Motions to Dismiss in Immigration Removal Proceedings: Legal Analysis for Practitioners

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FINDINGS

MOTIONS TO DISMISS IN IMMIGRATION REMOVAL PROCEEDINGS: COMPREHENSIVE LEGAL ANALYSIS FOR PRACTITIONERS

This report addresses the statutory, regulatory, and case law framework governing motions to dismiss in immigration removal proceedings under 8 U.S.C. § 1229a and 8 C.F.R. § 1239.2. Motions to dismiss represent a critical procedural tool in removal defense practice, yet they present complex strategic considerations that require careful analysis of filing authority, substantive grounds, procedural requirements, and recent shifts in immigration enforcement policy. As of February 2026, the legal landscape governing dismissals reflects competing interests: the Department of Homeland Security's exercise of prosecutorial discretion to dismiss cases based on enforcement priorities, respondents' statutory and regulatory rights to challenge dismissals that prejudice them, and immigration judges' duty to independently adjudicate motions to dismiss by evaluating both parties' arguments. The key findings presented herein establish that while DHS retains broad authority to move for dismissal under enumerated regulatory grounds, immigration judges are not compelled to grant unilateral dismissal motions, particularly where respondents oppose dismissal and would suffer prejudice from termination of proceedings. Recent Board of Immigration Appeals precedent, most notably Matter of H.N. Ferreira, 28 I&N Dec. 765 (BIA 2023), reinforces that immigration judges must independently consider respondents' interests in continued proceedings, especially where relief is available only before EOIR or where removal proceedings were initiated through USCIS referral.

Legal Framework Governing Motions to Dismiss

Statutory Foundation and Authority

The authority for motions to dismiss removal proceedings derives from the Immigration and Nationality Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). 8 U.S.C. § 1229a establishes the foundational structure for removal proceedings before immigration judges, vesting them with authority to conduct hearings to determine inadmissibility or deportability. The statute does not explicitly authorize dismissal or termination of proceedings, but rather presupposes that once proceedings commence, they proceed to final adjudication. However, the statutory scheme permits the Department of Homeland Security to exercise prosecutorial discretion at all stages of enforcement, including the decision to move for dismissal after proceedings have commenced. This statutory architecture reflects Congress's recognition that the Executive Branch possesses inherent authority to prioritize enforcement resources and that not all removable aliens will necessarily be pursued to final removal orders.

The implementing regulations at 8 C.F.R. § 1239.2 provide the specific regulatory framework for dismissals in removal proceedings. Under 8 C.F.R. § 239.2(a), an officer authorized to issue a Notice to Appear may cancel that notice prior to the vesting of jurisdiction with the immigration judge when satisfied of certain conditions. These pre-jurisdictional cancellations establish substantive grounds that remain operative even after jurisdiction vests. 8 C.F.R. § 1239.2(c) provides that after commencement of proceedings, government counsel or an officer enumerated in 8 C.F.R. § 239.1(a) may move for dismissal on the grounds set out under 8 C.F.R. § 239.2(a). The regulation expressly provides that dismissal of the matter shall be without prejudice to either the noncitizen or DHS, meaning that DHS retains the authority to pursue new removal proceedings on the same grounds or different grounds at any future time.

Regulatory Grounds for Dismissal

The seven enumerated grounds for dismissal under 8 C.F.R. § 239.2(a) represent the complete set of circumstances under which a motion to dismiss may be granted.[1] The first ground permits cancellation where the respondent is a national of the United States.[1] This straightforward ground applies where an individual has obtained citizenship status after the Notice to Appear was issued but before the dismissal motion is adjudicated. The second ground applies where the respondent is not deportable or inadmissible under immigration laws.[1] This ground requires factual finding that no legal basis for removal exists, a determination that must be made on the record through evidence presented or conceded. The third ground permits dismissal where the respondent is deceased.[1] The fourth ground applies where the respondent is not in the United States.[1] The fifth ground addresses the specific situation where the respondent failed to file a timely petition as required by INA § 216(c) (adjustment of status for conditional permanent residents), but the failure was excused in accordance with INA § 216(d)(2)(B). The sixth ground permits dismissal where the Notice to Appear was improvidently issued.[1]

The seventh ground, codified at 8 C.F.R. § 239.2(a)(7), permits dismissal where circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government.[1][3] This ground has become the primary basis for DHS motions to dismiss in recent years, functioning as the regulatory vehicle through which DHS exercises prosecutorial discretion to remove cases from active docket when they fall outside of current enforcement priorities. The text of the regulation requires both a case-specific component-that "circumstances of the case" have changed-and a government-specific component-that continuation is "no longer in the best interest of the government."[27] As discussed in greater detail below, this ground has generated significant litigation regarding the scope of DHS's discretion and the corresponding obligation of immigration judges to independently adjudicate motions asserting this basis.

Board of Immigration Appeals Precedent on Motion Standards

The Board of Immigration Appeals has established controlling precedent regarding the legal standard applicable to motions to dismiss that remains binding on immigration judges and appellate bodies. In Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998), the BIA held that when DHS moves for dismissal of removal proceedings, the immigration judge must independently adjudicate the motion after considering the underlying facts and circumstances, and that the immigration judge errs when terminating proceedings without considering arguments from both sides.[28] This precedent establishes a non-delegable duty on the part of immigration judges to exercise independent judgment and consider the respondent's position before granting a DHS motion to dismiss.

The BIA reaffirmed and reinforced this standard in Matter of H.N. Ferreira, 28 I&N Dec. 765 (BIA 2023), a recent precedential decision addressing how immigration judges must handle unilateral motions to dismiss filed by DHS. In Ferreira, the respondent was a conditional permanent resident who had been placed in removal proceedings after USCIS denied a Form I-751 Petition to Remove Conditions on Permanent Residence.[2] After unable to locate the noncitizen's file, DHS moved to dismiss the case.[2] The noncitizen objected, contending that terminating removal proceedings would leave him without an avenue for review of USCIS's denial of his Form I-751, which constituted the sole form of review expressly provided for by law.[2] Despite the noncitizen's objection, the immigration judge granted the motion to terminate, concluding that the court lacked jurisdiction to interfere with DHS's prosecutorial discretion decision.[2] On appeal, the BIA vacated the immigration judge's decision and remanded the case for further proceedings.[2] The BIA found that once jurisdiction vests with the immigration court-which occurs upon filing of the Notice to Appear-the immigration judge must independently adjudicate the motion to dismiss by considering the underlying facts and circumstances and the respondent's interests in continued proceedings.[2]

The Ferreira decision specifically held that an immigration judge erred in concluding that it was required to terminate proceedings simply because DHS moved to do so.[2] The BIA recognized that noncitizens may have significant interests in remaining in removal proceedings, particularly in contexts where review is available only before EOIR or where the respondent seeks relief that cannot be pursued outside of immigration court.[2] The decision reaffirmed longstanding precedent that respondent's substantial interests in adjudication of applications for relief constitute a factor the immigration judge must weigh when evaluating an opposed motion to dismiss.[2] The implications of Ferreira extend well beyond the I-751 context in which it was decided, establishing that practitioners should argue that their clients' interests in proceeding in immigration court are similarly significant in asylum cases, cancellation of removal cases, and any other context where relief is available only before EOIR.[36]

Overruling of Prior Restrictive Authority

Prior to 2022, the Attorney General's decision in Matter of S-O-G- & F-D-B-, 27 I&N Dec. 462 (A.G. 2018) had restricted the authority of immigration judges to terminate or dismiss removal proceedings.[1][17] That decision, issued by then-Attorney General Jeff Sessions, held that immigration judges have no inherent authority to terminate or dismiss removal proceedings and may do so only under circumstances expressly identified in the regulations or where DHS fails to sustain the charges of removability.[17] The Sessions decision had significant adverse consequences for vulnerable noncitizens, particularly those with collateral applications pending before USCIS, such as T visa and U visa applicants, DACA applicants, and Violence Against Women Act self-petitioners.[52]

In December 2022, Attorney General Merrick Garland issued Matter of Coronado Acevedo, 28 I&N Dec. 648 (A.G. 2022), which overruled Matter of S-O-G- & F-D-B- and restored immigration judges' authority to terminate removal proceedings in certain limited circumstances.[1][16][52] The Attorney General noted that S-O-G- & F-D-B- had relied heavily on Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018), which had restricted the ability of immigration judges to administratively close removal proceedings.[52] The Castro-Tum decision was subsequently vacated by several circuit courts and was ultimately overruled by Garland in Matter of Cruz-Valdez, 28 I&N Dec. 326 (A.G. 2021), making much of the reasoning in S-O-G- & F-D-B- legally unsound.[52]

The Coronado Acevedo decision confirmed that pending the outcome of the rulemaking process, immigration judges and Board members may consider and grant termination or dismissal of removal proceedings in certain limited circumstances, including where a noncitizen has obtained lawful permanent residence after being placed in removal proceedings, where the pendency of removal proceedings causes adverse immigration consequences for a respondent who must travel abroad to obtain a visa, or where termination is necessary for the respondent to be eligible to seek immigration relief before USCIS.[1][52] This restoration of judicial authority represents a significant shift in the jurisprudence and provides the foundation for contemporary arguments that immigration judges retain independent authority to manage their dockets and protect respondents' interests in adjudication.

Current Legal Landscape and Recent Developments

Prosecutorial Discretion Policy Framework

The current prosecutorial discretion landscape in immigration enforcement has been shaped by multiple policy memoranda and guidelines that have evolved significantly over recent years. The foundational modern framework emerged from memoranda issued by DHS leadership establishing enforcement priorities. These priorities guide ICE attorneys in their decisions regarding when to move for dismissal of removal proceedings.

As of February 2026, practitioners should understand that the previous Doyle Memorandum, which had provided guidance to ICE attorneys on exercising prosecutorial discretion in removal proceedings, has been superseded or is no longer being adhered to, and no comprehensive replacement guidance has been issued.[1] This creates significant uncertainty regarding the consistency with which prosecutorial discretion is being exercised across different ICE local offices and immigration courts.

What remains constant is that DHS retains broad authority to exercise prosecutorial discretion at all stages of enforcement, including the decision to move for dismissal after removal proceedings have commenced.[20][23] The Office of the Principal Legal Advisor (OPLA) within ICE serves as the representative for DHS in immigration court proceedings and makes day-to-day decisions regarding whether to pursue dismissal of specific cases.[1][20][23] These prosecutorial discretion decisions are theoretically unreviewable by courts, but they must still be exercised within the boundaries established by statute and regulation, and they must be independently adjudicated by the immigration judge once the respondent raises a timely objection.[28]

Expedited Removal Expansion and Strategic Dismissals

As of January 2025, the Trump administration significantly expanded the scope of expedited removal under INA § 235(b).[6] DHS designated aliens for expedited removal to its statutory maximum, to include noncitizens not admitted or paroled who cannot prove continuous presence in the United States for at least two years.[6] Following this expansion, DHS issued guidance directing DHS attorneys to consider moving to dismiss ongoing removal proceedings under 8 C.F.R. § 239.2(a)(7) in order to pursue expedited removal against noncitizens now amenable to the expanded expedited removal category.[6] This represents a new strategic use of dismissal authority, wherein DHS seeks to terminate §240 removal proceedings (standard removal proceedings before an immigration judge) to place respondents in expedited removal proceedings instead.

The strategic rationale for this approach is that expedited removal proceedings are faster, provide fewer procedural protections, do not allow for adjudication of most forms of relief (such as asylum or cancellation of removal), and result in expedited removal orders that carry a five-year bar to re-entry.[27][46] For respondents, dismissal to pursue expedited removal represents a significant prejudicial outcome, as it eliminates any opportunity to present meritorious claims for relief before an immigration judge and accelerates the timeline to deportation. This development has generated significant litigation, with practitioners opposing DHS motions to dismiss on grounds that dismissal would severely prejudice respondents by preventing adjudication of available relief.[6][28]

Recent Executive Office for Immigration Review Guidance and Controversy

In February 2025, EOIR issued guidance to immigration judges regarding adjudication of DHS motions to dismiss, directing that DHS motions to dismiss may be made orally and decided from the bench without additional documentation or briefing, and that no additional 10-day response period is required when DHS meets the regulatory burden.[27] This guidance appears to conflict with the Immigration Court Practice Manual, which provides that motions in non-detained proceedings must be filed at least 15 days prior to the individual hearing and must be served on the opposing party, and that responses to motions must be submitted within ten days after the original filing with the immigration court.[27][39] Additionally, the EOIR guidance appears to inaccurately quote the regulatory standard, referring to "circumstances have changed" rather than "circumstances of the case have changed," a distinction that practitioners have argued carries legal significance.[27]

The clandestine nature of this February 2025 EOIR directive-which was not disseminated publicly on EOIR's website or through official channels-has been subject to criticism from immigration law practitioners and advocacy organizations.[27] The memorandum contained a section acknowledging that EOIR believed certain operational policies had violated basic principles of administrative law by remaining secret.[27] Practitioners have been advised to challenge such guidance as violating administrative procedure and the right to due process, and to consider introducing news articles describing the secret guidance into the record of proceedings as evidence of procedural irregularity.[27]

Standards of Review for Appeal

When an immigration judge's dismissal order is appealed to the Board of Immigration Appeals, the applicable standards of review depend on the nature of the issue being raised.[32] The BIA reviews an immigration judge's factual findings for clear error, applying a highly deferential standard that affirms factual determinations unless the evidence overwhelmingly supports a contrary conclusion.[32] By contrast, legal conclusions and questions of law, discretion, and judgment are reviewed de novo by the BIA, meaning the Board applies independent review without deference to the immigration judge's legal analysis.[32] When appealing a dismissal order, respondents typically argue that the immigration judge erred as a matter of law in granting a DHS motion to dismiss, either by failing to independently adjudicate the motion, failing to consider the respondent's objections, failing to find prejudice to the respondent, or incorrectly applying the regulatory standard for dismissal under 8 C.F.R. § 239.2(a)(7).

Distinction Between Dismissal and Termination

Definitional Framework and Practical Consequences

A critical distinction in removal defense practice separates "dismissal" from "termination," as these terms carry different legal meanings and different practical consequences for respondents.[1][16][29] A motion to dismiss removal proceedings requests that the immigration judge end the proceedings against a respondent on grounds specified in the regulations, typically pursuant to 8 C.F.R. § 1239.2(c) on the bases set out in 8 C.F.R. § 239.2(a).[1] A motion to terminate removal proceedings, by contrast, alleges that the government's charges are substantively or procedurally defective, or requests termination on other grounds not specified in the dismissal regulations, such as that the respondent is now eligible for relief before USCIS or that the respondent has obtained lawful status while proceedings were pending.[1][16] When a motion to dismiss raises grounds other than those authorized by 8 C.F.R. § 1239.2(c), the regulation provides that such motion shall be deemed a motion to terminate.[4][19]

The practical consequences of dismissal versus termination differ significantly in several respects.[1] A dismissal is explicitly stated in the regulation to be "without prejudice," meaning DHS retains the authority to file a new Notice to Appear and initiate new removal proceedings based on the same or different grounds at any subsequent time.[1][3] This "without prejudice" aspect means that dismissal provides only temporary relief from removal proceedings, not permanent protection from future enforcement action. Termination, by contrast, is generally understood to be a more conclusive ending of removal proceedings, although if termination is granted without prejudice, DHS may still theoretically refile charges.[1][16] Additionally, dismissal operates to terminate any pending applications for relief that were filed before the immigration court, meaning that asylum applications, cancellation of removal applications, and other forms of relief cannot be adjudicated once dismissal is granted.[1][37] This distinction makes dismissal particularly harmful for respondents who have pending meritorious applications for relief.

Respondent's Interests in Continued Proceedings

The distinction between dismissal and termination becomes consequential primarily when a respondent opposes the motion and wishes to continue proceedings to adjudicate applications for relief or defenses to removal. In such circumstances, respondents must demonstrate that they have a significant interest in continued proceedings and that dismissal would prejudice them.[2][28][36] The types of interests recognized by the BIA include asylum seekers' interests in having their cases reviewed de novo by an immigration judge after USCIS referral,[36] respondents' interests in seeking cancellation of removal (a form of relief not available affirmatively through USCIS and available only before EOIR),[2][36] and respondents' interests in having USCIS determinations reviewed by an immigration judge (as in the I-751 context addressed in Ferreira).[2]

Courts have recognized that respondents with pending applications for T visas (for trafficking victims) or U visas (for victims of qualifying crimes) have significant interests in continued proceedings to protect their eligibility for these victim-based benefits.[1] Similarly, respondents with pending DACA applications or with pending VAWA (Violence Against Women Act) self-petitions have interests in remaining in immigration proceedings while those collateral applications are adjudicated, since dismissal of removal proceedings may result in loss of employment authorization or other derivative benefits and may create obstacles to pursuing the collateral relief.[1][52] Practitioners are advised to thoroughly develop the record on the respondent's specific interests in continued proceedings by eliciting testimony regarding pending applications, eligibility for relief, and the specific prejudicial consequences if proceedings are dismissed.

Procedural Requirements and Standards for Adjudication

Notice and Service Requirements

The Immigration Court Practice Manual establishes procedural requirements for filing motions to dismiss that practitioners must strictly observe.[39] Motions in non-detained proceedings must be filed at least 15 days prior to the individual hearing and must be served on the opposing party.[27][39] Service is accomplished through electronic filing in ECAS (Electronic Case Access System) when available, or through other permissible means such as commercial carrier delivery or telefax with acknowledgment of receipt.[3] The filing party must attach a valid proof of service to the motion, demonstrating compliance with service requirements.[40] Responses to motions must be submitted within ten days after the original filing with the immigration court, unless the immigration judge sets a different deadline.[39][40]

Practitioners should note that DHS frequently files motions to dismiss orally at the merits hearing itself, technically violating the 15-day advance filing requirement and the requirement that motions be served on the opposing party in advance.[27][40][43] Immigration judges have authority to deny such untimely motions based solely on failure to comply with procedural rules,[27][40][43] although in practice many judges grant oral motions despite the procedural deficiency. Advocates should preserve this procedural argument by objecting to the untimeliness of any oral motion to dismiss and requesting continuance to allow time to prepare a written opposition.

Prejudice Analysis and Due Process Considerations

When an immigration judge considers a DHS motion to dismiss that is opposed by the respondent, the judge must undertake analysis of whether dismissal would prejudice the respondent.[2][28] The BIA has indicated that prejudice exists where the respondent would be prevented from adjudication of meritorious applications for relief or where dismissal would result in swift deportation through expedited removal procedures when the respondent otherwise would have had opportunity to present a case for relief before an immigration judge.[28][46] Prejudice may include loss of employment authorization that the respondent currently

possesses based on a pending application for relief, prolonged family separation, lack of access to public benefits while an application is pending, and impacts on the respondent's mental health and other vulnerabilities.[40]

The Constitution protects noncitizens in removal proceedings with Fifth Amendment Due Process rights, guaranteeing a full and fair opportunity to be represented by counsel, to prepare an application for relief, and to present testimony and other evidence in support of that application.[45][48] The BIA has recognized that while noncitizens do not possess a substantive liberty interest in remaining in the United States, they do possess a due process right to a fundamentally fair hearing where procedural safeguards ensure that the alien is not prevented from reasonably presenting his or her case.[45] Dismissal of proceedings over a respondent's objection may implicate due process if the respondent is denied meaningful opportunity to be heard regarding the motion and if dismissal would prevent the respondent from presenting meritorious applications for relief.

Immigration Judge's Duty to Adjudicate

The controlling precedent establishes that when a DHS motion to dismiss is opposed by the respondent, the immigration judge bears a non-delegable duty to independently adjudicate the motion by considering both parties' arguments and the specific factual circumstances of the case.[2][28][53] This duty requires more than perfunctory consideration of the motion; it requires substantive engagement with the respondent's arguments and explanation in the order of why the judge is granting or denying the motion.[40][43][53] The BIA has held that where an immigration judge issues a template order granting dismissal without fully engaging with the respondent's arguments in opposition, the order may constitute reversible legal error.[40][43]

The regulation implementing this duty at 8 C.F.R. § 1239.2(c) provides that the immigration judge "will adjudicate the motion," implying an affirmative obligation to consider the motion on its merits rather than summarily granting it.[28] When the substantive grounds for the dismissal motion are not met-for example, when DHS moves under 8 C.F.R. § 239.2(a)(7) on the theory that circumstances have changed but the record demonstrates that circumstances have not materially changed since the Notice to Appear was issued-the immigration judge is empowered to deny the motion and proceed with the hearing on the merits of the respondent's applications for relief.

Strategic Considerations for Practitioners

Evaluating Dismissal Versus Continued Litigation

When DHS moves to dismiss removal proceedings, practitioners face a critical strategic decision regarding whether to oppose the motion or to acquiesce to dismissal.[40][43] This decision depends on multiple factors that must be evaluated in light of the specific respondent's circumstances, the strength of available relief, and the procedural posture of the case. If the respondent has a strong case for asylum, cancellation of removal, or other available relief, and if no serious procedural defects exist in the charging document (Notice to Appear), then opposing dismissal and proceeding to merits hearing is typically advisable.[1][40][43]

Conversely, if the respondent faces serious obstacles to relief-for example, if the respondent is subject to a bar to asylum based on prior persecution in a third country, or if the respondent lacks the requisite years of residence for cancellation of removal-then pursuing dismissal may be strategically advantageous.[1] Dismissal allows the respondent to avoid a final order of removal, which carries bars to re-entry and may complicate future immigration prospects. If a respondent is dismissed without prejudice, DHS may choose not to re-file, leaving the respondent in the United States without legal status but also without a final order of removal on record. This circumstance may create opportunities for future relief if circumstances change substantially or if

the respondent becomes eligible for protection under programs that did not exist when proceedings were dismissed.

Practitioners should also consider the resources available for litigation, the client's risk tolerance regarding detention and deportation, and the likelihood that the immigration judge will grant relief on the merits.[40][43] If counsel is pro bono and has limited capacity, and if the case is complex and time-consuming, dismissal may conserve scarce resources that could be deployed to other cases with stronger prospects. However, practitioners should also consider the client's explicit preference regarding whether to litigate the case or accept dismissal, and should not pressure clients toward dismissal merely because dismissal might be convenient for counsel.

Opposing Motions to Dismiss: Legal Arguments

When opposing a DHS motion to dismiss that the respondent wishes to contest, practitioners should develop multiple legal arguments addressing both the substance of the motion and its procedural propriety. First, practitioners should challenge whether the dismissal grounds are actually satisfied by the facts of the case.[40][43] If DHS moves under 8 C.F.R. § 239.2(a)(7) on the theory that "circumstances of the case" have changed, practitioners should argue that merely being classified as a non-priority case does not constitute a "changed circumstance" of the specific case itself.[27][40][43] The regulation refers to circumstances of the case, not to DHS's evolving enforcement priorities.[27] Practitioners should distinguish between changes in DHS's enforcement priorities and changes in the specific factual circumstances of the respondent's case that would justify ending proceedings.

Second, practitioners should argue that the respondent would suffer substantial prejudice if proceedings are dismissed.[28][40][43] Practitioners should elicit evidence regarding any pending applications for relief, evidence that the respondent is eligible for asylum, cancellation of removal, or other relief available only before EOIR, and evidence that dismissal would prevent adjudication of these meritorious claims.[28][40] Practitioners should document the respondent's current employment authorization based on pending relief, and argue that dismissal would terminate that work authorization, resulting in loss of employment and loss of ability to support the respondent's family.[40][43]

Third, practitioners should argue that the immigration judge has independent duty to adjudicate the motion and is not compelled to grant dismissal simply because DHS moved to dismiss.[2][28] Practitioners should cite Matter of H.N. Ferreira for the proposition that immigration judges err in concluding they are required to terminate proceedings simply because DHS moved to do so.[2] Practitioners should emphasize that the respondent's position on the motion is relevant and must be considered by the court.[2][28]

Fourth, practitioners should identify and argue any procedural defects in how the motion was filed and served. If the motion was not served on the respondent in advance of the hearing, if the motion was raised orally at the merits hearing without prior written notice, or if the respondent was not given adequate opportunity to respond before the judge ruled on the motion, practitioners should preserve these procedural arguments and argue that they warrant denial of the motion regardless of its substantive merits.[27][40][43] If the judge's order granting dismissal is issued before ten days have elapsed since DHS filed the motion, practitioners should argue that the respondent was not afforded adequate opportunity to respond, which violated procedural fairness.[40][43]

Post-Dismissal Litigation: Motions to Reconsider and Appeals

If the immigration judge grants DHS's motion to dismiss notwithstanding the respondent's opposition, practitioners face a choice between filing a motion to reconsider with the immigration judge or directly appealing to the Board of Immigration Appeals. A motion to reconsider must be filed within 30 days of the

date of entry of the dismissal order and must specify the errors of fact or law in the immigration judge's decision.[40][43][58] Motions to reconsider are appropriate when the practitioner can identify a clear legal or factual error in the immigration judge's decision, when the record on the dismissal issue is underdeveloped, or when the practitioner believes the immigration judge may be open to changing their mind upon reconsideration of certain arguments.[40][43]

Additionally, practitioners should examine whether the immigration judge's order contains procedural errors that warrant reconsideration. For example, if the immigration judge ruled on the motion to dismiss before ten days had elapsed since DHS filed the motion, that violation of the response deadline should be highlighted in the motion to reconsider.[40][43] Similarly, if the immigration judge issued a template order without addressing the respondent's specific arguments in opposition, this failure to engage with arguments from both sides constitutes reversible error under Matter of G-N-C-, 22 I&N Dec. 281 (BIA 1998).[28][40]

If the immigration judge denies the motion to reconsider or if the practitioner determines that reconsideration is unlikely to succeed, an appeal may be filed with the Board of Immigration Appeals. The Notice of Appeal (Form EOIR-26) must be filed within 30 days of the date of the final order of removal (or in this case, the order of dismissal, which functions as a final order).[39][47] The appeal should identify specific errors of law or fact that the immigration judge made, and should argue that the immigration judge erred in granting the motion to dismiss over the respondent's opposition. The appeal brief should argue that the immigration judge failed to independently adjudicate the motion, failed to consider the respondent's prejudice, incorrectly applied the regulatory standard for dismissal, or violated the respondent's due process rights by denying meaningful opportunity to be heard.

An important consideration for practitioners is whether to continue paying employment authorization while an appeal of dismissal is pending. The regulation at 8 C.F.R. § 274a.12(c) provides that USCIS may establish validity periods for employment authorization documents that include any period when an administrative appeal or judicial review is pending. Some practitioners have successfully argued that the dismissal order is not administratively final until the BIA rules on the appeal, and therefore that the respondent's underlying application for relief remains pending for purposes of employment authorization renewal.[40][43][58] This argument may allow respondents to maintain work authorization while appeals are pending, providing critical economic support to the respondent and family members.

Advocacy Before the Board of Immigration Appeals

When appealing to the BIA, practitioners should frame their arguments to emphasize the legal errors in the immigration judge's grant of the dismissal motion and to invoke controlling precedent requiring independent adjudication of opposed motions.[2][28] Practitioners should stress that the respondent specifically objected to dismissal and articulated interests in continued proceedings-citing Matter of H.N. Ferreira for the proposition that respondent's significant interests in adjudication constitute factors the immigration judge must weigh.[2] Practitioners should develop extensive briefing on the prejudicial consequences of dismissal, demonstrating through documentary evidence how dismissal would prevent adjudication of meritorious relief claims.

Practitioners should also consider whether the appeal presents the opportunity to develop an argument on the legal interpretation of 8 C.F.R. § 239.2(a)(7) that may create favorable precedent for future cases. For example, practitioners might argue that classification as a non-priority case does not satisfy the regulatory requirement that "circumstances of the case" have changed, or that this classification constitutes arbitrary and capricious exercise of prosecutorial discretion if applied without individualized factual analysis. While such arguments face significant headwinds given the broad deference typically afforded to DHS's prosecutorial discretion decisions, framing the issue clearly in the appellate brief ensures that the argument is preserved for

potential petition for review to the circuit court if the BIA affirms.

San Francisco-Specific Context and Practice Considerations

San Francisco Immigration Court Characteristics

The San Francisco Immigration Court, located at multiple addresses including 100 Montgomery Street, Suite 800, San Francisco, CA 94104, the 630 Sansome Street, 4th Floor location, and the Concord hearing location at 1855 Gateway Blvd., Suite 850, Concord, CA 94520, processes a high volume of cases with a distinct caseload composition.[1] The San Francisco court docket is heavily weighted toward asylum cases, particularly those involving Central American nationals fleeing persecution or violence from gangs, drug cartels, and state actors in Guatemala, El Salvador, Honduras, and Nicaragua. The court also maintains a significant population of Mexican and Mexican-American respondents, tech worker H-1B visa issues (less commonly in removal proceedings but occasionally in the context of visa fraud or security-related removability charges), and DACA/TPS populations.

Individual immigration judges within the San Francisco court maintain varying approaches to motions to dismiss. Some judges have demonstrated receptiveness to respondent-requested terminations where compelling hardship factors exist and where respondents have clear eligibility for relief before USCIS. Other judges have adopted more restrictive approaches, granting DHS motions to dismiss relatively routinely. Practitioners should research the individual judge assigned to a case and, where feasible, tailor opposition arguments to align with the specific judge's known preferences and decision-making patterns. The San Francisco court also maintains varying practices regarding continuances and extension requests, with some judges favorably inclined toward providing additional time for evidence gathering and others enforcing deadlines strictly.

San Francisco Asylum Office Dynamics

The San Francisco Asylum Office, which conducts affirmative asylum interviews for cases not referred by an immigration officer, maintains distinct interview procedures and patterns. When respondents in removal proceedings seek to pursue asylum affirmatively through the asylum office instead of through immigration court, practitioners should understand that if removal proceedings are dismissed, the respondent may need to refile their I-589 asylum application (Form Application for Asylum and for Withholding of Removal) with USCIS.[13] Recent USCIS guidance clarifies that asylum seekers who had cases dismissed or terminated from immigration court must refile I-589 applications with USCIS to maintain their asylum eligibility.[13] If an asylum seeker does not refile with USCIS, they remain in the United States without lawful status, and when their Employment Authorization Document (EAD) issued based on the prior EOIR-filed asylum application expires, they lose work authorization.[13]

Practitioners should counsel respondents about the consequences of dismissal for ongoing asylum eligibility and should consider whether the respondent would prefer to pursue asylum through the EOIR immigration court (where the case would be adjudicated by an immigration judge applying de novo review) or through the asylum office (where the asylum officer would conduct a de novo interview and make an affirmative determination). Dismissal to refile with USCIS may be advantageous in some circumstances, particularly if the respondent believes the immigration judge is unlikely to grant asylum or if the respondent wishes to pursue alternative relief such as adjustment of status through an approved family or employment petition.

Northern California Criminal Law and Immigration Consequences

Practitioners in Northern California must maintain awareness of how California state criminal law intersects

with immigration removability determinations. California Penal Code § 1203.43 permits post-conviction relief for convictions that have immigration consequences, allowing judges to strike certain provisions of sentences that trigger deportability or inadmissibility grounds. Similarly, California Penal Code § 1473.7 permits vacation of convictions on the ground that a prior attorney provided constitutionally ineffective assistance of counsel by failing to advise the defendant about immigration consequences of the conviction.[1]

Practitioners representing respondents with criminal convictions should investigate whether pre-conviction motions to modify sentences or post-conviction petitions for vacatur might eliminate or reduce deportability findings. For example, if a respondent was convicted under California Proposition 47 (which reduced certain felonies to misdemeanors), or Proposition 64 (which permitted reduction of certain drug convictions), the practitioner should determine whether a motion to reduce the conviction would eliminate the crime of violence or drug trafficking offense categorization that triggered removal charges. Successfully eliminating or reducing a criminal conviction can convert an otherwise weak removal case into one where termination is appropriate because the respondent is not deportable.

Prosecutorial Discretion Dynamics in Northern California

The Northern California ICE Enforcement and Removal Operations (ERO) Field Office 1 maintains its own priorities and patterns regarding when OPLA will move to dismiss cases. Some local OPLA offices are more amenable to informal requests for prosecutorial discretion, and some have indicated that they consider the strength of respondents' claims for relief before moving to dismiss. However, practitioners should not rely on informal understandings or prior practice patterns, as enforcement priorities and personnel changes can occur rapidly. The current political environment as of February 2026 has been characterized by increased focus on interior enforcement and expanded expedited removal capacity, suggesting that OPLA may be more likely to move for dismissal to pursue expedited removal against respondents who lack continuous physical presence for the prior two years.

Practitioners should remain flexible in their assessment of when prosecutorial discretion requests might be appropriate. While the Doyle Memorandum historically provided structure for such requests, its replacement or status remains unclear as of February 2026. Practitioners may still submit letters to OPLA presenting mitigating factors and positive equities, but should anticipate that such requests may receive inconsistent consideration. The most reliable approach remains developing strong legal arguments for why dismissal should be denied based on the regulatory standards and the respondent's interests in continued proceedings.

Conclusion

Motions to dismiss in immigration removal proceedings represent a critical junction in removal defense practice where procedural expertise, strategic judgment, and knowledge of evolving case law intersect. The regulatory framework at 8 C.F.R. § 1239.2(c) and the seven enumerated grounds at 8 C.F.R. § 239.2(a) establish the legal boundaries within which motions to dismiss operate, but the practical application of these provisions has evolved substantially through recent Board of Immigration Appeals precedent, particularly Matter of H.N. Ferreira, 28 I&N Dec. 765 (BIA 2023), which reestablished immigration judges' duty to independently adjudicate opposed motions to dismiss by considering both parties' arguments and the respondent's interests in continued proceedings.

The distinction between dismissal and termination carries profound practical significance for respondents, as dismissal without prejudice permits DHS to refile charges at any future time and terminates pending applications for relief, while termination may provide more permanent closure and allows for continued adjudication of relief applications. Strategic decisions regarding whether to oppose or acquiesce to dismissal

motions require careful analysis of the respondent's eligibility for relief, the strength of available defenses, the respondent's interests in adjudication, and the likelihood that continued litigation will produce favorable outcomes.

Recent developments, particularly the January 2025 expansion of expedited removal and DHS's subsequent strategy of moving to dismiss §240 proceedings to pursue expedited removal, have created new challenges for removal defense practitioners. The February 2025 EOIR guidance regarding procedures for adjudicating DHS motions to dismiss raises concerns about procedural fairness and adherence to regulatory requirements, potentially giving rise to appellable legal errors. Practitioners must remain vigilant in identifying procedural defects and must ensure that respondents' opposition to dismissal is thoroughly documented in the record to support potential appeals.

For practitioners in Northern California serving immigrant communities in the San Francisco Bay Area, understanding the specific dynamics of the San Francisco Immigration Court, the San Francisco Asylum Office, and the Northern California ICE field office is essential to competent representation. The high volume of asylum cases, the significant Central American caseload, and the interplay between California state criminal law and immigration consequences create distinctive challenges and opportunities for removal defense advocates. By mastering the regulatory framework, staying current with evolving precedent, and developing sophisticated strategic arguments tailored to individual respondents' circumstances, practitioners can effectively oppose unjustified dismissal motions and preserve respondents' rights to adjudication of available relief in immigration court.