



Removal Defense

Online Course

American Immigration Lawyers Association

MOTIONS TO RE-OPEN AT A GLANCE

GENERAL STATUTORY

- INA §240(c)(7), general statutory ground
- INA §240(c)(7)(C)(ii), for fear-based protection based on changed country conditions
- INA §240(c)(7)(C)(iv), for qualifying survivors of domestic violence

Regulations:

- 8 CFR §1003.23(b)(3) before the Immigration Court
- 8 C.F.R. § 1003.2(c) before the BIA

Motion **must be filed within 90 days of order** **UNLESS**

- Exception applies; or
- Joint Motion; or
- Equitable tolling

MUST: state the new facts that will be proven at a hearing if the motion is granted and include affidavits or other evidentiary material.

IN ABSENTIA

- INA §242B(c)(3)(B), pre-IIRAIRA
- INA §240(b)(5)(C)(i), post IIRAIRA; based on exceptional circumstances
- INA §240(b)(5)(C)(ii), post IIRAIRA; based on no notice

Regulations:

- 8 CFR §1003.23(b)(4)(ii) in removal proceedings
- 8 CFR §1003.23(b)(4)(iii) in deportation or exclusion proceedings

Motion **must be filed:**

- Within 180 days (exceptional circumstances)
- At any time (based on no notice)

NUMERICAL LIMITATIONS: In removal proceedings, movant limited to one motion **BUT** in deportation or exclusion proceedings, no time or numerical limitation

SUA SPONTE

These motions are based on the regulations only and come with limitations on judicial review. Where possible, seek *sua sponte* reopening as an alternative to a statutory motion.

Regulations:

- 8 CFR §1003.23(b)(1) (Immigration Court)
- 8 CFR §1003.2(a) (BIA)

LIMITATIONS: Motions may be filed at any time **BUT** watch out for the departure bar regulations:

- 8 CFR 1003.23(b)(1) (Immigration Court)
- 8 C.F.R. § 1003.2(d) (BIA)

A motion to reopen should include:

- **An entry of appearance:** Form EOIR-28 (Immigration Court); or Form EOIR-28 (BIA);
- **A motion** which includes all possible legal bases for reopening and all new facts that would be established in reopened proceedings. Be sure the Motion tells the right story. Be persuasive.
- **A statement from the movant**
- **An exhibit list and exhibits**, including (as applicable):
 1. A copy of the existing removal order of which reopening is sought;
 2. Any application for relief that would be sought in reopened proceedings, along with any supporting documents,
 3. Evidence of compliance with *Matter of Lozada*, 19 I&N Dec. 637, if making an ineffective assistance of counsel claim,
 4. Evidence to support equitable tolling of the filing deadline, including evidence of the extraordinary circumstances that prevented timely filing (i.e. vacated conviction; medical documents) and diligence (i.e. affidavits from the witnesses);
 5. Any other evidence which supports the claims made in the motion
- **A proposed order**, if seeking reopening from an immigration court,
- **Filing fee (if applicable) or fee waiver** application: Form EOIR-26A
- **A certificate of service**

STAY OF REMOVALS

Automatic stay **ONLY** where (1) a motion to rescind an in absentia removal or deportation proceeding is pending at the immigration court (8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. §§ 1003.23(b)(4)(ii) (removal proceedings); 1003.23(b)(4)(iii)(C) (deportation proceedings), **OR** (2) while a motion filed by a qualified battered spouse, child or parent pursuant to 8 U.S.C. § 1229a (c)(7)(C)(iv) is pending. **OTHERWISE** will need a motion for stay with motion to re-open.