years old with her parents. Jane’s family was placed in removal proceedings when Jane was five years old because they had overstayed their visitor visas. An IJ granted them voluntary departure, but neither Jane’s parents nor Jane ever left. She eventually requested and received DACA in 2012, when she was 21 years old. It was in the process of filing for DACA that Jane learned about her immigration procedural history, and that her failure to depart under a voluntary departure order had resulted in a removal order.

3. In Absentia Removal Order

Description. An *in absentia* removal order happens when a respondent does not appear at a scheduled immigration court hearing, and the IJ issues a removal order against that individual even though they are not present in the courtroom. Under the current statute, an IJ may issue an *in absentia* order “if the Service establishes by clear, unequivocal, and convincing evidence” that the respondent had written notice and is removable.⁶² There are many reasons why a respondent may fail to appear at a removal hearing, including but not limited to lack of notice of the hearing, sickness, a breakdown in transportation, or because the respondent is a child without the help of a responsible adult who can assist him or her in getting to the hearing. These types of reasons may be especially common for DACA recipients with *in absentia* orders, who in many cases may have received such an order as a young child.

Legal Consequences. An *in absentia* removal order is a type of removal order, and thus the consequences include those described in section III.A.1. An *in absentia* order becomes final

⁶⁰ INA § 240B(d). A previous statute in effect until April 1, 1997 barred certain discretionary relief for a period of five years for individuals who failed to depart voluntarily after receiving written and oral notice “other than because of exceptional circumstances.” INA § 242B(e)(2) (repealed). It is important for practitioners to understand what statute applies given the date the client’s proceedings commenced.

⁶¹ 8 CFR § 1241.7.

⁶² INA § 240(b)(5); 8 CFR § 1003.26. If an individual’s proceedings started before April 1, 1997, different laws applied. Practitioners should ensure they are applying the correct law based on when the proceedings occurred. For more information, see section IV.B below and Beth Werlin, American Immigration Council, *Practice Advisory: Rescinding an In Absentia Order of Removal* (Mar. 2010), americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf [hereinafter “AIC In Absentia Practice Advisory”].

immediately when the IJ enters the order.⁶³ The INA imposes additional penalties on those with *in absentia* removal orders, barring them for ten years from eligibility for many forms of immigration relief, including adjustment of status and cancellation of removal.⁶⁴ Those who fail to attend removal proceedings “without reasonable cause” are inadmissible for five years from the date of a subsequent departure or removal.⁶⁵

DACA Example. Sara and her father were placed in removal proceedings in 2002, when Sara was ten years old. A hearing notice was sent to an old address and Sara’s father never actually received it. Sara and her father missed their first court hearing and were ordered removed *in absentia*. Sara requested and received DACA in 2012.

B. Removal Orders Issued by an Immigration Officer

Some individuals with removal orders never had the opportunity to present their case to an IJ. Two common types of removal orders issued by an immigration officer are expedited removal orders and reinstated orders of removal.

1. Expedited Removal Orders

Description. Prior to 1996, all noncitizens, regardless of their location or time residing in the United States, generally were entitled to a full hearing before an IJ before they could be removed from the United States. In 1996, through the Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress created a separate and truncated process called “expedited removal.” Expedited removal is a summary removal that allows an immigration officer to issue a removal order without a hearing before an IJ. It applies to people arriving at a port of entry who are inadmissible for misrepresentation, INA § 212(a)(6)(C), or for lack of proper entry documents, INA § 212(a)(7).⁶⁶ The statute also authorizes immigration authorities to apply expedited removal against other individuals inadmissible under INA § 212(a)(6)(C) or (a)(7), who have not been admitted or paroled, and “who ha[ve] not affirmatively shown . . . that [they have] been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.”⁶⁷ If a noncitizen subjected to expedited removal indicates an intention to apply for asylum or expresses a fear of persecution, the immigration officer must refer him or her for a credible

⁶³ 8 CFR § 1241.1(e).

⁶⁴ INA § 240(b)(7). A previous statute in effect prior to April 1, 1997 barred certain discretionary relief for a period of five years for individuals who received an *in absentia* order of deportation “other than because of exceptional circumstances.” INA § 242B(e)(2) (repealed).

⁶⁵ INA § 212(a)(6)(B).

⁶⁶ INA § 235(b)(1)(A)(i).

⁶⁷ INA § 235(b)(1)(A)(iii)(II).

fear interview.⁶⁸ If the individual is found to have a credible fear, they are placed into section 240 proceedings.⁶⁹

Although the INA authorizes immigration authorities to apply expedited removal broadly, until recently, no administration has attempted to apply expedited removal beyond the border. From 1997 until July 23, 2019, legacy Immigration and Naturalization Service (INS) and DHS applied expedited removal only to those inadmissible for the above-mentioned reasons who either arrive at a port of entry, or are apprehended within 14 days of entry without inspection and 100 miles of an international land border.⁷⁰ However, on July 23, 2019, without providing any advance notice or public comment period, DHS published a Federal Register Notice authorizing the expansion of expedited removal to certain noncitizens arrested anywhere in the country who cannot show “to the satisfaction of an immigration officer” that they have been continuously present in the United States for longer than two years.⁷¹ This abrupt change in policy led to litigation that is still ongoing to date.⁷²

Under the provisions enacted via the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), “unaccompanied alien children”⁷³ from non-contiguous countries cannot be subjected to expedited removal; instead, they are entitled to have their case heard before an IJ in section 240 proceedings.⁷⁴ Unaccompanied children from contiguous countries may be permitted to withdraw an application for admission, such that it may be rare that these children are subjected to expedited removal.⁷⁵ Even before the TVPRA was enacted, a 1997 agency policy memo counseled against subjecting “unaccompanied minors” to expedited removal, and gave officers discretion to permit accompanied minors to withdraw applications for admission where appropriate.⁷⁶ A common scenario in which a minor child may be subjected to expedited removal is when they are accompanied by a parent and they are apprehended at or near the border.

Legal Consequences. Individuals subjected to expedited removal proceedings are often detained while they undergo any credible fear process, and if determined not to have a fear either by an asylum officer or by an IJ reviewing the asylum officer’s determination,⁷⁷ until they are removed.⁷⁸ In contrast to a respondent ordered removed by an IJ, who may appeal the decision to the BIA, an

⁶⁸ INA § 235(b)(1)(A)(iii).

⁶⁹ 8 CFR § 208.30(e)(5). If the asylum officer makes a negative credible fear determination, that determination can be reviewed by the IJ. 8 CFR § 1003.42. If the IJ finds there is a credible fear, the individual is placed in section 240 proceedings. 8 CFR § 1003.42(f).

⁷⁰ See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48879 (Aug. 11, 2004).

⁷¹ See Notice Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019).

⁷² See *Make The Rd. New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

⁷³ This term is defined at 6 USC § 279(g)(2).

⁷⁴ 8 USC § 1232(a)(5)(D).

⁷⁵ 8 USC § 1232(a)(2)(B).

⁷⁶ Memorandum from Paul Virtue, Acting Exec. Assoc. Comm’r, INS, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997), AILA Doc. No. 97082191, aila.org/infonet.

⁷⁷ 8 CFR § 1003.42 (describing procedure for IJ review of an immigration officer’s negative credible fear finding).

⁷⁸ See INA § 235(b)(1)(B)(iii)(IV).

individual who has been issued an expedited removal order does not have such appeal rights.⁷⁹ A noncitizen who is removed via expedited removal is inadmissible for a period of five years unless they obtain consent to reapply for admission.⁸⁰ As a type of removal order, the other consequences described in section III.A.1 also apply to noncitizens who have been removed via expedited removal.

DACA Example. Antonio's mother fled Honduras with her three young children (including Antonio) in 2005. She told immigration officers at a U.S. port of entry that she was afraid to return, but they issued expedited removal orders against all four family members and removed them. Antonio's mother reentered without permission a week later, bringing her three children with her. Antonio was granted DACA in 2013. Note that Antonio is also subject to reinstatement of removal, discussed immediately below, since he reentered the United States after having been removed.

DACA recipients, by definition, have been in the country far longer than 14 days (or 2 years) and therefore would not currently be vulnerable to the expedited removal process. Any DACA holder who leaves the United States without advance parole would lose DACA. As such, the expedited removal process would be inapplicable to DACA recipients. Instead, expedited removal would only be relevant to DACA recipients if the DACA holder received an expedited order of removal prior to obtaining DACA, as in the example above. Those DACA recipients would thus be subject to reinstatement of removal. For these reasons, this practice advisory does not discuss legal remedies for noncitizens with expedited removal orders, but covers remedies for those with reinstatement orders below at section IV.D.

2. Reinstated Removal Orders

Description. Another form of removal order that is issued by DHS without a hearing is a reinstatement of removal order. This type of removal applies to noncitizens who have been previously removed, or departed voluntarily while under an order of removal, and then illegally reentered the United States.⁸¹ In this situation, the statute directs that the "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed."⁸² The reinstatement provisions only

⁷⁹ INA § 235(b)(1)(C) (limited exception permitting review for those claiming to be a lawful permanent resident, asylee, or refugee); 8 CFR § 235.3(b)(2)(ii).

⁸⁰ INA § 212(a)(9)(A)(i) (period extends to 20 years after subsequent removal and is permanent for noncitizens with aggravated felony convictions). If the noncitizen reenters without permission, he or she will also be subjected to the "permanent bar" found at INA § 212(a)(9)(C), barring admission for ten years and requiring advance permission to reapply after ten years.

⁸¹ INA § 241(a)(5); 8 CFR § 241.8.

⁸² INA § 241(a)(5); *but see* American Immigration Council & Nat'l Immigration Project of the Nat'l Lawyers' Guild, *Practice Advisory: Reinstatement of Removal* (May 23, 2019), americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf (discussing collateral challenges to underlying orders of removal). While the reinstatement bar is difficult to overcome, there may be some arguments that it does not apply. For example, the statute purports to bar only "reopening" of prior order, so practitioners might argue *reconsideration* is not barred. Similarly, the bar arguably is not applicable to motions to rescind

apply to noncitizens who have previously physically departed under an order of removal and then reentered the United States without authorization; reinstatement does not apply to those ordered removed who never departed. A noncitizen placed in reinstatement proceedings is typically swiftly removed, unless they express a fear of return, in which case the regulations provide for referral to an asylum officer for a reasonable fear interview.⁸³

Legal Consequences. The INA states that an individual with a reinstated removal order is “not eligible and may not apply for any relief under this chapter.”⁸⁴ However, the regulations governing reinstatement proceedings allow such an individual to apply for withholding of removal or protection under the Convention Against Torture (CAT).⁸⁵ As a reinstatement order is a form of removal order, the consequences described in section III.A.1 also apply. For individuals who have been removed multiple times, a 20-year bar to seeking admission is triggered, unless the noncitizen receives advance consent to seek admission.⁸⁶

DACA Example. Antonio’s mother fled Honduras with her three young children (including Antonio) in 2005. She told immigration officers at a U.S. port of entry that she was afraid to return, but they issued expedited removal orders against all four family members and removed them. Antonio’s mother reentered without permission a week later, bringing her three children with her. Shortly after they crossed the border, immigration officers detained them and issued reinstatement orders against all four of them, and they were again removed. Antonio’s mother crossed with her children without apprehension a few days later and Antonio has lived in the United States since that time. He requested and received DACA in 2013.

IV. Legal Remedies for Individuals with Removal Orders

Many DACA recipients who have final orders of removal have options to reopen their old removal orders and obtain some form of immigration relief. This section delves into motions to reopen where an IJ or the BIA issued the removal order. In particular, the section provides a general overview of motions to reopen and then address equitable tolling of the filing deadline, motions to reopen based on ineffective assistance of counsel, motions to reopen based on VAWA, motions to reopen based on changed country conditions, joint motions, and *sua sponte* motions. The section will then turn to motions to reopen for individuals with *in absentia* removal orders. Next, this section will focus on strategies for overcoming bars to relief triggered by overstaying a grant of voluntary departure. The section will conclude with a discussion of legal remedies for DACA recipients with reinstatement orders.

in absentia orders based on lack of notice, which can be filed “at any time.” See *Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018); but see *Cuenca v. Barr*, 956 F.3d 1079 (9th Cir. 2020) (distinguishing *Miller* in a case that did not involve an *in absentia* order).

⁸³ 8 CFR §§ 241.8(e); 208.31. The reasonable fear process is discussed further in section IV.D *infra*.

⁸⁴ INA § 241(a)(5).

⁸⁵ 8 CFR §§ 241.8(e); 208.31.

⁸⁶ INA § 212(a)(9)(A)(i)-(iii).

A. Motions to Reopen for Individuals with Orders Issued by an IJ or the BIA⁸⁷

Motions to reopen are frequently the only remedy available to prevent final execution of a removal order.⁸⁸ The U.S. Supreme Court has characterized motions to reopen as an “important [procedural] safeguard designed to ensure a proper and lawful disposition of immigration proceedings.”⁸⁹ This part discusses remedies for individuals with a removal order that was issued by an IJ and/or the BIA. It does not apply to removal orders issued by DHS, which will be discussed in section IV.D below. There are different standards for different types of motions to reopen. It is important to determine which motion to reopen grounds apply in the DACA recipient’s case. Because of time and number restrictions on motions to reopen, it is usually best to argue all possible grounds for reopening in a single motion.⁹⁰

In providing examples where U.S. courts of appeals and the BIA have considered various types of motions to reopen, this advisory at times cites to unpublished decisions of those courts. These unpublished decisions are not precedential. However, they may be helpful to practitioners in developing potential arguments and can be employed as a persuasive tool in making arguments to

⁸⁷ Practitioners should be aware that on August 26, 2020, EOIR issued a Notice of Proposed Rulemaking (NPRM), titled “Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure,” 85 Fed. Reg. 52491 (Aug. 26, 2020), [federalregister.gov/documents/2020/08/26/2020-18676/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure](https://www.federalregister.gov/documents/2020/08/26/2020-18676/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure). This proposed rule would eliminate the regulation allowing the BIA to reopen or reconsider a decision *sua sponte*, and to limit the authority of IJs to reopen or reconsider cases *sua sponte*. Practitioners should continue to check the status of this NPRM. Likewise, CLINIC will continue to monitor this NPRM and update this practice advisory accordingly.

⁸⁸ While the standard and most straightforward way to seek review of a removal order issued by an IJ is to file an appeal with the BIA and thereafter seek review in federal court through a petition for review, this practice advisory does not discuss appeals and petitions for review given that strict filing deadlines apply to that process, which may mean it is not an option for many DACA recipients with old removal orders. Similarly, this advisory does not discuss motions to reconsider because a motion to reconsider is likely not a viable option for many DACA recipients with old removal orders, given the 30-day deadline, and also given that motions to reconsider must be based on legal or factual error in the previous decision, as opposed to new facts or circumstances. See INA § 240(c)(6); 8 CFR 1003.23(b)(2) (motion to reconsider an IJ decision); 8 CFR § 1003.2(b)(1) (motion to reconsider a BIA decision).

⁸⁹ *Kucana v. Holder*, 558 U.S. 233, 250 (2010) (internal quotations omitted).

⁹⁰ Failure to raise arguments in a motion to reopen could prejudice a client and could be the basis for a subsequent ineffective assistance of counsel claim. See, e.g., *Y-B-M-R*, AXXX-XXX-960 (BIA May 31, 2019) (unpublished), [scribd.com/document/414384386/Y-B-M-R-AXXX-XXX-960-BIA-May-31-2019?secret_password=zS5tPJZFj4W4bssLyHnY](https://www.scribd.com/document/414384386/Y-B-M-R-AXXX-XXX-960-BIA-May-31-2019?secret_password=zS5tPJZFj4W4bssLyHnY) (rescinding *in absentia* order *sua sponte* due to ineffective assistance where the first attorney failed to notify the respondents of their hearing and the second attorney filed a deficient motion to reopen); *Martiniano Patricio-Ojeda*, A205-324-832 (BIA Aug. 9, 2019) (unpublished), [scribd.com/document/427090352/Martiniano-Patricio-Ojeda-A205-324-832-BIA-Aug-9-2019?secret_password=cef3ZdAyyGeYeNCtMf4j](https://www.scribd.com/document/427090352/Martiniano-Patricio-Ojeda-A205-324-832-BIA-Aug-9-2019?secret_password=cef3ZdAyyGeYeNCtMf4j) (equitably tolling time and numerical limitations on motions to reopen where the first attorney provided ineffective assistance by failing to notify respondent of hearing and the second attorney provided ineffective assistance by failing to comply with *Matter of Lozada*).

the IJ or BIA. The Immigrant and Refugee Appellate Center index is an excellent source of unpublished BIA decisions.⁹¹

1. Motions to Reopen Generally

Generally, a respondent may file only one motion to reopen proceedings,⁹² and must file the motion within 90 days of the date on which the final administrative decision was rendered in the proceeding sought to be reopened.⁹³ However, there are important exceptions to these limitations, which are discussed below and in footnote 92. The motion to reopen “shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.”⁹⁴ A motion to reopen filed in order to apply for relief must be accompanied by the “appropriate application for relief and all supporting documentation.”⁹⁵ 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.”⁹⁶ 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.⁹⁷ Pursuant to 8 CFR § 1003.23(b)(v), this type of motion does not automatically stay removal and, instead, the practitioner can seek a discretionary stay of removal with the adjudicator that has jurisdiction over the motion (IJ or BIA) as well as with ICE.⁹⁸

⁹¹ Information about how to purchase the IRAC index can be found on the IRAC website, at irac.net/unpublished/index/.

⁹² INA § 240(c)(7)(A); 8 CFR § 1003.23(b)(1) (IJ motions to reopen); Immigration Court Practice Manual Ch. 5.7(d); 8 CFR § 1003.2(c)(2) (BIA motions to reopen); BIA Practice Manual Ch. 5.6(d). Common exceptions include those based on a request for asylum and related relief premised on changed circumstances, joint motions, VAWA based motions under INA § 240(c)(7)(C)(iv), and requests for *sua sponte* reopening. 8 CFR § 1003.23(b)(4)(ii); Immigration Court Practice Manual Ch. 5.7(e); 8 CFR § 1003.23(b)(4); BIA Practice Manual Ch. 5.6(e); 8 CFR § 1003.2(c)(3). In addition, the numerical limitations do not apply to *in absentia* orders entered in deportation proceedings, see 8 CFR § 1003.23(b)(4)(iii)(D), but only one motion to rescind and reopen an *in absentia* order entered in removal proceedings pursuant to INA § 240(b)(5) may be filed, 8 CFR § 1003.23(b)(4)(ii). Some U.S. courts of appeals have concluded that the numerical limitation is, or may be, subject to equitable tolling. See, e.g., *Ruiz-Turcios v. Att’y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013) (remanding to BIA to determine whether the limitation could be tolled); *Zhao v. INS*, 452 F.3d 154, 159-60 (2d Cir. 2006); *Joshi v. Ashcroft*, 389 F.3d 732, 734-35 (7th Cir. 2004); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2001); *Davies v. INS*, 10 F. App’x. 223 (4th Cir. 2001) (per curiam) (unpublished).

⁹³ INA § 240(c)(7)(C)(i); 8 CFR § 1003.2(c)(2) (BIA); 8 CFR § 1003.23(b)(1) (IJ).

⁹⁴ INA § 240(c)(7)(B); see also 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).

⁹⁵ 8 CFR § 1003.2(c)(1) (BIA); see 8 CFR § 1003.23(b)(3) (IJ); but see *Tanusantoso v. Barr*, 962 F.3d 694 (2d Cir. 2020) (determining that 8 CFR § 1003.2(c)(1) did not require submission of a new asylum application).

⁹⁶ 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).

⁹⁷ 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).

⁹⁸ For more information on how to request a stay of removal, see CLINIC, *Practice Advisory: Stays of Removal for DACA Recipients with Removal Orders* (Mar. 9, 2018), cliniclegal.org/resources/removal-proceedings/practice-advisory-stays-removal-daca-recipients-removal-orders [hereinafter “CLINIC Stay Advisory”].

In *Matter of Coelho*, the BIA stated that the person seeking reopening has a “heavy burden” to establish that the new evidence “would likely change the result.”⁹⁹ *Matter of Coelho* involved a respondent who had been convicted of conspiracy to possess with intent to distribute cocaine. The respondent admitted possessing about two pounds of cocaine, which he had intended to sell for \$50,000. The BIA noted that reopening may be denied if the respondent does not establish a *prima facie* case of eligibility for the relief sought,¹⁰⁰ if there is no previously unavailable and material evidence, or where the respondent has not shown he merits the requested relief as a matter of discretion.¹⁰¹ However, in a case decided four years later, *Matter of L-O-G-*, the BIA suggested that the “heavy burden” standard articulated in *Coelho* might be reserved for cases where there were “special, adverse” or “egregious” factors such as dilatory tactics or where the respondent had already had an opportunity to present and litigate the claim for relief.¹⁰² The BIA further explained that “[w]here an alien is seeking previously unavailable relief and has not had an opportunity to present her application before the Immigration Judge, the Board will look to whether there is sufficient evidence proffered to indicate a reasonable likelihood of success on the merits, so as to make it worthwhile to develop the issues further at a full evidentiary hearing.”¹⁰³ To warrant reopening, a respondent need not make a “conclusive showing on elements of eligibility which involve the exercise of judgment.”¹⁰⁴

One common basis for a motion to reopen is when the respondent becomes eligible for adjustment of status via marriage to a U.S. citizen and has a pending immediate relative petition with USCIS.¹⁰⁵ A review of unpublished BIA decisions¹⁰⁶ shows that reopening has been granted in circumstances where the respondent:

⁹⁹ *Matter of Coelho*, 20 I&N Dec 464, 473 (BIA 1992).

¹⁰⁰ See *Tilija v. Att’y Gen.*, 930 F.3d 165 (3d Cir. 2019) (stating that to establish a *prima facie* claim, the movant must produce objective evidence that, when considered together with the evidence of record, shows a reasonable likelihood that he is entitled to relief and in turn, to establish a reasonable likelihood that he is entitled to relief, the movant must merely show a realistic chance that he can at a later time show that relief should be granted).

¹⁰¹ *Id.* at 472.

¹⁰² *Matter of L-O-G-*, 21 I&N Dec. 413, 420 (BIA 1996). The BIA acknowledged that U.S. Supreme Court applied the “heavy burden” standard in *INS v. Abudu*, 485 U.S. 94 (1988), a case decided before the INA contained a provision for motions to reopen which involved a physician who overstayed a student visa and was placed in proceedings after being convicted of fraudulently obtaining narcotic drugs.

¹⁰³ 21 I&N Dec. at 420.

¹⁰⁴ *Id.* at 419.

¹⁰⁵ See *Matter of Velarde*, 23 I&N Dec. 253, 256 (BIA 2002) (recognizing reopening as appropriate where motion timely filed, not numerically or procedurally barred, shows clear and convincing evidence of marriage’s *bona fides*, and where DHS does not oppose it); *Matter of Lamus*, 25 I&N Dec. 61, 64-65 (BIA 2009) (mere fact of government’s opposition not sufficient to deny motion to reopen based on ability to adjust status through marriage to a U.S. citizen; rather the IJ or BIA should consider DHS’s arguments and exercise independent judgment).

¹⁰⁶ Of course, practitioners should also review relevant U.S. court of appeals decisions in their jurisdiction.

- Submitted evidence of his marriage to a U.S. citizen, pending I-130 petition, *bona fides* of the marriage, that he had been granted DACA, and that he had obtained advance parole and was paroled back into the United States and thus was eligible to apply for adjustment¹⁰⁷
- Had previously been denied a section 212(h) waiver, submitted additional evidence regarding hardship, including evidence of his son's medical condition and a statement from the respondent's wife about the hardship she fears she would suffer if the respondent were removed¹⁰⁸
- Filed a petition for U nonimmigrant status after obtaining a signed law enforcement certification¹⁰⁹
- Had shown that she was eligible for adjustment of status based on an approved VAWA self-petition¹¹⁰
- Had previously been denied voluntary departure because of his criminal history and submitted evidence that he had married a U.S. citizen with whom he had a U.S. citizen child since his last removal hearing¹¹¹
- Demonstrated that a change in law that made him newly eligible for cancellation of removal,¹¹² and
- Had previously been denied asylum, submitted evidence of facts that were relevant to his asylum claim that he had not known about during his removal hearing because his father had not told him of the facts due to trauma and fear.¹¹³

DACA Context. Most DACA recipients with removal orders have orders that were issued more than 90 days ago. Unable to meet the 90-day motion to reopen deadline, DACA recipients must rely on an equitable tolling argument, discussed below. Along with an equitable tolling argument, DACA recipients should also argue for the *Matter of L-O-G*- "reasonable likelihood of success" standard given the sympathetic factors in these cases and lack of special, adverse considerations, unlike those present in *Matter of Coelho*.

¹⁰⁷ Nishantkumar Patel, A073-546-027 (BIA July 11, 2017) (unpublished), [scribd.com/document/354710446/Nishanthkumar-Patel-A073-546-027-BIA-July-11-2017](https://www.scribd.com/document/354710446/Nishanthkumar-Patel-A073-546-027-BIA-July-11-2017).

¹⁰⁸ Giles Chibuzor Mbonu, A057-731-341 (BIA Feb. 27, 2017) (unpublished), [scribd.com/book/342617478/Giles-Chibuzor-Mbonu-A057-731-341-BIA-Feb-27-2017](https://www.scribd.com/book/342617478/Giles-Chibuzor-Mbonu-A057-731-341-BIA-Feb-27-2017).

¹⁰⁹ Adan Ramirez-Rios, A088-658-419 (BIA Feb. 29, 2016) (unpublished), [scribd.com/book/304204056/Adan-Ramirez-Rios-A088-658-419-BIA-Feb-29-2016](https://www.scribd.com/book/304204056/Adan-Ramirez-Rios-A088-658-419-BIA-Feb-29-2016).

¹¹⁰ A-M-A-H, AXXX-XXX-916 (BIA Feb. 10, 2020) (unpublished), [scribd.com/document/452083423/A-M-A-H-AXXX-XXX-916-BIA-Feb-10-2020?secret_password=nPVFSU7hCfdyruHUwfrq](https://www.scribd.com/document/452083423/A-M-A-H-AXXX-XXX-916-BIA-Feb-10-2020?secret_password=nPVFSU7hCfdyruHUwfrq).

¹¹¹ Luis Muniz, A200-141-905 (BIA Jan. 26, 2015) (unpublished), [scribd.com/book/254827067/Luis-Muniz-A200-141-905-BIA-Jan-26-2015](https://www.scribd.com/book/254827067/Luis-Muniz-A200-141-905-BIA-Jan-26-2015); see also Dwain Lloid Thorpe, A208-132-855 (BIA Nov. 14, 2019) (unpublished), [scribd.com/document/440768216/Dwain-Lloid-Thorpe-A208-132-855-BIA-Nov-15-2019?secret_password=JvxZqG5P1JhZpVCNDwWw](https://www.scribd.com/document/440768216/Dwain-Lloid-Thorpe-A208-132-855-BIA-Nov-15-2019?secret_password=JvxZqG5P1JhZpVCNDwWw).

¹¹² Nixon Saintelmi, A078-356-199 (Nov. 8, 2018) (unpublished), [scribd.com/document/395953286/Nixon-Saintelmi-A078-356-199-BIA-Nov-8-2018?secret_password=Oi2EWRGcpsK6ZL14NZjg](https://www.scribd.com/document/395953286/Nixon-Saintelmi-A078-356-199-BIA-Nov-8-2018?secret_password=Oi2EWRGcpsK6ZL14NZjg).

¹¹³ Benjamin Luis-Garcia, A098-237-658 (BIA Jan. 21, 2011) (unpublished), [scribd.com/book/173103309/Benjamin-Luis-Garcia-A098-237-658-BIA-Jan-21-2011](https://www.scribd.com/book/173103309/Benjamin-Luis-Garcia-A098-237-658-BIA-Jan-21-2011).

2. Equitable Tolling of the Motion to Reopen Deadline

Courts have recognized that “limitations periods are customarily subject to equitable tolling” unless tolling would be inconsistent with the statute’s text.¹¹⁴ The equitable tolling doctrine effectively extends deadlines to treat an otherwise untimely action as timely in extraordinary circumstances for parties who have been prevented from complying with them through no fault or lack of diligence of their own.¹¹⁵ Courts have long recognized equitable tolling’s importance in promoting access to a fair and just legal system, and have applied it in a variety of cases.¹¹⁶

All U.S. courts of appeals that have reached the issue have concluded that equitable tolling is available to excuse untimely motions to reopen in the immigration context filed outside of the 90-day deadline.¹¹⁷ Under U.S. Supreme Court precedent, generally to obtain equitable tolling of a deadline, an individual must demonstrate that “(1) . . . he has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way” to prevent timely filing.¹¹⁸ Thus, even if tolling is available, tolling requires that the person acted with diligence in pursuing the claim.¹¹⁹ Diligence must be exercised in learning of a claim and also in pursuing rights once the person has learned of the claim.¹²⁰ The particular equitable tolling standard may vary by U.S. court of appeals, so practitioners should be sure to review the precedents in their jurisdiction. Importantly, all U.S.

¹¹⁴ *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (quoting *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotations omitted)).

¹¹⁵ See, e.g., *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014) (concluding that equitable tolling did not apply to the Hague Convention).

¹¹⁶ See, e.g., *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874) (applying equitable tolling to time-barred civil action, where there were allegations of fraud); *Neverson v. Farquharson*, 366 F.3d 32 (1st Cir. 2004) (concluding that equitable tolling applied to time-barred federal habeas corpus actions but that tolling was not warranted in this case); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (applying equitable tolling to sexual harassment lawsuit deadline based on plaintiff’s mental health issues).

¹¹⁷ See, e.g., *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. Att’y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (per curiam); *Alzaarir v. Att’y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Gaberov v. Mukasey*, 516 F.3d 590, 594-597 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499–500 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001); *Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000); see also *Mata v. Lynch*, 135 S. Ct. 2150, 2155 n.3 (2015) (leaving open the possibility that the deadline can be equitably tolled). For further discussion of equitable tolling of motions to reopen, see for example Post-Deportation Human Rights Project, Ctr. for Human Rights & Int’l Justice at Boston Coll., *Equitable Tolling of Motions to Reopen* (Dec. 2013), [bc.edu/content/dam/files/centers/humanrights/pdf/Equitable%20tolling%20of%20motions%20to%20reopen_FINAL.pdf](https://www.bostoncollege.edu/content/dam/files/centers/humanrights/pdf/Equitable%20tolling%20of%20motions%20to%20reopen_FINAL.pdf) (note that portions of this advisory are outdated).

¹¹⁸ *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); accord *Holland v. Florida*, 560 U.S. 631 (2010).

¹¹⁹ See, e.g., *Holland v. Florida*, 560 U.S. 631, 653 (2010) (to warrant tolling, claimant must exercise reasonable diligence, not “maximum feasible diligence” (internal quotations omitted)).

¹²⁰ See *Rashid v. Mukasey*, 533 F.3d 127 (2d Cir. 2008).

courts of appeals have jurisdiction to review whether undisputed facts satisfy the legal requirements for equitable tolling.¹²¹

Examples of cases where a U.S. court of appeals or the BIA in an unpublished decision¹²² has granted an untimely motion to reopen finding that equitable tolling is warranted include the following:

- Ineffective assistance of counsel¹²³ (see section IV.A.3 below for a discussion of the procedural requirements for filing a motion to reopen based on ineffective assistance of counsel)
- Fraud¹²⁴
- Government interference¹²⁵
- Due process violation at the prior removal hearing¹²⁶
- A respondent's undiagnosed medical condition¹²⁷

¹²¹ *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020); see also CLINIC, *Practice Pointer U.S. Supreme Court Decision: Guerrero-Lasprilla v. Barr* (Apr. 21, 2020), cliniclegal.org/resources/removal-proceedings/guerrero-lasprilla-v-barr-practice-pointer; American Immigration Council, *Practice Advisory: Guerrero-Lasprilla v. Barr: Implications for Judicial Review* (Mar. 31, 2020), americanimmigrationcouncil.org/sites/default/files/practice_advisory/guerrero-lasprilla_v_barr_implications_for_judicial_review.pdf.

¹²² The BIA has not affirmed the availability of equitable tolling in a published decision but has applied it in unpublished decisions.

¹²³ 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); *Jose Leonardo Ramirez-Perez*, 029-277-936 (BIA Feb. 4, 2020) (unpublished), scribd.com/document/447702704/Jose-Leonardo-Ramirez-Perez-A029-277-936-BIA-Feb-4-2020?secret_password=w8606EutpaFHLeUxLzUb; *Rafael Gomes*, A088-446-067 (BIA May 17, 2019) (unpublished), scribd.com/document/414381889/Rafael-Gomes-A088-446-067-BIA-May-17-2019?secret_password=2qNHRJEc3Hwz2IragRUe; *Roy Alberto Ramirez Calderon*, A200-423-316 (BIA Mar. 9, 2017) (unpublished), scribd.com/book/342622208/Roy-Alberto-Ramirez-Calderon-A200-423-316-BIA-March-9-2017.

¹²⁴ See, e.g., *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

¹²⁵ 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 for equitable tolling); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011) (noting that “governmental interference” could be a ground for equitable tolling).

¹²⁶ See *Valdovinos-Lopez v. Att’y Gen.*, 628 F. App’x 817 (3d Cir. 2015) (unpublished) (remanding to BIA to consider equitable tolling argument); *J-B-M-*, AXXX-XXX-853 (BIA April 19, 2018) (unpublished), scribd.com/document/380076359/J-B-M-AXXX-XXX-853-BIA-April-19-2018?secret_password=V5rdsbWdS9z5NymkjOPS (equitably tolls filing deadline where the respondent was ordered removed in 2007 during a hearing conducted in language he did not speak and he pursued his rights diligently after learning of Fifth Circuit decisions allowing the filing deadline to be tolled); *Juvenal Valdovinos-Lopez*, A200-684-816 (BIA June 29, 2016) (unpublished), scribd.com/book/318828163/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).

¹²⁷ *A-A-B-*, AXXX-XXX-292 (BIA Jan. 22, 2018) (unpublished), scribd.com/document/371995244/A-A-B-AXXX-XXX-292-BIA-Jan-22-2018?secret_password=y4ZG4qLktsQJs4TmFxpV.

- A respondent’s severe mental health issues or lack of mental competence, and¹²⁸
- 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.¹²⁹

As an example of the last point listed above, the BIA in an unpublished decision¹³⁰ followed the U.S. Court of Appeals for the Fifth Circuit decision in *Lugo-Resendez v. Lynch* holding that equitable tolling applied to the 90-day motion to reopen filing deadline.¹³¹ After the *Lugo-Resendez v. Lynch* decision, Mr. Lugo-Resendez’s case was remanded to the immigration court to determine whether equitable tolling should apply to his case. Mr. Lugo-Resendez had filed his motion to reopen two months after learning that the post-departure bar to motions to reopen no longer applied pursuant to *Garcia-Carias v. Holder*.¹³² The IJ ruled that Mr. Lugo Resendez could not benefit from equitable tolling because he did not file his motion to reopen within a reasonable time after the Supreme Court decision years earlier invalidating the previous interpretation of the ground of deportability and thus “the importance of finality” outweighed equitable tolling considerations. The BIA disagreed, holding that Mr. Lugo-Resendez’s actions showed “reasonable diligence” for equitable tolling purposes. It cited to the reasoning in *Lugo-Resendez v. Lynch* that the court should give “due consideration to the reality that many departed aliens are poor . . . and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions.”¹³³ The BIA also held that Mr. Lugo-Resendez had experienced “extraordinary circumstances . . . beyond his control” that prevented him from filing his motion until 2014. Although the change in law impacting his removal case occurred in 2006 (three years after his removal order was issued), he was prevented

¹²⁸ 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”); *Miguel Aguilar-Elias*, 041-765-696 (BIA May 15, 2019) (unpublished), [scribd.com/document/414381698/Miguel-Aguilar-Elias-A041-765-696-BIA-May-15-2019?secret_password=mhTvHwypAs3Ymo2CMmlN](https://www.scribd.com/document/414381698/Miguel-Aguilar-Elias-A041-765-696-BIA-May-15-2019?secret_password=mhTvHwypAs3Ymo2CMmlN); *Saul Rincon-Garcia*, A034-338-426 (BIA Nov. 27, 2017) (unpublished), [scribd.com/book/367642745/Saul-Rincon-Garcia-A034-338-426-BIA-Nov-27-2017](https://www.scribd.com/book/367642745/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.”); see also *Kim Stevens*, A035-172-124 (BIA Oct. 12, 2011) (unpublished), [scribd.com/book/199185203/Kim-Stevens-A035-172-124-BIA-Oct-12-2011](https://www.scribd.com/book/199185203/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).

¹²⁹ See, e.g., *Jose Guerrero-Soto*, A091-225-150 (BIA Nov. 17, 2015) (unpublished), [scribd.com/book/291132258/Jose-Guerrero-Soto-A091-225-150-BIA-Nov-17-2015](https://www.scribd.com/book/291132258/Jose-Guerrero-Soto-A091-225-150-BIA-Nov-17-2015) (remanding to consider whether deadline should be tolled). *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).

¹³⁰ *Sergio Lugo-Resendez*, A034-450-500 (BIA Dec. 28, 2017) (unpublished), [lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/01/17/unpub-bia-equitable-tolling-victory-matter-of-lugo-resendez-dec-27-2017.aspx?Redirected=true&Redirected=true](https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/01/17/unpub-bia-equitable-tolling-victory-matter-of-lugo-resendez-dec-27-2017.aspx?Redirected=true&Redirected=true).

¹³¹ *Lugo-Resendez v. Lynch*, 831 F.3d 337, 343-45 (5th Cir. 2016).

¹³² *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012).

¹³³ *Lugo-Resendez*, 831 F.3d at 345.

from filing a motion to reopen until the U.S. Court of Appeals for the Fifth Circuit made it legally possible to file motions to reopen from abroad through its *Garcia-Carias v. Holder* decision in 2012. Mr. Lugo-Resendez did not learn about this opportunity until May 2014, and it took him two months to retain legal counsel and file the motion to reopen.

A motion to reopen arguing equitable tolling must thus demonstrate that diligence was exercised from the time the removal order was entered, or from the time the individual became aware (or reasonably should have been aware) that the order was entered or that there was a basis for filing a motion to reopen, depending on the circumstances. This diligence must be shown as specifically as possible, through affidavits and other evidence demonstrating exactly when the individual became aware of the removal order or basis for the claim, what circumstances prevented the individual from filing earlier, and what steps were taken to pursue the claim.¹³⁴

DACA Context. For those DACA recipients who were ordered removed many years prior to obtaining DACA, and have not taken any action to investigate a possible claim for reopening until now, it may be difficult to argue that the filing deadline should be tolled. However, equitable tolling may be useful for DACA recipients who only recently discovered they had a removal order—or a possible basis for reopening a removal order—during or after the process of applying for DACA.

In exploring equitable tolling arguments, practitioners should carefully review the record of proceedings and audio recordings or transcript of the hearing(s), in addition to interviewing the noncitizen about what happened during and after the removal proceedings. They should investigate whether there was a defect during the removal proceedings, or during the 90-day motion to reopen period after a removal order was entered, that prevented the client from timely filing a motion to reopen. As described below, these defects might include ineffective assistance of counsel, due process or regulatory violations, or failures by an adult with responsibility to protect the interests of the child respondent.

If the client was represented during the removal proceedings or sought the assistance of a legal representative during the 90-day reopening period, practitioners should investigate whether there is a tolling argument based on ineffective assistance or fraud by the representative. For example, in *Gordillo v. Holder*,¹³⁵ the U.S. Court of Appeals for the Sixth Circuit concluded that tolling could be warranted where the respondents had been eligible for Nicaraguan Adjustment and Central American Relief Act (NACARA) relief during their removal proceedings but their attorney did not raise it. Their attorney had also filed an appeal to the BIA but never informed them when the BIA affirmed the IJ's decision. The respondents thus did not find out about the BIA's decision until 18 months after the fact, when their employment authorization renewal applications were denied. At that point, they sought legal advice but were advised incorrectly that they had no available relief. It was not until four years later, when one respondent was arrested by DHS, that they learned from a

¹³⁴ See *Gonzalez-Cantu v. Sessions*, 866 F.3d 302, 305 (5th Cir. 2017).

¹³⁵ 640 F.3d 700 (6th Cir. 2011) (remanding to BIA for further diligence analysis).

different attorney about their eligibility for relief, and they filed a motion to reopen a week after first meeting with the attorney.

Regardless of whether the client was represented during the removal proceedings, practitioners should also look for defects in the manner that the IJ conducted the proceeding. These defects could include due process violations such as for failure advise of eligibility for relief and failure to comply with regulatory duties.¹³⁶ If the client was a child at the time of the removal proceedings, practitioners should be mindful of the heightened procedural requirements in children’s cases.¹³⁷ Further, if the client was in proceedings along with a parent or other adult who was treated as the child’s legal guardian, practitioners should examine whether that adult failed to act in the child’s legal interests, such as by failing to seek available relief on behalf of the child or to pursue an appeal. All of these factors could contribute to an argument that extraordinary circumstances prevented timely filing of a motion to reopen. Practitioners will also want to address how the client’s failure to find out about the basis for reopening earlier was reasonable. It is wise to review case law in the applicable jurisdiction to determine the relevant standard and explore arguments, such as the need to assess reasonableness due to the client’s age and other particular circumstances, or that the client’s reliance on the statements of their representative, the IJ, or another adult were reasonable in preventing earlier discovery of the claim.¹³⁸

DACA recipients could also explore age-based arguments that extraordinary circumstances prevented timely filing of a motion to reopen. It is possible that many DACA recipients with removal orders might not have known about the order or a basis for reopening given their age. Many DACA recipients may not have learned about or understood their immigration history until they began applying for financial aid for college or a driver’s license. Even if a DACA recipient knew about their

¹³⁶ See, e.g., *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004) (finding, in illegal reentry case, that noncitizen’s due process rights were violated where the IJ failed to advise him of eligibility for relief or of his right to appeal); cases cited *supra* note 126; see also *Serrano-Alberto v. Att’y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017) (finding due process violation where IJ’s conduct prevented the petitioner from reasonably presenting case, explaining that due process requires “a full and fair hearing that allows [petitioners] a reasonable opportunity to present evidence on their behalf” (internal quotations omitted)); C-A-R-M-, AXXX-XXX-713 (BIA March 15, 2018) (unpublished), [scribd.com/document/377420845/C-A-R-M-AXXX-XXX-713-BIA-March-15-2018?secret_password=j2frC6EG5RjEoNkf8gqh](https://www.scribd.com/document/377420845/C-A-R-M-AXXX-XXX-713-BIA-March-15-2018?secret_password=j2frC6EG5RjEoNkf8gqh) (remanding where the IJ failed to advise the minor respondents of their right to apply for asylum after their father appeared on their behalf and said they feared returning to El Salvador). For further discussion of BIA precedent and regulatory authority for the IJ’s duty to develop the record, see Brief for American Immigration Council as Amicus Curiae Supporting Respondents, In the Matter of C-C-C- & H-B-C- (BIA filed Aug. 17, 2015), americanimmigrationcouncil.org/content/re-c-c-c-board-immigration-appeals.

¹³⁷ See, e.g., discussion *infra* at section IV.B.2.

¹³⁸ See, e.g., *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) (“We cannot penalize individuals in such circumstances for reasonably relying on the advice of counsel, even if that counsel turns out to have been incompetent or predatory.”); *Rosanna Zicca*, A031-119-162, 2008 WL 4420127, at *2 (BIA Sept. 12, 2008) (unpublished) (“[W]e consider that it was not unreasonable for the respondent not to have filed her motion earlier premised on her reliance on her former counsel’s continued reassurances; and that only upon her detention by DHS, did she become fully aware of the grievous consequences of her former counsel’s egregious conduct, and then acted diligently in submitting the instant motion, and has raised a *prima facie* claim for relief from removal.”).

lack of lawful status, they may not have known about or understood the implications of a removal order. In these circumstances, practitioners should look to the prevailing case law in their jurisdiction to determine if arguments are available that the DACA recipient's youth and lack of competence¹³⁹ could combine with other factors to amount to an extraordinary circumstance that prevented timely filing. An individual in this situation could argue that the time limitation should be tolled until they became aware of the removal order or the claim to reopen the order. Practitioners could analogize to the asylum one-year filing deadline extraordinary circumstances exceptions, which specify that a "legal disability" is an extraordinary circumstance.¹⁴⁰ Although the regulations do not define the term "legal disability," they offer as illustration the example of an applicant who "was an unaccompanied minor or suffered from a mental impairment."¹⁴¹ A DHS training manual further expands on this point, explaining that all minors should be considered to be under a legal disability and meet the definition of an "extraordinary circumstance" for the purpose of satisfying the exception to the one-year asylum filing deadline.¹⁴² In an unpublished decision, the BIA held that those under 18 years of age categorically qualify for the extraordinary circumstances exception to the one-year asylum filing deadline.¹⁴³ The BIA further held that the youth of a person between ages 18 and 21 remains a factor to consider in determining whether an applicant qualifies for the extraordinary circumstances exception.¹⁴⁴ Practitioners could apply this same reasoning in support of equitable tolling for DACA youth while under the age of 21. If DACA was obtained before or shortly after the 21st birthday, the practitioner could argue that DACA was a new extraordinary circumstance further tolling the filing deadline, as described below.

It may be possible that multiple extraordinary circumstances exist, and different extraordinary circumstances may toll different periods of time. For example, if the client became aware of the removal order or the basis for reopening during or after the DACA application process, they could explore an extraordinary circumstances argument based on DACA itself. The extraordinary circumstance would be the advent of DACA, a DHS-sponsored program that permitted those with removal orders to apply for it and thereby obtain protection from removal.¹⁴⁵ This argument is

¹³⁹ Cf. cases cited *supra* note 128 and accompanying text.

¹⁴⁰ CLINIC, *Practice Advisory: Overcoming the Asylum One-Year Filing Deadline for DACA Recipients* (June 25, 2020), cliniclegal.org/resources/asylum-and-refugee-law/practice-advisory-overcoming-asylum-one-year-filing-deadline-daca.

¹⁴¹ 8 CFR § 208.4(a)(5)(ii).

¹⁴² USCIS, RAO Combined Training Course, *Children's Claims*, at 78 (Aug. 21, 2014), uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/RAO_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.").

¹⁴³ See *A-D-*, AXXX-XXX-526, at 5 (BIA May 22, 2017) (unpublished), scribd.com/book/351904250/A-D-AXXX-XXX-526-BIA-May-22-2017.

¹⁴⁴ See *id.* at 5-8.

¹⁴⁵ See *H-M-C-J-*, AXXX-XXX-586 (BIA March 1, 2018) (unpublished), scribd.com/document/374339687/H-M-C-J-AXXX-XXX-586-BIA-March-1-2018?secret_password=GG1eV8bffNQDy5GXq1GM (concluding that the receipt of deferred action under the DACA program qualifies as extraordinary circumstances exception to the one-year filing deadline even though it did not confer lawful status).

supported by another definition of extraordinary circumstance found in the regulations discussing the one-year filing deadline for asylum applications. That regulation provides that one extraordinary circumstance exempting an applicant from the deadline is if the applicant “maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application.”¹⁴⁶ Practitioners can argue that a similar standard should be applied where an individual discovers the existence of a removal order, or a claim to reopen a removal order, in the process of applying for DACA, but waits to file the motion to reopen until their DACA protection is rescinded or otherwise terminates. DACA recipients could argue that they reasonably relied on the existence of this government program, which expressly included and protected eligible individuals with removal orders. Furthermore, given all the developments regarding the status of the DACA program following litigation and President Trump’s vows to find a permanent solution for DACA youth, it is likely that many DACA recipients are confused about the status of the program.¹⁴⁷ Like Mr. Lugo-Resendez’s case, equitable tolling arguments should address all hurdles preventing the filing of a motion to reopen, including confusion rendering one “unable to follow developments in the American legal system—much less read and digest complicated legal decisions.”¹⁴⁸

In addition to arguing that exceptional circumstances stood in the way of timely filing, to be eligible for tolling the DACA recipient will also need to demonstrate due diligence in pursuing the motion to reopen. Practitioners should consider whether factors, such as age and lack of ability to search for, pay for, or arrange transportation to visit, an attorney given the DACA recipient’s age (including statistics on scarcity of free legal services in the jurisdiction during the relevant period), could factor into the diligence analysis. DACA recipients may also argue that requesting DACA, which is available despite a removal order, and maintaining the DACA protection, may suffice to show diligence. The argument would be that pursuing DACA as a protection from removal shows sufficient diligence warranting tolling during that period.¹⁴⁹ Practitioners could argue that as in Mr. Lugo-Resendez’s case, DACA recipients would need some amount of time following the expiration of the extraordinary circumstance to confer with legal counsel and for that counsel to submit the motion to reopen. It will be very important for legal counsel to diligently prepare and quickly file the motion to reopen once retained.

¹⁴⁶ See 8 CFR § 208.4(a)(5)(iv). In addition, an extraordinary circumstance argument could be used to overcome the one-year filing deadline for DACA recipients who wish to file a motion to reopen to apply for asylum and related relief based on changed country conditions that occurred while they maintained DACA. See USCIS, Asylum Officer Basic Training Course, *One-Year Filing Deadline*, at 17 (Mar. 23, 2009), AILA Doc. No. 16102840, aila.org/infonet (explaining that the purpose of the “maintained lawful status” extraordinary circumstances exception is to “avoid forcing a premature application” by allowing individuals who might seek asylum to wait and see if conditions in their countries improve).

¹⁴⁷ See, e.g., *supra* section I & *infra* note 197.

¹⁴⁸ *Lugo-Resendez v. Lynch*, 831 F.3d 337, 345 (5th Cir. 2016).

¹⁴⁹ Cf. *Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (“Contrary to the government’s arguments before us, the mere passage of time—even a lot of time—before an alien files a motion to reopen does not necessarily mean she was not diligent.”).

In sum, in pursuing a late-filed motion to reopen, where possible, practitioners should argue equitable tolling, rather than merely rely on the IJ or BIA's regulatory *sua sponte* authority, discussed below in section IV.A.7. Many U.S. courts of appeal have concluded that they lack jurisdiction to review the BIA's discretionary decision declining to exercise *sua sponte* authority.¹⁵⁰ Further, a motion to reopen under the statutory authority is governed by legal standards that may be easier to establish compared to the exceptional circumstances standard under discretionary *sua sponte* authority.

3. Motions to Reopen Based on Ineffective Assistance of Counsel¹⁵¹

Unfortunately, many noncitizens may have been previously unable to effectively present their case due to ineffective assistance of counsel. As the Third Circuit has aptly explained:

Immigration law is a field in which fair, accurate factfinding is of critical importance. The need in immigration proceedings for effective attorneys who can competently marshal the evidence on each side is therefore of commensurate importance. Yet aliens—often poor, often non-English speaking—are disproportionately saddled with low-quality counsel, and the consequences can be drastic.¹⁵²

Fortunately, a noncitizen may be able to mitigate the effects of the prior attorney's actions by filing a motion to reopen based on ineffective assistance of counsel. Noncitizens may file a motion to reopen in which they raise ineffective assistance of counsel to explain that evidence that should have been presented previously was not available to the court at the time of the hearing because of the ineffective assistance of counsel. Additionally, many courts of appeal have recognized that ineffective assistance of counsel can be a basis for equitable tolling of the 90-day deadline and numerical limitations.¹⁵³ To argue equitable tolling on the basis of ineffective assistance of counsel, the respondent must comply with the requirements in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The BIA in *Matter of Lozada* recognized that ineffective assistance of counsel in removal proceeding can be a Fifth Amendment due process violation "if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case."¹⁵⁴ To prevail

¹⁵⁰ See *infra* note 202.

¹⁵¹ For an excellent practice advisory on this subject, see American Immigration Council, *Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases* (Jan. 2016), americanimmigrationcouncil.org/sites/default/files/research/seeking_remedies_for_ineffective_assistance_of_counsel_in_immigration_cases_practice_advisory.pdf [hereinafter "AIC Ineffective Assistance Advisory"]. The authors drew on this advisory in drafting this section.

¹⁵² *Calderon-Rosas v. Att'y Gen.*, 957 F.3d 378, 381 (3d Cir. 2020).

¹⁵³ See, e.g., cases cited *supra* note 123; *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); *Rashid v. Mukasey*, 533 F.3d 127, 130 (2d Cir. 2008).

¹⁵⁴ 19 I&N Dec. at 638 (BIA 1988); see *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) (affirming *Lozada* and noting that many courts have recognized that respondents can articulate a due process violation if counsel "prevents the respondent from meaningfully presenting" their case even though there is no right to appointed counsel). Many but not all

on an ineffective assistance claim, the claimant must show deficient performance and prejudice.¹⁵⁵ A motion to reopen based on alleged ineffective assistance of counsel must meet certain procedural requirements:

- It must be accompanied by an affidavit from the respondent providing the relevant facts, including the agreement entered into with prior counsel as to what actions were to be taken and what representations counsel made
- Prior counsel must be notified and given the opportunity to respond to the allegations, and the claimant should include any response or failure to respond with the motion, and
- If the conduct is alleged to have violated ethical or legal duties, the motion should state whether a complaint has been filed with the appropriate disciplinary authority and if not, why not.¹⁵⁶

It is best practice to comply fully with the *Lozada* requirements, even though some U.S. courts of appeals have held that only “substantial compliance” is required.¹⁵⁷ It is possible to assert ineffective assistance of counsel against multiple prior attorneys to show that the individual continuously received ineffective representation and was diligent in trying to present their case.

4. Motions to Reopen Based on VAWA Relief

The 90-day time limit and the one-motion rule do not apply to individuals seeking reopening in order to apply for VAWA relief, in the form of a VAWA self-petition, VAWA cancellation of removal, or VAWA suspension (for those placed into proceedings before April 1, 1997).¹⁵⁸ Instead, motions to reopen filed under this provision can be filed within a year of the final removal order, but the Attorney General can waive this one-year deadline in extraordinary circumstances or situations of “extreme hardship to the alien’s child.”¹⁵⁹ The motion must meet the substantive requirements for motions to reopen discussed previously, and in particular must be accompanied by the VAWA self-

U.S. courts of appeals have recognized a due process right to effective assistance of counsel in removal proceedings. See discussion of case law in AIC Ineffective Assistance Advisory, *supra* note 151 at 13-15.

¹⁵⁵ Practitioners should examine precedents in their jurisdiction to determine the applicable deficient performance and prejudice standards.

¹⁵⁶ *Lozada*, 19 I&N Dec. at 639.

¹⁵⁷ See, e.g., *Fadiga v. Att’y Gen.*, 488 F.3d 142, 155-57 (3d Cir. 2007); *Yang v. Gonzales*, 478 F.3d 133, 143 (2d Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226-27 (9th Cir. 2002). *But see*, e.g. *Hernandez-Ortez v. Holder*, 741 F.3d 644, 647-48 (5th Cir. 2014); *Lin Xing Jiang v. Holder*, 639 F.3d 751, 755 (7th Cir. 2011) (requiring strict compliance).

¹⁵⁸ INA § 240(c)(7)(A), (c)(7)(C)(iv). INA § 240(c)(7)(C)(iv)(I) states that the limitation on deadlines for filing motions to reopen shall not apply “if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 204(a)(1)(A), clause (ii) or (iii) of section 204(a)(1)(B) [VAWA self-petitioners, except for parents subject to battery or extreme cruelty by U.S. citizen sons or daughters], section 240A(b)(2) [VAWA cancellation], or section 244(a)(3) (as in effect on March 31, 1997) [VAWA suspension].”

¹⁵⁹ INA § 240(c)(7)(C)(iv)(III). Under 2005 VAWA amendments, there is no deadline for motions to reopen *deportation* proceedings (those commenced before April 1, 1997) in order to seek VAWA adjustment or suspension, if the motion is accompanied by a suspension application or self-petition. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(b), 119 Stat. 2960, 3064 (Jan. 5, 2006).

petition that has been or will be filed with USCIS or the cancellation of removal application that is being submitted to the immigration court.¹⁶⁰ The respondent must also be physically present in the United States at the time the motion is filed.¹⁶¹ The filing of a motion to reopen under this provision stays the removal of a “qualified alien” while the motion is pending, “including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.”¹⁶² “Qualified alien” is defined to include individuals with an approved VAWA self-petition, a pending VAWA self-petition setting forth a *prima facie* case, an approved VAWA suspension or cancellation application, or a pending VAWA suspension or cancellation application setting forth a *prima facie* case.¹⁶³

DACA Context. A discussion of the requirements for VAWA relief is beyond the scope of this practice advisory.¹⁶⁴ Some DACA recipients could be eligible for VAWA relief based on abuse by a spouse or parent who is a U.S. citizen or permanent resident.¹⁶⁵ Others could be eligible for VAWA relief as the child of a self-petitioner, for example if the DACA recipient’s parent has filed for VAWA relief as an abused spouse of a U.S. citizen or permanent resident.¹⁶⁶ VAWA cancellation may also be available to a DACA recipient who is the parent of an abused child¹⁶⁷ of a U.S. citizen or permanent resident, even where the DACA recipient is not married to the child’s parent.¹⁶⁸ DACA recipients who may be eligible for this relief should also consider arguments that the one-year time limitation for filing a motion to reopen should be waived, by setting forth extraordinary circumstances or establishing extreme hardship to a child. A motion to reopen under this provision should state on the cover page that the respondent meets the requirements for the statutory stay. In the motion, the practitioner should establish that the DACA recipient is a “qualified alien,” along with an approved

¹⁶⁰ INA § 240(c)(7)(C)(iv)(II).

¹⁶¹ INA § 240(c)(7)(C)(iv)(IV).

¹⁶² INA § 240(c)(7)(C)(iv).

¹⁶³ 8 USC § 1641(c)(1)(B) (does not include as part of the definition VAWA self-petitioning parents subject to battery or extreme cruelty by U.S. citizen sons or daughters, as set forth INA § 204(a)(1)(A)(vi)).

¹⁶⁴ ASISTA provides excellent resources and technical assistance to practitioners working with immigrant survivors of crime, including domestic violence. Their resources are available on their website: asistahelp.org/.

¹⁶⁵ See USCIS, Battered Spouse, Children & Parents, uscis.gov/humanitarian/battered-spouse-children-parents. Note that VAWA relief is also available to parents abused by a U.S. citizen son or daughter, but abuse by a U.S. citizen son or daughter will not confer the VAWA motion to reopen benefit discussed in this part, despite the misleading title, which includes “parents.” See INA § 240(c)(7)(C)(iv)(I) (not including cross reference to VAWA self-petition statute discussing parents of abusive U.S. citizens). Instead reopening in this scenario would need to be sought under the general reopening provisions or through a request for *sua sponte* reopening.

¹⁶⁶ See INA § 204(a)(1)(A)(iii), (a)(1)(B)(ii). Children included in their parent’s VAWA self-petition are known as derivative children. To be included in the parent’s self-petition, derivative children must be unmarried and under 21 at the time of filing. These children are “derivatives” or “derivative beneficiaries” because they derive a benefit from the parent’s application for legal immigration status.

¹⁶⁷ See INA § 101(b)(1) (defining “child”).

¹⁶⁸ INA § 240A(b)(2)(A)(i)(I)-(II).

petition, *prima facie* determination, or copy of the application,¹⁶⁹ and argue that a *prima facie* showing has been made.¹⁷⁰

5. Motions to Reopen Based on Changed Country Conditions Related to Asylum Eligibility

Another type of motion to reopen that does not have the numerical or 90-day time limitation is a motion based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, where the purpose is to apply or reapply for asylum, withholding of removal, or protection under CAT.¹⁷¹ The new evidence presented must be material and “not available and would not have been discovered or presented at the previous proceeding.”¹⁷² The BIA has interpreted the standard for this type of reopening to include the applicant’s “heavy burden to show that his proffered evidence is material, reflects changed country conditions arising in the country of nationality, and supports a *prima facie* case for a grant of asylum.”¹⁷³ The change does not, however, have to be dramatic.¹⁷⁴ The “previous proceeding” refers to the proceedings before the IJ, not the BIA.¹⁷⁵ The change in country conditions must have materially worsened,¹⁷⁶ and not be merely “more of the same.”

The Immigration Court and BIA Practice Manuals state that a motion to reopen 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.”¹⁷⁷ The respondent must include evidence of the alleged changed circumstances.¹⁷⁸ U.S. courts of appeals

¹⁶⁹ VAWA self-petitions are filed on Form I-360, while VAWA cancellation is filed on Form EOIR 42-B.

¹⁷⁰ For further information on motions to reopen under the VAWA provisions, see IMMIGRANT LEGAL RESOURCE CENTER, THE VAWA MANUAL: IMMIGRATION RELIEF FOR ABUSED IMMIGRANTS § 10.6 (7th Ed. 2017).

¹⁷¹ INA § 240(c)(7)(C)(ii); 8 CFR § 1003.2(c)(3)(ii); 8 CFR § 1003.23(b)(4)(i).

¹⁷² *Id.*

¹⁷³ *Matter of J-G-*, 26 I&N Dec. 161, 169 (BIA 2013).

¹⁷⁴ See *Joseph v. Holder*, 579 F.3d 827, 831-35 (7th Cir. 2009).

¹⁷⁵ 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).

¹⁷⁶ 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).

¹⁷⁷ Immigration Court Practice Manual Ch. 5.7(e)(i); BIA Practice Manual Ch. 5.6(e)(i).

¹⁷⁸ Immigration Court Practice Manual Ch. 5.7(e)(i); BIA Practice Manual Ch. 5.6(e)(i). The BIA must address the evidence presented by the noncitizen. *Inestroza-Antonelli v. Barr*, 954 F.3d 813 (5th Cir. 2020) (holding the BIA’s failure to address the evidence regarding changed country conditions in Honduras—specifically, the large increase in violence against women following a military coup—constituted an abuse of discretion); *Perez-Tino v. Barr*, 937 F.3d 48 (1st Cir. 2019) (finding that the noncitizen had offered evidence to support her claim that Guatemala had become more dangerous for Organizacion Maya K’Iche (OMK) members and remanding for the BIA to assess whether the evidence established a change in country conditions); *Liem v. U.S. At’y Gen.*, 921 F.3d 388 (3d Cir. 2019) (concluding that the BIA failed to meaningfully consider evidence and arguments presented by the Christian Indonesian noncitizen nor

and BIA decisions have upheld the denial of motions to reopen based on changed country conditions where:

- The changes asserted were merely changed personal circumstances, rather than changed country conditions¹⁷⁹
- The changes asserted were merely more evidence of the same country conditions that previously existed,¹⁸⁰ and
- The changed conditions presented were general conditions, instead of a showing of individual and particularized risk.¹⁸¹

This type of motion does not automatically stay removal; rather, an individual can seek a discretionary stay of removal with the adjudicator that has jurisdiction over the motion (IJ or BIA), as well as with ICE.¹⁸² Where an IJ previously made an adverse credibility finding, the individual can still prevail on a motion to reopen based on changed country conditions, but only if they overcome prior determinations of adverse credibility or show the new claim is independent of the evidence previously found incredible.¹⁸³ In addition, the regulations state that if the original asylum application

explain its conclusions); *but see Meriyu v. Barr*, 950 F.3d 503 (7th Cir. 2020) (“Its assessment may have been sparse, but the Board was not required to give an ‘exegesis on every contention’ . . . What it did say was sufficient to address the scant evidence that Ms. Meriyu put into the record.”).

¹⁷⁹ See, e.g., *Pablo Lorenzo v. Barr*, 779 F. App’x 366, 374–75 (6th Cir. 2019) (unpublished); *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) (unpublished); *Averianova v. Holder*, 592 F.3d 931, 937 (8th Cir. 2010); *Alvarez 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 defeat 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).

¹⁸⁰ See, e.g., *Shire v. Barr*, 967 F.3d 722 (8th Cir. 2020); *Molina v. Barr*, 952 F.3d 25 (1st Cir. 2020); *Sugiarto v. Holder*, 761 F.3d 102 (1st Cir. 2014); *Zhao v. Gonzales*, 440 F.3d 405 (7th Cir. 2005); see also *Matter of S-Y-G*, 24 I&N Dec. 247, 257 (BIA 2007) (“Change that is incremental or incidental does not meet the regulatory requirements for late motions of this type.”); *but see Inestroza-Antonelli v. Barr*, 954 F.3d 813, 816 (5th Cir. 2020) (finding that the BIA’s statement that the “evidence describes conditions in Honduras substantially similar to those that existed at the time of [her] 2005 hearing, and at best, reflects only an ‘incremental or incidental’ change” misstated the record, and stating that “Inestroza-Antonelli introduced voluminous and uncontroverted evidence that the regime established after the 2009 coup made changes that substantially reduced legal protections for women and dramatically impaired institutions within the government and civil society that protect women from gender-based violence. And the coup was accompanied by the rate of homicides of women doubling within a single year, which can hardly be described as incremental.”).

¹⁸¹ See, e.g., *Simarmata v. Holder*, 752 F.3d 79 (1st Cir. 2014). *But see Salim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016) (remanding where petitioner had shown “heightened individualized risk if returned”).

¹⁸² 8 CFR § 1003.23(b)(4)(i); see 8 CFR § 1003.2(f); *Blake v. U.S. Att’y Gen.*, 945 F.3d 1175 (8th Cir. 2019) (concluding that the noncitizen was not entitled to an emergency stay of removal because the BIA had reasonably found he failed to show changed country conditions in Jamaica, and accordingly was not exempt from the filing deadline for a motion to reopen).

¹⁸³ *Matter of F-S-N*, 28 I&N Dec. 1 (BIA 2020).

was denied based on a frivolous finding,¹⁸⁴ the respondent is not eligible to file a motion to reopen before the IJ,¹⁸⁵ reconsider, or for a stay.¹⁸⁶ Moreover, a respondent previously found to have filed a frivolous asylum claim is ineligible for asylum, but could still be eligible for withholding of removal and protection under CAT.¹⁸⁷

DACA Context. DACA recipients with old removal orders may have received them many years ago, in the 1980s, 1990s, or 2000s. Practitioners should consider whether there are now changed circumstances that have created eligibility for asylum, withholding of removal, and CAT protection in the alternative.¹⁸⁸ Practitioners evaluating a changed country conditions-based motion to reopen for a DACA recipient must consider whether country conditions have materially changed since the date of the last immigration court hearing or proceeding. Even though changed personal circumstances are distinct from changed country conditions, DACA recipients may argue that the country conditions have changed materially as to their personal circumstances. For example, consider the hypothetical scenario of a DACA recipient who was ordered removed as a small child and years later recognized his sexual orientation. He also learns that since the removal order's issuance, in his home country there has been an increase in violence against individuals due to their sexual orientation and that the police have increasingly done nothing, a change in country conditions made relevant due to his changed personal circumstances.

In conducting country conditions research, practitioners should use the wealth of resources available,¹⁸⁹ starting with the client's (or client's family members') own knowledge of changed conditions. Practitioners should include specific incidents that may have happened to the client's family or friends in the home country that are relevant to the client's fear of return. In preparing a motion to reopen based on changed country conditions, it is best practice to engage an expert who

¹⁸⁴ See 8 CFR § 1208.20 (“[A]n asylum application is frivolous if any of its material elements is deliberately fabricated.”). The authors are not aware of case law on whether a minor derivative would face the severe consequences of a frivolous finding, however he or she would have strong arguments that he or she did not “deliberately” fabricate if he or she was young at the time or if he or she was not involved in preparing the asylum application.

¹⁸⁵ Compare 8 CFR § 1003.23(b)(4)(i) (stating that a prior frivolous rendering non-citizen ineligible to file a motion to reopen before the IJ) with 8 CFR § 1003.3(b)(4)(i) (no comparable language for a motion to reopen before BIA).

¹⁸⁶ 8 CFR § 1003.23(b)(4)(i). Note that where there was a previous frivolous finding, a motion to reopen based on changed country conditions may still be available for the purpose of applying for withholding of removal and CAT protection as they are not barred by a frivolous finding. See 8 CFR § 1208.20 (“a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal”). CAT protection is not considered a “benefit under this Act” as the legal authority for CAT resides in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (1998), and not in the INA.

¹⁸⁷ 8 CFR § 1208.20 (“a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal”); *Sliusar v. Whitaker*, 761 F. App'x 718, 720 (9th Cir. 2019) (unpublished) (vacating the BIA's denial of motion to reopen filed based on ineffective assistance of counsel where prior counsel failed to argue eligibility for withholding of removal and CAT despite a prior frivolous finding).

¹⁸⁸ See DACA Recipients: Country of Birth, *supra* note 14.

¹⁸⁹ One excellent source of country conditions material is the Center for Gender and Refugee Studies, which provides litigation support materials to those who request assistance via the organization's web page, found at cgrs.uchastings.edu/search-materials/cgrs-litigation-support-materials.

can write a declaration explicitly evaluating the change between the time of the last hearing and the time of the filing of the MTR and discussing how the changed circumstances present an individual and particularized risk to the applicant. For asylum purposes, there may be one-year deadline exception arguments to be made based on changed circumstances or extraordinary circumstances, such as the applicant's youth or mental health issues.

6. Joint Motions to Reopen

The regulations governing reopening provide an exception to time and numerical limitations in cases where a motion to reopen is "agreed upon by all parties and jointly filed."¹⁹⁰ The BIA in *Matter of Yewondwosen* reasoned that "the parties have an important role to play in these administrative proceedings, and . . . their agreement on an issue or proper course of action should, in most instances, be determinative."¹⁹¹ In fact, a joint motion to reopen may be granted even when the applicant does not include an application for relief.¹⁹² In unpublished decisions the BIA has reversed IJ denials of joint motions to reopen.¹⁹³

The likelihood of DHS joining a motion will depend on the administration's enforcement priorities and the DHS office in question. Nonetheless, practitioners should consider reaching out to DHS to see if they would join in the motion, particularly if the IJ likes to see motions where the parties have tried to reach agreement before filing.¹⁹⁴ If this is the IJ's preference, but DHS declined to join the motion, the practitioner can explain in the subsequently filed motion attempts made at reaching an agreement with DHS prior to filing.¹⁹⁵ In the past, DHS has joined motions to reopen in cases of clear relief, such as an approved I-130, Petition for Alien Relative when the applicant is eligible to adjust status, an approved I-360 Petition for Amerasian, Widow(er), or Special Immigrant, an approved U

¹⁹⁰ 8 CFR § 1003.23(b)(4)(iv); 8 CFR § 1003.2(c)(3)(iii).

¹⁹¹ *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997).

¹⁹² *Id.* at 1027.

¹⁹³ *Alma del Acosta Carmona*, A086-285-207 (BIA June 1, 2020) (unpublished), [scribd.com/document/466557332/Alma-Delia-Acosta-Carmona-A086-285-207-BIA-June-1-2020?secret_password=IhHlPk0tsRwSp7yVxhVP](https://www.scribd.com/document/466557332/Alma-Delia-Acosta-Carmona-A086-285-207-BIA-June-1-2020?secret_password=IhHlPk0tsRwSp7yVxhVP); *Oscar Diaz-Medina*, A096-188-908 (BIA Feb. 11, 2016) (unpublished), [scribd.com/book/303203515/Oscar-Diaz-Medina-A096-188-908-BIA-Feb-11-2016](https://www.scribd.com/book/303203515/Oscar-Diaz-Medina-A096-188-908-BIA-Feb-11-2016); see also *Hernan Antonio Reyes*, A095-084-205 (BIA Sept. 18, 2015) (unpublished), [scribd.com/book/285239784/Hernan-Antonio-Reyes-A095-084-205-BIA-Sept-18-2015](https://www.scribd.com/book/285239784/Hernan-Antonio-Reyes-A095-084-205-BIA-Sept-18-2015); *Adam Laurence*, A200-867-388 (BIA Feb. 7, 2014) (unpublished), [scribd.com/document/208246334/Adam-Laurence-A200-867-388-BIA-Feb-7-2014](https://www.scribd.com/document/208246334/Adam-Laurence-A200-867-388-BIA-Feb-7-2014).

¹⁹⁴ The Immigration Court Practice Manual directs that "[t]he party filing a motion should make a good faith effort to ascertain the opposing party's position on the motion," should state the opposing party's position in the motion, and should explain efforts made to contact the opposing party if the filing party "was unable to ascertain the opposing party's position." Ch. 5.2(i).

¹⁹⁵ The 90-day motion to reopen deadline is generally not tolled while a practitioner awaits DHS's response regarding whether that office will join the motion. See, e.g., *Alzaarir v. Att'y Gen.*, 639 F.3d 86, 90-91 (3d Cir. 2011); *Valeriano v. Gonzales*, 474 F.3d 669, 673-75 (9th Cir. 2007). Thus, in cases where the 90-day deadline is still in play and the practitioner is seeking to have DHS join the motion, he or she may need to file the motion to meet the deadline despite not having a response from DHS. In other cases, the deadline has already passed and the only alternative basis for the motion is *sua sponte*.

nonimmigrant status petition, or a strong claim for asylum with a solid one-year filing deadline exception. One specific context where DHS has traditionally agreed to join in motions to reopen is for adjustment of status purposes. A 2001 memo directs that the predecessor agency to DHS, the INS, may join in a motion to reopen for adjustment of status if: (1) adjustment was not available to the respondent at the former hearing; (2) the respondent is statutorily eligible for adjustment; and (3) the respondent merits a favorable exercise of discretion.¹⁹⁶ Although this memo has not been expressly rescinded, it is no longer on the ICE website, and some ICE Office of the Principal Legal Advisor (OPLA) offices may regard it as being rescinded.

DACA Context. Practitioners should ascertain the current DHS policy on joining motions to reopen. If it is still possible in some circumstances or jurisdictions to obtain DHS agreement to join a motion to reopen, practitioners could argue to DHS that DACA cases certainly merit DHS’s favorable discretion. In presenting a request to DHS to join a motion, practitioners could consider the following strategies:

- Note that President Trump has indicated that DACA recipients should be protected and are deserving of a permanent solution via legislation¹⁹⁷
- Note that (if still true) Congress is actively working on legislation to protect DACA recipients
- Argue that the above points show the executive and legislative intent to protect DACA recipients, and
- Document and emphasize all of the positive equities in the particular client’s case, including, if applicable, the client’s young age and lack of culpability at the time the order was issued.

In addition to these arguments, some DACA recipients have adjustment of status options that would strengthen a request for a joint motion to reopen. Those who were “admitted” into the United States on a visa,¹⁹⁸ most recently entered on a grant of advance parole, or are the beneficiary of a petition under INA § 245(i), are examples of DACA recipients who may be adjustment eligible. DACA

¹⁹⁶ See Memorandum from Bo Cooper, General Counsel, INS, *Motions to Reopen for Consideration of Adjustment of Status* (May 17, 2001), AILA Doc. No. 01070333, aila.org/infonet.

¹⁹⁷ See, e.g., Franco Ordonez, *Trump Says Upcoming Immigration Measure Will Include DACA*, NPR, July 10, 2020, npr.org/2020/07/10/889950540/trump-says-upcoming-immigration-measure-will-include-daca (stating that President Trump is “willing to work with Congress on a negotiated legislative solution to DACA”); Katie Reilly, *Here’s What President Trump Has Said About DACA in the Past*, TIME, Sept. 5, 2017, time.com/4927100/donald-trump-daca-past-statements/ (stating, for example, that the administration would show “great heart,” that DACA recipients were “mostly” “absolutely incredible kids,” that he “love[s] these kids,” that they “shouldn’t be very worried” and would be taken care of); Statement from President Donald J. Trump (Sept. 5, 2017), whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump (promising to deal with the “DACA issue with heart and compassion – but through the lawful Democratic process”); *The Latest: Trump Vows to Revisit DACA If Congress Stumbles*, U.S. NEWS & WORLD REPORT, Sept. 5, 2017, usnews.com/news/politics/articles/2017-09-05/the-latest-trump-says-congress-needs-to-act-on-immigration.

¹⁹⁸ For discussion of what constitutes an “admission” for purposes of adjustment of status, see American Immigration Council, *Practice Advisory: Inspection, Entry and Admission* (Oct. 2015), americanimmigrationcouncil.org/practice_advisory/inspection-and-entry-port-entry-when-there-admission.

recipients with removal orders who were previously admitted into the United States may have become eligible for adjustment since their removal proceedings, such as by marriage to a U.S. citizen. In such cases, practitioners should submit a written request to DHS asking that agency to join the motion to reopen, along with supporting evidence showing the client's eligibility, including the adjustment of status application the respondent plans to file, a proposed joint motion, a proposed order, and a copy of the I-130 petition approval notice, where appropriate.¹⁹⁹

7. Motions to Reopen Based on Sua Sponte Authority

The regulations give the IJ and BIA *sua sponte* authority to reopen a case in which that body has made a decision at any time, with no time or numerical limitations.²⁰⁰ The BIA has noted that its *sua sponte* power is limited to "exceptional situations" and "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship."²⁰¹ U.S. courts of appeals have generally held that they do not have jurisdiction to review the BIA's discretionary denial to reopen *sua sponte*.²⁰² Therefore, it is best to ask for *sua sponte* reopening in the alternative where possible, perhaps first arguing that the respondent is entitled to equitable tolling of the 90-day deadline or that the respondent's motion falls under another statutory reopening ground that does not have a deadline, such as changed country conditions for asylum purposes. Practitioners may rely on the same facts that would support a tolled 90-day deadline argument and should emphasize any pending application for relief or the client's eligibility for a form of relief. The below subsections discuss various types of cases in which the BIA has granted *sua*

¹⁹⁹ CLINIC network members may access a sample joint motion to reopen and terminate via our Removal Defense Toolkit, cliniclegal.org/toolkits/removal.

²⁰⁰ 8 CFR § 1003.23(b)(1) (IJ may "upon his or her own motion at any time" reopen "any case in which he or she has made a decision, unless jurisdiction is vested with the [BIA]"); 8 CFR § 1003.2(a) (BIA may "at any time reopen . . . on its own motion any case in which it has rendered a decision").

²⁰¹ *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); see also *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997) (noting that the BIA "has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone would not preclude such action").

²⁰² See, e.g., *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Lenis v. Att'y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004), overruled on other grounds by *Mata v. Lynch*, 576 U.S. 143 (2015); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999). But see, e.g., *Sang Goo Park v. Att'y Gen.*, 846 F.3d 645, 654 (3d Cir. 2017) (noting limited exceptions where court can review denial of *sua sponte* reopening); *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (as amended) (noting that the court has jurisdiction to review BIA decisions "denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error"); *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012) (noting that the court is not foreclosed from reviewing "the Board's denial of a motion to reopen *sua sponte* in cases where a petitioner has a plausible constitutional or legal claim that the Board misapplied a legal or constitutional standard").

sponte reopening and which may be relevant in the DACA context.²⁰³ Because *sua sponte* reopening is reserved for exceptional situations, practitioners should carefully develop, document, and present all equities in the client’s case, in addition to establishing a basis for *sua sponte* reopening. Practitioners should review BIA cases to see in what circumstances the BIA has exercised its *sua sponte* authority to reopen.

a. Sua Sponte - Pursue Previously Unavailable Relief or Acquires Lawful Status

A common basis for seeking reopening is in order to pursue new, previously unavailable relief from removal. Examples of situations where the BIA has reopened *sua sponte* in light of new available relief include:

- Evidence that the respondent’s U nonimmigrant status petition was conditionally approved via an approval notice from USCIS²⁰⁴
- Evidence that the respondent had been granted DACA, had married a U.S. citizen, and had an approved I-130 petition (to pursue adjustment of status)²⁰⁵
- Evidence that the respondent had an approved Special Immigrant Juvenile Status (SIJS) petition, or a pending state court custody action where SIJS findings would be sought²⁰⁶
- Evidence of an approved or pending visa petition filed by a U.S. citizen spouse or child²⁰⁷

²⁰³ There are other bases for *sua sponte* motions not covered in this advisory. For example, while *sua sponte* motions to reopen based on a change in criminal convictions are generally an option, this reopening ground would not likely apply to DACA recipients because a conviction serious enough to make an individual removable or ineligible for relief would have rendered him or her ineligible for DACA. Another ground for *sua sponte* reopening not specifically covered here is where there has been a “profound” change in law, *Matter of G–D–*, 22 I&N Dec. 1132, 1135-36 (BIA 1999); see *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998) (*sua sponte* reopening warranted after “fundamental” change in asylum law allowing claims based on coercive population control policies). Practitioners are encouraged to review unpublished BIA decisions and explore creative arguments for other bases for *sua sponte* motions not covered here.

²⁰⁴ *Dirav Dolatbhai Patel*, A201-183-819 (BIA Sept. 15, 2017) (unpublished), [scribd.com/document/362582274/Dirav-Dolatbhai-Patel-A201-183-819-BIA-Sept-15-2017](https://www.scribd.com/document/362582274/Dirav-Dolatbhai-Patel-A201-183-819-BIA-Sept-15-2017).

²⁰⁵ See, e.g., *Miguel Yun Wi*, A072-443-439 (BIA Dec. 11, 2017) (unpublished), [scribd.com/document/369892346/Miguel-Yun-Wu-A072-443-439-BIA-Dec-11-2017?secret_password=hno7Vt8tnlrse6wllOqf](https://www.scribd.com/document/369892346/Miguel-Yun-Wu-A072-443-439-BIA-Dec-11-2017?secret_password=hno7Vt8tnlrse6wllOqf); *Francisco Villagrana-Robles*, A094-984-254 (BIA Mar. 27, 2017) (unpublished), [scribd.com/document/346336602/Francisco-Villagrana-Robles-A094-984-254-BIA-March-27-2017](https://www.scribd.com/document/346336602/Francisco-Villagrana-Robles-A094-984-254-BIA-March-27-2017).

²⁰⁶ *B-A-M-G-*, AXXX-XXX-558 (BIA Dec. 27, 2016) (unpublished), [scribd.com/document/337536726/B-A-M-G-AXXX-XXX-558-BIA-Dec-27-2016](https://www.scribd.com/document/337536726/B-A-M-G-AXXX-XXX-558-BIA-Dec-27-2016) (pending custody action in state court); *S-D-A-A-*, AXXX-XXX-716 (BIA Dec. 27, 2016) (unpublished), [scribd.com/document/337536365/S-D-A-A-AXXX-XXX-716-BIA-Dec-27-2016](https://www.scribd.com/document/337536365/S-D-A-A-AXXX-XXX-716-BIA-Dec-27-2016) (approved SIJS petition; reopening *in absentia* removal order).

²⁰⁷ See, e.g., *Lassana Dembele*, A075-835-755 (BIA Dec. 22, 2017) (unpublished), [scribd.com/document/369893495/Lassama-Dembele-A075-835-755-BIA-Dec-22-2017?secret_password=rolwAbBsGoKmlXxG7W](https://www.scribd.com/document/369893495/Lassama-Dembele-A075-835-755-BIA-Dec-22-2017?secret_password=rolwAbBsGoKmlXxG7W) (noting other positive discretionary factors such as lack of criminal record, history of employment and payment of taxes, lengthy residence in the United States, and seven U.S. citizen children); *Tunde Olayinka Awaye*, A076-971-012 (BIA July 1, 2016) (unpublished), [scribd.com/document/318844376/Tunde-Olayinka-Awaye-A076-971-012-BIA-July-1-2016](https://www.scribd.com/document/318844376/Tunde-Olayinka-Awaye-A076-971-012-BIA-July-1-2016); *Luis Eduardo Munoz-*

- Evidence that the respondent feared return to her home country due to past abuse by her partner²⁰⁸
- Evidence of an approved VAWA self-petition²⁰⁹
- DACA recipient had obtained permission to travel on advance parole to visit her mother after surgery, but could not depart the United States with an outstanding removal order without “self-deporting”²¹⁰
- To pursue voluntary departure,²¹¹ including where the IJ failed to advise *pro se* respondent of the option of voluntary departure²¹²
- To pursue adjustment of status after living in the United States for a lengthy time period with DACA,²¹³ and
- So that respondent could pursue I-601A waiver while residing in the United States.²¹⁴

In some situations, a request for *sua sponte* reopening may be based on the applicant’s having already obtained lawful status. In such situations, the applicant may be asking the IJ or BIA to reopen and terminate at the same time based on the person’s having lawful status. Examples of situations where the BIA has reopened *sua sponte* and terminated in light of the applicant already having lawful status include:

- Where the respondent obtained U nonimmigrant status²¹⁵
- Where the respondent adjusted status through a U visa,²¹⁶ and

Castellon, A094-230-428 (BIA Sept. 24, 2015) (unpublished), [scribd.com/document/285938690/Luis-Eduardo-Munoz-Castellon-A094-230-428-BIA-Sept-24-2015](https://www.scribd.com/document/285938690/Luis-Eduardo-Munoz-Castellon-A094-230-428-BIA-Sept-24-2015)

²⁰⁸ Iris Jeanette Benites-Maurisio, A099-679-349 (BIA Sept. 3, 2015) (unpublished), [scribd.com/document/281170813/Iris-Jeanette-Benites-Maurisio-A099-679-349-BIA-Sept-3-2015](https://www.scribd.com/document/281170813/Iris-Jeanette-Benites-Maurisio-A099-679-349-BIA-Sept-3-2015) (rescinding *in absentia* order and reopening proceedings).

²⁰⁹ E-F-, AXXX-XXX-802 (BIA May 5, 2015) (unpublished), [scribd.com/doc/265986142/E-F-AXXX-XXX-802-BIA-May-5-2015](https://www.scribd.com/doc/265986142/E-F-AXXX-XXX-802-BIA-May-5-2015).

²¹⁰ Yessica Mayeli Colatl-Coyotl, A200-599-796 (BIA Oct. 6, 2016) (unpublished), [scribd.com/document/328157753/Yessica-Mayeli-Colatl-Coyotl-A200-599-796-BIA-Oct-6-2016](https://www.scribd.com/document/328157753/Yessica-Mayeli-Colatl-Coyotl-A200-599-796-BIA-Oct-6-2016).

²¹¹ Rosa Amparo Salmeron, A072-163-739 (BIA Oct. 24, 2013) (unpublished), [scribd.com/document/182343652/Rosa-Amparo-Salmeron-A072-163-739-BIA-Oct-24-2013](https://www.scribd.com/document/182343652/Rosa-Amparo-Salmeron-A072-163-739-BIA-Oct-24-2013); Carlos Andres Palaez, A096-985-160 (BIA Sept. 27, 2013) (unpublished), [scribd.com/doc/178496061/Carlos-Andres-Palaez-A096-985-160-BIA-Sept-27-2013](https://www.scribd.com/doc/178496061/Carlos-Andres-Palaez-A096-985-160-BIA-Sept-27-2013).

²¹² Jose Israel Chavarria-Reyes, A206-274-376 (BIA Apr. 10, 2017) (unpublished), [scribd.com/document/346342741/Jose-Israel-Chavarria-Reyes-A206-274-376-BIA-April-10-2017](https://www.scribd.com/document/346342741/Jose-Israel-Chavarria-Reyes-A206-274-376-BIA-April-10-2017).

²¹³ Melissa Rincon Hernandez, A079-492-482 (BIA June 7, 2018) (unpublished), [scribd.com/document/382795381/Melissa-Rincon-Hernandez-A079-492-482-BIA-June-7-2018?secret_password=0invHidLZdNlfmUo2UhZ](https://www.scribd.com/document/382795381/Melissa-Rincon-Hernandez-A079-492-482-BIA-June-7-2018?secret_password=0invHidLZdNlfmUo2UhZ) (reopening proceedings *sua sponte* to allow the respondent to apply for adjustment of status in light of her lengthy residence in the United States and prior grant of DACA).

²¹⁴ Juan Luis Avalos Avalos, A205-834-943 (BIA Dec. 31, 2013) (unpublished), [scribd.com/document/198429668/Juan-Luis-Avalos-Avalos-A205-834-943-BIA-Dec-31-2013](https://www.scribd.com/document/198429668/Juan-Luis-Avalos-Avalos-A205-834-943-BIA-Dec-31-2013) (remanding for IJ for further consideration because IJ gave insufficient reasoning for his decision).

²¹⁵ Zhi Feng Zhou, A073-874-177 (BIA May 23, 2018) (unpublished), [scribd.com/document/382793842/Zhi-Feng-Zhou-A073-874-177-BIA-May-23-2018?secret_password=WhfufgxdODTybISjaQCm](https://www.scribd.com/document/382793842/Zhi-Feng-Zhou-A073-874-177-BIA-May-23-2018?secret_password=WhfufgxdODTybISjaQCm).

²¹⁶ Lilian Karla Dias-Gomes, A098-723-878 (BIA Feb. 12, 2020) (unpublished), [scribd.com/document/452083654/Lilian-Karla-Dias-Gomes-A098-723-878-BIA-Feb-12-2020](https://www.scribd.com/document/452083654/Lilian-Karla-Dias-Gomes-A098-723-878-BIA-Feb-12-2020).

- Where the respondent has acquired derivative asylee status.²¹⁷

DACA Context. Given the characteristics discussed in section II above, many DACA recipients may be or may become eligible for relief that was unavailable at the time of the removal proceedings, such as non-LPR cancellation of removal,²¹⁸ family-based adjustment, or humanitarian relief like VAWA or U nonimmigrant status. DACA recipients with potential asylum claims may also consider making *sua sponte* arguments in the alternative to statutory arguments based on changed country conditions, as discussed in section IV.A.5. While the statutory argument is certainly preferable, an alternative *sua sponte* argument may be warranted particularly in cases where there are hurdles to meeting the statutory requirements, such as if the asylum claim is based on changed personal circumstances but it may be more difficult to show changed country conditions.

b. Sua Sponte - Ineffective Assistance of Counsel

Ineffective assistance of counsel can serve as a basis for seeking *sua sponte* reopening. As discussed above, it can also be grounds for argument that the 90-day deadline should be tolled.²¹⁹ Practitioners may want to argue for both in the alternative, as the BIA may be more inclined in some instances to grant *sua sponte* reopening than to recognize that the requirements for equitable tolling have been met. On the other hand, federal court review of a denied untimely motion may be more likely if based on equitable tolling rather than *sua sponte* authority.²²⁰ In unpublished decisions, the BIA has granted *sua sponte* reopening due to counsel error in circumstances including:

- The respondent missed the filing deadline set by the IJ for submitting an application for cancellation of removal due to his representative's admitted error²²¹

[2020?secret_password=MloYT4V70OfyWj2lZrDd](#) (reopening and terminating proceedings *sua sponte* in light of adjustment from U to LPR status).

²¹⁷ A-N-A-, AXXX-XXX-918 (BIA Jan. 22, 2020) (unpublished), [scribd.com/document/447698692/A-N-A-AXXX-XXX-918-BIA-Jan-22-2020?secret_password=v0lSQlOY84EgCSBORQ7m](#) (reopens and terminates proceedings *sua sponte* in light of grant of derivative asylee status); Ming Yue Piao, A096-187-617 (BIA Dec. 15, 2016) (unpublished), [scribd.com/document/337533566/Ming-Yue-Piao-A096-187-617-BIA-Dec-15-2016](#) (approved I-730); Yu Qing Chen, A077-977-214 (BIA Oct. 20, 2016) (unpublished), [scribd.com/document/330537440/Yu-Qing-Chen-A077-977-214-BIA-Oct-20-2016](#); Jin Wei Gao, A079-692-001 (BIA Jan. 31, 2007) (unpublished), [scribd.com/document/339404202/Jin-Wei-Gao-A079-692-001-BIA-Jan-31-2007](#).

²¹⁸ In assessing cancellation eligibility, practitioners would need to look at the date the original NTA was served and analyze whether the NTA stop-time rule operated to terminate the period of continuous physical presence before the required ten years was accrued. While beyond the scope of this practice advisory, representatives may also find information about *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) useful. See CLINIC, *Practice Advisory: Pereira v. Sessions—Updated Strategies and Considerations* (Dec. 3, 2019), [cliniclegal.org/resources/removal-proceedings/practice-advisory-strategies-and-considerations-wake-pereira-v.](#)

²¹⁹ See *supra* section IV.A.2-3.

²²⁰ See *supra* note 202 and accompanying text.

²²¹ *Luis Alberto Sosa-Alvarado*, A200-718-257 (BIA Jan. 17, 2017) (unpublished), [scribd.com/document/339309391/Luis-Alberto-Sosa-Alvarado-A200-718-257-BIA-Jan-17-2017](#).

- The respondent’s counsel failed to identify relevant immigration relief, including failure to develop or present an asylum claim,²²² or
- The respondent’s former attorney did not tell him about the hearing until the night before (respondent lived in New York and the hearing was in Atlanta), resulting in an *in absentia* removal order.²²³ In this case, the BIA had previously denied the motion for failure to comply with *Lozada* and granted the motion after *Lozada* compliance.

c. Sua Sponte – Claim to Acquired U.S. Citizenship

Another basis for *sua sponte* reopening that has been recognized by the BIA in unpublished decisions is where there is a claim to acquired or derived²²⁴ U.S. citizenship.

A person may have acquired U.S. citizenship at birth despite being born abroad if at least one U.S. citizen parent meets the relevant requirements of residence in the United States.²²⁵ The law governing how long a U.S. citizen parent must have resided in the United States in order to convey citizenship to a child born abroad has changed over the years.²²⁶ The length of time the parent must have lived in the United States before their child born abroad will acquire citizenship depends on which law was in effect on the date of the child’s birth and whether the child was born in or out of wedlock. For example, for children born in wedlock on or after November 14, 1986, to one U.S. citizen and one noncitizen parent, the U.S. citizen parent must have been physically present in the United States or its possessions for at least five years prior to the child’s birth, two of which were after the parent turned 14 years of age.²²⁷ If the child was born out of wedlock to a U.S. citizen father, the statute specifies

²²² D-O-B-O, AXXX-XXX-857 (BIA Dec. 17, 2019) (unpublished), [scribd.com/document/443776092/D-O-B-O-AXXX-XXX-857-BIA-Dec-17-2019?secret_password=mXs7CHGnrrMzJq1hirO4](https://www.scribd.com/document/443776092/D-O-B-O-AXXX-XXX-857-BIA-Dec-17-2019?secret_password=mXs7CHGnrrMzJq1hirO4); F-M-A-, AXXX-XXX-656 (BIA July 13, 2015) (unpublished), [scribd.com/document/274420825/F-M-A-AXXX-XXX-656-BIA-July-13-2015](https://www.scribd.com/document/274420825/F-M-A-AXXX-XXX-656-BIA-July-13-2015); but see *Matter of R-C-R-*, 28 I&N Dec. 74 (BIA 2020) (holding that “[a]fter an Immigration Judge has set a firm deadline for filing an application for relief, the respondent’s opportunity to file the application may be deemed waived, prior to a scheduled hearing, if the deadline passes without submission of the application and no good cause for noncompliance has been shown”).

²²³ *Tashthed Haider Kabir*, A096-114-231 (BIA Jan. 21, 2011) (unpublished), [scribd.com/document/173113823/Tashthed-Haider-Kabir-A096-114-231-BIA-Jan-21-2011](https://www.scribd.com/document/173113823/Tashthed-Haider-Kabir-A096-114-231-BIA-Jan-21-2011).

²²⁴ It is unlikely that DACA recipients derived U.S. citizenship under the current and former law. One of the conditions of derivative citizenship is obtaining lawful permanent residency. Under such circumstances, a child would not have needed DACA. For more information on derivation of citizenship by children born abroad, practitioners should refer to the Immigrant Legal Resource Center’s (ILRC) chart on this topic. ILRC, *Chart C: Derivative Citizenship - Lawful Permanent Resident Children Gaining Citizenship through Parents’ Citizenship* (July 2020), <https://www.ilrc.org/acquisition-derivation-quick-reference-charts>.

²²⁵ INA §§ 301, 309.

²²⁶ Per the U.S. Supreme Court, both unwed fathers and unwed mothers are currently subject to the same physical presence requirements under INA § 301(g). See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (holding that on or after June 13, 2017 unwed mothers would be subject to the same five-year physical presence requirement in INA § 301(g) as unwed fathers and married couples).

²²⁷ INA §301(g).

that proof of legitimation and of meeting other eligibility requirements must be provided.²²⁸ A child born out of wedlock may qualify as legitimate if they were born in a country or state that has eliminated all legal distinctions between children based on the marital status of their parents, or had a residence or domicile in such a country or state (including a state within the United States).²²⁹ If the child's parent does not meet the physical presence requirement, the child may rely on the physical presence of the child's U.S. citizen grandparent to meet the requirement.²³⁰ Like the citizen parent, a grandparent's physical presence is calculated in the aggregate and includes time accrued in the United States during periods when the grandparent was not a U.S. citizen.²³¹ For more information on acquisition of citizenship by children born abroad, practitioners should refer to the ILRC charts setting out the requirements for acquisition of citizenship by children born abroad.²³²

The BIA has granted *sua sponte* reopening for citizenship claims in circumstances such as where:

- The respondent submitted proof that the Department of State had issued him a passport, even though the IJ and BIA had previously denied his citizenship claim,²³³
- The respondent submitted evidence that he may have derived citizenship from his father under former INA § 321(a),²³⁴
- The respondent derived citizenship under former INA § 321(a) based on intervening circuit court rulings interpreting the meaning of custody,²³⁵ and

²²⁸ INA § 309(a); see *Miller v. Albright*, 523 U.S. 420, 431 (1998); *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (discussing legitimation in Mexico); *Anderson v. Holder*, 673 F.3d 1089, 1097-1101 (9th Cir. 2012); *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006) (discussing legitimation in Guyana) (overruled in part); *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008) (discussing legitimation in Jamaica) (overruled in part).

²²⁹ *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015).

²³⁰ INA § 322(a)(2)(B).

²³¹ See USCIS, *Policy Manual*, Vol. 12, Pt. H, Ch. 5, uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter5.html.

²³² ILRC, *Chart A: Determining Whether Children Born Outside the U.S. Acquired Citizenship at Birth* (July 2020), ilrc.org/sites/default/files/resources/natz_chart-a-2020-7-14.pdf; ILRC, *Chart B: Acquisition of Citizenship Determining If Children Born Abroad Out of Wedlock Acquired U.S. Citizenship at Birth* (July 2020), ilrc.org/sites/default/files/resources/natz_chart_b-7-14-20.pdf.

²³³ *Nidal Shawkat Salem*, A046-010-157 (BIA Oct. 24, 2016) (unpublished), scribd.com/document/330538575/Nidal-Shawkat-Salem-A046-010-157-BIA-Oct-24-2016 (remanding to IJ for further proceedings rather than terminating).

²³⁴ *Trokon Douglas Smith*, A045-161-654 (BIA Oct. 20, 2019) (unpublished), scribd.com/document/437041830/Trokon-Douglas-Smith-A045-161-654-BIA-Oct-20-2019?secret_password=A87MTPZkHn8s26HfyoP.

²³⁵ *David Anderson Payne*, A035-187-615 (BIA Oct. 22, 2018) (unpublished), scribd.com/document/393730534/David-Anderson-Payne-A035-187-615-BIA-Oct-22-2018?secret_password=ElxSZVklCimllpXr23Rm.

- The respondent submitted evidence that he had derived citizenship while under the age of 18, including copies of his green card and birth certificate and a copy of his mother’s naturalization certificate.²³⁶

DACA Context. The mass deportations of Mexicans from the 1930s until the 1950s ensnared U.S. citizens of Hispanic origin.²³⁷ There may thus be DACA recipients who have a U.S. citizen parent or parents or U.S. citizen grandparents who themselves may be unaware of their own claim to U.S. citizenship but may nonetheless have transmitted citizenship at birth to the DACA recipient. For this reason, it is important to ask about the citizenship of grandparents in addition to the citizenship of parents, which could establish a claim to acquired U.S. citizenship.

d. Sua Sponte - Humanitarian Reasons

The BIA may also grant *sua sponte* reopening where there are compelling equities and the applicant demonstrates the availability of some form of relief. Examples of cases with available relief where the BIA granted *sua sponte* reopening citing humanitarian factors include:

- The respondent presented evidence of U.S. citizen immediate family members serving in the Armed Forces²³⁸
- The respondent presented evidence of a serious medical problem affecting the respondent or a U.S. citizen or lawful permanent resident family member²³⁹

²³⁶ Heyman Martinez, A073-661-308 (BIA July 27, 2012) (unpublished), [scribd.com/document/148370353/Heyman-Martinez-A073-661-308-BIA-July-27-2012](https://www.scribd.com/document/148370353/Heyman-Martinez-A073-661-308-BIA-July-27-2012) (remanding for further proceedings before the IJ).

²³⁷ Eyder Peralta, *It Came Up in the Debate: Here Are 3 Things to Know About “Operation Wetback,”* NPR, Nov. 11, 2015, npr.org/sections/thetwo-way/2015/11/11/455613993/it-came-up-in-the-debate-here-are-3-things-to-know-about-operation-wetback.

²³⁸ Gyu Seon Oh, A098-666-025 (BIA June 23, 2020) (unpublished), [scribd.com/document/470812968/Gyu-Seon-Oh-A098-666-025-BIA-June-23-2020?secret_password=koKj4JTL5BJMBQAIittY](https://www.scribd.com/document/470812968/Gyu-Seon-Oh-A098-666-025-BIA-June-23-2020?secret_password=koKj4JTL5BJMBQAIittY) (reopening *sua sponte* to allow the respondents to adjust status based on an approved visa petition filed by their U.S. citizen child who is a member of the military on active duty); N-K-C-, AXXX-XXX-948 (BIA July 8, 2020) (unpublished), [scribd.com/document/473846635/N-K-C-AXXX-XXX-948-BIA-July-8-2020?secret_password=qcKfYSqtrjEaxdeFbFBa](https://www.scribd.com/document/473846635/N-K-C-AXXX-XXX-948-BIA-July-8-2020?secret_password=qcKfYSqtrjEaxdeFbFBa) (reopening *sua sponte* due to the potential hardship to the respondent’s U.S. citizen spouse, a military veteran who was injured in service and has serious medical needs); Rolando Protocarrero Tello, 097-659-598 (BIA Sept. 5, 2017) (unpublished), [scribd.com/document/360078234/Rolando-Protocarrero-Tello-A097-659-598-BIA-Sept-5-2017](https://www.scribd.com/document/360078234/Rolando-Protocarrero-Tello-A097-659-598-BIA-Sept-5-2017) (remanding for consideration of adjustment or status or any other available relief).

²³⁹ Alhaji Shoku Lamin, A079-236-239 (BIA July 18, 2017) (unpublished), [scribd.com/document/357068700/Alhaji-Shoku-Lamin-A079-236-239-BIA-July-18-2017](https://www.scribd.com/document/357068700/Alhaji-Shoku-Lamin-A079-236-239-BIA-July-18-2017) (respondent had sickle cell disease and had approved I-130 petition based on a U.S. citizen spouse); Kanubhai Lalbhai Bhatt, A073-183-507 (BIA Oct. 28, 2013) (unpublished), [scribd.com/document/183270217/Kanubhai-Lalbhai-Bhatt-A073-183-507-BIA-Oct-28-2013](https://www.scribd.com/document/183270217/Kanubhai-Lalbhai-Bhatt-A073-183-507-BIA-Oct-28-2013) (LPR wife had serious health issues); Jose Adan Robles, A-073-567-320 (BIA Aug. 30, 2011) (unpublished), [scribd.com/doc/199158553/Jose-Adan-Robles-A073-567-320-BIA-Aug-30-2011](https://www.scribd.com/doc/199158553/Jose-Adan-Robles-A073-567-320-BIA-Aug-30-2011) (respondent presented evidence of the medical condition of the mother of his U.S. citizen children; remanded to apply for cancellation).

- The respondent presented evidence that her spouse struggled with mental illness²⁴⁰
- The respondent who had resided in the United States since age 3, presented evidence that he is a stellar student, helps his mother care for his two young U.S. citizen brothers, was abandoned and neglected by his father, and has no caretakers in his country of nationality²⁴¹
- The respondent presented evidence that she was a young child when ordered removed and only learned of the removal order when USCIS denied her application to adjust status based on her marriage to a U.S. citizen²⁴²
- The respondent was ordered removed from the United States as a child and later held deferred action, and presented evidence that he feared returning to his native country on account of his sexual orientation,²⁴³ and
- The respondent presented evidence of significant ties, including length of presence in the United States and U.S. citizen family members.²⁴⁴

DACA Context. Due to the nature of the DACA benefit, DACA recipients will likely have multiple compelling humanitarian factors they can emphasize in a request for *sua sponte* reopening, such as length of time in the United States, U.S. citizen or permanent resident family members, family service in the Armed Forces, and educational attainment. Of course, equities should be presented along with evidence and arguments of new, previously unavailable evidence that would likely have changed the outcome, such as eligibility for a previously unavailable form of immigration relief. Practitioners can argue that the grant of DACA itself is a compelling humanitarian factor in support of *sua sponte* reopening.

B. Motions to Reopen for Individuals with *In Absentia* Orders

An *in absentia* order can be reopened by filing a motion to rescind and reopen under INA § 240(b)(5)(C).²⁴⁵ It is important to note that the current law governing reopening of *in absentia* orders

²⁴⁰ C-H-, AXXX-XXX-200 (BIA Feb. 3, 2020) (unpublished), [scribd.com/document/447702119/C-H-AXXX-XXX-200-BIA-Feb-3-2020?secret_password=VBoTCgGcTcRvx6DCOm2Y](https://www.scribd.com/document/447702119/C-H-AXXX-XXX-200-BIA-Feb-3-2020?secret_password=VBoTCgGcTcRvx6DCOm2Y) (reopening *sua sponte* for respondent to adjust of status with a waiver in light of evidence that the respondent's husband was diagnosed with major depression alcohol abuse, intermittent explosive disorder, and personality disorders, complicated by her unsettled immigration status).

²⁴¹ J-E-, AXXX-XXX-542 (BIA May 26, 2020) (unpublished), [scribd.com/document/466555947/J-E-AXXX-XXX-542-BIA-May-26-2020?secret_password=N9YTiA7Kjniu1pfy6alq](https://www.scribd.com/document/466555947/J-E-AXXX-XXX-542-BIA-May-26-2020?secret_password=N9YTiA7Kjniu1pfy6alq).

²⁴² Natalia Cristina Concha Cavieres, A095-448-983 (BIA May 28, 2020) (unpublished), [scribd.com/document/466557132/Natalia-Cristina-Concha-Cavieres-A095-448-983-BIA-May-28-2020?secret_password=O3Kdy9DsW9wx74hm4mQm](https://www.scribd.com/document/466557132/Natalia-Cristina-Concha-Cavieres-A095-448-983-BIA-May-28-2020?secret_password=O3Kdy9DsW9wx74hm4mQm).

²⁴³ O-E-Z-R-, AXXX-XXX-864 (BIA April 1, 2019) (unpublished), [scribd.com/document/406502249/O-E-Z-R-AXXX-XXX-864-BIA-April-1-2019?secret_password=C7Y51PytIEX6zzt3qg0W](https://www.scribd.com/document/406502249/O-E-Z-R-AXXX-XXX-864-BIA-April-1-2019?secret_password=C7Y51PytIEX6zzt3qg0W).

²⁴⁴ Cristobal Villatoro, A077-751-555 (BIA Jan. 31, 2017) (unpublished), [scribd.com/document/339404020/Cristobal-Villatoro-A077-751-555-BIA-Jan-31-2017](https://www.scribd.com/document/339404020/Cristobal-Villatoro-A077-751-555-BIA-Jan-31-2017) (adjustment-eligible and had approved petition with current visa number).

²⁴⁵ For further resources on reopening of *in absentia* orders, see Asylum Seeker Advocacy Project & CLINIC, *A Guide to Assisting Asylum Seekers with In Absentia Removal Orders* (Dec. 2016, updated July 2019), [cliniclegal.org/resources/guide-assisting-asylum-seekers](https://www.cliniclegal.org/resources/guide-assisting-asylum-seekers) [hereinafter "Guide for Asylum Seekers with *In Absentia*"]

went into effect on April 1, 1997. For individuals whose proceedings commenced prior to that date, different rules apply.²⁴⁶ This section will focus on statutory motions to rescind and reopen under INA § 240(b)(5)(C).

Even if a respondent does not meet one of the statutory bases discussed below for a motion to rescind and reopen an *in absentia* order, the regulations discussed in sections IV.A.6 and IV.A.7 above apply in the *in absentia* context and provide for reopening without a deadline where DHS joins the motion or in an exercise of the court's *sua sponte* authority. Practitioners should review sections IV.A.6 and IV.A.7 for a discussion of joint and *sua sponte* motions. When crafting *sua sponte* arguments, practitioners should review unpublished BIA decisions finding *sua sponte* reopening warranted in the *in absentia* context.²⁴⁷ Unlike statutory motions to rescind and reopen an *in absentia* order discussed here, the regulatory motions do not provide an automatic stay of removal, and judicial review of BIA decisions on this type of motion may be more limited than for statutory motions. For these reasons, where possible, practitioners should assert regulatory grounds in the alternative to one or more of the statutory bases. For example, where applicable, practitioners should argue *sua sponte* reopening in addition to a tolling of the 180-day deadline for extraordinary circumstances based statutory motions, discussed below.

Where applicable, and although the statute indicates different reopening rules for *in absentia* orders, practitioners filing a motion to reopen within 90 days of the *in absentia* removal order may argue under both general motion to reopen rules described at INA § 240(c)(7) and the *in absentia* rules.²⁴⁸ Practitioners should argue both statutes in order to preserve any and all possible statutory arguments. The mechanisms for reopening under INA § 240(c)(7) are discussed above in section IV.A.1.

Orders”]; AIC *In Absentia* Practice Advisory, *supra* note 62. The authors relied heavily on these helpful resources in writing this section.

²⁴⁶ INA § 242B (pre-IIRIRA statute); see AIC *In Absentia* Practice Advisory, *supra* note 62 (discussing legal frameworks that applied before June 13, 1992 and before April 1, 1997).

²⁴⁷ See, e.g., *Katherine Bonilla-Cortez*, A097-398-782 (BIA April 25, 2019) (unpublished), [scribd.com/document/411263570/Katherine-Bonilla-Cortez-A097-398-782-BIA-April-25-2019?secret_password=WPeugBF5jShqXRIM7WO](https://www.scribd.com/document/411263570/Katherine-Bonilla-Cortez-A097-398-782-BIA-April-25-2019?secret_password=WPeugBF5jShqXRIM7WO) (rescinding an *in absentia* order *sua sponte* given the respondent's very young age when the order was entered and subsequent receipt of deferred action); *A-A-R-C-*, AXXX-XXX-104 (BIA Dec. 20, 2017) (unpublished), [scribd.com/document/369893062/A-A-R-C-AXXX-XXX-104-BIA-Dec-20-2017?secret_password=ae4f7wFtZb0U0xlOojdN](https://www.scribd.com/document/369893062/A-A-R-C-AXXX-XXX-104-BIA-Dec-20-2017?secret_password=ae4f7wFtZb0U0xlOojdN) (reopening *sua sponte* where the respondent was five years old when her parents abandoned her in the United States and she was potentially eligible for SIJS. The child had been in proceedings with her father, who had been personally served and had failed to change his address with the court); *Isela Esmeralda Hernandez-Reyes*, A098-719-936 (BIA Dec. 9, 2016) (unpublished), [scribd.com/document/334719052/Isela-Esmeralda-Hernandez-Reyes-A098-719-936-BIA-Dec-9-2016](https://www.scribd.com/document/334719052/Isela-Esmeralda-Hernandez-Reyes-A098-719-936-BIA-Dec-9-2016) (reopening an 11-year old *in absentia* order where the parties had jointly filed a motion to reopen); *Bilal Hassan Dyook*, A076-305-737 (BIA July 22, 2015) (unpublished), [scribd.com/document/274512169/Bilal-Hassan-Dyook-A076-305-737-BIA-July-22-2015](https://www.scribd.com/document/274512169/Bilal-Hassan-Dyook-A076-305-737-BIA-July-22-2015) (reopening 14-year old *in absentia* order where the parties had filed a joint motion to reopen and terminate for the respondent to pursue adjustment of status).

²⁴⁸ See *Matter of Monges-Garcia*, 25 I&N Dec. 246 (BIA 2010) (90-day motion to reopen an *in absentia* deportation order was proper vehicle in order to pursue adjustment of status).

1. Did the Respondent Fail to Appear?

The *in absentia* provisions apply to a noncitizen who “does not attend” a removal proceeding after written notice.²⁴⁹ A first line of attack to consider is whether the respondent really failed to appear. In some situations, a respondent may have come to court on the day of the hearing but a removal order was issued because they arrived late. Some federal courts and the BIA in unpublished decisions have concluded that a late arrival is not a failure to appear. These arguments may be particularly successful where the respondent arrived while the IJ was still on the bench,²⁵⁰ arrived only a short amount of time after the hearing,²⁵¹ or there were other unforeseen reasons for the late arrival such as car trouble.²⁵² In these circumstances, the practitioner can argue that the *in absentia* order was issued in error and the case should be reopened on that basis.²⁵³

²⁴⁹ INA § 240(a)(5)(A).

²⁵⁰ *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008) (respondent arrived two hours late due to car failure while IJ still in courtroom); *Frida Solis Valero*, A204-965-006 (BIA Jan. 9, 2020) (unpublished), [scribd.com/document/447695494/Frida-Solis-Valero-A204-965-006-BIA-Jan-9-2020?secret_password=IPYtyFK7UkHBQEIRCTzO](https://www.scribd.com/document/447695494/Frida-Solis-Valero-A204-965-006-BIA-Jan-9-2020?secret_password=IPYtyFK7UkHBQEIRCTzO) (stating that the respondent’s late arrival did not constitute a failure to appear because the IJ was still on the bench when she arrived); *Sukhdev Singh*, A209-154-612 (BIA Aug. 25, 2017) (unpublished), [scribd.com/document/360077856/Sukhdev-Singh-A209-154-612-BIA-Aug-25-2017](https://www.scribd.com/document/360077856/Sukhdev-Singh-A209-154-612-BIA-Aug-25-2017); *Mingyue Hu*, A205-625-592 (BIA May 19, 2017) (unpublished), [scribd.com/document/351904150/Mingyue-Hu-A205-625-592-BIA-May-19-2017](https://www.scribd.com/document/351904150/Mingyue-Hu-A205-625-592-BIA-May-19-2017).

²⁵¹ See, e.g., *Abu Hasirah v. DHS*, 478 F.3d 474 (2d Cir. 2007) (respondent was 15 minutes delayed; holding that “brief, innocent lateness does not constitute a failure to appear”); *Cabrera Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006) (respondent arrived 15 to 20 minutes late; concluding that “[w]hen the delay is as short as it was here, there have been no prior instances of tardiness, and the IJ is either still on the bench or recently retired and close by, it is a due process violation to treat the tardiness as a failure to appear”); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005) (respondent arrived 20 minutes late; concluding that “[w]hen . . . (1) there is no failure but only a slight tardiness, (2) the IJ is either still on the bench or recently retired and still close by, and (3) the time of the immigrant’s delayed arrival is still during ‘business hours,’ it is an abuse of discretion-if not worse-to treat such slight tardiness as a non-appearance”); *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999) (respondent was 15 to 20 minutes late and arrived while IJ still on the bench; concluding failure to reopen or continue “unreasonably deprived Jerezano of his due process right to a full and fair hearing”); *Jesus Flores-Lopez*, A209-946-545 (BIA July 2, 2020) (unpublished), [scribd.com/document/473846081/Jesus-Flores-Lopez-A209-946-545-BIA-July-2-2020?secret_password=suHtsbfKsdcTDtZs5oam](https://www.scribd.com/document/473846081/Jesus-Flores-Lopez-A209-946-545-BIA-July-2-2020?secret_password=suHtsbfKsdcTDtZs5oam) (respondent did not fail to appear where he arrived 20 minutes late to hearing and IJ was still on the bench); *Lucas Hernandez-Domingo*, A200-277-081 (BIA Sept. 19, 2019) (unpublished) (concluding that the respondent did not fail to appear where he was less than an hour late to his hearing because he did not realize his case was transferred to a different courthouse) [scribd.com/document/431712207/Lucas-Hernandez-Domingo-A200-277-081-BIA-Sept-19-2019?secret_password=jkUmNGd7DwObCBojje3N](https://www.scribd.com/document/431712207/Lucas-Hernandez-Domingo-A200-277-081-BIA-Sept-19-2019?secret_password=jkUmNGd7DwObCBojje3N); *Gabino Rolando Cortez-Talavera*, A096-748-656 (BIA July 10, 2015) (unpublished), [scribd.com/document/274419844/Gabino-Rolando-Cortez-Talavera-A095-748-656-BIA-July-10-2015](https://www.scribd.com/document/274419844/Gabino-Rolando-Cortez-Talavera-A095-748-656-BIA-July-10-2015) (respondent arrived 30 minutes late). But see *Thomas v. INS*, 976 F.2d 786 (1st Cir. 1992) (reopening not warranted where respondent and counsel arrived 10 minutes late).

²⁵² *Higinio Rivas-Diaz*, A208-362-593 (BIA July 18, 2017) (unpublished), [scribd.com/document/357068801/Higinio-Rivas-Diaz-A208-362-593-BIA-July-18-2017](https://www.scribd.com/document/357068801/Higinio-Rivas-Diaz-A208-362-593-BIA-July-18-2017).

²⁵³ If filing the motion to reopen within 90 days of the removal order, practitioners may seek to argue under the general motion to reopen rules that the *in absentia* removal order was issued in error. In addition, practitioners may argue that the IJ’s finding that the individual failed to appear constituted an exceptional circumstance.

2. Did DHS Meet Its Burden to Prove Removability by “Clear, Unequivocal, and Convincing Evidence”?

The *in absentia* removal provision is triggered when a noncitizen fails to appear at a removal hearing “if the Service establishes by clear, unequivocal, and convincing evidence . . . that the alien is removable.”²⁵⁴ Practitioners should carefully examine the record of proceedings to determine whether there are arguments that DHS failed to meet its burden to prove removability. Practitioners should examine whether the documents submitted by DHS are unreliable and whether DHS submitted sufficient evidence to support the charge of removability.²⁵⁵ For example, in an unpublished decision from September of 2017, the BIA granted the respondent’s motion to reopen and terminated removal proceedings.²⁵⁶ In that case, the 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.” The BIA noted that the source of the information in the Form I-213 was an adult male who at first claimed to be the child’s father but was not, and that the I-213 stated that the source of information about the child was a guardian who was not present at the border encounter. In these circumstances, practitioners should argue that reopening and termination is warranted because DHS did not meet its burden to prove removability by clear, unequivocal, and convincing evidence.²⁵⁷

Practitioners should consider additional arguments for clients whose *in absentia* order was issued against them as a child, grounded in regulatory protections required in children’s cases. Immigration regulations prohibit the IJ from accepting an admission of removability from an unrepresented and unaccompanied child under the age of 18.²⁵⁸ In such cases, the IJ must “direct a hearing on the

²⁵⁴ INA § 240(a)(5)(A).

²⁵⁵ *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); see also *Jorge Ronaldo Perez-Natareno*, A077-398-964 (BIA June 13, 2018) (unpublished), [scribd.com/document/382795738/Jorge-Ronaldo-Perez-Natareno-A077-398-964-BIA-June-13-2018?secret_password=tQHkZLNHs7DQpyg1M73G](https://www.scribd.com/document/382795738/Jorge-Ronaldo-Perez-Natareno-A077-398-964-BIA-June-13-2018?secret_password=tQHkZLNHs7DQpyg1M73G) (finding that DHS did not establish his removability by clear, unequivocal, and convincing evidence at the hearing in which the IJ ordered removal *in absentia*).

²⁵⁶ *Jordan Omar Nunez-Zepeda*, A097-315-824 (BIA Sept. 29, 2017) (unpublished), [scribd.com/document/362583713/Jordan-Omar-Nunez-Zepeda-A097-315-824-BIA-Sept-29-2017](https://www.scribd.com/document/362583713/Jordan-Omar-Nunez-Zepeda-A097-315-824-BIA-Sept-29-2017) (reopening where the NTA was not properly served and where the Form I-213 was not reliable).

²⁵⁷ See also Helen Lawrence et al., *Practice Advisory: Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, at 18-19 (Mar. 2015), <https://helenlawrencelaw.com/wp-content/uploads/2015/03/Suppression-Termination-PA-without-Appendices.pdf> (discussing reliability concerns with I-213s in children’s cases). If more than 180 days have passed since the removal order’s issuance, practitioners could argue that the 180-day deadline should not apply where DHS has not met its burden to prove removability, could argue for equitable tolling, and could argue for *sua sponte* reopening in the alternative. Of course, if notice arguments are available as well, those should be included.

²⁵⁸ 8 CFR § 1240.10(c) (covering children “not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend”).

issues.”²⁵⁹ In *Matter of Amaya*, the BIA noted that the regulations presume that a minor is “incapable of determining whether a charge applies to him.”²⁶⁰ The BIA thus held that an IJ “must exercise particular care” in determining removability, taking into account the child’s “age and pro se and unaccompanied status,” and conducting a “comprehensive and independent inquiry” to determine “where there is clear, unequivocal, and convincing evidence” to support the NTA charge(s).²⁶¹ The IJ “must consider the reliability of the testimony given by such a minor in response to the factual allegations made against him.”²⁶² Another regulation directs that all children apprehended by DHS must be given Form I-770, Notice of Rights and Disposition.²⁶³ If the child is under 14 or unable to understand the notice, it must be read to the child in a language they understand.²⁶⁴ Given these special protections and after listening to the recording of the hearing, practitioners should consider arguments that the IJ did not conduct the *in absentia* hearing with the particular care required in determining removability of a *pro se* child and that the ground(s) of removability was thus not established by “clear, unequivocal, and convincing evidence” as required to proceed *in absentia*.

3. Statutory Bases to Rescind and Reopen In Absentia Orders

The statute provides for rescission and reopening of an *in absentia* order where: (1) the respondent did not receive proper notice; (2) the respondent was in federal or state custody and the failure to appear was not the fault of the respondent; or (3) exceptional circumstances caused the failure to appear.²⁶⁵ Filing a motion to rescind and reopen based on any of these grounds results in an automatic stay of removal while the motion is pending with the IJ.²⁶⁶

a. Notice-Based Arguments: No Deadline

Motions to rescind and reopen *in absentia* removal orders based on lack of notice can be filed at any time.²⁶⁷ The respondent must be served with the charging document, called the Notice to Appear or NTA (pre-IRIRA — meaning pre-April 1, 1997 — it was called an Order to Show Cause or OSC), and must receive written notice of all hearings. Certain information must be provided in the NTA in order for it to constitute sufficient notice. That information includes the nature of the proceedings, the legal authority for the proceedings, the alleged conduct of the respondent and

²⁵⁹ *Id.*

²⁶⁰ *Matter of Amaya*, 21 I&N Dec. 583, 586 (BIA 1996).

²⁶¹ *Id.* at 587.

²⁶² *Id.*

²⁶³ 8 CFR § 236.3(h).

²⁶⁴ *Id.*

²⁶⁵ INA § 240(a)(5)(C).

²⁶⁶ *Id.* In *in absentia* deportation cases commenced before April 1, 1997, the stay continues if the IJ denies the motion to reopen and the individual appeals to the BIA. See *Matter of Rivera*, 21 I& Dec. 232, 234 (BIA 1996).

²⁶⁷ INA § 240(a)(5)(C)(ii); 8 CFR § 1003.23(b)(4)(iii)(A)(2).

charges, with statutory provisions alleged to have been violated.²⁶⁸ The NTA must also inform the respondent of the option of being represented by counsel, the obligation to inform the court of change in address or phone number and the consequences of failing to do so, and the consequences of failing to appear at removal proceedings.²⁶⁹ The hearing notice must inform the respondent of the time and place of the hearing and the consequences of failure to appear.²⁷⁰ The NTA similarly should state the time and place of hearing, and where this information is missing, practitioners should preserve the issue for appeal in light of ongoing litigation.²⁷¹

In proceeding *in absentia*, DHS must prove that the respondent received written notice as described in the above paragraph.²⁷² The rules governing proper service differ depending on whether the noncitizen's proceedings started before IIRIRA went into effect on April 1, 1997 or after. For removal proceedings that began on or after April 1, 1997, service can be effectuated either through personal service or by mail, including attempted delivery by regular mail to the last address provided by the respondent and mail to counsel of record.²⁷³ For respondents whose charging document (then called an Order to Show Cause) was issued on or after June 13, 1992, but before April 1, 1997, service could be made personally or by certified mail to the respondent or the respondent's counsel of record.²⁷⁴ If service of the charging document was done through certified mail, a certified mail receipt had to be signed by the respondent or a responsible person at that address.²⁷⁵ For respondents whose cases started before June 13, 1992, service could be accomplished by personal service or routine service; however, if a respondent did not appear for the hearing or acknowledge receipt in writing after routine service, then personal service was required, which included certified mail and required that the respondent or another responsible person in the household sign the return receipt.²⁷⁶

²⁶⁸ INA § 240(a)(5)(A), referencing INA § 239(a)(1) & (2). For pre-IIRIRA requirements, see former INA § 242B(a)(1)(A)-(D).

²⁶⁹ INA § 239(a)(1)(E), (F), (G). For pre-IIRIRA requirements, see former INA § 242B(a)(1)(E)-(F).

²⁷⁰ INA § 239(a)(2). For pre-IIRIRA requirements, see former INA § 242B(a)(2).

²⁷¹ See CLINIC, *Practice Advisory: Pereira v. Sessions—Updated Strategies and Considerations* (Dec. 3, 2019), cliniclegal.org/resources/removal-proceedings/practice-advisory-strategies-and-considerations-wake-pereira-v.

²⁷² INA § 240(a)(5).

²⁷³ INA § 239(c) ("Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F)."); INA § 239(a)(1); 8 CFR § 1003.13.

²⁷⁴ INA § 242B(a)(1) (effective June 13, 1992; now repealed); see *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995) ("...[i]n cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises," which "may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service.").

²⁷⁵ *Grijalva*, 21 I&N Dec. at 32.

²⁷⁶ See former INA § 242(b)(1) (repealed); 8 CFR § 242.1(c) (repealed); 8 CFR § 103.5a(a)(2) (no longer in effect), redesignated as 8 CFR § 103.8 and revised by 76 Fed. Reg. 53781 (Aug. 29, 2011); *Matter of Huete*, 20 I&N Dec. 250 (BIA 1991).

Rebuttable Presumption of Delivery by Mail. There is a presumption of delivery when a notice is sent by certified mail.²⁷⁷ This presumption can be overcome by showing that the Postal Service did not deliver or improperly delivered the document.²⁷⁸ There is a weaker presumption of effective delivery for notices sent by regular mail that were “properly addressed mailed according to normal office procedures.”²⁷⁹ The IJ must consider “all relevant evidence” when deciding if a respondent can overcome the presumption of delivery for documents sent by regular mail, including:

- Declarations from the respondent and others who are knowledgeable about whether notice was received
- “[T]he respondent’s actions upon learning of the *in absentia* order, and whether due diligence was exercised in seeking to redress the situation”
- Any prior applications for relief that would indicate an incentive to appear, and
- The respondent’s prior appearance at immigration proceedings, if applicable.²⁸⁰

Practitioners evaluating a notice-based challenge to an *in absentia* order should look at BIA cases as well as U.S. court of appeals decisions in their circuit discussing the presumption of delivery and what types of evidence have been deemed sufficient to overcome the presumption.²⁸¹

Service by Mail to the Respondent. When service of the NTA is accomplished by mail and the respondent fails to appear at a removal hearing, a notice-based challenge to an *in absentia* removal order can be made if the address where the NTA was mailed was an address provided before the person was in removal proceedings and thus before receiving notice of the requirement to update the address for removal proceedings purposes.²⁸² This type of challenge will not be successful if the NTA was mailed to the correct address but the person failed to collect their mail.²⁸³ If the notice was sent to the correct address but the respondent did not receive it “through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper

²⁷⁷ *Grijalva*, 21 I&N Dec. at 37.

²⁷⁸ *Id.*

²⁷⁹ *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008).

²⁸⁰ *Id.* at 674; *Matter of C-R-C-*, 24 I&N Dec. 677, 680 (BIA 2008) (respondent overcame presumption of delivery of NTA sent by regular mail where he submitted “an affidavit claiming that he has continued to reside at the address to which the Notice to Appear was sent,” demonstrated “he had an incentive to appear at proceedings,” and exercised “diligence in promptly seeking to redress the situation by obtaining counsel and requesting reopening”).

²⁸¹ See, e.g., *Hernandez v. Lynch*, 825 F.3d 266 (5th Cir. 2016); *Diaz v. Lynch*, 824 F.3d 758 (8th Cir. 2016); *Sanchez v. Holder*, 627 F.3d 226 (6th Cir. 2010); *Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156 (2d Cir. 2008); *Kozak v. Gonzales*, 502 F.3d 34 (1st Cir. 2007); *Santana Gonzalez v. Att’y Gen.*, 506 F.3d 274 (3d Cir. 2007); *Sembiring v. Gonzales*, 499 F.3d 981 (9th Cir. 2007); *Lopes v. Gonzales*, 468 F.3d 81 (2d Cir. 2006); *Nibagwire v. Gonzales*, 450 F.3d 153 (4th Cir. 2006); *Maknojija v. Gonzales*, 432 F.3d 588 (5th Cir. 2005); *Ghounem v. Ashcroft*, 378 F.3d 740 (8th Cir. 2004); *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002).

²⁸² *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001).

²⁸³ *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.”).

service will have been effected.”²⁸⁴ If a notice was sent to an incorrect address because a respondent failed to keep the court updated as required after receiving notice of these requirements on the NTA, a notice-based challenge will likely fail.²⁸⁵ However, there may be a strong argument for reopening based on lack of notice where the government delayed filing the NTA with the court, thereby preventing the respondent from updating their address with the immigration court as instructed in the NTA, and the respondent moved and attempted to otherwise update the government concerning the address change.²⁸⁶ Therefore, practitioners should assess whether the respondent met the obligation to provide the new address to the government before DHS filed the NTA with the Immigration Court.²⁸⁷

Service on the Legal Representative. Service on the respondent’s attorney is considered proper service.²⁸⁸ If the attorney did not inform the respondent of the hearing after the attorney received notice, this failure to communicate may be a basis for a motion to reopen based on ineffective assistance of counsel. For further information on requirements for ineffective of assistance of counsel-based motions to reopen, see section IV.A.3 above.

Special Service Rules for Children. Special rules govern service of the NTA in cases of child respondents. The regulations provide specific instructions for service of an NTA in the case of a child under 14 years of age. In such cases, the service “shall be made upon the person with whom . . . the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend.”²⁸⁹ If a child will be residing with a parent in the United States, the BIA has interpreted the regulations to require “service on the parents, whenever possible, in addition to service that may be made on an accompanying adult or more distant relative.”²⁹⁰ The Ninth Circuit has more stringent service rules for children, requiring that where a child under the age of 18 is released from immigration custody to a parent or relative’s custody, the adult assuming custody of the minor must be served.²⁹¹ Thus, for individuals with *in absentia* orders who were served the NTA before the age of 14 (or in the Ninth Circuit, before the age of 18), noticed-based challenges to the order can be made when DHS “fail[s] to demonstrate clear, unequivocal, and convincing evidence

²⁸⁴ *Matter of G-Y-R-*, 23 I&N Dec. at 189 (citing *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995)).

²⁸⁵ See INA § 240(a)(5)(A).

²⁸⁶ *Fuentes-Pena v. Barr*, 917 F.3d 827 (5th Cir. 2019).

²⁸⁷ See Guide for Asylum Seekers with *In Absentia* Orders, *supra* note 245 (discussing *Fuentes-Pena v. Barr*, 917 F.3d 827 (5th Cir. 2019)).

²⁸⁸ INA § 239(a)(1); INA § 242B(a) (repealed; pre-IRIRA); see, e.g., *Cruz Gomez v. Lynch*, 801 F.3d 695 (6th Cir. 2015); *Garcia v. INS*, 222 F.3d 1208 (9th Cir. 2000). In the Ninth Circuit, if a respondent is represented and a notice of appearance has been filed, service on the respondent without serving the representative is not considered adequate service. *Hamazaspian v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009). *But see Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997). Practitioners outside the Ninth Circuit should examine whether precedent would allow for a similar argument, where applicable.

²⁸⁹ 8 CFR § 103.8(c)(2)(ii).

²⁹⁰ *Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002).

²⁹¹ *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004).

of proper service of the Notice to Appear” under the more stringent notice requirements for minors.²⁹²

DACA Context. Many DACA recipients with *in absentia* orders may have received those orders at a young age. For children who were under 14 at the time the NTA was served, there may be arguments for notice-based rescission and reopening if there is no proof that the NTA was served on a responsible adult as required by the regulation found at 8 CFR § 103.8(c)(2)(ii).²⁹³ Those who resided within the jurisdiction of the Ninth Circuit, had been released from federal custody to an adult, and were under 18 at the time the NTA was served, can argue for notice-based rescission and reopening if there is no proof that the responsible adult was served with the NTA as required by *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004).

Others may be able to formulate notice arguments grounded in other age-based theories in two scenarios. First, if the hearing notice was mailed to the adult caretaker who never informed the child respondent. In *Matter of G-Y-R-*, the BIA stated that “[a]n alien can, in certain circumstances, be properly charged with receiving notice, even though he or she did not personally see the mailed document.”²⁹⁴ In that case, the BIA stated that if the NTA “reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper service will have been effected.” Second, if the notice was sent to the adult caretaker, who did give it to the child respondent, but due to the child’s age they did not understand the notice. In *Matter of G-Y-R-*, the BIA stated that respondent need not “personally receive, read, and understand the Notice to Appear for the notice requirements to be satisfied.”²⁹⁵ In both scenarios, practitioners might argue that the minimum due process requirements for children are different, and distinguish this case on the basis of the age and mental incapacity of the child respondent who was dependent on the caretaker to provide him or her with notice.

Respondent in Custody When *In Absentia* Order Entered. The statute also allows for rescission and reopening of an *in absentia* order where the respondent was in custody at the time of its issuance and was not responsible for the failure to appear.²⁹⁶ For example, a respondent who failed to appear because they were being held in federal ICE or Office of Refugee Resettlement (ORR) custody or federal or state criminal custody and was not transported to their hearing could file a motion to rescind and reopen on this ground.²⁹⁷ There is no filing deadline for this type of motion to

²⁹² *Mejia-Andino*, 23 I&N Dec. at 537.

²⁹³ This was the case in *Matter of Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002). At the time of the *Mejia-Andino* decision, the regulation was found at 8 CFR § 103.5a(c)(2)(ii); 8 CFR § 103.5a was redesignated as 8 CFR § 103.8 by 76 Fed. Reg. 53781 (Aug. 29, 2011).

²⁹⁴ *Matter of G-Y-R-*, 23 I&N Dec. 181, 189 (BIA 2001).

²⁹⁵ *Id.*

²⁹⁶ INA § 240(a)(5)(C)(ii); 8 CFR § 1003.23(b)(4)(iii)(A)(2).

²⁹⁷ See *Benjamin Milton Geovani Gale Vargas*, A205-718-884 (BIA Oct. 31, 2014) (unpublished), [scribd.com/document/246506097/Benjamin-Milton-Geovani-Gale-Vargas-A205-718-884-BIA-Oct-31-2014](https://www.scribd.com/document/246506097/Benjamin-Milton-Geovani-Gale-Vargas-A205-718-884-BIA-Oct-31-2014) (rescinding and reopening where respondent was in California county jail at time of *in absentia* hearing); *Matter of Evra*,

reopen.²⁹⁸ Practitioners should investigate whether this ground applies by ascertaining where the DACA recipient client was residing at the time of the order's issuance, looking for instances where, for example, they were in ORR custody or state custody related to criminal charges, foster care, or delinquency.

No Oral Notice of Consequences for Failure to Appear and Respondent Eligible for Relief. The BIA in *Matter of M-S*²⁹⁹ analyzed a prior version of the statute discussing limitations on discretionary relief for those with *in absentia* orders. The statutory language, now found at INA § 240(a)(7), states that if a respondent is “provided oral notice, either in the alien’s native language or in another language the alien understands, of the time and place of the proceedings and of the consequences . . . of failing . . . to attend” removal proceedings, they are barred from certain relief for ten years. The BIA held that a respondent who was not given these required oral warnings and qualified for relief that was not available at the time of the *in absentia* hearing could file a motion to reopen, under the “regular” rules governing motions to reopen, rather than the rules for rescinding and reopening an *in absentia* order.³⁰⁰

b. Exceptional Circumstances-Based Arguments: 180-Day Deadline or Argue Equitable Tolling

The statute also provides for rescission and reopening of an *in absentia* order “if the alien demonstrates that the failure to appear was because of exceptional circumstances.”³⁰¹ The statute defines this term as “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.”³⁰² An exceptional circumstances-based motion must be filed within 180 days of the order. For deportation proceedings that commenced before June 13, 1992 and for exclusion proceedings, there is no deadline for filing a motion to reopen an *in absentia* order, and a less strict “reasonable cause” standard applies.³⁰³

To decide whether a respondent’s failure to appear was the result of exceptional circumstances, the BIA has directed that a “totality of the circumstances” test be used to look at the reasons why the

25 I&N Dec. 79 (BIA 2009) (the fact that a respondent is arrested and jailed for criminal conduct does not constitute “fault” for purposes of the *in absentia* provision).

²⁹⁸ INA § 240(a)(5)(C)(ii); 8 CFR § 1003.23(b)(4)(iii)(A)(2).

²⁹⁹ *Matter of M-S*, 22 I&N Dec. 349 (BIA 1998).

³⁰⁰ The rules include a filing deadline of 90 days from the time of the removal order. No automatic stay accompanies this type of motion to reopen, unlike the motion to rescind and reopen an *in absentia* removal order under INA § 240(b)(5)(C). See *supra* section IV.A.1.

³⁰¹ INA § 240(b)(5)(C)(i).

³⁰² INA § 240(e)(1).

³⁰³ *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1159 (BIA 1999); *Matter of N-B-*, 22 I&N Dec. 590, 593 (BIA 1999); *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

respondent did not appear.³⁰⁴ Practitioners should examine BIA case law and precedents in their jurisdiction that discuss what amounts to exceptional circumstances. For example, while serious illness may be an exceptional circumstance under INA § 240(e)(1), the BIA in *Matter of J-P*.³⁰⁵ concluded that a respondent's headache was not. In that case the BIA found it relevant that the respondent had failed to provide evidence that the headache was serious such as details regarding its severity, cause, or treatment, medical records, affidavits from witnesses "attesting to the extent of his disability and the remedies used," or evidence of absence from work. The BIA also found that the fact that the respondent had not attempted to contact the immigration court to notify it of his absence undermined his exceptional circumstance claim.³⁰⁶ The BIA has found that ineffective assistance of counsel may amount to an exceptional circumstance.³⁰⁷ There are excellent practice advisories available discussing exceptional circumstances and examining precedential cases as well as unpublished BIA decisions.³⁰⁸

Equitable Tolling. While the BIA has not recognized equitable tolling of the 180-day deadline in a published decision,³⁰⁹ every U.S. court of appeals that has addressed the issue in a published decision has found equitable tolling applies.³¹⁰ Equitable tolling generally is discussed above at section IV.A.2. Practitioners should review precedents in their jurisdiction to examine the viability of equitable tolling arguments for a motion to rescind and reopen an *in absentia* order that is more than 180 days old based on exceptional circumstances.

DACA Context. Most likely, a DACA recipient with an *in absentia* order received it a long time ago, before they requested or received DACA. Were it not for the deadline problem, many DACA recipients might have compelling exceptional circumstances arguments for why they failed to attend

³⁰⁴ *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996) (concluding that being on a fishing boat for work was not an exceptional circumstance).

³⁰⁵ *Matter of J-P-*, 22 I&N Dec 33 (BIA 1998).

³⁰⁶ See also *Matter of B-A-S-*, 22 I&N Dec. 57 (BIA 1998) (respondent's foot injury not an exceptional circumstance where he did not explain why he did not contact the immigration court before the hearing and did not provide supporting documentation such as medical records).

³⁰⁷ *Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996); *Matter of Rivera*, 21 I&N Dec. 599 (BIA 1996) (must meet *Lozada* requirements).

³⁰⁸ See Guide for Asylum Seekers with *In Absentia* Orders, *supra* note 245; AIC *In Absentia* Practice Advisory, *supra* note 62.

³⁰⁹ See *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998). But see *Seidi Elda Sandoval Landero*, A088-056-174 (BIA Nov. 20, 2015) (unpublished), [scribd.com/document/293444660/Seidi-Elda-Sandoval-Landero-A088-056-174-BIA-Nov-20-2015](https://www.scribd.com/document/293444660/Seidi-Elda-Sandoval-Landero-A088-056-174-BIA-Nov-20-2015); *Luis Alfredo Castro*, A200-226-899 (BIA Oct. 29, 2015) (unpublished), [scribd.com/document/290079633/Luis-Alfredo-Castro-A200-226-899-BIA-Oct-29-2015](https://www.scribd.com/document/290079633/Luis-Alfredo-Castro-A200-226-899-BIA-Oct-29-2015).

³¹⁰ See, e.g., *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357, 1364 n.4 (11th Cir. 2013) (en banc); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); see also *Davies v. INS*, 10 Fed. App'x 223, 224 (4th Cir. 2001) (per curiam) (unpublished); cf. *Vaz Dos Reis v. Holder*, 606 F.3d 1, 4 n.3 (1st Cir. 2010) (noting that the First Circuit has not decided this question); *Pafe v. Holder*, 615 F.3d 967, 968 (8th Cir. 2010) (per curiam) (noting that the Eighth Circuit has not decided this issue in the *in absentia* motion to reopen context); *Scorteanu v. INS*, 339 F.3d 407, 413 (6th Cir. 2003) (not reaching issue of tolling in the *in absentia* context).

the hearing. If an exceptional circumstances-based motion to rescind and reopen is untimely under the 180-day statutory deadline, practitioners should examine whether equitable tolling of the deadline may be available. Practitioners should argue for equitable tolling of the 180-day deadline and make *sua sponte* arguments in the alternative.

C. Strategies for Overcoming the Ten-Year Bar to Immigration Relief After Overstaying a Grant of Voluntary Departure³¹¹

Respondents who fail to depart after a grant of voluntary departure are ineligible to pursue certain immigration relief including adjustment of status, cancellation of removal, and voluntary departure for a period of ten years under INA § 240B(d)(1)(B), or five years if the voluntary departure order was issued in proceedings commenced before April 1, 1997.³¹² Depending on the jurisdiction, this relief bar may apply even if the individual is successful in obtaining reopening of the removal order.³¹³ In many cases, DACA recipients have received voluntary departure more than five or ten years ago, in which case the voluntary departure five- or ten-year bar to seeking “any further relief” under specified parts of the INA would no longer apply.³¹⁴ However, the removal order remains and will impede many adjustment of status options. During past administrations, DHS was willing to join motions to reopen in cases in which the respondent had a departure order from over ten years ago and presented an adjustment of status option.

However, DACA recipients whose failure to depart was due to exceptional circumstances (pre-IIRIRA) or was involuntary (post-IIRIRA) may not be subject to the failure to depart consequences.³¹⁵ Prior to the enactment of IIRIRA, the penalty for failure to depart contained an “exceptional circumstances” exception for failing to depart within the allotted time.³¹⁶ The term “exceptional circumstances” meant “exceptional circumstances (such as serious illness of the alien or death of an

³¹¹ For a more in-depth discussion of potential strategies, see AIC Voluntary Departure Advisory, *supra* note 42.

³¹² See INA § 240B(d)(1)(B) (rendering respondent “ineligible, for a period of 10 years,” for voluntary departure under section 240B, cancellation of removal under section 240A, adjustment of status under section 245, change of nonimmigrant classification under section 248, and registry benefits under section 249); INA § 242B(e)(2)(A) (repealed) (applying to individuals whose proceedings commenced prior to April 1, 1997 and making the noncitizen ineligible for five years “after the scheduled date of departure or the date of unlawful reentry” for the following relief: voluntary departure under former section 242(b)(1), suspension of deportation or voluntary departure under former section 244, and adjustment or change of status under section 245, 248, or 249).

³¹³ Compare *Orichitch v. Gonzales*, 421 F.3d 595 (7th Cir. 2005) (concluding that reopening eliminates the ten-year relief bar) with *Odogwu v. Gonzales*, 217 F. App’x 194, 197 (4th Cir. 2007) (unpublished); *DaCosta v. Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006); *Singh v. Gonzales*, 468 F.3d 135, 139-40 (2d Cir. 2006).

³¹⁴ Under former INA § 242B(e)(2)(A), the five-year penalty period begins to run “after the scheduled date of departure or the date of unlawful reentry.” Under current INA § 240B(d)(1)(B), the individual “shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 240A, 245, 248, and 249.”

³¹⁵ In 1996, Congress amended the penalty provision for failure to depart pursuant to a grant of voluntary departure in a number of ways. IIRIRA eliminated the “exceptional circumstances” exception and added a new clause specifying that the penalties apply to an alien who “fails voluntarily to depart.” See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. at 3009-597.

³¹⁶ INA § 242B(e)(2)(A) (repealed).

immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.”³¹⁷ IIRIRA eliminated the “exceptional circumstances” exception and added a new narrow exception at INA § 240B(d)(1) specifying that the penalties apply to an individual who “voluntarily fails to depart.”³¹⁸ The BIA has held that an individual who “through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart” does not incur the failure to depart penalties.³¹⁹ The BIA reasoned that for the bar to come into effect, the failure to depart must be voluntary, and thus a “respondent who, through no fault of her own, remains unaware of the grant of voluntary departure until after the period for voluntary departure has expired cannot be said to have ‘voluntarily’ failed to depart within the period of voluntary departure.”³²⁰ Proving the “voluntariness” exception is thus a basis for reopening the removal order that resulted from failure to depart on an order of voluntary departure, by showing that relief is not barred by section 240B(d)(1).

The voluntary departure statute also provides an exception to the ten-year relief bar for individuals seeking VAWA cancellation, adjustment of status through a VAWA self-petition, or suspension of removal under former INA § 244(a)(3), if “extreme cruelty or battery was at least one central reason for the alien’s overstaying the grant of voluntary departure.”³²¹

DACA Context. For DACA recipients who failed to depart after a grant of voluntary departure, practitioners should explore arguments that the failure to depart was not voluntary and thus the ten-year bar to relief should not apply.³²² These arguments may be particularly compelling for those DACA recipients who were very young when the voluntary departure order was issued and thus could not understand the consequences of not leaving and were not able to leave on their own, or who were subjected to ineffective assistance of counsel.³²³ For example, in *Matter of Zmijewska*,³²⁴ the respondent’s attorney accepted voluntary departure without consulting with the respondent or obtaining the respondent’s informed consent resulting in ineffective assistance of counsel. In unpublished cases, the BIA has concluded in certain circumstances, that a respondent’s failure to depart was not voluntary and did not trigger the ten-year bar for relief. For example, in one case the respondent was nine years old at the time of the voluntary departure order and “due to her young age, she did not understand the consequences of not leaving under the voluntary departure order,

³¹⁷ INA § 242B(e)(2)(B) (repealed).

³¹⁸ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. at 3009-597.

³¹⁹ *Matter of Zmijewska*, 24 I&N Dec. 87, 94 (BIA 2007).

³²⁰ *Id.*

³²¹ INA § 240B(d)(2).

³²² If the voluntary departure order was issued in proceedings that commenced before IIRIRA’s effective date, the DACA recipient would be bound by the broader exceptional circumstances standard.

³²³ See *Flores-Panameno v. U.S. Att’y Gen.*, 913 F.3d 1036 (11th Cir. 2019) (questioning the voluntariness of the noncitizen’s decision to accept voluntary departure where she received ineffective assistance of counsel).

³²⁴ *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007).

and was likely unable to depart on her own.”³²⁵ As children at the time of the voluntary departure order, DACA recipients would have been financially dependent on an adult and limited in physical mobility. It would thus be unreasonable to expect a child lacking independence to clear the logistical and financial hurdles to voluntarily depart from the United States. Such voluntariness exception arguments would serve as the basis for seeking reopening *sua sponte* in cases where relief is otherwise available, thus removing the ten-year bar to immigration relief caused by failure to depart. In addition, practitioners should also explore notice-based arguments that the bar does not apply, such as analyzing whether the client received proper notice of the voluntary departure order and whether proper advisals were given at time of the voluntary departure grant.³²⁶

D. Legal Remedies for DACA Recipients with Reinstatement Orders

Some DACA recipients will be subject to reinstatement of a prior removal order, be it an IJ order or a DHS order. These DACA recipients would likely have departed the United States following an order of removal and then been brought back to the United States illegally before the age of 16. Before discussion of potential avenues to relief for DACA recipients with reinstatement orders, it is helpful to briefly summarize the reinstatement process.

The INA provides for reinstatement of removal for noncitizens who reentered the United States illegally after being removed or departing voluntarily under a removal order.³²⁷ In such circumstances, “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed,” the noncitizen is barred from seeking most relief from removal, and “shall be removed under the prior order at any time after the reentry.”³²⁸ There is no IJ hearing in reinstatement proceedings.³²⁹ In reinstatement proceedings, the regulations require that the immigration officer make several determinations:

³²⁵ E-R-, AXXX-XXX-571 (BIA Dec. 21, 2016) (unpublished), [scribd.com/document/337535116/E-R-AXXX-XXX-571-BIA-Dec-21-2016](https://www.scribd.com/document/337535116/E-R-AXXX-XXX-571-BIA-Dec-21-2016); see also Valerie Lee Maedgen, A093-407-562 (BIA May 30, 2014) (unpublished), [scribd.com/document/234123443/Valerie-Lee-Maedgen-A093-407-562-BIA-May-30-2014](https://www.scribd.com/document/234123443/Valerie-Lee-Maedgen-A093-407-562-BIA-May-30-2014) (failure to depart not voluntary where respondent stayed in United States relying on promise made by IJ to reopen proceedings if the I-130 was granted during the voluntary departure period).

³²⁶ See, e.g., INA § 240B(d)(3) (“The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.”); 8 CFR § 1240.26(c)(3) (before granting voluntary departure, IJ must inform the respondent of conditions to be imposed and give him or her opportunity to decline); 8 CFR § 240.25(b) (“A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.”).

³²⁷ Certain individuals are exempt from reinstatement proceedings. For a listing of exempt groups, see American Immigration Council & National Immigration Project of the National Lawyers Guild, *Practice Advisory: Reinstatement of Removal*, at 3 (May 23, 2019), [americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf) [hereinafter “Reinstatement Practice Advisory”]. The authors relied heavily on this helpful advisory in drafting this section.

³²⁸ INA § 241(a)(5); see *supra* section III.B.2.

³²⁹ 8 CFR § 241.8(a).

- That the noncitizen has been subject to a prior removal order. The officer “must obtain the prior order.”³³⁰
- “The identity of the alien, i.e. whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation or removal.” If identity is disputed, the officer must compare the subject’s fingerprints with those of the individual previously removed. If there are no fingerprints and identity is disputed, the noncitizen “shall not be removed” through reinstatement proceedings.³³¹
- That the noncitizen unlawfully reentered the United States. The officer must consider “all relevant evidence” in making this determination including any statement or evidence from the noncitizen. If the noncitizen claims to have been lawfully admitted, the officer must “attempt to verify” the claim including checking government records.³³²

If the officer makes the above determinations and proceeds with reinstatement, they must give the noncitizen written notice of the determination and advise the noncitizen that they can make a statement contesting the determination.³³³ If the noncitizen makes a statement contesting the determination, the officer must consider whether the statement warrants reconsideration of the reinstatement determination.³³⁴

If the noncitizen expresses a fear of returning to the country of origin, they “shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture.”³³⁵ The noncitizen can be represented by counsel at the non-adversarial interview.³³⁶ If the noncitizen is determined by the asylum officer to have a reasonable fear of persecution or torture, they are referred to the immigration court for “withholding-only” removal proceedings during which the regulations provide that the noncitizen is limited to seeking withholding and/or CAT protection before the IJ.³³⁷ If the asylum officer does not find a reasonable fear, the noncitizen can have the decision reviewed by an IJ.³³⁸ The IJ can affirm the asylum officer’s negative

³³⁰ 8 CFR § 241.8(a)(1).

³³¹ 8 CFR § 241.8(a)(2).

³³² 8 CFR § 241.8(a)(3).

³³³ 8 CFR § 241.8(b). If the noncitizen is represented, the representative should also be provided notice. 8 CFR 292.5(a).

³³⁴ 8 CFR § 241.8(b).

³³⁵ 8 CFR § 241.8(e).

³³⁶ 8 CFR § 208.31(c).

³³⁷ 8 CFR § 208.31(e). Some courts of appeals have held that a noncitizen in this situation is barred from applying for asylum. See, e.g., *Mejia v. Sessions*, 866 F.3d 573 (4th Cir. 2017); *Cazun v. Att’y Gen.*, 856 F.3d 249 (3d Cir. 2017); *Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1074-82 (9th Cir. 2016); *Jimenez-Morales v. Att’y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489-90 (5th Cir. 2015). Given the ongoing litigation on this issue, and depending on the facts of the case, practitioners may want to preserve the statutory and international law arguments that the government should not preclude asylum seekers from applying for asylum in withholding-only proceedings before an IJ.

³³⁸ 8 CFR § 208.31(f), (g).

reasonable fear determination, in which case the noncitizen cannot appeal to the BIA,³³⁹ but may seek review of the reinstatement order and the negative reasonable fear determination by filing a petition for review directly with the relevant U.S. court of appeals.³⁴⁰ Or the IJ can vacate the negative reasonable fear determination, in which case the noncitizen proceeds with withholding-only removal proceedings.³⁴¹

While some DACA recipients will want to seek withholding and/or CAT,³⁴² which would serve as a legal remedy to a reinstated order of removal, others will want to approach DHS to seek that agency's exercise of some form of prosecutorial discretion, such as by cancelling the reinstatement order and instituting section 240 removal proceedings instead.³⁴³ Because the likelihood of prosecutorial discretion will depend on the administration, practitioners should consider challenging the reinstatement order, a negative reasonable fear determination, and/or, the ultimate denial of withholding and/or CAT relief in withholding-only proceedings. If a DACA recipient is currently being subjected to reinstatement proceedings, the representative should ask for a copy of all documents related to the proceedings.³⁴⁴ If the DACA recipient has signed any documents or waived any rights, the practitioner may request to withdraw those signatures and waivers immediately, supplementing the record with any evidence supporting withdrawal. The practitioner also should submit a statement contesting the reinstatement determination where there is a basis to do so, and seek to review the evidence with the client to determine whether there are viable arguments to be made.³⁴⁵ It is important to make a record before ICE in order to preserve the issue for potential federal court review.

³³⁹ 8 CFR § 208.31(g)(1). There is no appeal of an IJ's decision concurring with the asylum officer that there is no reasonable fear of persecution or torture. *Id.*

³⁴⁰ See below discussion about U.S. court of appeals review of a reinstatement order.

³⁴¹ 8 CFR § 208.31(g)(2).

³⁴² If the DACA recipient has a fear of return, the practitioner could assist the DACA recipient in asserting fear and scheduling a reasonable fear interview with an asylum officer. The practitioner should inform the ICE deportation officer orally and in writing that the DACA recipient has a fear of returning and requests a reasonable fear interview. The practitioner can also contact the Asylum Office with jurisdiction explaining that the DACA recipient has requested a reasonable fear interview through ICE and is awaiting scheduling. The practitioner should help the client to prepare ahead of the reasonable fear interview and attend the interview. See Katharine Ruhl & Christopher Strawn, *Accessing Protection at the Border: Pointers on Credible Fear and Reasonable Fear Interviews*, Immigration Practice Pointers (2015), AILA Doc. 14072246a, aila.org/infonet.

³⁴³ See *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1081 (9th Cir. 2016) (noting that "the government has discretion to forgo reinstatement and instead place an individual in ordinary removal proceedings"); *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) (noting the agency has "discretion to afford an alien a new plenary removal hearing"). If for some reason a client is not subjected to the reasonable fear process and instead ICE places the individual in the credible fear interview process and/or issues an NTA and places the individual into removal proceedings pursuant to INA § 240, practitioners could argue that DHS has applied favorable discretion and the noncitizen is thus not subject to reinstatement. Should DHS attempt to file a motion to terminate the proceedings to institute reinstatement proceedings, practitioners should oppose such a motion.

³⁴⁴ See 8 CFR § 292.5(a) (discussing notice and service rights for representatives generally); 8 CFR § 241.8(b) (requiring DHS to provide written notice of reinstatement determination to noncitizen).

³⁴⁵ 8 CFR § 241.8(b).

If a reinstatement order is issued, the practitioner can appeal the order to the relevant U.S. court of appeals through a petition for review (PFR) filed within thirty days of the order.³⁴⁶ There is no automatic stay of removal when seeking PFR review of a reinstatement order; instead the petitioner can file a motion for a judicial stay of removal with the same U.S. court of appeals where the PFR is filed.³⁴⁷ A thorough discussion of possible arguments that could be raised in a PFR is beyond the scope of this advisory.³⁴⁸ Arguments to consider might include:

- The individual is a U.S. citizen³⁴⁹
- There is no prior removal order
- The individual never departed under an order of removal and was never removed
- The individual's reentry was legal
- DHS failed to follow the regulations governing reinstatement proceedings (such as verification of identity, obtaining the prior order, or asking if the noncitizen has a fear of return), resulting in prejudice, and
- It may be possible to attack the underlying (prior) removal order, although jurisdiction-stripping provisions could make this difficult. Practitioners should research and determine whether the U.S. court of appeals in their jurisdiction would conclude that it has jurisdiction to consider the legality of the underlying order.³⁵⁰

³⁴⁶ INA § 242(b)(1). All courts of appeals have concluded there is jurisdiction to review reinstatement orders under INA § 242(b)(1). See *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004); *Warner v. Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001). Practitioners should research the case law of the relevant jurisdiction to determine whether the circuit has also found jurisdiction to review the negative reasonable fear determination. See, e.g., *Ayala v. Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2017) (finding jurisdiction to review the negative reasonable fear determination); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 831 (9th Cir. 2016). The deadline for filing a petition for review for a reinstatement of removal order is 30 days from the date of the order, i.e., the date DHS signed the bottom portion of Form I-871 (Decision, Order and Officer's Certification). INA § 242(b)(1); *Lemos v. Holder*, 636 F.3d 365, 366-67 (7th Cir. 2011); *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 342-43 (1st Cir. 2004). However, where a noncitizen indicates a fear of return and DHS refers that noncitizen for a reasonable fear interview before an asylum officer, some circuits have held expressly that the 30-day petition for review clock does not begin until the conclusion of reasonable fear proceedings. See, e.g., *Ponce-Osorio v. Johnson*, 824 F.3d 502 (5th Cir. 2016); *Jimenez-Morales v. Atty. Gen.*, 821 F.3d 1307 (11th Cir. 2016); *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015); *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012). As a practical matter, unless and until this issue is resolved by the Supreme Court, practitioners may consider filing a petition for review within 30 days of the reinstatement order as a protective measure, and a second petition for review at the conclusion of reasonable fear proceedings in order to preserve an individual's right to judicial review.

³⁴⁷ See CLINIC Stay Advisory, *supra* note 98.

³⁴⁸ For further information about remedies for reinstatement orders, practitioners should consult Reinstatement Practice Advisory, *supra* note 327.

³⁴⁹ See INA § 242(b)(5).

³⁵⁰ See INA § 241(a)(5); INA § 242(a)(2)(D). For further discussion see Reinstatement Practice Advisory, *supra* note 327.

In reviewing a challenge to a reinstatement order or negative fear-based determination through a PFR, the U.S. court of appeals is limited to the administrative record before it, and the IJ's and DHS's factual findings are viewed as "conclusive unless any reasonable adjudicator would be compelled to the contrary."³⁵¹ Thus practitioners should be sure that the record below has the necessary evidence to support the arguments, including by supplementing the administrative record before DHS.

It may also be possible to seek reopening or reconsideration of the reinstatement order, or the underlying order, by filing an administrative motion to reopen or reconsider with DHS under 8 CFR § 103.5 or, if an IJ issued the original removal order, seeking reopening of the underlying order with the IJ.³⁵² If the individual is not already in reinstatement proceedings, but has reentered unlawfully, filing a motion to reopen or reconsider a prior order could trigger ICE detention, reinstatement proceedings, and/or criminal prosecution for illegal reentry after removal. It is important to discuss risks and benefits of any strategy with the client before proceeding so that the client can make an informed decision.³⁵³

None of the strategies discussed above confers an automatic stay of removal; it would instead be necessary to seek a discretionary stay with the appropriate entity.

V. Practical Considerations for Motions to Reopen

A. Investigating the Case and Preparing the Motion to Reopen

Providing clients with removal orders accurate information about their options is key. To meet this goal, it is necessary first to gather as much information as possible about the client's immigration history and particularly their previous removal order(s). In situations where the client's previous DHS encounter was at the border, it can be especially difficult to ascertain with certainty whether the client has an order of removal (as opposed to, for example, voluntary return or withdrawal of application for admission) without seeing government records of the encounter. Further, it is necessary to know what type of removal order was issued to determine the appropriate remedy. The information gathering process should include:

- Detailed questioning of the client to get as much information as possible about any encounter with immigration authorities or a removal process.

³⁵¹ INA § 242(b)(4)(A)-(B).

³⁵² For further discussion of this regulatory motion to reopen provision, see Reinstatement Practice Advisory, *supra* note 327. For an example of an unpublished decision where the BIA granted reopening, applying equitable tolling principles, of a prior IJ-issued removal order for an individual in reinstatement proceedings, see *Juvenal Valdovinos-Lopez*, A200-684-816 (BIA June 29, 2016) (unpublished), [scribd.com/document/318828163/Juvenal-Valdovinos-Lopez-A200-684-816-BIA-June-29-2016](https://www.cribd.com/document/318828163/Juvenal-Valdovinos-Lopez-A200-684-816-BIA-June-29-2016).

³⁵³ See also discussion *infra* at section V.B about ethical and criminal liability issues.

- Thorough review of all documents in the client’s possession that were issued by immigration authorities, including any documents received while in immigration detention.
- Calling the Executive Office for Immigration Review (EOIR) case status information hotline at 1-800-898-7180³⁵⁴ or checking the EOIR “Automated Case Information” webpage to find out if the client has a removal order issued in immigration court.³⁵⁵ It is necessary to know the client’s A number to get information via either the hotline or the webpage.³⁵⁶ Requesting a copy of the client’s immigration file via a Freedom of Information Act (FOIA) request to EOIR, if the client has a removal order from immigration court proceedings.³⁵⁷ In addition, if the practitioner is able to visit the immigration court where the removal order was issued, they could inquire with the local court about procedures for reviewing a file (and ensure that the file is indeed still physically at that court).³⁵⁸
- Reviewing the Digital Audio Recording (DAR) of the proceedings. Practitioners can obtain the DAR by making a request directly to the Immigration Court³⁵⁹ or via a FOIA request to EOIR.³⁶⁰
- Requesting an Office of Biometric Identity Management FOIA³⁶¹ and Federal Bureau of Investigation (FBI) background check,³⁶² if the removal order was issued by a DHS officer

³⁵⁴ Practitioners should not solely rely on the EOIR hotline. The hotline was established in 1995 and it includes pre-1995 cases, but the hotline will only issue information for the most recent case before EOIR. For example, if a noncitizen had a case pre-1995 and that was the only case with EOIR, then the hotline will offer that information. However, if the individual has had another encounter with EOIR since that first encounter pre-1995, then the hotline will offer only the most recent information.

³⁵⁵ EOIR Automated Case Information webpage, portal.eoir.justice.gov/InfoSystem/.

³⁵⁶ If the A number is unknown, consider whether an FBI background check or an InfoPass appointment attended by the representative might be tools to obtain the A number. The latter would be possible if the client has had a previous application with USCIS. The practitioner can attend the InfoPass with a Form G-28 signed by the client and ask for the noncitizen’s A number or other pertinent immigration information at the appointment. Information about scheduling an InfoPass appointment is available on the USCIS website, my.uscis.gov/appointment. Note, however, that recent changes to InfoPass scheduling have made it much more difficult to obtain these appointments than in the past.

³⁵⁷ Information on filing an EOIR FOIA request can be found on the EOIR website, justice.gov/eoir/foia-facts. In addition, the American Immigration Council (AIC) has created helpful resources about FOIA. See AIC, *Practice Advisory: FOIA for Immigration Lawyers* (Feb. 2017), americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_foia_for_immigration_lawyers.pdf.

³⁵⁸ A listing of immigration courts along with their contact information can be found on the EOIR website, justice.gov/eoir/eoir-immigration-court-listing.

³⁵⁹ Immigration Court Practice Manual Ch. 1.6 (c)(iii)(A) states that the immigration court will provide a copy of the DAR on a compact disc to a party that requests it. However, procedures for making such a request vary by locality, and practitioners should inquire about local procedure. Moreover, the response time for sending the DAR varies tremendously depending on the immigration court.

³⁶⁰ It may be wise to ask that the EOIR FOIA Office disclose the DAR separately from any requested written records, as this often expedites the practitioner’s receipt of the DAR.

³⁶¹ DHS, Office of Biometric Identity Management: Privacy Information, dhs.gov/obim-privacy-information.

³⁶² Information about requesting an FBI background check is found on the FBI website, fbi.gov/services/cjis/identity-history-summary-checks.

rather than in immigration court. A FOIA request could also be filed with other relevant entities, such as Customs and Border Protection (CBP), ICE, or USCIS.³⁶³

- Obtaining the client's signature on Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, in case DHS detains the client as DHS will request this from the practitioner before discussing the individual's case.³⁶⁴

Practitioners should consider submitting a FOIA request prior to filing a motion to reopen in order to properly advise on the available grounds to seek reopening and not contradict facts already in the record.³⁶⁵ Practitioners should research case law in their jurisdiction to determine whether the equitable tolling doctrine would allow filing and awaiting the results of a FOIA request before filing a motion to reopen. However, if time is of the essence, such as in cases where the client is detained or is still within the statutory time frame for timely filing, the practitioner may not have the luxury of awaiting a FOIA response. In this situation, practitioners should make all available arguments in the motion given the number limitation on filing motions to reopen and then seek to supplement the pending motion with new information obtained through a records request while the motion is pending.³⁶⁶

B. Strategic Considerations

Once the practitioner has determined that a removal order in fact exists, and what type of order it is, practitioners should consider, among other factors:

- Any filing deadline or arguments that an exception to the deadline exists

³⁶³ See ILRC, *Practice Advisory: A Step-By-Step Guide to Completing FOIA Requests with DHS* (Sept. 2020), ilrc.org/sites/default/files/resources/a_step_by_step_guide_to_completing_foia_requests_with_dhs_09_2020.pdf. In addition, the USCIS website contains a helpful chart indicating what agencies have which records. USCIS, *Submitting FOIA Requests*, uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/submitting-foia-requests. Note that for a copy of the A-file, the request should go to USCIS. For any records requests, the practitioner should request that the disclosures be sent to their office address if this address is more reliable than the client's due to the client's personal circumstances.

³⁶⁴ Both DHS and EOIR are currently accepting electronic signatures. See USCIS Announces Flexibility in Submitting Required Signatures During COVID-19 National Emergency (Mar. 20, 2020), uscis.gov/news/alerts/uscis-announces-flexibility-in-submitting-required-signatures-during-covid-19-national-emergency; Immigration Court Practice Manual Ch. 3.3(b). For some clients, it may be easiest to provide a signature on a document using an app on a cellular phone, rather than by printing out a document, scanning it, and sending it to the attorney. For a Spanish-language video with instructions on how to sign a document using WhatsApp, see youtu.be/tTcTIBTIYP8. Note, however, that rules regarding electronic signatures may change depending on changes in COVID-19 prevalence.

³⁶⁵ See, e.g., *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099-1100 (9th Cir. 2005).

³⁶⁶ Cf. *Einstein Markov Dauphin*, A099-508-343 (BIA Aug. 24, 2016) (unpublished), scribd.com/document/324230360/Einstein-Markov-Dauphin-A099-508-343-BIA-Aug-24-2016-pdf (concluding that "equitable tolling of the motion deadline was warranted to allow [the respondent] to supplement the record with evidence of his prima facie eligibility for adjustment of status," where the respondent timely filed a motion to reopen which initially lacked evidence regarding his eligibility for relief and supplemented with further information while the motion was pending).

- Whether the motion to reopen would confer an automatic stay of removal, and if not, the likelihood that the relevant adjudicator would issue a discretionary stay³⁶⁷
- The benefits and risks of pursuing a motion to reopen
- What underlying relief is available to the individual, and the likelihood of prevailing³⁶⁸
- Whether the individual is able to retain an attorney to represent him or her in pursuing the underlying relief, in the event that the removal order is remedied, and
- Whether the individual can afford all the fees associated with the motion to reopen, if applicable, the applications or petitions for relief, and resources required to adequately prepare the case.

Having evaluated these various factors, practitioners should convey the options, and the risks and benefits of each, to the client so that the client can make an informed decision about how to proceed. It may be wise to convey these advisals to the client in writing, explaining all the risks of taking action, along with timing considerations, and the risks of not taking action (including what future options might be available). For example, when it is unlikely that the motion to reopen will succeed and the individual is not in danger of imminent removal, practitioners should inform the client that filing the motion to reopen may attract ICE's attention and possibly lead to the client's detention. Conversely, when the client is detained and in danger of imminent removal, that reality would compel the filing of a motion to reopen even if just under *sua sponte* grounds along with a motion for a stay of removal. Part of this discussion should also include the fugitive disentitlement doctrine³⁶⁹ and criminal penalties associated with having a removal order. It is important for practitioners to consider applicable ethical rules and even the potential for personal exposure to criminal penalties.³⁷⁰ In this regard, practitioners must be mindful of the distinction between explaining the potential consequences of various courses of action, versus advocating for a particular course of conduct that could be perceived as an effort to evade law enforcement detection.³⁷¹

Usually, when to file the motion to reopen is part of the discussion of whether to file a motion to reopen in the first place since timing considerations are often a main legal issue. This decision will largely depend on the motion to reopen ground. For example, a motion to reopen arguing equitable tolling should be filed while the exceptional circumstances exist or a diligence argument applies. A motion to reopen based on *sua sponte* authority is the riskiest given its basis in regulatory authority

³⁶⁷ Consider reaching out to knowledgeable practitioners in the jurisdiction to determine the preferred practices of the particular adjudicator.

³⁶⁸ For sample screening materials, see, for example, CLINIC, *Screening Tool*, cliniclegal.org/resources/program-management/screening-tool.

³⁶⁹ For more information about how this doctrine has been applied by courts in the immigration context, see resources cited *supra* note 41.

³⁷⁰ See, e.g., Brief for Immigration Representatives and Organizations as Amici Curiae in Support of Respondents, *United States v. Sinenang-Smith*, 140 S. Ct. 1575 (2020) (No. 19-67), aila.org/infonet/amicus-us-v-sinenang-smith (arguing that the Encouragement Provision chills immigration advice that is both constitutionally protected and critical to the proper functioning of the U.S. immigration system).

³⁷¹ For information on ethical issues pertaining to the practice of immigration law, see the resources available to members on the American Immigration Lawyers Association website, aila.org/practice/ethics.

rather than the INA, high evidentiary standard, and lack of automatic stay of removal. Practitioners may therefore wish to wait until the client is detained or removal is imminent to file the motion. While a no notice *in absentia* motion to reopen has no filing deadline as well as an automatic stay of removal, if the current relief from removal is weak or speculative, the practitioner may wish to wait until Congress definitively decides the fate of DACA youth. It is an assessment that practitioners must conduct on a case-by-case basis and is ultimately the decision of the client after a full understanding of the possible risks and benefits.

C. Filing the Motion to Reopen

As always, it is important to follow the rules governing practice in the relevant jurisdiction. For example, if a motion is to be filed with the immigration court, practitioners should carefully follow the Immigration Court Practice Manual³⁷² in addition to complying with the statutes and regulations governing those filings. Likewise, filings with the BIA should comply with the BIA Practice Manual.³⁷³

Practitioners should be sure to enter a notice of appearance on the appropriate form and file a change of address form³⁷⁴ along with the filing. As with other motions, a representative filing the motion should also submit a proposed order (for IJ motions), and proof of service on the applicable ICE OPLA office. Service on the ICE OPLA office usually occurs by electronic service, mail, or personal service.³⁷⁵ As required by the regulations, the motion to reopen should be accompanied by the relevant application for relief and supporting documentation, especially since the application for relief shows incentive to appear at reopened proceedings. The motion should be filed with the immigration court “having administrative control over the Record of Proceeding,”³⁷⁶ or with the BIA in cases where the BIA last made a decision.³⁷⁷ Motions to reopen must be accompanied by a fee (BIA) or fee receipt (IJ) or a fee waiver request,³⁷⁸ unless an exception applies.³⁷⁹ Given recent

³⁷² Immigration Court Practice Manual, justice.gov/eoir/office-chief-immigration-judge-0.

³⁷³ BIA Practice Manual, justice.gov/eoir/board-immigration-appeals-2. Note that the BIA now has a 25-page limit on motions to reopen (excluding exhibits), though it is possible to file a motion for to increase the page limit. See BIA Practice Manual Ch. 3.3. For another resource, see American Immigration Council, *Practice Advisory: The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 7, 2018), americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders.

³⁷⁴ See Immigration Court Practice Manual Ch. 5.7(b)(i).

³⁷⁵ For service by mail, practitioners should use the mailing address on the ICE OPLA Contact website, ice.gov/contact/legal. ICE OPLA also offers an eService portal: eserviceregistration.ice.gov. Whether to file by mail or by eService may be a strategic decision.

³⁷⁶ 8 CFR § 1003.23(b)(1)(ii).

³⁷⁷ 8 CFR § 1003.2(a).

³⁷⁸ 8 CFR §§ 1003.8(a), 1003.2(g)(2)(1), 1103.7(b)(2); Immigration Court Practice Manual Ch. 3.4(e)(i); BIA Practice Manual Ch. 3.4(d). Practitioners should be sure to check the current rules regarding the fee amount, as fee increases are expected in the near future.

³⁷⁹ The procedures for IJ and BIA motion to reopen filing fees and fee waiver requests can be found in the regulations and the relevant practice manuals. See Immigration Court Practice Manual Ch. 3.4 (fee procedures for filings with the IJ); 8 CFR § 1003.24 (same); BIA Practice Manual Ch. 3.4 (fee procedures for filings with the BIA); 8 CFR § 1003.8 (same); 8 CFR § 1003.2(g)(2)(i); see also 8 CFR § 1003.24(d) (fee waivers for IJ motions to reopen); 8 CFR § 1003.8(a)(3)

changes to InfoPass and changes in light of the COVID-19 pandemic, it is important to review local USCIS District Office procedures regarding feeing in motions to reopen. If the local USCIS District Office has made it logistically difficult to fee in a motion, then it may be useful to partner with a practitioner near another USCIS office so that the other practitioner can fee in the motion by simply walking in to their local USCIS office and then sending the receipt.³⁸⁰ The fee for a motion to reopen filed with the BIA may now be paid online through the EOIR Payment Portal.³⁸¹

If the removal order was issued at an immigration court that does not have jurisdiction over the respondent's current place of residence, the motion to the IJ should also be filed in conjunction with a motion for change of venue to the immigration court with jurisdiction over the respondent's current place of residence, along with a proposed order.³⁸² Otherwise, the immigration court will schedule the respondent for a master calendar hearing and the respondent and the practitioner (unless the IJ grants a motion to appear telephonically) may be forced to travel to attend the master calendar hearing, if the IJ reopens the proceedings. Practitioners should obtain a file-stamped copy of the filing and ensure that the client has a copy of the file-stamped filing.³⁸³

Practitioners should analyze whether the type of remedy confers an automatic stay upon filing (such as for a motion to rescind and reopen an *in absentia* removal order based on lack of notice). If it does, the practitioner should note prominently "automatic stay" on the cover page. If it does not, the practitioner should consider whether to seek a discretionary stay concurrently with the motion to reopen and, if so, note "stay of removal" on the motion's cover page. For more information about requesting a stay of removal, see CLINIC's practice advisory about seeking stays of removal for DACA recipients with removal orders.³⁸⁴ Regardless of whether a stay is sought concurrently with the motion to reopen, it is wise to have a stay request prepared so that it can be filed quickly if necessary.

(fee waivers for BIA motions to reopen). A filing fee is not required for motions to reopen based exclusively on a claim for asylum, 8 CFR §§ 1003.24(b)(2)(i), 1003.8(a)(2)(ii); a joint motion to reopen, 8 CFR §§ 1003.24(b)(2)(vii), 1003.8(a)(2)(vii); a motion to reopen filed under a law, regulation, or directive that does not require a filing fee, 8 CFR §§ 1003.8(a)(2)(viii), 1003.24(b)(2)(viii); and motions to reopen an *in absentia* removal (filed under INA § 240(b)(5)(C)(ii)) or deportation order (filed under INA § 242B(c)(3)(B), as it existed prior to April 1, 1997) if based on lack of notice, 8 CFR § 1003.24(b)(2)(v).

³⁸⁰ 8 CFR § 103.7 (stating that "any fee relating to any Department of Justice Executive Office for Immigration Review proceeding shall be paid to, and accepted by, any USCIS office authorized to accept fees") (emphasis added). For more tips on feeing in the motion to reopen, please refer to part VII of the Guide for Asylum Seekers with *In Absentia* Orders, *supra* note 245.

³⁸¹ EOIR Payment Portal, epay.eoir.justice.gov.

³⁸² "Parties are strongly discouraged from filing compound motions, which are motions that combine two separate requests." Immigration Court Practice Manual Ch. 5.4. As such, practitioners should avoid filing a motion to reopen that also requests a change of venue, but could file two separate motions simultaneously.

³⁸³ The stamped copy may be especially important if the motion confers an automatic stay of removal or for proof that a motion is pending.

³⁸⁴ See CLINIC Stay Advisory, *supra* note 98.

VI. Conclusion

The fate of the DACA program is currently uncertain, given President Trump's DACA rescission announcement, pending federal court litigation, and possible legislative solutions. Although the U.S. Supreme Court stopped the Trump Administration's attempt to end DACA because of procedural problems with the way in which the government tried to rescind DACA, the U.S. Supreme Court ruling does not prevent the Trump Administration from rescinding DACA in the future, so long as it complies with applicable procedural rules. Consequently, DACA recipients with removal orders are in a vulnerable position, and that vulnerability would increase greatly if DACA rescission were to go fully into effect. Practitioners provide a great benefit to DACA recipient clients with removal orders by proactively assessing what remedies may be available to reopen the underlying removal order, taking into account the risks and benefits of each option as well as timing considerations. DACA recipients with removal orders can then make informed choices about how to proceed (and on what timeline) in order to best protect themselves and their families.



The Catholic Legal Immigration Network, or CLINIC, promotes the dignity and protects the rights of immigrants in partnership with its network of legal immigration programs since its 1998 founding. CLINIC's network counts nearly 400 agencies in 48 states and the District of Columbia and includes farmworker programs, domestic violence shelters, ethnic community organizations, and libraries. Its network is the largest in the nation.

Building on the foundation of [CLINIC's BIA Pro Bono Project](#), CLINIC launched the Defending Vulnerable Populations (DVP) project in 2016 in response to growing anti-immigrant sentiment and policy measures that will hurt immigrant families. As more immigrants became vulnerable to removal, CLINIC relaunched DVP as a stand-alone program in March 2019. DVP has four goals: 1) provide immigrant defenders with skills in the areas of removal defense, asylum, special immigrant juvenile (SIJ) status, and criminal consequences; 2) challenge anti-immigrant policies and regulations through appeals to the Board of Immigration Appeals and federal litigation; 3) create remote-based crisis response models to immigration enforcement; and 4) raise public awareness of the human toll on those affected by anti-immigrant policies.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice pointer on the Supreme Court's decision in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), a practice pointer on refreshing recollection in immigration court, a guide on how to obtain a client's release from immigration detention, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Presumed Dangerous: Bond, Representation, and Detention in the Baltimore Immigration Court."

These resources and others are available on the DVP webpage at cliniclegal.org/resources.