

Time-Barred Motions to Reopen—Tips and Tricks for Success

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INTRODUCTION

Long-after an immigration case is decided by an Immigration Judge or the Board of Immigration Appeals (BIA), individual facts and circumstances may arise which provide an alternative basis to avoid removal. For example, an individual may marry, have a child born in the United States, or have a criminal conviction overturned, long-after a final disposition has been made. Such new facts and circumstances may create eligibility for a previously unrepresented application for relief, support a prior argument against deportability, or offer additional discretionary reasons why an individual should be eligible to remain in the United States.

Under applicable statutory and regulatory provisions, motions to reopen before an Immigration Judge and the BIA are limited both in terms of time and number.¹ Because a successful motion to reopen may dramatically alter the final disposition of a case, often removing the fact of certain deportation and removal and providing the possibility of relief, it is imperative that practitioners understand the rules and procedures seeking reopening outside of the standard, applicable time and numerical limitations. These exceptions to the time and numerical limitations provide a basis to afford relief where previously non-existed.

¹ See 8 CFR §1003.2(c)(2), INA §240(c)(6) (ninety (90) day time limit from date of final administrative order); *Matter of Susma*, 22 I&N Dec. 947 (BIA 1999) (discussing time restrictions on motions to reopen).

JOINT MOTION TO REOPEN REQUESTS TO ICE OFFICE OF CHIEF COUNSEL

Adjustment of Status Cases

Often, a client will come to you with an old deportation order. The 90-day limit to timely file a motion to reopen has long expired, but now they have an immediate relative, or they are eligible to adjust under Immigration and Nationality Act (INA)² §245(i), or their priority date has just become current. They are eligible to adjust status, but can't because of the old deportation order, and have come to you for help.

Generally, motions to reopen are subject to a 90-day time limit³, but there are a number of exceptions in the regulations, including those that are "agreed upon by all parties and are jointly filed."⁴ In cases where a respondent is immediately eligible to adjust status, a request for a joint motion to reopen and remand to U.S. Citizenship and Immigration Services (USCIS) for adjudication may be joined by U.S. Department of Homeland Security (DHS) "if such adjustment of status was not available to the respondent at the former hearing, the alien is statutorily eligible for adjustment of status, and the respondent merits a favorable exercise of discretion."⁵

Practice Pointer

Because joining a motion is discretionary on the part of DHS, it is important to address the factors that warrant a favorable exercise of that discretion in your cover letter. Those factors would be such things as (1) the hardship to your client and/or his or her U.S. citizen (USC) or lawful permanent resident (LPR) family members if the he or she were required to consular process (including the potential applicability of the three/ten-year bar should the he or she depart the United States); (2) your client's criminal history, if any; (3) the number and severity of the immigration violations; and (4) whether your client is a removal is a removal priority. Including evidence that the respondent has been a productive member of the community, such as proof of the filing of tax returns, community service and similar equities can go a long way in tipping the balance.

Checklist

Although DHS Offices of the Chief Counsel vary tremendously in their policies across the country, the general procedures are the same:

- Send a request to join the Motion to Reopen to the Office of the Chief Counsel for the court where the original removal order was issued⁶;

² Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

³ 8 CFR §1003.23(b)(1).

⁴ 8 CFR §1003.23(b)(4)(iv).

⁵ Legacy INS Memorandum, B. Cooper, "Motions to Reopen for Consideration of Adjustment of Status" (May 17, 2001), AILA Infonet Doc No. 01070333.

⁶ The author's practice, which has been very successful, has been to email the entire packet to the email address designated for prosecutorial discretion, with a hard copy to follow by mail. The email addresses may be found at www.ice.gov/contact/legal.

- Include a proposed *Joint Motion to Reopen Dismiss Without Prejudice for Remand to USCIS* and a proposed order;
- Include a copy of the I-130 Approval Notice (this is almost universally required, even if the respondent is eligible to file for the ‘one-step’ adjustment. If in doubt, check with the local Office of Chief Counsel directly);
- Include a complete *copy* of the adjustment packet you intend to file, complete with all supporting documents, to show clear eligibility; and
- G-28.

Other Circumstances

Not all candidates for a joint motion to reopen involve eligibility for adjustment of status. Your client may be eligible for DACA (Deferred Action for Childhood Arrivals), DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents), a U visa, or some other form of relief that was not available at the time the order was entered. Unlike adjustment of status cases, where a legacy Immigration and Naturalization Service memorandum (Cooper Memo)⁷ ameliorated the “exceptional and compelling circumstances” requirement, DHS states it will consent to non-adjustment cases only where alien can meet this higher standard. The procedures are the same as above, where documentation of eligibility for the appropriate relief should be substituted, but paying particular attention to your client’s equities.

Judicial Review

Because the decision by DHS whether to join a motion to reopen is entirely within its discretion, the courts have declined to review a denial. *See e.g., Aguilera v. Kirkpatrick*, 241 F.3d 1286 (10th Cir. 2001) (“Because the regulation lacks criteria or standards limiting official discretion, the government has unfettered discretion to deny the requested relief for no reason at all.”); *Prado v. Reno*, 198 F.3d 286 (1st Cir. 1999) (“the [DH]S’s decision whether to consent to reopening under 8 CFR §[100]3.2(c)(3)(iii) is not justiciable. The regulation prescribes no standards or guidelines for this exercise of discretion, and, therefore, it is not subject to review in this court”).

MATTER OF LOZADA MOTIONS TO REOPEN BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL AND EQUITABLE TOLLING

Matter of Lozada establishes the required elements for successful reopening based on ineffective assistance of counsel.⁸ The respondent must include an affidavit which attests to the relevant facts, and if there is an agreement between the respondent and counsel that sets forth in detail the agreement entered into or what counsel did or not do or represent to the respondent in this regard; former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel’s failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel’s

⁷ See Legacy INS Memorandum, B. Cooper, “Motions to Reopen for Consideration of Adjustment of Status” (May 17, 2001), AILA Infonet Doc No. 01070333.

⁸ *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.⁹ *Matter of Lozada* notes that simply failure to submit a brief does not admit to deprivation of due process, but that prejudice must be demonstrated.¹⁰ The Board of Immigration Appeals emphasized the prejudice requirement in *Matter of Assaad*, and confirmed the “high standard” required for successful *Lozada* claims.¹¹

If a motion to reopen is filed after the ninety day deadline, equitable tolling may be invoked to excuse lateness.¹² Successful equitable tolling includes demonstrating that the applicant exercised due diligence in determining the attorney’s misconduct, and prompt filing of the motion to reopen.¹³ If there was fraud or concealment of the existence of a claim, and that prevents the individual from timely filing, equitable tolling is permitted until the fraud or concealment is, or should have been, discovered by a reasonable person in the situation.¹⁴ Equitable tolling is notably a doctrine to be invoked sparingly.¹⁵

The policy goals of *Lozada* are to “provide a framework within which to assess the bona fides of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance.”¹⁶ Where there is clear evidence of ineffective assistance and prejudice, courts are more likely to find ineffective assistance with only substantial compliance to the *Lozada* factors.¹⁷ Of course, more traditionally enforcement minded courts will follow a strict compliance standard. The U.S. Court of Appeals for the Fifth Circuit recently dismissed as

⁹ *Lozada*, 19 I&N at 639.

¹⁰ *Lozada*, 19 I&N at 638.

¹¹ *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003).

¹² 8 CFR 1003.2(c)(2).

¹³ *Valencia v. Holder*, 657 F.3d 745 (8th Cir.2011)(denying a motion to reopen as untimely where there was a six year wait to file a motion to reopen); *Vaz Dos Reis v. Holder*, 606 F.3d 1 (1st Cir.2010)(denying a motion to reopen where the respondent did not assert prejudice, and where the respondent waited eight years to file the motion); *Avagyan v. Holder*, 646 F.3d 672 (9th Cir.2011)(establishing three point test to determine whether respondent exercised due diligence sufficient to equitably toll late filed motion to reopen); *Rashid v. Mukasey*, 533 F.3d 127 (2nd Cir.2008)(requiring due diligence before and after the respondent should have discovered ineffective assistance to successfully equitably toll the time period).

¹⁴ *Iturribarria v. INS*, 321 F.3d 889 (9th Cir.2003)(finding underlying fraud of attorney sufficient to establish ineffective assistance and equitable tolling, but reopening denied for failure to demonstrate prejudice).

¹⁵ *Guerrero-Santana v. Gonzales*, 499 F.3d 90 (1st Cir.2007), citing *Irwin v. Dep’t of Vet. Aff.*, 498 US 89,96, 111 S.Ct. 453, 112 L.Ed. 2d 435 (1990).

¹⁶ *Lo v. Ashcroft*, 341 F.3d 934 (9th Cir.2003).

¹⁷ See e.g. *Rranci v. Attorney Gen. of U.S.*, 540 F.3d 165, 173 (3d Cir.2008) (new counsel’s conversation with prior counsel discussing motion to reopen satisfies notice requirement even if ineffective assistance of counsel was not mentioned); *Rodriguez-Lariz v. I.N.S.*, 282 F.3d 1218, 1227 (9th Cir.2002) (holding that the “factors are not rigidly applied, especially when the record shows a clear and obvious case of ineffective assistance” where counsel failed to timely file applications for suspension of deportation); *Dakane v. U.S. Atty. Gen.*, 371 F.3d 771, 775 (11th Cir.2004) *corrected*, 399 F.3d 1269 (11th Cir.2005) (“substantially complied with the procedural requirements of *Lozada*” where new counsel filed disciplinary grievance and affidavit detailing attorney-client relationship and ineffective assistance of counsel but where notification of former counsel was not asserted); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 133 (3d Cir.2001) (“[t]here are inherent dangers . . . in applying a strict, formulaic interpretation of *Lozada*); *Lo v. Ashcroft*, 341 F.3d 934 (9th Cir.2003)(reversing the BIA’s denial of motion to reopen due to failure to file bar complaint and finding ineffective assistance where attorney’s secretary erroneously advised respondent not to attend court and same attorney then filed *Lozada* motion to reopen).

“without merit” a *pro se* Petitioner’s argument that substantial compliance is sufficient where the Petitioner had failed to show he met the procedural requirements of *Lozada*.¹⁸

Counsel is not ineffective for a strategic decision, such as a failure to raise a meritless argument, or a tactical trial decision.¹⁹ A simple failure to file an appeal is not *per se* prejudicial, but the respondent must establish substantial prejudice.²⁰ Prejudice is established where the outcome or result may have been different but for counsel’s deficient performance.

The ineffective assistance is not necessarily limited to attorneys; the BIA found that the *Lozada* requirements were met where an accredited representative failed to advise of a voluntary departure period.²¹ Ineffective assistance has also been extended to non-attorneys, provided that *Lozada*’s procedural requirements, including prejudice, have been met.²²

Practice Pointer

If a BIA appeal was not filed due to ineffective assistance, the motion to reopen should be filed with the immigration court. If the appeal is filed, but it is not timely due to the ineffective assistance of counsel, the BIA will deny the appeal for lack of jurisdiction, for being untimely.²³ Upon issuance of that written denial, jurisdiction returns to the immigration court for filing of the motion to reopen based on the ineffective assistance of counsel. However, the BIA 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.²⁴

It is not sufficient to argue a missed opportunity; one must convince the court that the ineffective assistance of counsel resulted in the removal order, and that substantial grounds exist for the underlying application. This often creates a two part submission; the motion to reopen (covering the *Lozada* factors), and evidence demonstrating the merits of the issue that was precluded due to the ineffective assistance of counsel. Also, you do not need to prepare the bar complaint yourself; if the client has already prepared and submitted the bar complaint, ensure you have a copy. Review the bar complaint to confirm if the bar association provides mandatory notice to the ineffective counsel. If the ineffective advice was provided by a non-attorney, confirm that the bar complaint references unauthorized practice of law.

¹⁸ *Hernandez-Ortez v. Holder*, 741 F.3d 644 (5th Cir.2014).

¹⁹ *Ali v. U.S. Atty. Gen.*, 643 F.3d 1324 (11th Cir.2011) (finding counsel not deficient where admitting a factual allegation of fraud on a notice to appear); *Jiang v. Mukasey*, 522 F.3d 266 (2nd Cir.2008)(finding no ineffective assistance where withdrawal of an asylum application was a tactical decision to avoid potential frivolous finding of asylum application).

²⁰ *Assaad*, 23 I & N Dec. 562-563; *but see Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir.2003)(presuming prejudice for failure to file appellate brief).

²¹ *In re Zmijewska*, 24 I. & N. Dec. 87, 94-95 (2007).

²² *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099 (9th Cir.2005), *citing Varela v. INS*, 204 F.3d 1237 (9th Cir.2000).

²³ 8 CFR 1003.38(b),(c)(Notice of Appeal must be filed within 30 calendar days of an Immigration Judge’s oral decision or the mailing of a written decision unless the last day falls on a weekend or legal holiday, in which case the appeal must be received no later than the next working day.)

²⁴ *See, Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974); *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998).

Checklist

- An affidavit from the respondent, including any documentation from ineffective counsel. Include any written contract and proof of payment (receipts, bank statements showing withdrawals, copies of cashed checks or money orders). If there is no written contract, address that in the respondent's affidavit
- Counsel's affidavit, including print out of State Bar information on the ineffective attorney, including mailing address, if the violator is an attorney. In Counsel's affidavit, include the manner that notice was provided to former Counsel, and if there has been no response, indicate that you will update the Court with any response from former counsel
- Documentation that former counsel has been notified (discuss notice in your own affidavit, and review the bar complaint to see if there is additional notice provided by the adjudicating bar association)
- Copy of the bar complaint that has been filed
- Proof of payment of motion to reopen filing fee, or request for fee waiver, if required

MOTIONS TO REOPEN BASED ON CHANGED CIRCUMSTANCES

The Immigration Court Practice Manual clearly sets out the procedure for a motion to reopen filed outside the time and number limits "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered."²⁵

When a motion to reopen is based on a request for asylum, withholding of removal (restriction on removal), or protection under the Convention Against Torture, and it is premised on new circumstances, 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. See 8 CFR §1003.23(b)(4)(i). Motions based on changed circumstances must also be accompanied by evidence of the changed circumstances alleged. See 8 CFR §1003.23(b)(3).²⁶

The BIA standards for a motion to reopen based on changed country conditions are characterized as a "heavy burden"²⁷ and the Board has broad discretion over motions to reopen. Denials are considered appropriate if the movant fails to show eligibility for relief or to proffer material, previously unavailable evidence.²⁸ The respondent must also persuade the BIA to exercise its discretion favorably.²⁹

Practice Pointer

²⁵ INA §240(c)(7)(C)(ii).

²⁶ Immigration Court Practice Manual, Chapter 5.7 (e)(i) (June 10, 2013).

²⁷ *Matter of S-Y-G*, 24 I&N Dec. 247 (BIA 2007)

²⁸ *Id.*

²⁹ *Id.*

The change in country conditions must have occurred since the previous asylum application or removal order to qualify, typically requiring a showing that conditions have materially worsened, and not a gradual change³⁰ or ‘more of the same’. The change does not, however, have to be dramatic.³¹ It is important to remember that changed personal circumstances do not qualify for the purposes of a late-filed motion to reopen.³²

Checklist

- Have there been significant changes in conditions in your client’s country that affect his or her eligibility for asylum, withholding or the Convention Against Torture (CAT)³³?
- Have those changes occurred since your client’s previous hearing or proceeding?³⁴
- Can you document the changes in conditions with reliable sources or an expert?
- Does the DOS report corroborate the change in conditions?
- Have there been elections, hostilities or other political upheavals?
- Do these changes directly impact your client’s exposure to harm?
- Can you address any previous finding of a lack of credibility on the part of your client?

Judicial Review

Denials of motions to reopen are subject to judicial review (in contrast to the lack of review for DHS denial of a request to join a motion to reopen).³⁵

REQUESTS FOR SUA SPONTE REOPENING TO THE IMMIGRATION JUDGE AND THE BIA

Pursuant to the regulations, an immigration judge and the BIA may entertain a motion to reopen even the where the time limit (90) days or the numerical limit (one motion) has been reached, on their own accord. Both the Immigration Judge and the BIA have *sua sponte* authority to decide cases. In Latin, *sua sponte* means “of one’s own accord,” as if without prompting. For immigration purposes, however, the regulations provide that either party may move the court to exercise its *sua sponte* powers. A *sua sponte* motion may be granted by either the immigration judge or the BIA.³⁶ Finally, both *sua sponte* motions to reopen and motions to reconsider are permissible.

Procedure

³⁰ *Yang Zhao-Cheng v. Holder*, 721 F.3d 25 (1st Cir. 2013)

³¹ *Joseph v. Holder*, 579 F.3d 827 (7th Cir. 2009)

³² *Wei v. Mukasy* 545 F.3d 1248 (10th Cir. 2008)

³³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); Pub. L. No. 105-277, Division G, Subdivision B, Title XXI, Sec. 2242, 112 Stat. 2681-822.

³⁴ The terms ‘previous hearing’ and ‘previous proceeding’ refer to immigration court and not the BIA. *Norani v. Gonzalez*, 451 F.3d 292 (2^d Cir. 2006)

³⁵ *Kucana v. Holder*, 558 U.S. 233 (2010)

³⁶ See 8 CFR §1003.23(b)(1) (*sua sponte* authority before the IJ), §1003.2(a) (*sua sponte* authority before the BIA).

Under these regulations, “[a]n Immigration Judge may upon his or her motion at any time, or upon the motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals.”³⁷ Similarly, this language is virtually identical to 8 CFR §1003.2(a), which governs *sua sponte* motions before the BIA. (“The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision.”) It is important to note that the regulations do not place any temporal or geographic restrictions on the exercise of an Immigration Judge’s *sua sponte* authority to reopen cases. Ordinarily, the scope of an Immigration Judge’s jurisdiction to reopen cases is governed by statute, or when the statute is silent, by the applicable regulations.³⁸ For purposes of *sua sponte* powers, however, the grant of jurisdiction is solely regulatory, and the scope and extent of the Immigration Judge’s jurisdiction is determined by the specific language contained in the regulation, itself.

Practice Pointer

Because a *sua sponte* motion (to reopen or reconsider) may be made to the Immigration Judge or the BIA and is a request for the applicable entity to exercise authority outside of the normal rules, practitioners should take great steps to persuade either the Immigration Judge or the BIA that an exception to the time and numerical limitations should be favorably exercised. The following procedure provides a methodical approach to filing a *sua sponte* request:

- Determine where jurisdiction vests, either before the immigration judge or BIA. Remember that the immigration judge IJ has no jurisdiction to consider a *sua sponte* motion where jurisdiction has already vested with the BIA.
- Review the applicable case facts and determine the relief to be sought, whether it is to apply for new relief, provide an argument against deportability³⁹ because of new case law, or the existence of new, favorable discretionary considerations.
- Determine what, if any, additional evidentiary materials are needed for the relief sought, or to demonstrate *prima facie* eligibility.⁴⁰
- If additional, evidentiary materials are needed or required, complete any petitions or applications prior to the filing of a *sua sponte* motion request (e.g., I-130 filing and approval).
- Consider contacting DHS to determine position on motion and filing a statement contained in the motion itself (list on cover page DHS’s position).⁴¹
- Provide any other favorable evidence to persuade agency that favorable exercise of discretion is warranted.

³⁷ *Id.*

³⁸ See *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999); see also *Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991); *Matter of Artigas*, 23 I&N Dec. 99 (BIA 2001).

³⁹ *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (holding that when a court vacates a conviction for procedural or substantive defects in the underlying criminal proceedings, the conviction is eliminated for immigration purposes).

⁴⁰ See 8 CFR §§1003.2(c)(1), 103.5(a)(2); see also *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (BIA does not require a conclusive showing that relief would be granted because it is not ruling on the ultimate merits in deciding reopening).

⁴¹ See 8 CFR §1003.23(b)(4)(iv) (regarding exceptions to limitations for jointly filed motions).

Departure Issues in Sua Sponte Motion Practice

As noted, the filing of a *sua sponte* motion to reopen or reconsider may be filed long-after the original proceeding was completed. In some cases, the filing of a *sua sponte* request may be made months, or years later. And, undoubtedly because of the nature of *sua sponte* requests, a noncitizen may have already been removed from the United States. Thus, the question arises, can a *sua sponte* motion be filed on behalf of an individual who has already departed the United States?

By its plain language, the regulation authorizes an immigration judge or the BIA to act in “any case” in which he or she has made a decision, and not simply those cases in which the noncitizen has not departed the United States. The regulation also provides that an Immigration Judge or the BIA may act “at any time,” and thus does not restrict the authority to reopen/reconsider cases *prior* to a noncitizen’s departure or removal from the United States. In contrast, the regulation does prohibit a motion to reopen “made *by or on behalf of a person* who is the subject of exclusion deportation or removal proceedings subsequent to his or her departure from the United States.”⁴² However, this limitation does not apply, based upon the regulation’s plain language, to an immigration judge’s or BIA’s independent *sua sponte* authority to reopen/reconsider cases. In this regard, an Immigration Judge or the BIA acts “on his or her own motion” and not “on behalf” of a noncitizen.⁴³

Practice Pointer

Because a *sua sponte* motion (to reopen or reconsider) is a request for the agency to exercise its extraordinary powers, practitioners should remember that it is a useful tool to address unjust⁴⁴ removal orders and should be presented in a persuasive manner. The BIA has recognized that it “has clear authority to reopen and remand cases without regard to other regulatory provisions.”⁴⁵ However, it is important to note that *sua sponte* requests to reopen may not be used as a general cure for filing defects or to otherwise circumvent the regulations when enforcing the regulations may result in hardship.⁴⁶ Practitioners may wish to consider the following checklist in assessing a *sua sponte* request:

- Is the request made to cure a filing defect or other procedural issue?
- Is jurisdiction conferred exclusively to DHS, or for relief for which neither the immigration judge nor BIA have jurisdiction?⁴⁷
- Was there a gross miscarriage of justice that occurred?
- Does the request to reopen “serve the interests of justice?”⁴⁸

⁴² See 8 CFR §1003.23(b) (emphasis added).

⁴³ *Matter of L-V-K-*, 22 I&N Dec. 976 (BIA 1999) (discussing *sua sponte* authority to reopen on BIA’s own motion as distinct from adjudication of a noncitizen’s motion).

⁴⁴ *Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967) (finding that a prior deportation order “can and must” be examined upon a showing of a gross miscarriage of justice); *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966) (same).

⁴⁵ *Matter of Yewondwosen*, (BIA 1997); see also *Matter of G-D-*, (BIA 1999) (labeling the BIA’s authority under §1003.2(a) as “independent regulatory power.”)

⁴⁶ *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (discussing *sua sponte* authority, generally).

⁴⁷ *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009) (holding that BIA generally lack authority to reopen final orders where a noncitizen seeks to pursue relief over which neither the BIA nor the Immigration Judge has jurisdiction).

- Is this situation unique, rare, or novel?

Judicial Review of Sua Sponte Requests

If a motion to reopen or reconsider seeking *sua sponte* consideration is ultimately denied by the BIA, is there judicial review in the circuit courts of appeal? In *Kucana v. Holder*, the U.S. Supreme Court held that federal law did not prohibit judicial review to review a decision by the BIA to deny a motion to reopen.⁴⁹ Arguably, *Kucana* stands for the proposition, generally, that the BIA cannot insulate itself from judicial review by declaring its decisions to be “discretionary.” Following *Kucana*, at least one court has concluded that there *may* be jurisdiction to review a *sua sponte* decision in cases where a petitioner has a plausible constitutional or legal claim that the BIA misapplied a legal or constitutional standard.⁵⁰

Prior to *Kucana*, some courts, however, determined that there was no jurisdiction to review a *sua sponte* decision because it was one that was committed to agency discretion by law and, therefore, unreviewable.⁵¹ Courts reached this conclusion by determining that there is no “sufficiently meaningful standard” by which to review such decisions.⁵² Post-*Kucana*, courts have concluded that *Kucana* did not alter the prior jurisprudence and that such a decision is, essentially, unreviewable.⁵³

⁴⁸ *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998).

⁴⁹ 558 U.S. 233 (2010).

⁵⁰ *Anaya-Aguilar v. Holder*, 683 F.3d 369, 371-72 (7th Cir. 2012).

⁵¹ *Luis v. INS*, 196 F.3d 36, 40 (1st Cir.1999); *Alt v. Gonzales*, 448 F.3d 515, 518 (2d Cir.2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir.2003); *Doh v. Gonzales*, 193 Fed.Appx. 245, 246 (4th Cir. 2006) (per curiam); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir.2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir.2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir.2008); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-01 (10th Cir.2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir.1999).

⁵² *Ekimian v. INS*, 303 F.3d 1153 (9th Cir.2002); *Mejia-Hernandez v. Holder*, 633 F.3d 818 (9th Cir. 2011).

⁵³ *Pllumi v. Attorney Gen. of the U.S.*, 642 F.3d 155, 159 & n. 6 (3d Cir.2011); *Luna v. Holder*, 637 F.3d 85, 96 (2d Cir.2011); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823-24 (9th Cir.2011); *Neves v. Holder*, 613 F.3d 30, 35 (1st Cir. 2010); *Gor v. Holder*, 607 F.3d 180, 187-88 (6th Cir.2010); *Ochoa v. Holder*, 604 F.3d 546, 549 n. 3 (8th Cir.2010); *Bakanovas v. Holder*, 438 Fed.Appx. 717, 722 (10th Cir. 2011); *Jaimes-Aguirre v. U.S. Attorney Gen.*, 369 Fed.Appx. 101, 103 (11th Cir. 2010).