

Motions to Reopen Before the Board of Immigration Appeals: A Analysis of Procedural Requirements, Substantive Standards, and Considerations

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FINDINGS

MOTIONS TO REOPEN BEFORE THE BOARD OF IMMIGRATION APPEALS: A COMPREHENSIVE ANALYSIS OF PROCEDURAL REQUIREMENTS, SUBSTANTIVE STANDARDS, AND STRATEGIC CONSIDERATIONS

A motion to reopen (MTR) before the Board of Immigration Appeals represents a critical procedural mechanism allowing noncitizens to challenge final removal orders when material and previously unavailable evidence has emerged or circumstances have fundamentally changed.[1][24] While the Immigration and Nationality Act codified basic reopening procedures, the framework involves multiple competing standards articulated through Board precedent, circuit court authority, and developing regulatory guidance that significantly affect success probability. This report synthesizes current law on MTR filing requirements, the evolving "heavy burden" versus "reasonable likelihood" dichotomy, equitable tolling principles, and discretionary denial factors to provide practitioners with a comprehensive roadmap for strategy and execution. The analysis addresses Ninth Circuit controlling authority while identifying circuits split on issues likely to become increasingly significant, particularly regarding the interaction between post-conviction relief and reopening standards, the application of equitable tolling to ineffective assistance claims filed after the BIA's final order, and the scope of discretionary denial authority following the statutory codification of reopening rights in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

The Statutory and Regulatory Foundation for Motions to Reopen

The legal authority for reopening removal proceedings derives from two sources: the Immigration and Nationality Act's codification of reopening rights and the regulations implementing those rights.

Understanding this layered framework is essential because the interaction between statutory grants of right and regulatory discretionary authority remains contested in appellate litigation. The INA, specifically [8 U.S.C. § 1229a(c)(7)][link], establishes that noncitizens possess a statutory right to file one motion to reopen removal proceedings within 90 days of a final removal order.[1][25][37] This statutory codification occurred through IIRIRA and represents a significant protection because the statute explicitly grants the right without qualifying it with discretionary language.

However, the regulatory framework implementing this statutory right contains language appearing to limit that right. [8 C.F.R. § 1003.2(c)(1)][link] provides that a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." [1][25][28] Importantly, the regulation continues by stating that the Board "has discretion to deny a motion to reopen even if the moving party has made out a prima facie case for relief." [25] This regulatory language creating discretionary denial authority has generated substantial legal controversy regarding whether, after Congress codified reopening rights in IIRIRA, the Board retains power to deny motions that meet the statutory requirements.

The Supreme Court addressed this precise issue in [Kucana v. Holder][link], holding that while [8 C.F.R. § 1003.2(a)][link] places reopening decisions within the BIA's discretion, [8 U.S.C. § 1252(a)(2)(B)(ii)][link]-which generally bars judicial review of decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General"-does not encompass decisions made discretionary solely by regulation.[55][58] The Court reasoned that "Congress did not codify the regulation delegating to the BIA discretion to grant or deny reopening motions," and therefore "Congress left the matter

where it was pre-IIRIRA: The BIA has broad discretion, conferred by the Attorney General, 'to grant or deny a motion to reopen,' 8 C.F.R. § 1003.2(a), but courts retain jurisdiction to review the BIA's decision." [55][58] This preservation of federal appellate review means practitioners can challenge MTR denials through petitions for review even when the BIA exercises its discretionary authority.

Understanding What Constitutes "Material and Previously Unavailable" Evidence

Among the Tier 1 priority questions requiring detailed analysis is what precisely constitutes "material" facts for MTR purposes. The BIA has articulated multiple, sometimes conflicting, standards depending on whether the underlying relief sought is discretionary or nondiscretionary. The foundational formulation appears in [Matter of Coelho][link], where the Board established that a moving party must meet a "heavy burden" of proving that new evidence "would likely change the result in the case." [7][10] In that matter, the respondent, a lawful permanent resident facing deportation based on a cocaine conspiracy conviction, sought reopening to present evidence of rehabilitation to support a section 212(c) waiver (now criminal grounds waiver under current law). [10][43] Because the relief was discretionary and the immigration judge had previously denied the waiver on discretionary grounds, the Board articulated the heightened "heavy burden" standard. [10]

However, the Board significantly modified this approach in [Matter of L-O-G-][link], decided in 1996 after IIRIRA's enactment, involving a mother and her minor daughter seeking reopening to apply for suspension of removal for the first time. [46] The Board held that "where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening," reopening is appropriate. [46] Critically, the Board articulated a distinction: where the noncitizen seeks previously unavailable relief and has not had an opportunity to present her application before the immigration judge, "we have been willing to reopen 'where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening.'" [46] This "reasonable likelihood of success on the merits" standard materially differs from the "likely to change the result" standard of Coelho.

The BIA explicitly recognized in L-O-G- that "the heavy burden standard of Coelho does not apply where the relief is previously unavailable." [46] This distinction has enormous practical implications for practitioners. Where a noncitizen could not have previously applied for relief because facts underlying eligibility did not exist at the time of the initial hearing, the "reasonable likelihood" standard applies. [43][46][47] Conversely, where the noncitizen had an opportunity to apply for relief but failed to do so, or where the relief is discretionary and the immigration judge already exercised discretion to deny it, practitioners must meet the heavier Coelho burden. [43]

Practice advisories issued by immigration law organizations emphasize that practitioners should consistently argue Matter of L-O-G- applies rather than Matter of Coelho when seeking reopening to pursue discretionary relief newly available due to changed circumstances. [7][43] The distinction matters because establishing a "reasonable likelihood of success" requires substantially less evidence than proving new evidence would "likely change the result." For post-conviction relief motions to reopen, where practitioners can demonstrate the noncitizen is now eligible for relief (such as cancellation of removal or adjustment of status) due to vacated convictions, the L-O-G- standard should apply because the relief was not available at the time of the original hearing. [43][47]

Materiality itself carries specific meaning in the reopening context. Evidence is material when it relates directly to eligibility for relief or removability and is genuinely new rather than merely elaborating on facts previously presented. [1][24][25] The Board has rejected evidence that merely supports existing claims without

introducing genuinely new circumstances.[1][37] For country conditions-based motions to reopen seeking asylum or withholding of removal, "material" evidence must demonstrate conditions have objectively changed in the country of origin since the original hearing, not merely that new information about previously existing conditions has become available.[19][23] This distinction creates significant challenges for practitioners arguing that better documentation of longstanding gang or domestic violence patterns now qualifies noncitizens for asylum based on changes in the law or country conditions.

The requirement that evidence be "previously unavailable" contains both objective and subjective dimensions. Objectively, evidence must not have existed or been discoverable through reasonable diligence at the time of the original proceeding.[1][24][25] Subjectively, the moving party must demonstrate they could not have discovered the evidence despite exercising reasonable diligence.[6][12] This standard protects against meritless serial reopening attempts by requiring noncitizens and their counsel to show why evidence genuinely could not have been located earlier. However, where prior counsel provided ineffective assistance by failing to investigate or discover available evidence, the "previously unavailable" requirement is satisfied because the evidence was practically unavailable to the client given counsel's failures.[12][27]

Exceptions to the 90-Day Deadline and One-Motion Limitation

The statutory framework provides several critical exceptions to the general 90-day filing deadline and one-motion limit, each with distinct requirements and implications. Understanding when these exceptions apply is essential because the BIA has stated that exceptions exist only as "explicitly provided by statute or regulation," meaning courts will not create additional equitable exceptions beyond the statutory text.[50] This strict interpretation means practitioners must carefully analyze whether their client's circumstances fit within a specific statutory exception or rely on equitable tolling doctrine (discussed separately).

The most straightforward exception applies to motions to reopen based on changed country conditions for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).[1][22][24] [8 U.S.C. § 1229a(c)(7)(C)(ii)][link] and [8 C.F.R. § 1003.23(b)(4)(i)][link] establish that where a motion premised on changed country conditions arising in the country of nationality or country to which removal has been ordered, the time and number limitations do not apply.[1][22][24][37] The motion must contain "a complete description of the new facts that comprise those circumstances and articulate how those circumstances affect the party's eligibility for relief" and must be "accompanied by evidence of the changed circumstances alleged." [1][24][25]

This exception requires specific attention because it is frequently invoked but comes with significant interpretive challenges. Federal circuits remain divided on whether "changed country conditions" requires demonstrating that conditions have changed objectively or whether changed circumstances personal to the noncitizen—such as increased gang targeting or political activism—can constitute grounds for reopening when paired with objectively changed country conditions.[19][23] The Ninth Circuit has adopted a more flexible approach, recognizing that if changed country conditions exist (even if not previously relevant to the particular noncitizen), courts must consider those conditions in light of the noncitizen's current personal circumstances.[19][31] In contrast, the Second Circuit has required that changed country conditions themselves must have made the noncitizen's particular circumstances newly relevant to persecution or suffering, rejecting arguments that mere personal changes following an initial denial can support reopening.[19]

The Northern California context is governed by Ninth Circuit precedent, which allows practitioners to argue that changed country conditions need not independently render the noncitizen eligible for asylum, but courts

must consider how those conditions interact with the noncitizen's current circumstances.[19] However, even in the Ninth Circuit, the conditions must have actually changed; general improvements in documentation of longstanding violence does not itself constitute "changed country conditions" unless circumstances in the country have actually altered.[19][23]

For noncitizens with in absentia removal orders, [8 U.S.C. § 1229a(b)(5)(C)][link] and [8 C.F.R. § 1003.23(b)(4)(ii)][link] provide that motions to rescind or reopen based on "exceptional circumstances" causing failure to appear may be filed within 180 days of the in absentia order and are not subject to the one-motion limitation.[50][51] Recent Ninth Circuit authority clarifies that ineffective assistance of counsel constitutes an "exceptional circumstance" justifying rescission of in absentia orders.[50] The Ninth Circuit's decision in [Singh v. Garland][link] held that "ineffective assistance of counsel is an 'exceptional circumstance' that can justify reopening an in absentia removal order." [50]

Additionally, motions to rescind in absentia orders based on lack of proper notice under [8 U.S.C. § 1229a(b)(5)(C)(ii)][link] may be filed "at any time" with no deadline or numerical restriction.[51][52][54] This "at any time" language has generated circuit splits regarding whether it permits reopening even after a noncitizen has physically departed the United States. Recent Ninth and Tenth Circuit decisions hold that the "at any time" language in the statute permits filing motions to rescind in absentia orders based on lack of notice even post-departure, notwithstanding the regulatory "post-departure bar," though conflicting authority exists in other circuits.[53]

The Doctrine of Equitable Tolling and Its Application to Motion to Reopen Deadlines

The doctrine of equitable tolling permits courts to excuse compliance with filing deadlines when a party has exercised diligence but faces circumstances beyond their control preventing timely filing. The application of equitable tolling to motions to reopen represents a complex area of law with substantial circuit variation and recent BIA developments. The Supreme Court's decision in [Reyes Mata v. Lynch][link] confirmed that equitable tolling is available in the immigration context and that federal courts have jurisdiction to review BIA denials of equitable tolling requests.[33][36] The Court held that "the reason for the [Board's] denial makes no difference to the jurisdictional issue," meaning federal appellate courts maintain jurisdiction even when the BIA bases denial on failure to establish equitable tolling, not merely on other procedural grounds.[33]

The Fifth Circuit's decision in [Lugo-Resendez v. Lynch][link], decided before Reyes Mata but affirmed by Fifth Circuit practice thereafter, established detailed requirements for equitable tolling in the motion to reopen context.[3][33] The court held that equitable tolling is available where an immigrant "filed a statutory motion to reopen, the agency cannot simply ignore the arguments presented in the motion," and "the motion to reopen filing deadline is subject to equitable tolling and that, where an immigrant qualifies for tolling of the deadline, his motion will be treated as a timely filed statutory motion to reopen." [3] The Lugo-Resendez court instructed that "the Board [should] not apply the test 'too harshly,' noting the difficulties faced by deported immigrants who may be 'poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system-much less read and digest complicated legal decisions.'" [3]

The two-part test for equitable tolling requires that a moving party demonstrate: (1) they exercised due diligence in pursuing reopening, and (2) the delay was caused by extraordinary circumstances.[12][14] The BIA has recognized that ineffective assistance of counsel constitutes an extraordinary circumstance meriting tolling.[29][50] However, the application of a diligence requirement to motions based on ineffective assistance has generated circuit splits. Some courts have held that where ineffective assistance occurred during the original proceedings before the immigration judge, a noncitizen who later discovers the ineffective assistance

must file a motion to reopen within 90 days of discovering the ineffectiveness, not within 90 days of the original removal order.[12][29][30]

This interpretation creates significant practical problems because noncitizens often remain unaware of counsel's failures until well after the 90-day period from the original removal order has passed. The Tenth and Fifth Circuits have specifically applied diligence requirements to ineffective assistance claims filed late, upholding BIA denials where noncitizens did not timely pursue relief despite knowing of counsel's errors.[12][29][30] However, the BIA has more recently held that equitable tolling is available for late-filed notices of appeal caused by counsel's error in *[Matter of Morales-Morales]*[link] (2023), suggesting the BIA is moving toward more flexible tolling standards.[29][40][50]

Practitioners filing equitable tolling arguments must be prepared to document the extraordinary circumstances preventing timely filing and establish that the client or their current counsel exercised diligence in pursuing reopening once the circumstances permitting reopening (such as discovery of ineffective assistance or changed country conditions) became apparent.[3][12][29][50] Documentation should include affidavits explaining the client's efforts to locate counsel, seek legal advice, or gather evidence of changed conditions. The degree of diligence required has been interpreted less stringently in the Ninth Circuit and more strictly in circuits applying heightened scrutiny to ineffective assistance claims filed after final BIA orders.[29][30]

The Matter of Lozada Framework for Ineffective Assistance Claims

Motions to reopen based on claims of ineffective assistance of counsel are subject to specialized procedural requirements established by the Board in *[Matter of Lozada]*[link], decided in 1988, and reaffirmed with modifications in *[Matter of Melgar]*[link] (2020).[5][21][26][27] The Lozada requirements exist in addition to the general requirements that evidence be material and previously unavailable. The four core Lozada procedural requirements are: (1) the motion must be supported by an affidavit of the allegedly aggrieved noncitizen attesting to relevant facts, including a detailed statement of the agreement with former counsel regarding actions to be taken and what counsel did or did not represent; (2) before allegations are presented to the Board, former counsel must be informed of the allegations and allowed an opportunity to respond, with any response submitted with the motion; (3) the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities, and if not, why not; and (4) the noncitizen must demonstrate that counsel's representation was ineffective and caused prejudice.[5][21][26][27]

The disciplinary authority complaint requirement has proven uniquely controversial. The American Immigration Lawyers Association and former immigration judges have urged Congress to eliminate this requirement, arguing it creates an unnecessary bureaucratic burden inconsistent with Supreme Court jurisprudence in *[Strickland v. Washington]*[link], which governs ineffective assistance claims in criminal proceedings.[2] The complaint requirement exists exclusively in immigration law and represents a unique burden that AILA has characterized as creating "an unfair obstacle for people who have suffered prejudice in their case," particularly where the previous attorney cannot be located or has disappeared.[2] Senator Chris Murphy's "Strengthening Immigration Procedures Act of 2024" (discussed separately) would eliminate this requirement.[2]

Currently, however, the complaint requirement remains binding on immigration judges and the BIA. In *[Matter of Melgar]*[link], the Board held that an attorney's acceptance of responsibility for his errors does not discharge the disciplinary authority complaint obligation, particularly where the same attorney representing the respondent on the ineffective assistance motion makes allegations against himself.[21][26] The BIA expressed concern about "the potential for collusion between the respondent and his attorney, where the

attorney could avoid dealing with a bar complaint while the respondent receives a benefit with respect to the motion to reopen." [21][26] The decision effectively requires that an attorney who committed errors not represent the noncitizen in the subsequent ineffective assistance motion to reopen. Instead, new counsel should be retained to file the motion, file the bar complaint, and prevent conflicts of interest. [21][26]

The substantive requirements for ineffective assistance claims establish a two-part test: (1) counsel's performance was deficient, and (2) counsel's deficient performance caused prejudice to the client. [27][29] Deficiency is established by showing that "competent counsel would have acted otherwise," but "subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen." [27][29] Counsel's decisions regarding trial strategy, legal theory selection, and presentation approach receive substantial deference; only decisions manifestly contrary to professional norms constitute ineffective assistance. [27][29]

Prejudice requires a showing that "there is a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different." [29][30] This is a substantial burden because the noncitizen must demonstrate not merely that an error occurred, but that the error likely changed the outcome. Where counsel failed to raise a viable argument or pursue available relief, prejudice is established if the noncitizen could have prevailed on that argument or obtained that relief. [27][29] However, where counsel made a strategic choice not to pursue a particular argument or form of relief, and that choice was reasonable even if ultimately unsuccessful, prejudice is not established. [27][29]

The timing of ineffective assistance affects the procedural posture significantly. Ineffective assistance occurring during initial removal proceedings may be remedied through a timely motion to reopen filed within 90 days of the final removal order. [27][29] However, where ineffective assistance occurred during BIA appellate proceedings and the noncitizen discovers it after the 90-day window, the motion to reopen becomes subject to equitable tolling requirements and heightened scrutiny regarding diligence. [12][29][30][50]

Comparing the Materiality Standard for Different Types of Relief

The substantive standard for what evidence satisfies the "material and previously unavailable" requirement varies depending on the relief sought. This variation, while not explicitly articulated as rule of law in all decisions, emerges from the interplay between *Matter of Coelho*, *Matter of L-O-G-*, and subsequent decisions addressing specific relief categories. Understanding these distinctions is critical for practitioners evaluating whether particular evidence supports reopening.

For nondiscretionary forms of relief—such as asylum or withholding of removal where the noncitizen has established the statutory elements of persecution—newly discovered evidence of past persecution or future risk can support reopening even if the evidence differs only marginally from evidence presented at the original hearing, provided the new evidence is material to establishing one of the statutory elements not previously proven. [1][24][37] The principle reflects that nondiscretionary relief requires establishment of specific legal elements; if new evidence proves those elements were met, the evidence is material. [46]

For discretionary forms of relief—such as criminal grounds waivers, voluntary departure, or adjustment of status where relief is available but the immigration judge must exercise discretion—the standard applied depends on whether the relief was available at the time of the original hearing. If the relief was unavailable (because required facts did not exist), *Matter of L-O-G-* applies and the noncitizen need establish only a "reasonable likelihood of success on the merits." [43][46][47] If the relief was available but the noncitizen failed to apply, or the immigration judge denied it on discretionary grounds, *Matter of Coelho* applies and the noncitizen must establish the "heavy burden" that new evidence would "likely change the result." [43][46][47]

For post-conviction relief motions to reopen, the legal status of the underlying conviction is critical. When a conviction has been vacated or modified through post-conviction proceedings in state court based on procedural or substantive defects, the noncitizen becomes newly eligible for relief (such as cancellation of removal or adjustment of status) that was previously unavailable.^{[43][47][49][52]} In this scenario, *Matter of L-O-G-* applies rather than *Coelho* because the relief was genuinely unavailable at the time of the original hearing.^{[43][47][49]} The noncitizen need only demonstrate a reasonable likelihood of success, not that new evidence would likely change the result.

Recent practice advisories from ILRC and other organizations emphasize that practitioners should argue the distinction aggressively in post-conviction relief motions.^{[43][47]} The distinction can be outcome-determinative because the "reasonable likelihood" standard requires substantially less evidence. A noncitizen who can demonstrate statutory eligibility for cancellation of removal, suspension of removal, or adjustment of status following conviction vacatur should prevail under *L-O-G-* without needing to prove that the immigration judge would exercise discretion favorably—that exercise of discretion occurs in the reopened hearing itself.

Strategic Venue Considerations: When to File with the Immigration Court Versus the BIA

The determination of proper venue for filing a motion to reopen depends critically on the current status of the noncitizen's case and where appellate jurisdiction currently resides. Misidentifying proper venue can result in the motion being summarily dismissed or treated as a request for different relief than intended. The general rule is stated simply but application is complex: if an administrative appeal is still pending with the BIA, the motion to reopen must be filed with the BIA.^{[1][9][22][25][29]} If the BIA has already issued a final decision and no appeal is pending, the motion to reopen must be filed with the immigration court that entered the original removal order.^{[1][9][22][25][29]}

This rule creates several important variations. Where a noncitizen has filed a notice of appeal with the BIA but has not yet received the BIA's appellate decision, any motion to reopen should be filed with the BIA (not the immigration court), and the BIA will treat the motion to reopen as a motion to remand—a request for the case to be returned to the immigration court for a hearing on the new evidence.^{[1][9][22][29][31]} This treatment is important because motions to remand are not subject to the 90-day deadline or one-motion limitations that constrain statutory motions to reopen under 8 C.F.R. § 1003.2(c).^[31] However, motions to remand based on ineffective assistance of counsel must still comply with the *Lozada* requirements.^[29]

Where a motion to reopen is filed with the BIA after the BIA has already issued a final decision and all appellate time has expired, the motion must be denied under 8 C.F.R. § 1003.2(a) because the BIA no longer has jurisdiction.^{[1][29]} In this scenario, the proper venue is the immigration court, not the BIA. The noncitizen must determine which immigration judge or immigration court location issued the original removal order and file there.^{[1][9][22][52]}

The practical implications are significant. Filing a motion to reopen with the wrong venue can result in dismissal, consuming critical time and potentially passing the 90-day deadline. Practitioners must review the case history carefully: Did the noncitizen appeal to the BIA? Did the BIA issue a final decision? Is there a petition for review pending in federal court? The answers determine proper venue and potentially affect deadline compliance.^{[1][9][22][29]}

An additional complication arises where a petition for review is pending in federal court and the noncitizen seeks to file a motion to reopen. If the motion is filed with the BIA and granted, the petition for review

becomes moot because there is no longer a final removal order for the federal court to review.^{[1][20][37]} This creates a strategic choice: The noncitizen might prefer to have the BIA grant the motion to reopen (vacating the removal order and reopening proceedings) or might prefer to preserve the petition for review if that petition raises legal arguments not preserved in a motion to reopen. These are case-specific strategic decisions requiring careful analysis of the relative strength of appellate arguments versus newly available evidence.

The Heavy Burden Standard and Discretionary Denial Authority

Despite the statutory codification of reopening rights in IIRIRA, the BIA retains broad discretionary authority to deny motions to reopen even when the moving party has established a prima facie case for relief.^{[1][25][35][37][45]} This discretionary denial authority, preserved in [8 C.F.R. § 1003.2(a)][link], creates a secondary layer of analysis practitioners must address in strategizing about reopening. The Board has articulated that denial in the exercise of discretion is an independent ground for rejecting a motion, separate from failure to establish material and previously unavailable evidence.^{[45][46]}

In [Matter of Coelho][link], the Board established criteria for evaluating whether discretionary denial is warranted. The motion should not be denied solely because the noncitizen engaged in some violation of immigration law (such as failing to depart voluntarily) if the noncitizen demonstrated rehabilitation and changed circumstances since the violation.^[46] Conversely, the Board may deny reopening where the noncitizen's conduct demonstrates a pattern of deliberate evasion or disrespect for the immigration process.^[46] In L-O-G-, the Board explicitly refused to deny reopening on discretionary grounds where the noncitizen's only conduct at issue was filing what the government characterized as a "frivolous" appeal, emphasizing that filing an unsuccessful appeal does not warrant discretionary denial where new evidence is genuinely material.^[46]

Recent BIA decisions suggest that discretionary denial is rarely exercised where evidence is material and previously unavailable and where the noncitizen can establish eligibility for underlying relief.^{[1][25][35]} The Board has indicated that the purposes of reopening—ensuring fair hearings and proper application of law to changed circumstances—are generally satisfied once a prima facie case is established.^{[45][46][55]}

However, practitioners should be aware that federal appellate courts reviewing BIA discretionary denials employ an abuse of discretion standard, which is highly deferential.^{[45][55]} Under the abuse of discretion framework, the noncitizen must demonstrate that the BIA's decision was not merely wrong but was clearly wrong or based on an erroneous legal principle.^{[45][55]} This deferential standard makes discretionary denials difficult to overturn on petition for review. Practitioners should therefore focus on establishing a strong prima facie case for reopening and should argue in the motion itself why discretionary denial would be inappropriate given the strength of the evidence and the noncitizen's equities.

Changed Country Conditions as a Basis for Reopening Beyond the 90-Day Deadline

The exception to the 90-day deadline for motions based on changed country conditions has become increasingly important as country circumstances—particularly in Central America—have continuously evolved. The statutory basis for this exception, [8 U.S.C. § 1229a(c)(7)(C)(ii)][link], permits reopening for asylum, withholding of removal, or CAT protection based on changed country conditions "arising in the country of nationality or the country to which removal has been ordered" without regard to the 90-day deadline or one-motion limitation.^{[1][22][24][37]}

The definition of "changed country conditions" in practice extends beyond merely different factual conditions in the country; it includes both objective changes in country circumstances and, in the Ninth Circuit, new legal

interpretations or precedents that affect the analysis of country conditions in light of a noncitizen's current personal circumstances.[19][23][31] For example, if a country's government has changed enforcement patterns regarding gang violence or if courts have recognized a new form of persecution (such as gender-based violence or LGBTQ+ persecution), those changes can constitute grounds for reopening based on changed conditions.[19][23]

The evidentiary requirements for changed country conditions motions are stringent. The motion must contain "a complete description of the new facts that comprise those circumstances and articulate how those circumstances affect the party's eligibility for relief" and must be "accompanied by evidence of the changed circumstances alleged." [1][22][24][37] Practitioners frequently rely on State Department country reports, Human Rights Watch or Amnesty International reports documenting changed conditions, UNHCR assessments, and news media documentation of changed circumstances. However, mere changes in available documentation of previously existing conditions may not constitute "changed country conditions" unless the conditions themselves have actually changed.[19][23]

The Ninth Circuit's approach to changed country conditions allows practitioners to argue that if country conditions have changed (even if not independently making the noncitizen eligible for asylum based solely on those conditions), courts must consider how those changed conditions interact with the noncitizen's current personal circumstances.[19][23][31] This is a meaningful distinction from some other circuits' more restrictive approach requiring that the changed conditions themselves, absent changes in the noncitizen's circumstances, render the noncitizen eligible for relief.[19][23]

In Northern California practice, practitioners representing Central American asylees denied on the basis of gang activity, generalized violence, or crime can frequently develop changed country conditions arguments by documenting that gang structures, enforcement patterns, or government responses have changed since the original hearing. Recent documentation from El Faro, local media sources, and NGO reports regarding gang activity in Honduras, El Salvador, and Guatemala can support such arguments when accompanied by expert declarations establishing the relevance of the changed conditions to the noncitizen's particular circumstances.

Jointly Filed Motions and the Role of Prosecutorial Discretion

The highest likelihood of success in motion to reopen proceedings occurs when the government joins the motion, resulting in a jointly filed motion to reopen.[1][31][37][43] [8 C.F.R. § 1003.2(c)(3)(iii)][link] explicitly provides that "motions to reopen that are agreed upon by all parties and are jointly filed are not limited in time or number," meaning jointly filed motions can be brought at any point and without regard to the one-motion bar.[1][31][37][43]

The practical success rate for jointly filed motions is substantially higher than for unilateral motions because the government's agreement that the motion should be granted carries significant weight with the BIA.[31][37] In practice, the BIA has not been known to deny jointly filed motions where the government has explicitly agreed that reopening is warranted.[31] This reflects the principle that where the government and the noncitizen agree reopening serves the interests of justice, the BIA will honor that agreement.

Prosecutorial discretion (PD) presents the mechanism through which DHS counsel can agree to join motions to reopen and support dismissal of removal proceedings. However, the landscape of prosecutorial discretion has shifted dramatically since January 2026, when the current administration discontinued formal PD policies that had governed the prior administration. The Doyle memorandum, which had guided prosecutorial discretion decisions, is no longer in effect, and no replacement policy has been issued.[personalization note] This means practitioners cannot rely on published PD guidance to predict whether DHS will join motions;

instead, decisions appear to be made on a case-by-case basis by ICE Office of Chief Counsel (OPLA) attorneys.

For post-conviction relief motions to reopen, where a noncitizen's conviction has been vacated and they are newly eligible for discretionary relief, practitioners should contact ICE OPLA directly to request that DHS join the motion to reopen and support dismissal of proceedings.[43][44] Even without formal PD policies, OPLA attorneys may have discretion to recommend that cases be dismissed where the noncitizen is not deemed an enforcement priority. The timing of such requests is critical; practitioners should contact OPLA before filing the motion to allow for administrative review and decision-making.

Federal Appellate Review Standards and Petition for Review Procedures

When the BIA denies a motion to reopen, the noncitizen may seek judicial review by filing a petition for review with the federal circuit court of appeals having jurisdiction over the immigration court location.[1][20][37] This is a critical option because, as *Kucana* established, federal courts retain jurisdiction to review MTR denials notwithstanding the BIA's discretionary authority.[55][58] However, the standard of review applied to MTR denials is highly deferential and has evolved considerably.

Federal courts review BIA denials of motions to reopen under the abuse of discretion standard.[1][45][55] Under abuse of discretion review, the noncitizen must demonstrate that the BIA's decision was not merely incorrect but was clearly erroneous or based on an erroneous legal principle.[45][55] This deference means that even if the petitioner can demonstrate the BIA incorrectly analyzed evidence or misapplied law, the petition may still fail if the BIA's error was not sufficiently egregious to constitute abuse of discretion.

The scope of appellate review is limited to the record developed before the BIA.[1][37] Petitioners cannot submit new evidence on petition for review; instead, they must demonstrate that the BIA's decision on the evidence presented was an abuse of discretion. This creates a significant incentive for practitioners to develop comprehensive evidentiary records in the motion to reopen itself, including affidavits, documentary evidence, and expert declarations that will be reviewed on appeal.

For ineffective assistance claims, the circuit courts have developed more exacting review standards. Where the noncitizen alleges that the BIA abused its discretion by not granting reopening based on ineffective assistance despite satisfying *Lozada* requirements, courts examine whether the record supports the BIA's findings regarding deficiency and prejudice. Courts may reverse where the BIA clearly erred in finding no prejudice when evidence established a reasonable probability of different outcome but for counsel's error.[1][30][45]

The Ninth Circuit has issued several recent decisions clarifying that MTR denials are reviewable and that the abuse of discretion standard, while deferential, does permit reversal where the BIA's analysis was clearly erroneous.[30][50] This preservation of appellate review provides meaningful recourse for noncitizens denied motions to reopen, particularly where the basis for denial was discretionary rather than failure to satisfy statutory requirements.

Conclusion: Synthesis and Strategic Recommendations for Immigration Practitioners

The motion to reopen represents a critical procedural tool for immigration practitioners representing clients with final removal orders, yet successful prosecution of motions requires navigation of complex, sometimes conflicting legal standards. Practitioners must systematically address threshold procedural requirements (90-day deadline, one-motion limitation, material and previously unavailable evidence), apply substantive standards that vary depending on the relief sought and whether it was previously available, and develop

comprehensive evidentiary records that can withstand appellate scrutiny.

For Northern California practitioners, the Ninth Circuit's flexible approach to equitable tolling and changed country conditions provides strategic advantages in reopening cases, particularly those involving Central American asylees facing gang violence, gender-based persecution, or LGBTQ+ persecution claims. The circuit's receptiveness to equitable tolling arguments based on ineffective assistance, combined with its recognition that ineffective assistance constitutes an exceptional circumstance for in absentia orders, creates reopening pathways that may be foreclosed in more restrictive circuits.

The distinction between Matter of Coelho's "heavy burden" standard and Matter of L-O-G-'s "reasonable likelihood of success" standard is outcome-determinative and should be aggressively advanced. Where noncitizens seek previously unavailable relief due to changed circumstances (such as post-conviction relief creating new eligibility), practitioners should consistently argue that the lower L-O-G- standard applies rather than Coelho's heightened burden.

Practitioners should also recognize that while the BIA retains discretionary authority to deny motions that meet prima facie requirements, federal appellate courts retain jurisdiction to review such denials under an abuse of discretion standard. This preservation of review, clarified by Kucana and recent circuit decisions, means that even unsuccessful motions before the BIA are not final; petition for review remains a viable option where the BIA's decision was clearly erroneous or based on misapplication of law.

The absence of formal prosecutorial discretion policies as of early 2026 should not deter practitioners from contacting DHS counsel to seek joint motion agreements, particularly where post-conviction relief has rendered noncitizens eligible for relief they were not previously eligible for. Direct communication with OPLA about particular cases may result in agreements to join motions even absent published PD policies.

Finally, practitioners must recognize that motion to reopen practice is increasingly sophisticated and time-sensitive. The procedural requirements, evidentiary standards, and strategic considerations outlined in this analysis require careful case-by-case assessment. Practitioners should maintain organized case files documenting when the removal order was entered, when appeals were filed and resolved, what evidence was presented at the original hearing, what counsel provided representation and what counsel's performance was, and what changed circumstances or newly available evidence support reopening. This documentation will be essential both for negotiating with DHS counsel regarding joint motions and for developing comprehensive motions that withstand BIA and federal appellate review.

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