



AMERICAN **BAR** ASSOCIATION

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Commission on Immigration

# **A LEGAL GUIDE FOR ICE DETAINEES:**

**Filing a Motion to Reopen  
After an Order of Removal**

**Last Updated February 2020**

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## TERMS TO KNOW

- **Immigration Judge (“IJ”):** this is the person who will make a decision about your case. They hold hearings in the courtroom. This person does not work for ICE, it is their job to look at the facts of your case and apply the law fairly.

- **Executive Office for Immigration Review (“EOIR”)**: They oversee immigration courts and are responsible for adjudicating all immigration cases (including immigration court proceedings, appellate reviews and administrative hearings).
- **Board of Immigration Appeals (“BIA”)**: this is an administrative body within EOIR. They review the decisions of IJ’s in immigration courts. BIA decisions are the final administrative action in a case, and the next stage of appeal after the BIA is usually the US court of appeals (if an appeal is allowed by statute)
- **Government Attorney**: this is the lawyer who represents ICE when you go to your court hearings. They sit at the table next you and talk to the judge. It’s usually this attorney’s job to ask the judge to order you removed.
- **Holding**: The holding is a court's determination in a case. In other words: under the law, under these facts, the judge made this decision.
- **Prima facie evidence**: legally sufficient to prove a fact, unless disproved
- **Movant**: a person who applies to or petitions a court or judge for a ruling in their favor.
- **Affidavit**: a written statement confirmed by oath or affirmation, for use as evidence in court.
- **Notarized**: A document that is legalized by a notary. A notary is a publicly commissioned official who serves as an impartial witness to the signing of a legal document. A notary is used to create a trustworthy agreement or statement and are mainly used to prevent fraud. Notaries cannot refuse to witness a document based on race, nationality, religion or sex. For a document to be notarized, it must contain a statement that what is in the document is true and original signatures from the parties involved. Prior to the signing of a document, notaries ask for photo identification. The document then receives a notarial certificate and the seal of the notary who witnessed the signings.
- **Burden of proof**: required evidence to support a claim
- **Code of Federal Regulations (“C.F.R.”)**: there are the general and permanent rules and regulations for federal government agencies.

## WHAT IS A MOTION TO REOPEN?

A Motion to Reopen requests a review by the *same authority* that issued the last decision. This is not an appeal, which asks a *different* authority to review and reverse a decision. As a result, when filing a motion to reopen the IJ has jurisdiction over decisions they have made, and the BIA has jurisdiction over decisions they have made.

- **Do you think the IJ made the wrong decision?** If you think the IJ made the wrong decision and would like the court to look at evidence you have already presented, that is **NOT** what a motion to reopen is for!
  - If you think the IJ made the wrong decision, the proper action is filing an appeal with the BIA
  - **CAUTION:** If you were ordered removed by the Immigration Judge (IJ) you **only have 30 days** to appeal your case to the Board of Immigration Appeals (BIA). If you choose to file a Motion to Reopen or Reconsider with the IJ instead of appealing to the BIA, you will lose your opportunity to appeal your request for removal!
- **Where can I get more information on the regulations for a motion to reopen?**  
See 8 C.F.R. § 103.5 for the rules and regulations governing motions to reopen

[The Difference Between a Motion to Reopen and a Motion to Reconsider](#)

Motions to reopen and motions to reconsider are often confused. Both ask the court to reopen proceedings after the IJ or BIA has rendered a decision so they can reevaluate the decision.

<b>Motion to Reopen</b>	<b>Motion to Reconsider</b>
<ul style="list-style-type: none"> <li>➤ <b>Why you file:</b> to present evidence about some NEW development in your case, OR ineffective assistance of counsel, OR you were ordered removed in a hearing you did not attend</li> <li>➤ <b>Evidence:</b> NEW documentary evidence or documented facts (affidavits, country reports, etc.) which were NOT available at the time of your hearing</li> <li>➤ <b>Reopening is NOT:</b> a time to resubmit previously provided evidence or previously stated facts</li> </ul>	<ul style="list-style-type: none"> <li>➤ <b>Why you file:</b> you believe the judge made an error in law or fact in their prior decision, OR there has been a change in law or new court case that effects the IJ's prior ruling</li> <li>➤ <b>Evidence:</b> the <u>existing record</u>, new facts or evidence are NOT introduced. This IS supported by pertinent presentient, adopted decision, statutory regulation or provision, or statements of USCIS or DHS policy. Citing to an authority that is not relevant to the issue raised on motion will not meet the requirements to reconsider.</li> <li>➤ <b>Reconsideration is NOT:</b> asking the judge to think it over and reverse their judgement</li> </ul>

[Combined Motions to Reopen and Reconsider](#)

Appellants may file a combined motion to reopen and reconsider. The AAO will consider each motion independently. The AAO may grant both motions, grant one motion but deny the other or deny both motions.

**GROUND FOR FILING MOTION TO REOPEN**

You may be eligible to file a motion to reopen if:

- **You missed your hearing**  
If you missed your hearing and received an Order of Removal you may be eligible to file a motion to reopen if you missed your hearing because:

1. You were not given written notice of your hearing – for example the date of the hearing was not on your notice to appear (“NTA”)
2. There were exceptional circumstances that prevented you from appearing in court
3. You had ineffective assistance of counsel – for example your attorney told you that you did not need to appear at the hearing

For this motion you will have to show first that your removal was ordered during a hearing that you did not attend, and second that you had a good reason for not attending

➤ **You have new information that is important to your case that was not available at the time of your hearing**

A motion to reopen based on new facts may be denied except when it appears that the evidence offered is material (important enough to change the IJ’s decision) and was not available and/or could not have been discovered or presented at an earlier stage in the proceedings. When submitting this motion, you must support it with affidavits or other evidentiary materials

➤ **You are now eligible for a form of relief**

If you are now eligible for a form of relief that you had not previously applied for because you were (1) not told about it; or (2) there has been a change in circumstance which now makes you eligible for relief

- This will not be granted if it appears the right to apply for that form of relief was *fully explained to you* and you had the opportunity to apply for that form of relief at an earlier stage in the proceedings
- The proceedings may be reopened if the relief you are seeking is based on a change in circumstance that occurred *after* the previous stage in the proceedings. For example, if there was a change in your country conditions.

➤ **There was a change in your criminal conviction**

Your original criminal conviction has changed – overturned, vacated, modified or disturbed in some way. You must provide clear evidence that the conviction has actually been disturbed. Neither eligibility for post-conviction relief nor seeking post-conviction relief, by themselves, are enough to reopen proceedings.

➤ **Your attorney made a mistake while representing you (ineffective assistance of counsel)**

When filing a motion to reopen based on ineffective assistance of counsel you must show:

1. Counsel’s performance was deficient; and
2. Counsel’s performance caused prejudice to you, the client

Reasons you May Not be Able to File a Motion to Reopen

You **may not** be eligible to file a motion to reopen if the following apply to your situation”

➤ **You have filed an appeal with the BIA**

After the IJ makes their decision, a party can file an appeal to the BIA or a motion to reopen. Once you file an appeal with the BIA the IJ no longer has jurisdiction and you can no longer file a motion to reopen.

➤ **You were previously eligible for the relief which you are applying:** your motion to reopen will not be granted if it appears that the new relief you are applying for was previously available

to you and was fully explained at an earlier stage in the proceedings. UNLESS the relief you are seeking is based on a change in circumstance since the last stage in the proceedings

- **Evidence was previously available:** a motion to reopen will not be granted if it appears that the evidence offered is immaterial or could have been discovered or presented at an earlier stage in the proceedings
- **You case has been administratively closed or continued indefinitely:** in these situations, the proper motion to file is a *Motion to Recalendar*, not a motion to reopen.

## FILING YOUR MOTION TO REOPEN

### ➤ **When do I File My Motion to Reopen?**

Generally, the IJ or BIA must receive the motion **within 90 days** of the final removal order.

- **What if it has been more than 90-days since my final order of removal?** In some situations, there are exceptions to the 90-day filing period:
- **Are there exceptions to the 90 day filing period?**
  - **Has there been a change in your circumstances?** When the motion to reopen is based on a request for asylum, withholding of removal, relief under the Convention Against Torture (CAT), or changed country conditions and premised on new circumstances, it may be filed after the 90-day filing period. The motion must contain a complete description of all the new facts/circumstances and explain how those circumstances affect your eligibility for relief.
  - **Did you miss your hearing? (*In absentia order of removal*)** An *in absentia* order cannot be appealed to the BIA. If you missed your hearing and the IJ ordered you removed you can file a motion to reopen with the IJ explaining why you missed the hearing.
  - **Are you a victim of Domestic Violence?** A motion to reopen filed by certain battered spouses, children, or parents of abusive U.S. citizens or lawful permanent residents must be filed within one year of the final removal order, although this deadline is waivable upon a showing of extraordinary circumstances or extreme hardship to the movant's child.
  - **Were there exceptional circumstances that prevented you from filing within the 90-day period? (*Sua Sponte and Equitable Tolling*)** By regulation, an IJ or the BIA can reopen a removal order *sua sponte* at any time. *Sua sponte* authority is “an extraordinary remedy reserved for **truly exceptional situations**.” Matter of G-D-, 22 I&N Dec. 1132, 134 (BIA 1999). An IJ relying on *sua sponte* authority may open a removal order regardless of any time/number of restrictions.
    - Did you try to file on time, but were prevented by extraordinary circumstances? The IJ or BIA may also adjudicate a motion to reopen as a statutory motion even if it is filed after the 90-day deadline if you can show your case merits **equitable tolling**. Equitable tolling entitles a party to an extension of non-judicial filing deadlines if you can show you acted diligently in pursuing

your rights, but where nonetheless prevented from filing on time by some extraordinary circumstance.

- The standard of review for equitable tolling varies by circuit, but generally, equitable tolling claims should be *supported by evidence of the circumstance that preventing timely filing* (e.g. ineffective assistance of counsel, fraud, or agency malfeasance) and *evidence that you pursued your case with reasonable diligence*. Declarations explaining why you did not pursue reopening earlier and your efforts after discovering the basis for reopening are helpful.

➤ **What if the Department of Homeland Security (“DHS”) has filed a motion to reopen after the 90-day filing period?**

DHS motions to reopen in immigration court are not limited in time. Additionally, and motions jointly agreed upon by the movant and DHS are not limited in time

➤ **Where do I File My Motion to Reopen?**

A motion to reopen is filed with the entity that last hand contact with the case. This is usually the immigration court or the BIA.

Case Status	Where to File
Last hearing was with the IJ, I did not appeal	File with the immigration court
I appealed the IJ’s decision to the BIA	File with the BIA
Filed a petition for review of the BIA’s decision, which was not remanded back to immigration court	File with the BIA
My administrative appeal is still before the BIA and there is a viable basis to seek reopening	File the motion to reopen with the BIA <b>NOTE:</b> in this situation the BIA may treat the motion to reopen as a motion to remand and may consolidate it with the underlying appeal
I have a petition for review pending	File the motion to reopen with the BIA <b>NOTE:</b> if the BIA grants reopening the court of appeals will lose jurisdiction over the pending petition for review and there will no longer be a final order for the court to review

➤ **Is there a filing fee?**

YES. Generally, the filing fee for a motion to reopen is \$110 and should be included when you file your motion. There are some exceptions to this, motions to reopen that DO NOT require are filing fee include:

- A motion to reopen that is based exclusively on an application for relief that does not require a fee. This includes motions to reopen based exclusively on **asylum**
- A motion requesting only a stay of removal, deportation, or exclusion
- A motion to reopen a deportation or removal ordered entered *in absentia* if the motion is filed to 8 U.S.C. 1252(c)(3)(B), as it existed prior to April 1, 1997, or 8 U.S.C. 1229a(b)(5)(C)(ii) as amended
- A motion that is agreed upon by all parties and is jointly filed; or



- A motion filed under a law, regulation, or directive that specifically does not require a filing fee
  - There is no additional fee for combined motion to reopen and motion to reconsider
- **What if I can't afford to pay the filing fee?**  
If you cannot afford to pay the filing fee you should include an [I-290B fee waiver](#) request when you file the motion.
- **How many times can I reopen my case?**  
The statute provides that a person may only file ONE motion to reopen. Exceptions:
- You are a victim of domestic violence
  - Motions to reopen filed before September 30, 1996 do not count toward the limit
  - If the motion is **jointly filed** (agreed upon by the movant and DHS) there is no numerical limit
  - **DHS** is not limited in the number of motions they may file with the immigration court
- **How long does DHS have to respond to the Motion?**  
Given the volume and the varying complexity of these cases, **they cannot predict processing times upon request**. However, most parties can expect to receive a filing receipt for an appeal, a motion to reopen, or a motion to reconsider within **1-2 weeks of filing**.
- If the motion to filed with the IJ, the IJ may set and extend time limits for replies 8 C.F.R. § 1003.23(b)(1)(iv)
  - If the motion is filed with the BIA, DHS has 13 days from the service of the motion to file an opposition 8 C.F.R. § 1003.2(g)(3).
- \*If DHS does not file a timely opposition, the movant may file a statement notifying the IJ or BIA that DHS has not opposed the motion, therefore the motion should be deemed unopposed. If DHS field a late opposition, the movant may oppose the motion to accept the late-filed opposition and consider filing a reply to the opposition as soon as possible*
- **What If I Want to Withdraw My Motion to Reopen?**  
Appellants may withdraw a motion by **submitting a written request** via mail or fax before the AAO issues a decision. The procedure for withdrawing a motion is the same as the procedure for withdrawing an appeal. See Chapter 3.12 for more information.
- **Will Filing a Motion to Reopen Automatically Stay Deportation?**  
In general, filing a motion to reopen with an IJ or the BIA **does not automatically** stay deportation, unless USCIS directs otherwise. There are two exceptions to this:
1. While a motion to rescind an *in absentia* removal or deportation proceeding is pending at the immigration court
  2. While a motion filed by a qualified battered spouse, child or parent pursuant to 8 U.S.C. § 1229a (c)(7)(C)(iv) is pending.
- \*\*\*In all other circumstances, a person must affirmatively file a motion for a stay** and either an IJ or the BIA must grant the motion before ICE is legally obligated to stay deportation. Notably, the BIA will not consider an emergency discretionary stay request unless: (1) it is accompanied by a motion; and (2) an individual is in physical custody and facing imminent removal.

➤ **What Standard Will My Motion be Reviewed Under?**

The BIA **has not set a review standard for stay of removal** by opinion, practice manual or other guidance, and no regulation addressed the issue. This is often a source of confusion, but despite this, IJs and the BIA are presumably *more inclined to grant stay motions that demonstrate the merits of the motion to reopen and the gravity of potential harm deportation would cause*. Accordingly, it is best to file a substantive (i.e. substantial, meaningful, considerable) motion to reopen with the stay request.

➤ **Can I appeal if my motion to reopen is denied?**

If an IJ denies a motion to reopen, a person first must appeal the denial to the BIA. If the BIA denies a motion to reopen, the decision is reviewable through the filing of a petition for review with the court of appeals with jurisdiction over the location in which the immigration judge completed the underlying proceedings. 8 U.S.C. § 1252(b)(2). Any petition for review of a decision denying reopening “shall be consolidated with” any petition for review seeking review of the underlying decision. 8 U.S.C. § 1252(b)(6).<sup>17</sup>

## WHAT A MOTION TO REOPEN SHOULD INCLUDE<sup>1</sup>

A motion to reopen must state the **new facts** that will be proved at a reopened hearing and must be **supported by affidavits or other evidentiary material**. **Remember:** A motion to reopen will not be granted unless it appears to the BIA that the evidence offered is material and **was not available and could not have been** discovered or presented at an earlier stage in the proceedings.

➤ **Is there a form I need to fill out?**

NO, there is no special form for a motion to reopen, but it may be useful to check the BIA Practice Manual or the Immigration Court Practice Manual at the law library to check for any special requirements

➤ **What do I need to include?** What will be included will vary depending on your case, but all motions to reopen should include:

1. Cover page and caption
2. The motion in brief format
3. **Exhibit List:** This is a page which lists what documents you have attached to support your motion to reopen.
  - a. NOTE: it is helpful if you number the list, and then attach flags with the coordinating number on each exhibit so they are easy to find
4. **Supporting Evidence:** last, you will include the evidence supporting your motion. This might include: your notice to appear, affidavits, police reports, applications for relief
5. **Certificate of Service:** See appendix for example

\*See below for further explanations of what each of these sections may include

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<sup>1</sup> <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/practice-manual/chapter-3-appeals#3.8>

### Cover Page and Caption

All motions, briefs, and supplemental filing should include a cover page. The cover page should include a caption and contain the following information:

1. Name and address of the filing party
2. Title of the filing (e.g. “REPENDENT’S MOTION TO REOPEN”)
3. Alien registration number (A number)
4. Type of proceeding involved (such as removal, deportation, exclusion, bond)
5. Name, city, and state of the court you are filing with

\*\*\*See Appendix for Sample Cover Page\*\*\*

### The Motion

You will write a brief, which includes all the possible legal grounds for reopening, and all the new facts that would be established in reopening proceedings. It should include the following headings:

- i. **Introduction:** This is a short summary of why you are filing the motion to reopen and what relief you will be seeking from the court
- ii. **Statement of the Procedural History and Facts:** In this section you will explain what has happened in your proceedings up to this point. You will explain when and where you entered the United States, how long you have been here, when you received your notice to appear, and what the IJ and/or BIA held in your case
- iii. **Standard of Review:** this is a statement of the law that allows you to reopen your case
  - o NOTE: This law is stated in the sample brief, if you don’t know what the standard of review is, you should not include this section
- iv. **Conclusion and Prayer for Relief:** this is where you will explain what you want to the court to do (e.g. reopen the case to allow you to apply for [political asylum, cancelation of removal])

**IF YOU ARE INVOLVED IN NON-IMMIGRATION LEGAL PROCEEDINGS:** The motion must state if the order is/has been the subject of any judicial proceeding, **including any criminal proceeding**. If so, the motion must provide additional information and/or a statement from the movant regarding that proceeding.

### Supporting Evidence

A motion to reopen must be supported by new evidence. Depending on your case, this may include:

- Affidavits
- Notice to appear
- Evidence of the change in circumstance or country conditions
- Police reports
- A completed application for relief

NOTE: Generally, you cannot meet the burden of proof by simply claiming a fact to be true without supporting documentary evidence. Assertions should be supported by new, relevant, probative, and credible evidence. For example, if you are filing based on a change in country conditions, the change must have occurred *after* you were ordered removed.

➤ **What if I don't have access to corroborative evidence?**

For some protection-based benefit categories it can be difficult to secure corroborative evidence. In these situations, the burden of proof may be met with credible testimonial evidence. This category includes, but is not limited to:

- Asylum applications
- VAWA self-petitions
- T visa applications
- U visa petitions

\*Claims by representatives, such as an attorney do not constitute evidence. Counsel's statements must be supported in the record with independent evidence (e.g. affidavits, declarations)

[Examples of Supporting Evidence](#)

➤ **Photocopies:** Photocopies are generally permissible when submitting supporting evidence

➤ **Original Documents:** the court may request appellants submit an original copy for review. Original documents submitted in response to these requests will be returned when the adjudication is complete. Failure to submit to a request for original documents may result in the dismissal of an appeal

- If an appellant submits original documents on appeal when not specifically requested, the documents may remain a part of the record, and USCIS **will not automatically return the originals**

➤ **Translations:** Any document in a foreign language must be accompanied by a full English language translation. The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English.

➤ **What if my evidence is not available?**

The nonexistence or other unavailability of required evidence creates a presumption of ineligibility for the requested immigration benefit.

- If a required document doesn't exist or cannot be obtained, an appellant must generally:
  - Demonstrate its nonexistence or unavailability; and
  - Submit relevant secondary evidence

➤ **What if relevant secondary evidence does not exist or is not available?**

If both the evidence as well as the secondary evidence does not exist or is not available, to support their motion the appellant must generally:

- Demonstrate the unavailability of both the required document AND relevant secondary evidence; and
- Submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of the event and circumstances.

➤ **How do I demonstrate that a government record is unavailable?**

Where a government record does not exist, the appellant must submit (a) an original written statement on the letterhead of the appropriate government entity (b) establishing its unavailability, (c) stating the reason it does not exist and (d) whether similar records for the time and place are available

- However, a statement from a foreign government is not required if the Department of State's Foreign Affairs Manual indicates this type of document generally does not exist.

\*Appellants who are unable to acquire a necessary document or statement from the relevant foreign authority may submit evidence that they made repeated good faith attempts to obtain the required document or statement. However, if the court determines that such documents or statements are generally available, it may require that an appellant submit the required document or statement.

➤ **What if there are inconsistencies in my records?**

An appellant must resolve any material inconsistencies in the record by competent, objective evidence. Unresolved material inconsistencies may lead the AAO to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit.

## II. [Change of Address Form](#)

The Board recommends that an alien file a Change of Address Form ([Form EOIR-33](#)) whenever filing a motion to reopen, a motion to reconsider, or a motion to recalendar. This will ensure that the Board has your current address when it adjudicates the motion.

## GUIDELINES FOR BRIEFS

There are no specific procedural rules for the format of supporting briefs. Briefs should clearly and concisely explain any legal arguments, relevant facts and procedural history, and cite to the proper legal authorities fully, fairly, and accurately. They encourage limiting briefs to 25 pages.

The following is recommended when submitting evidence in support of a motion:

- An index of the submitted evidence with a short explanation of the relevance of each document;
- Number each page;
- Insert file tabs or colored paper between exhibits; and
- **Do not resubmit evidence that is already in the record of proceedings.** The AAO reviews all previously submitted evidence in the relevant record. Resubmitting the same evidence may slow down appellate review. Instead, the brief should reference the existing evidence.