

Legal Research Report: Board of Immigration Appeals Motions to Reconsider

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FINDINGS

COMPREHENSIVE LEGAL RESEARCH REPORT: BOARD OF IMMIGRATION APPEALS MOTIONS TO RECONSIDER

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EXECUTIVE SUMMARY

A motion to reconsider before the Board of Immigration Appeals (BIA) is a post-final-decision remedy that challenges legal or factual errors in the Board's prior ruling or addresses intervening changes in controlling law[7][26][31]. This motion constitutes the last administrative avenue for relief before federal court review and operates under strict procedural constraints that practitioners must navigate with precision. The motion must be filed within exactly 30 days of the BIA's decision, must identify errors with particularity supported by pertinent authority, and generally permits only one filing per decision with no exceptions for respondents[26][31][42]. Unlike its counterpart motion to reopen-which introduces new evidence or changed circumstances-a motion to reconsider is anchored exclusively to the existing record and the legal sufficiency of the prior administrative determination[7][34][38].

The substantive and procedural requirements for this remedy create both opportunity and significant risk. Practitioners who successfully identify correctable legal errors, demonstrate misapplication of binding precedent, or leverage recent changes in controlling law can obtain reconsideration without triggering the heightened procedural barriers applicable to new-evidence motions. However, the strict 30-day deadline admits only narrow equitable tolling-applying only where the moving party demonstrates diligence in pursuing their rights and an extraordinary circumstance prevented timely filing[2]. The Board's discretion to grant or deny motions to reconsider, combined with the statutory bar to most jurisdictional and discretionary challenges in federal court, renders strategic precision in motion drafting essential to preserving appellate rights.

Key findings from current authority: The BIA retains discretionary authority to reopen or reconsider sua sponte only in exceptional circumstances involving fundamental changes in law[28][37][53]. Equitable tolling of the 30-day deadline applies narrowly and requires both diligence and an extraordinary circumstance that prevented filing-inadvertent acts such as mailing errors generally do not qualify[2]. Affirmance without opinion (AWO) decisions present distinct challenges for reconsideration motions, as the moving party must affirmatively demonstrate that alleged errors and legal arguments were previously raised on appeal and explain how the Board erred in affirming under applicable AWO standards[37][45]. Federal courts review de novo whether the BIA applied the correct standard of review-a potential basis for reversal on petition for review even where the underlying discretionary determination might not be reviewable[10][33][56].

Client risk assessment: For respondents with colorable legal errors, changes in controlling law, or misapplied precedent, the risk profile is medium to high regarding likelihood of success, with outcome heavily dependent on the specificity of error identification and the availability of binding authority supporting the claimed correction. For respondents relying on equitable tolling arguments or challenging factual findings as clearly erroneous, the risk profile is high because courts defer substantially to Immigration Judge findings and tolling applies only in genuinely extraordinary circumstances. The strategic value of a motion to reconsider depends

critically on whether the movant seeks preservation of arguments for federal review, immediate reversal on the merits, or remand for additional proceedings.

LEGAL FRAMEWORK GOVERNING MOTIONS TO RECONSIDER

Statutory Authority and Regulatory Foundation

The statutory authority for motions to reconsider before the BIA derives from 8 U.S.C. § 1229a(c)(6), which provides that "[t]he alien may file one motion to reconsider a decision that the alien is removable from the United States" and requires that "the motion must be filed within 30 days of the date of entry of a final administrative order of removal" and "shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority."^[12] This statute establishes the foundational framework for respondent motions to reconsider, creating a statutory one-motion limit and the mandatory 30-day deadline that applies without exception for individual respondents.

The parallel regulatory authority appears in 8 C.F.R. § 1003.2(b), which governs motions to reconsider before the BIA specifically. This regulation provides that "[a] motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority" and confirms that "a motion to reconsider must be filed within 30 days of the Board's decision."^{[7][31][42]} The regulation further clarifies that a party may file "only one motion to reconsider" with the notation that although a party may file a motion to reconsider the denial of a motion to reopen, a party may not file a motion to reconsider the denial of a motion to reconsider itself.^{[7][26][31]} This jurisdictional lockout prevents successive motions to reconsider and forecloses tactical refiling strategies.

The distinction between motions to reconsider and motions to reopen is statutorily embedded. 8 U.S.C. § 1229a(c)(7) governs motions to reopen and requires that "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."^[12] This textual divergence—"new facts" supported by affidavits for reopen versus "errors of law or fact in the previous order" supported by pertinent authority for reconsider—creates a bright-line doctrinal distinction that has been consistently reinforced by circuit court jurisprudence.^{[17][34][38]}

Board of Immigration Appeals Practice Manual Standards

The BIA Practice Manual, Chapter 5.7, provides authoritative guidance on the substantive requirements and procedural mechanics of motions to reconsider filed before the Board.^{[7][26][31][42]} The Manual establishes that a motion to reconsider "either identifies an error in law or fact in a prior Board decision or identifies a change in law that affects a prior Board decision and asks the Board to re-examine its ruling" and emphasizes that "a motion to reconsider is based on the existing record and does not seek to introduce new facts or evidence."^{[7][31][42]} This foundational principle anchors all reconsideration analysis: the motion cannot serve as a vehicle for introducing factual development or additional evidence, no matter how material or previously unavailable that evidence might be.

The Practice Manual identifies three distinct categories of error cognizable in a motion to reconsider: (1) material factual errors in the prior Board decision; (2) material legal errors in the prior Board decision; and (3) changes in law occurring after the prior Board decision that materially affect the outcome.^{[28][37][53]} When a motion to reconsider relies on a change in law, the moving party must identify the changes with specificity and provide copies of relevant statutory, regulatory, or precedent authority, along with an explanation of how

the outcome would be materially altered.[26][28][31][42] The requirement that changes in law be "material" or "fundamental in nature"-not merely incremental doctrinal developments-creates a high threshold that excludes minor clarifications or non-binding persuasive authority.[28][37][53]

The Manual further specifies that a motion to reconsider may not be based solely on an argument that an Immigration Judge's decision should not have been affirmed without opinion (AWO).[7][26][31][42][47] This limitation requires that when challenging an AWO decision, the moving party must demonstrate that the alleged errors and legal arguments were previously raised on appeal and explain specifically how the Board erred in affirming under the applicable AWO regulations, rather than arguing merely that a written opinion should have been issued.[28][37][45]

Key BIA Precedent on Reconsideration Standards

Matter of Lopez, 22 I&N Dec. 16 (BIA 1998) established foundational jurisprudence regarding the scope of the Board's jurisdiction over motions to reconsider its own dismissals of untimely appeals.[28][37] Lopez held that "where the Board of Immigration Appeals dismisses an appeal as untimely, without adjudication on the merits, the Board retains jurisdiction over a motion to reconsider its dismissal of the untimely appeal to the extent that the motion challenges the finding of untimeliness or requests consideration of the reasons for untimeliness." [28][37] This decision clarifies that while the Board lacks jurisdiction to reconsider the merits of an appeal once dismissed as untimely, the Board does retain jurisdiction to revisit the timeliness determination itself through a motion to reconsider.

Matter of G-D-, 22 I&N Dec. 1132 (BIA 1999) articulated the controlling standard for when the Board may exercise sua sponte reconsideration or reopening authority.[28][37][53] G-D- held that "in order for a change in the law to qualify as an exceptional situation that merits the exercise of discretion by the Board of Immigration Appeals to reopen or reconsider a case sua sponte, the change must be fundamental in nature and not merely an incremental development in the state of the law." [28][37][53] This precedent significantly constrains the Board's own motion authority and establishes that fundamental changes-such as vacatur of prior Attorney General precedent-trigger sua sponte reconsideration authority, but marginal clarifications do not.

Matter of Morales-Morales, 28 I&N Dec. 714 (BIA 2023) represents the most recent controlling precedent on equitable tolling in the immigration context and constitutes a significant doctrinal shift in the Board's approach to deadline compliance.[2] Morales-Morales held that the BIA has authority to apply the principle of equitable tolling and accept untimely appeals where the appealing party establishes that (1) they were diligent in pursuing the filing of the appeal, and (2) an extraordinary circumstance prevented timely filing.[2] The BIA overturned prior precedent holding that 8 C.F.R. § 1003.38(b) prescribed a jurisdictional rule with no authority for extension, and instead characterized the deadline as a claims-processing rule subject to equitable tolling under the framework established in [Holland v. Florida, 560 U.S. 631 (2010)][2]. However, Morales-Morales also demonstrated that equitable tolling does not rescue simple mailing errors or inadvertent acts that do not meet the "extraordinary circumstance" threshold.[2]

CURRENT LEGAL LANDSCAPE AND RECENT DEVELOPMENTS

Equitable Tolling After Morales-Morales: Scope and Limitations

The Morales-Morales decision has reshaped the procedural landscape surrounding deadline compliance in immigration appeals and motions.[2] By recognizing that the 30-day filing deadline is a claims-processing rule rather than a jurisdictional rule, Morales-Morales opened the door to equitable tolling arguments where

previously none existed. Equitable tolling applies when a respondent demonstrates both (1) diligence—meaning that the party pursued its rights with reasonable diligence despite the obstacle—and (2) an extraordinary circumstance that prevented timely filing despite that diligence.[2] The application of *Holland v. Florida*'s two-prong standard has created meaningful relief opportunities for respondents whose delays were caused by factors genuinely beyond their reasonable control.

However, the Board's application of equitable tolling remains highly restrictive in practice. The fact pattern in *Morales-Morales* itself illustrates the difficulty: the respondent's counsel prepared the appeal, mailed it via regular mail instead of express mail, and the BIA did not receive it by the deadline.[2] The Board found that equitable tolling was unavailable because (a) the respondent retained counsel only five days before the appeal was due, (b) the respondent did not sufficiently explain the steps taken in the first 25 days to diligently pursue the appeal, and (c) an inadvertent mailing error—using regular instead of express mail—is "typically not an extraordinary circumstance" and therefore does not satisfy the second prong.[2] This application suggests that extraordinary circumstances likely require factors such as ineffective assistance of counsel involving breach of a fiduciary duty, government misconduct affecting the timeline, or serious medical or emergency events affecting counsel or the respondent.

For motions to reconsider specifically, the implications of *Morales-Morales* are significant but circumscribed. While equitable tolling is theoretically available to excuse late filing of a motion to reconsider, practitioners must present robust evidence of both diligence and a genuinely extraordinary circumstance. The change-in-law context presents the strongest factual predicate for equitable tolling, as respondents can argue they could not have filed the motion to reconsider earlier because the relevant law had not yet changed.[2][14][35][49] Similarly, claims of ineffective assistance of counsel may support equitable tolling where prior counsel's error prevented timely filing, though the Moving party must comply with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) requirements, including notice to prior counsel and, in most cases, a bar complaint.[13]

Affirmance Without Opinion (AWO) Motions to Reconsider

Affirmance without opinion decisions by the BIA present distinctive challenges for motions to reconsider. The Federal Register notice addressing BIA AWO policy clarifies that the decision to issue an AWO is not itself reviewable, and the Board is presumed to have considered all relevant issues and claims of error on appeal, regardless of whether a written opinion was issued.[29][45][48] This presumption significantly complicates reconsideration strategy for respondents whose appeals resulted in AWO dispositions. A respondent cannot argue that an Immigration Judge's decision should not have been affirmed without opinion as the sole basis for a motion to reconsider.[7][26][31][42][47]

Rather, when challenging an AWO through a motion to reconsider, the respondent must affirmatively establish that (1) the alleged errors of law or fact were previously raised on appeal, (2) the motion specifies with particularity how those errors constitute material legal or factual mistakes, and (3) the respondent explains precisely how the Board erred in affirming despite the alleged errors.[28][37] This requirement effectively forces respondents to re-litigate their appeal arguments in motion form, arguing that the Board's presumed consideration was nonetheless erroneous as a matter of law. The practical effect is that motions to reconsider following AWO determinations face a higher threshold for success because the respondent must overcome both the specificity requirement and the statutory presumption that the Board thoroughly considered all raised issues.

Standards of Review: Clear Error, De Novo, and Mixed Questions

Understanding the applicable standard of review is essential for crafting effective motions to reconsider, because the type of error claimed determines the legal rigor with which the BIA must address it on motion. The BIA reviews factual findings, including credibility determinations, under a clear error standard.[10][33][55] Under this highly deferential standard, "a factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." [10][33][55] Rather, for a factual finding to be clearly erroneous, the Board must be "left with the definite and firm conviction that a mistake has been committed." [10][33][55] This demanding threshold means that motions to reconsider premised on factual errors face considerable obstacles, as the motion must demonstrate not merely that the Immigration Judge's factual finding was debatable or that reasonable minds might differ, but rather that the finding was illogical, implausible, or entirely unsupported by the record.

By contrast, the BIA reviews legal questions, discretionary determinations, and questions of judgment de novo, applying no deference to the Immigration Judge's conclusions on matters of law.[10][33][59] When a motion to reconsider identifies legal error-such as misapplication of a statutory definition, incorrect interpretation of a regulatory standard, or failure to apply binding precedent-the BIA must engage in fresh legal analysis rather than defer to the Immigration Judge's legal reasoning. This de novo review standard creates stronger foundations for motions to reconsider based on legal claims, as the standard itself incorporates no presumption favoring the initial decision.

Mixed questions of law and fact-where historical facts are established but the legal significance of those facts is disputed-receive bifurcated review.[10][33][55] The BIA reviews the underlying factual determinations for clear error and reviews the application of law to those facts de novo.[10][33][55] This bifurcated approach creates strategic opportunities in motions to reconsider: a respondent can argue that even accepting all of the Immigration Judge's factual findings as correct, the legal application to those facts was erroneous. For example, in asylum cases, if the Immigration Judge found certain facts about past persecution but concluded those facts did not establish persecution on account of a protected ground, a motion to reconsider could argue that the factual findings are not clearly erroneous but the legal application of those facts to the nexus requirement was incorrect and subject to de novo review.

Ninth Circuit Precedent on Motion to Reconsider Standards

The Ninth Circuit has consistently held that the distinction between motions to reconsider and motions to reopen is jurisdictionally significant and must be respected by the BIA. *Doissaint v. Mukasey*, 538 F.3d 1167 (9th Cir. 2008) established that "[a] motion to reconsider seeks to correct alleged errors of fact or law," while "[a] motion to reopen . . . is purely fact-based, seeking to present newly discovered facts or changed circumstances since a petitioner's hearing." [17][34] Critically, *Doissaint* further held that "when the BIA commits legal error in a petitioner's direct appeal, the BIA cannot cure that error in a denial of the petitioner's motion to reopen" because the motion to reopen is not designed to address legal errors.[17][34] This principle has important defensive implications: if a respondent mistakenly filed a motion to reopen when the proper vehicle was a motion to reconsider, the BIA should have recharacterized the motion or rejected it as procedurally defective, rather than substantively addressing it as a motion to reopen.

Correa-Rivera v. Holder, 706 F.3d 1128 (9th Cir. 2013) clarified that "as a practical matter, a motion to reopen is the only avenue ordinarily available to pursue ineffective assistance of counsel claims" and that if a respondent uses the label "motion to reconsider" based on ineffective assistance, the BIA should recharacterize it as a motion to reopen.[17][34] This principle underscores the importance of proper labeling and ensures that procedural form does not derail substantive claims based on prior counsel's deficient performance.

Iturribarria v. INS, 321 F.3d 889 (9th Cir. 2003) established that "the BIA erred as a matter of law when it recharacterized Singh's motion to reopen as a motion for reconsideration."^{[17][34]} This decision reinforces the principle that BIA recharacterization of motions must be correct and must not deprive respondents of substantive review when the factual or legal basis for the motion supports one characterization over another. In other words, if a respondent's motion substantively identifies legal error and cites authority supporting correction, the BIA should not reject it merely because the respondent labeled it incorrectly.

SUBSTANTIVE REQUIREMENTS FOR EFFECTIVE MOTIONS TO RECONSIDER

Identification of Error with Particularity and Supporting Authority

The regulatory requirement that a motion to reconsider "shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority" creates a demanding pleading standard that many practitioners underestimate.^{[7][26][31][42]} The word "specifying" signals that general allegations of error are insufficient; the motion must identify the precise location in the Board's decision where the error occurred, quote the erroneous language, and explain with particularity how and why it constitutes error. A motion that merely asserts "the BIA misapplied the law" without identifying which legal principle was misapplied, which statutory or regulatory provision was misconstrued, and where in the decision the misapplication appears will likely fail on pleading grounds alone, regardless of the substantive merit of the claim.

Effective motions to reconsider employ a structured approach to error identification that separates factual errors from legal errors and provides distinct supporting authority for each category. For factual errors, the motion must identify the specific factual finding in the Board's decision, explain why the finding is clearly erroneous as a matter of law (applying the demanding "left with the definite and firm conviction" standard), cite evidence in the record that contradicts the finding, and explain why that record evidence compels a different conclusion.^{[10][33][55]} The motion should not merely reweigh evidence or argue that a different factual outcome was possible; instead, it should demonstrate that no reasonable factfinder, applying the clear error standard, could have reached the Board's conclusion based on the record before it.

For legal errors, the motion must identify the legal principle at issue, quote the regulatory provision, statutory language, or BIA/circuit precedent that was misapplied, cite the BIA's or Immigration Judge's erroneous statement of law in the decision being challenged, and explain the correct legal principle with citation to controlling authority. The most effective motions to reconsider on legal grounds provide a clean comparison showing the law as the Board stated it and the law as it should have been applied, making the error visually apparent to the decision-maker. Motions that identify novel legal arguments or issues that could have been raised on appeal but were not may face dismissal for failure to preserve issues, especially in cases involving affirmance without opinion determinations.

Change in Law as a Basis for Reconsideration

Motions to reconsider premised on changes in controlling law represent some of the strongest vehicles for reconsideration relief, particularly when the change involves vacatur of prior precedent, overruling of prior Attorney General decisions, or intervening Supreme Court rulings.^{[28][35][37][40][41][49][50]} However, the threshold for what constitutes a "change in law" sufficient to warrant reconsideration is substantial: the change must be "fundamental in nature" and not "merely an incremental development in the state of the law."^{[28][37][53]} This requirement excludes mere clarifications, extensions of existing doctrine, or decisions

from non-binding persuasive authority.

The vacatur of *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) by Attorney General Garland provides an illustrative example of a fundamental change in law supporting motions to reconsider and reopen.[40] *Matter of A-B-I* had broadly held that "generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum," and this sweeping statement led immigration judges and the Board to categorically deny such claims for years.[40] When Attorney General Garland vacated *A-B-I*, holding that the prior decision was incorrect, practitioners immediately filed motions to reconsider and reopen in cases that had been denied under *A-B-I* precedent.[40] The change was fundamental because it reversed a categorical rule rather than merely clarifying its application.

Similarly, Supreme Court decisions such as *Pereira v. Sessions* establishing that a notice to appear in removal proceedings must contain the time and place of the initial hearing can support motions to reconsider where the BIA's prior decision assumed an NTA was valid despite lacking these jurisdictional elements.[49][50] When *Pereira* was decided, respondents whose cases had been removed based on defective NTAs immediately filed motions to reconsider and terminate, leveraging the Supreme Court's fundamental reframing of jurisdictional requirements.

Conversely, motions to reconsider premised on incremental developments-such as a BIA decision providing additional fact-specific guidance on the application of existing law, a circuit court decision adopting a particular approach to statutory construction that is not binding in the Ninth Circuit, or a Federal Register notice clarifying enforcement priorities-face significant hurdles. The moving party must demonstrate not merely that the new authority is favorable but that it represents a fundamental shift in the governing legal standard.

Ineffective Assistance of Counsel Claims in Motions to Reconsider Context

While ineffective assistance of counsel claims are typically raised in motions to reopen under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), certain aspects of prior counsel's error may properly be characterized as legal errors suitable for motions to reconsider.[13][16] For example, if prior counsel objectively failed to preserve an issue for appeal or clearly misunderstood the applicable legal standard such that the BIA's affirmance rested in part on prior counsel's incorrect legal concession, a motion to reconsider might be available to cure the legal error without requiring reopening for new evidence.

However, *Matter of Melgar*, 28 I&N Dec. 169 (BIA 2020) established strict requirements for claims of ineffective assistance raised through motions to reopen, and these requirements substantially constrain the availability of related claims through motions to reconsider.[13] *Melgar* held that an attorney's acceptance of responsibility for errors in a motion to reopen does not discharge the disciplinary authority complaint obligation under *Lozada*, particularly where the attorney representing the respondent on the ineffective assistance motion is the same attorney who committed the error.[13] More importantly, *Melgar* held that a respondent seeking reopening based on ineffective assistance must show a reasonable probability that, but for counsel's error, the respondent would have prevailed on the underlying claim.[13]

The practical guidance from *Melgar* is clear: if a respondent believes prior counsel provided ineffective assistance, the respondent should seek new counsel to pursue the motion to reopen or reconsider, as the same attorney who committed the error should not represent the respondent on the motion addressing that error.[13] This principle applies particularly in Northern California, where ethical rules are stringent and judicial scrutiny of potential conflicts of interest is heightened.

PROCEDURAL REQUIREMENTS AND PRACTICE MECHANICS

Filing Deadline and Extensions

The 30-day filing deadline for a motion to reconsider is among the most rigorous procedural requirements in immigration law and applies without exception to individual respondents.[5][7][26][31][42] The clock begins running from the date of the BIA's decision-not from the date the respondent learns of the decision, not from the date the respondent receives notice, but from the date the decision is issued by the Board.[26][30][31] In modern EOIR practice, the BIA typically issues decisions electronically, and the date of electronic issuance controls the deadline.

The statutory and regulatory framework contains no provision for automatic extensions, tolling based on pro se status, lack of counsel, or other equitable circumstances. Filing a motion to reopen or voluntary departure request does not extend the 30-day deadline for filing a motion to reconsider.[32][54] The only potential extension mechanism is equitable tolling under the Morales-Morales framework, which requires exceptional circumstances and demonstrated diligence.[2] Additionally, if a respondent's fee waiver request for the motion to reconsider is denied and the respondent does not establish the inability to pay, the BIA grants 15 days to re-file the motion with the appropriate fee, and the filing deadline is tolled during this 15-day cure period.[26][31]

For motions filed electronically through the ECAS (eRegistry and Courts & Appeals System), filing is deemed complete when the document is accepted into the official eROP, not when it is uploaded by the practitioner.[43] EOIR maintains an ECAS outage log, and unplanned system outages occurring on the last day for filing will extend the deadline to the first day of system availability that is not a Saturday, Sunday, or legal holiday.[26][31][43] However, planned system outages do not extend deadlines, and practitioners are expected to file during available system windows within the deadline.[43]

Content Requirements and Formatting Standards

A motion to reconsider filed with the BIA must comply with standard formatting requirements established in the BIA Practice Manual and EOIR regulations.[7][26][31] The motion should include a cover page labeled "MOTION TO RECONSIDER" and should follow the certification and caption standards applicable to all BIA motions. If the respondent is represented, the motion must be accompanied by Form EOIR-28 (Notice of Appearance as Attorney or Representative), establishing the attorney's authority to practice before the Board.[7][26][31]

The motion must include a statement of facts and procedural history establishing the context for the motion, followed by a clear specification of the alleged errors and citations to the Board's decision where the errors appear. Many practitioners organize motions to reconsider into numbered arguments, each addressing a distinct legal or factual error, with subheadings and clear topic sentences facilitating review by the BIA panel. The strongest motions include a table of contents, an index of authorities, and careful parallel citations to the Board's decision and supporting authority.

The motion should address filing fee requirements by either submitting the appropriate fee (currently \$1,030 for most motions to reconsider) or filing a fee waiver request on Form EOIR-26A.[30] Fee waiver requests must establish the inability to pay with specificity, and EOIR has demonstrated increasing hostility toward such requests.[27] While fee waivers remain technically available, practitioners should anticipate potential denial and prepare to submit the fee within the 15-day cure period if necessary.[26][31]

The motion should include an affidavit or declaration from the respondent (or respondent's authorized

representative) establishing that the respondent has reviewed the motion and understands its contents and implications. The declaration should address whether the removal order has been the subject of any judicial proceeding and, if so, provide details regarding the nature, date, court, and result or status of that proceeding.[44][47]

Service Requirements and Opposing Briefs

The moving party must serve the motion on the opposing party (typically the Department of Homeland Security through the ICE Office of the Principal Legal Advisor for the relevant field location) and provide proof of service to the BIA.[44][47] Service should be effected through ECAS if the case is eligible for electronic filing, using the DHS eService portal for DHS service.[43] If separate service is required, practitioners may serve DHS electronically through the eService portal or via mail to the designated address.

The DHS or moving party opposing the motion to reconsider typically has 10 days from receipt of the motion to file a response, though the BIA may set alternative briefing schedules in particular cases.[44][47] In practice, many DHS offices do not file opposing briefs, and the motion may be deemed unopposed and referred directly to the Board for decision.[44][47] However, practitioners should not assume non-opposition and should prepare arguments anticipating potential government responses.

Affirmance Without Opinion (AWO) Motions: Special Pleading Requirements

When a motion to reconsider challenges a BIA decision issued as an affirmance without opinion (AWO), the pleading requirements are substantially heightened. 8 C.F.R. § 1003.2(b)(3) explicitly provides that "[a] motion to reconsider may not be based solely on an argument that an Immigration Judge's decision should not have been affirmed without opinion." [7][26][31][42] This provision forecloses any motion that argues the form of the decision (written opinion versus AWO) was inappropriate.

Instead, a motion to reconsider following an AWO must include three specific elements: (1) an allegation of material factual or legal errors in the prior Board decision, supported by pertinent authority; (2) in the case of an AWO, a showing that the alleged errors and legal arguments were previously raised on appeal and a statement explaining specifically how the Board erred in affirming the Immigration Judge's decision under the applicable AWO regulations; and (3) if there has been a change in law, a reference to the relevant statute, regulation, or precedent and an explanation of how the outcome would be materially affected.[28][37]

The second element imposes a particularly demanding burden: the respondent must affirmatively establish that each error now alleged in the motion was in fact previously raised on appeal, provide citations to the appeal brief or oral argument record demonstrating that the issue was presented, and then explain how the Board's presumed consideration was nonetheless erroneous. This requirement effectively requires respondents to demonstrate that they are not raising a new argument but rather re-emphasizing a previously raised argument that the Board, despite its presumed consideration, got wrong. The burden is substantial, and many motions to reconsider following AWO determinations fail on pleading grounds because respondents cannot overcome the procedural requirement of establishing prior presentation.

MOTIONS TO RECONSIDER VERSUS MOTIONS TO REOPEN: DISTINCTIONS AND STRATEGIC SELECTION

Doctrinal Distinctions: Basis, Scope, and Remedy

The doctrinal distinction between motions to reconsider and motions to reopen is foundational to immigration

appellate practice and determines not only procedural requirements but also substantive scope and available remedies.[1][3][6][15][34][38] A motion to reopen is designed to introduce new facts or evidence not available at the time of the prior hearing or decision, supported by affidavits or documentary evidence demonstrating both materiality and prior unavailability.[1][8] In contrast, a motion to reconsider operates exclusively within the existing record and challenges the legal or factual sufficiency of the prior decision based on that record.[6][7][26][31][34][38]

The distinction has profound strategic implications. A respondent with newly discovered evidence—such as updated country conditions supporting an asylum claim, new family hardship documentation supporting cancellation of removal, or newly obtained birth certificates or marriage licenses—cannot use a motion to reconsider to introduce that evidence. Instead, the respondent must file a motion to reopen, which requires showing that the evidence is material, was not available and could not have been discovered at an earlier stage, and that reopening is warranted based on the new evidence together with the existing record.[1][8] Conversely, a respondent who believes the Board misapplied the law to the existing record or misunderstood facts that were already before the Board at the time of the prior hearing should file a motion to reconsider, as new evidence is irrelevant to a legal or factual error claim.

Improper selection of motion type can result in substantive prejudice. If a respondent files a motion to reopen when the proper vehicle is a motion to reconsider, the BIA might characterize the motion and potentially reject it for failure to comply with reopen requirements (such as affidavits supporting new facts), even if the underlying legal error is meritorious.[17][34] Conversely, if a respondent files a motion to reconsider when new evidence is the true basis for relief, the BIA will likely dismiss the motion for failure to introduce new evidence, and the respondent will have wasted the single motion to reconsider or reopen available to pursue the claim.

Timing and Number Limitations: Strategic Implications

Both motions to reconsider and motions to reopen are subject to strict timing and number limitations, but the limitations differ in significant ways. A motion to reopen must generally be filed within 90 days of the BIA's final administrative decision, with exceptions for changed country conditions in asylum, withholding, and CAT cases, which may be filed outside the normal time limits.[1][8] A motion to reconsider must be filed within 30 days of the BIA's decision, with no exceptions for individual respondents.[5][7][26][31][42]

Each party may file only one motion to reopen and only one motion to reconsider, though a party may file one motion to reconsider challenging the denial of a motion to reopen.[7][26][31][42] Once both motions have been filed (one motion to reconsider and one motion to reopen), no additional motions to reconsider or reopen are available to the respondent in that case, absent exceptional circumstances warranting sua sponte Board action.

This one-motion limitation creates substantial strategic pressure. A respondent who identifies both legal errors (suggesting a motion to reconsider) and new evidence or changed circumstances (suggesting a motion to reopen) must carefully evaluate which vehicle is more likely to succeed and whether it is strategically sound to use the single motion on one category of relief or to pursue a combined motion to reconsider and reopen addressing both categories.[15][35][49][50] The decision is often case-specific, depending on the strength of each claim and the likelihood of prevailing under each theory.

Changed Circumstances Exception to Reopen Time Limits

The exception permitting motions to reopen based on changed country conditions to be filed outside the normal 90-day window applies specifically to motions claiming changed circumstances in asylum,

withholding of removal, or Convention Against Torture cases.[1][8] This exception is not available for other relief categories such as cancellation of removal, adjustment of status, or INA § 212(c) relief. When a respondent's case involves both asylum claims (eligible for the changed circumstances exception) and cancellation of removal (not eligible), practitioners must carefully consider whether a single motion addressing both relief categories can take advantage of the exception or whether separate motions are necessary.

The changed circumstances exception requires that the respondent provide evidence of the changed circumstances and that the Board find the evidence material and establishing circumstances that have arisen subsequent to the prior hearing.[1][8] Unlike motions to reopen for other reasons, the changed circumstances motion is not constrained by the 90-day deadline and can theoretically be filed years after the initial decision, provided the respondent files only one such motion and complies with materiality and temporal requirement.

STRATEGIC FRAMEWORK FOR MOTION TO RECONSIDER PRACTICE

Arguments Favoring Motion to Reconsider Approval

Strong motions to reconsider typically present one or more of the following characteristics: (1) identification of a clear legal misapplication supported by binding circuit or BIA precedent; (2) demonstration that the Board's factual findings are illogical, implausible, or entirely unsupported by the record, satisfying the demanding clear error standard; (3) citation to intervening changes in law-such as vacatur of prior precedent or new Supreme Court decisions-that are fundamental in nature and materially affect the outcome; (4) demonstration that the Board's decision contains internal logical inconsistencies or fails to address material arguments previously raised on appeal; or (5) evidence that the BIA applied an incorrect standard of review to the respondent's claims.

The strongest motions to reconsider are those premised on legal error where the respondent can cite binding Ninth Circuit or BIA authority that was not discussed in the Board's decision but clearly compels a different legal conclusion. For example, if the Board applied a strict interpretation of a statutory term but controlling Ninth Circuit precedent interprets the term differently, the motion to reconsider citing that circuit precedent presents a strong claim. Similarly, motions to reconsider filed after Attorney General or BIA precedent is reversed or vacated provide powerful authority supporting reconsideration.

Motions to reconsider premised on clear error factual findings face higher barriers to success but can succeed where the respondent can demonstrate that the Board's factual conclusion is not merely debatable but rather irrational or unsupported by any substantial evidence in the record. For example, if the Immigration Judge found that a respondent had been persecuted based on testimony and documentary evidence, and the BIA reversed the persecution finding without explaining why it discredited the testimony or distinguished the documents, the respondent might file a motion to reconsider arguing that the clear error standard was violated because the Board provided no rational basis for rejecting the uncontradicted evidence.

Arguments DHS Likely to Present in Opposition

Experienced DHS counsel will typically respond to motions to reconsider by arguing that (1) the claimed errors were previously raised on appeal and adequately addressed by the Board, such that the motion merely re-litigates arguments already decided; (2) the motion fails to meet the particularity requirement because it does not clearly identify the specific error location in the Board's decision; (3) for factual error claims, the respondent has failed to overcome the clear error standard because the Board's findings were supported by

substantial evidence; (4) for legal error claims, the Board's legal interpretation is reasonable and supported by statutory text and legislative history, such that reasonable minds could disagree and the Board's choice is not erroneous; (5) any change in law relied upon is merely incremental and does not constitute the fundamental change required under Matter of G-D-; and (6) the motion is untimely and equitable tolling is unavailable because the respondent lacked diligence or the claimed extraordinary circumstance does not qualify.

A strong DHS opposition brief will also argue that approving the motion would effectively rewrite the appeal standard and permit respondents to re-argue failed appeals by simply relabeling them as reconsideration motions. DHS counsel will emphasize that the motion to reconsider is a narrow remedy designed only for genuine errors, not for second-guessing factual or legal judgments within the Board's discretion.

Risk Assessment: Likelihood of Success by Motion Type

Legal error motions: Motions to reconsider premised on clear legal misapplication supported by binding precedent face medium likelihood of success when the precedent cited in the motion was not discussed in the Board's decision and clearly compels a different legal conclusion. However, motions arguing that the Board misinterpreted precedent it actually discussed face low likelihood of success because the Board's interpretation, even if debatable, likely falls within its discretion on questions of law.

Factual error motions: Motions to reconsider challenging factual findings as clearly erroneous face low likelihood of success unless the respondent can demonstrate that the Board's finding is illogical, implausible, or entirely lacking evidentiary support. The clear error standard is highly deferential, and most factual findings, even if arguably contestable, will survive motions to reconsider.

Change of law motions: Motions to reconsider premised on fundamental changes in law-such as vacatur of prior precedent or new Supreme Court decisions directly addressing an issue decided against the respondent-face medium to high likelihood of success if the motion clearly establishes that the law has changed and explains how the new law materially affects the outcome. However, motions relying on incremental developments or non-binding persuasive authority face low likelihood of success.

Equitable tolling motions: Late-filed motions to reconsider seeking equitable tolling face low to medium likelihood of success depending on the strength of the underlying claim and the specificity of the extraordinary circumstance alleged. Simple mailing errors, counsel mistakes, or confusion about procedural requirements do not qualify, but genuine extraordinary circumstances such as documented ineffective assistance of counsel, government misconduct, or serious medical emergencies may warrant tolling.

Preservation for Federal Court Review

An important strategic consideration is that even if a motion to reconsider is denied, filing the motion preserves arguments for subsequent federal court review via petition for review. 8 U.S.C. § 1252(a)(2)(D) permits federal courts to review questions of law and constitutional claims despite statutory bars to review of discretionary decisions or factual determinations.[10][32][33][56] When filing a motion to reconsider to preserve arguments for federal review, the respondent should be strategic in identifying claims that are reviewable in federal court-such as claims that the BIA applied an incorrect standard of review-even if the underlying discretionary or factual claims are themselves not reviewable.

COMPARATIVE ANALYSIS WITH IMMIGRATION COURT MOTIONS TO RECONSIDER

Distinct Standards for Immigration Judge Motions to Reconsider

The rules governing motions to reconsider filed before an Immigration Judge are substantively similar but procedurally distinct from those applicable to BIA motions to reconsider.[44][47] Before the Immigration Court, a motion to reconsider must be filed within 30 days of the Immigration Judge's final administrative order, must specify the errors of fact or law in the prior decision, and must be supported by pertinent authority.[44][47] Like BIA motions, Immigration Court motions to reconsider cannot introduce new evidence or facts.

However, key procedural differences apply. An Immigration Judge has discretion to reopen or reconsider sua sponte at any time,[44][47] a broader authority than the BIA's limited sua sponte authority. Additionally, the Immigration Judge may set extended time limits for replies to motions and may reassign the motion to a different Immigration Judge if the original judge is unavailable.[44][47] A motion to reconsider filed before an Immigration Judge does not automatically stay removal, though the respondent may request a stay and, if granted, the respondent shall not be removed pending disposition of the motion.

The decision to grant or deny a motion to reconsider is within the discretion of the Immigration Judge,[44][47] meaning that even if the legal or factual errors alleged in the motion are substantial, the court may exercise its discretion to deny relief. This discretionary element creates a different strategic posture than BIA review, where the Board must apply clearly defined standards of review and provide written findings explaining its reasoning.

Strategic Considerations for Coordinating Motions at Both Levels

Practitioners must carefully coordinate strategy when considering whether to file a motion to reconsider before the Immigration Judge or whether to preserve issues for appeal to the BIA by not filing before the Immigration Judge. Once an appeal is filed with the BIA, the Immigration Judge no longer has jurisdiction over the case, and any motion to reconsider should not be filed with the Immigration Judge but rather with the BIA.[44][47][51]

The decision to file before the Immigration Judge should consider (1) whether the errors claimed are substantial and clearly erroneous, (2) whether the Immigration Judge's discretionary authority to reopen sua sponte might benefit the respondent, (3) whether filing before the Immigration Judge preserves the right to appeal to the BIA, and (4) whether immediate appellate review is preferable to allowing the Immigration Judge another opportunity to address the errors. In many cases, practitioners file immediately with the BIA rather than requesting reconsideration before the Immigration Judge, particularly when the errors alleged are legal in nature and therefore more suitable for appellate review.

NORTHERN CALIFORNIA IMPLEMENTATION CONSIDERATIONS

San Francisco Immigration Court Context

The immigration courts in Northern California-including the San Francisco Immigration Court at 100 Montgomery Street and 630 Sansome Street in San Francisco, as well as the Concord Hearing Location at 1855 Gateway Blvd.-handle significant asylum and removal caseloads from Central American respondents, particularly from Guatemala, El Salvador, and Honduras.[44][47] San Francisco Immigration Judges have developed patterns regarding credibility findings and asylum claims that practitioners should research before drafting appeals or motions to reconsider.

Motions to reconsider filed before San Francisco Immigration Judges addressing denial of asylum claims based on adverse credibility findings face the demanding clear error standard applicable to all factual findings. Practitioners should research individual judges' jurisprudence regarding what constitutes sufficient corroboration for asylum claims and what credibility concerns are typically cited. Some judges consistently require independent documentary corroboration for claims that testimony alone might otherwise support, while others are more receptive to testimony-only proofs for certain categories of persecution claims.

For motions to reconsider addressing cancellation of removal denials in removal proceedings, San Francisco Immigration Judges apply discretionary standards that are subject to de novo review by the BIA. A motion to reconsider challenging the BIA's affirmance of a discretionary cancellation denial might emphasize legal errors in how the BIA weighed discretionary factors rather than challenging factual findings about physical presence or family hardship.

BIA Practice and Processing

Motions to reconsider filed with the BIA are initially docketed by EOIR and assigned case numbers. The BIA typically provides filing receipts within one to two weeks, though the processing timeline varies significantly depending on the complexity of the case and the BIA's current docket.[11] For cases in the San Francisco region, motions to reconsider are typically assigned to panels with no particular local preference, though experienced practitioners develop relationships with particular BIA panelists whose jurisprudence is favorable to particular claims.

The BIA does not provide estimated decision timelines for motions to reconsider, and respondents may wait anywhere from several months to over a year for a decision.[11] If a respondent is in detention during this waiting period, counsel should consider filing a motion to expedite the BIA's consideration, supported by detailed evidence of detention conditions and immigration status, particularly if the respondent is vulnerable or subject to heightened detention risks.

California State Law Intersections

Practitioners in Northern California must consider the intersection between federal immigration law and California state law protections, particularly where prior convictions impact removability. California Penal Code § 1473.7 permits vacatur of criminal convictions where the conviction has immigration consequences and was entered without proper advisal of those consequences or was the result of ineffective assistance of counsel. When a respondent obtains vacatur of a conviction under PC § 1473.7 after removal proceedings have concluded, that development may support a motion to reconsider (or reopen) based on the changed legal status of the conviction.

Similarly, California Penal Code § 1203.43 and Proposition 47 reductions of certain felonies to misdemeanors can have significant immigration consequences, particularly for crimes of violence and aggravated felony determinations. A respondent whose felony conviction has been reduced to a misdemeanor under Prop 47 should consider whether a motion to reconsider challenging an aggravated felony or crime of violence finding is available.

PRACTICAL IMPLEMENTATION AND MOTION DRAFTING GUIDANCE

Step-by-Step Procedural Roadmap

The process for filing and litigating a motion to reconsider before the BIA proceeds through clearly defined

steps. First, obtain a complete copy of the BIA's decision and all prior orders in the case. Read the decision multiple times, noting the Board's findings on each element of each claim raised on appeal, the Board's statement of applicable law, and any areas where the Board's reasoning is incomplete or inconsistent. Second, review the underlying Immigration Judge decision, the appeal brief filed with the BIA, any oral argument transcript (if available), and the complete administrative record.

Third, identify potential errors by comparing the Board's analysis to (1) binding Ninth Circuit precedent, (2) BIA precedent, (3) the statutory and regulatory framework, and (4) the record evidence. For each potential error, determine whether it is a legal error subject to de novo review, a factual error subject to clear error review, or a mixed question subject to bifurcated review. Assess the likelihood that the error meets the applicable standard and would likely persuade a BIA panel if properly presented.

Fourth, determine the basis for the motion to reconsider. Is it a legal error that was previously raised on appeal? Is it a factual finding that is clearly erroneous? Is it a change in law that fundamentally affects the outcome? Has an intervening court decision or precedent change occurred that was not available when the prior decision was issued? Fourth, research whether equitable tolling is necessary and, if so, develop evidence supporting both prongs of the *Holland v. Florida* framework (diligence and extraordinary circumstance).

Fifth, draft the motion to reconsider in accordance with BIA formatting requirements, including a cover page, table of contents, index of authorities, statement of facts and procedural history, legal standard for reconsideration, and separately organized arguments addressing each alleged error with citations to the Board's decision and supporting authority. Sixth, obtain the required filing fee or prepare a fee waiver request if the respondent cannot afford the fee. Seventh, prepare proof of service and file the motion through ECAS (if electronic filing is available) or via mail if paper filing is required. Eighth, serve a copy on DHS through appropriate channels and document the service. Ninth, await DHS opposition or the expiration of the time period for opposition, and be prepared to file a reply if DHS opposes the motion.

Evidence Organization and Record Development

Unlike motions to reopen, which require affidavits and documentary evidence supporting new facts, motions to reconsider rely entirely on the existing record. However, supporting documentation establishing changes in law—such as copies of newly issued court decisions, Federal Register notices announcing vacatur of precedent, or Attorney General memoranda reversing prior policy positions—should be attached as exhibits to the motion.

If a motion to reconsider is premised on ineffective assistance of counsel or attorney misconduct, the respondent must comply with *Matter of Lozada* requirements, including notification to prior counsel and typically a complaint to appropriate bar authorities. Documentation of these compliance steps should be included in the motion or accompanying declaration.

Client Interviews and Strategic Consultation

Before filing a motion to reconsider, counsel should conduct a detailed interview with the respondent to explain (1) what a motion to reconsider is and how it differs from a motion to reopen, (2) the 30-day filing deadline and the consequences of missing it, (3) the fact that only one motion to reconsider is available, (4) the likelihood of success based on the claimed errors, (5) the timeline for decision (potentially many months), and (6) the consequences if the motion is denied, including preservation of arguments for federal court review versus foreclosure of certain arguments.

The client should understand that a motion to reconsider is a narrow remedy and that the threshold for success is higher than the respondent might intuitively believe. The clear error standard for factual errors is

extraordinarily deferential, the Board's discretion regarding legal interpretation is substantial, and changes in law must be fundamental rather than incremental. Counsel should be candid about the likelihood of success in the client's particular case and should not file a motion to reconsider unless there is a reasonable basis for believing the Board committed an error and that the motion has a meaningful chance of success.

CONCLUSION: SYNTHESIS AND STRATEGIC RECOMMENDATIONS

Summary of Key Findings

A motion to reconsider before the Board of Immigration Appeals is a strictly regulated post-final-decision remedy available only within 30 days of the Board's decision, permitting only one filing per decision, and available only to challenge legal or factual errors in the Board's prior decision or address fundamental changes in controlling law.^{[7][26][31][42]} The motion cannot introduce new evidence or facts, and it must specify alleged errors with particularity and cite supporting authority.^{[7][26][31][42]} The legal or factual sufficiency of the Board's decision is reviewed according to clearly established standards-de novo for legal questions and clear error for factual findings-and the same standards apply when evaluating motions to reconsider claiming those categories of error.^{[10][33]}

Equitable tolling of the 30-day deadline is available in narrow circumstances where the respondent demonstrates both diligence and an extraordinary circumstance preventing timely filing, applying the framework established in *Holland v. Florida* as adopted in *Matter of Morales-Morales*.^[2] However, simple mailing errors, counsel mistakes, and procedural confusion do not qualify as extraordinary circumstances.^[2] Ineffective assistance of counsel claims, while sometimes cognizable through motions to reconsider for legal errors, are more typically raised through motions to reopen under *Matter of Lozada*, which imposes demanding procedural requirements including notice to prior counsel and bar complaints.^[13]

Strategic success in motion to reconsider practice requires careful distinction from motions to reopen, precise identification of errors supported by binding authority, and realistic assessment of the likelihood that the Board will grant relief. Practitioners should file motions to reconsider only when there is a substantial basis for believing the Board committed a correctable error, and should consider whether preservation of arguments for federal court review or settlement leverage is a realistic goal when the likelihood of Board approval is low.

Recommendations for Practice

Practitioners facing decisions about whether to file motions to reconsider should apply the following decision-making framework. First, assess the nature and strength of the claimed error: Is it a legal error that is clearly inconsistent with binding Ninth Circuit or BIA precedent? Is it a factual finding that is illogical or entirely unsupported by record evidence? Is it based on a fundamental change in controlling law that materially affects the outcome? Only errors that clearly fall into these categories justify the expense and effort of motion practice.

Second, confirm that the motion can be filed within 30 days or that equitable tolling is available based on genuine extraordinary circumstances and demonstrated diligence. If the 30-day window has passed and equitable tolling is unavailable, do not file a late motion as the BIA will dismiss it as untimely without addressing the merits.

Third, determine whether the motion should be filed before the Immigration Judge (if appeal has not yet been filed with the BIA) or with the BIA (if appeal is pending or the 30-day deadline for appeal has passed).

Consult local rules and the specific judge's practices regarding motion practice.

Fourth, draft the motion with meticulous attention to specificity, citing particular pages and passages from the Board's decision where errors appear, and providing parallel citations to statutory, regulatory, and case authority supporting the claimed correction. Motions drafted with insufficient specificity face dismissal on pleading grounds.

Fifth, prepare for potential DHS opposition by anticipating the government's strongest counter-arguments and addressing them directly in the motion rather than waiting for a reply brief. A motion that acknowledges and distinguishes potentially adverse authority demonstrates greater rigor than a motion that ignores it.

Sixth, consider whether the motion serves purposes beyond the immediate likelihood of Board approval: Does it preserve arguments for federal court review? Does it serve as a basis for negotiation with DHS counsel for settlement or voluntary dismissal? Does it create a record of Board consideration that strengthens a subsequent petition for review? If the motion has value for these ancillary purposes even if Board approval is unlikely, it may be worth filing.

The motion to reconsider remains an essential tool in immigration appellate practice, particularly for respondents with identifiable legal errors or significant changes in controlling law. However, it is not a vehicle for re-litigating failed appeals or presenting arguments that could and should have been raised initially. Practitioners who understand the distinct purpose and narrow scope of motions to reconsider, who exercise discipline in identifying only colorable errors, and who draft with precision and cite supporting authority will maximize the utility of this remedy within its appropriate domain.

Report Current as of: February 3, 2026

Sources Reviewed: 60+ primary and secondary legal authorities including BIA Practice Manual (updated 2025), EOIR regulations and guidance, relevant statutes, BIA precedent decisions, Ninth Circuit decisions, administrative guidance documents, and practitioner resources from immigration law organizations.