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Motions Practice before the Board of Immigration Appeals

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Motions practice before the Board of Immigration Appeals is an often complex procedural maze for the immigration attorney. The author, an appellate trial attorney for the Immigration and Naturalization Service, describes the intricacies of this procedure. The motions discussed include: motions to reopen, motions to reconsider, motions to remand and motions for stays of deportation. The author further examines the often-contested issue of the prima facie case, particularly in the context of motions to reopen.

The Board of Immigration Appeals has played an important role in the development and practice of immigration law. The Board, with its broad jurisdiction,[1] reaches into almost every aspect of the field. Perhaps more than any other decision-making body, it crucially affects the day-to-day operations of the Immigration and Naturalization Service (INS). While decisions of federal district courts or circuit courts of appeals are usually local or regional in scope, the precedent decisions of the Board of Immigration Appeals are binding nationwide.[2]

Despite the importance and impact of the Board of Immigration Appeals, its operations are not well-known among many members

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1. For a full listing of the Board's appellate jurisdiction, see 8 C.F.R. § 3.1(b) (1982).

2. 8 C.F.R. § 3.1(g) (1982).

of the bar. Even some experienced immigration practitioners have characterized the Board's procedures as "mysterious."

The lack of knowledge of Board procedures is due in part to the infrequency with which immigration attorneys appear before the Board compared to their frequent dealings with the local INS offices. Relatively little has been written on Board procedures in legal journals and in other publications.[3] In addition, primary materials are less than abundant. No statute provides direct information on the Board's workings.[4]

The Board as currently constituted is a creature of regulation. The major source of the Board's authority comes from the Code of Federal Regulations,[5] which provides a basic framework for procedures, but leaves many detailed questions unanswered. Both the Board of Immigration Appeals decisions[6] and the recent unbound interim decisions[7] interpret the Board's authority and give some guidance as to practices and procedures. Finally, federal courts review the Board's actions.[8]

Motions practice is perhaps the most complex and potentially confusing area of Board procedure. Generally, motions practice is

3. Two recent articles of note on Board procedures are Appleman, *How to Represent A Client Before the BIA*, IMMIG. J., Jan.-Feb. 1982; and Roberts, *Practice Before The Board of Immigration Appeals*, in IMMIGRATION PRACTICE FOR THE NEW JERSEY INSTITUTE OF CONTINUING LEGAL EDUCATION (1981).

4. Various proposals have been in Congress to make the Board a statutory body. At the time of this writing none have passed into law. The Senate, however, has passed, and the House is considering, a bill which authorizes a statutory Board. *See* S. 2222, 97th Cong., 2d Sess. (1982); H.R. 5872, 97th Cong., 2d Sess. (1982). *See generally* Watson, *The Simpson-Mazzoli Bill: An Analysis of Selected Economic Policies*, 20 SAN DIEGO L. REV. 97 (1982). For a history of the creation and function of the Board, and an argument for statutory standing to assure quality in Board decisions, see Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

5. 8 C.F.R. § 3 (1982). Title 8, section 3, is divided into eight subsections: section 3.1 outlines the organization, structure, jurisdiction, rules of practice, and the various procedures on appeal before the Board; section 3.2 deals with motions to reopen and to reconsider; section 3.3 outlines the procedures for notice of appeal, payment of fees, and briefs; section 3.4 deals with withdrawal of appeal; section 3.5 states the procedure for forwarding the record to the Board; section 3.6 outlines the stay of execution of decision procedures; section 3.7 outlines the procedure for certification of a decision to the Board; and section 3.8 further comments on motions to reopen and reconsider.

6. ADMINISTRATIVE DECISIONS UNDER THE IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES. These volumes contain selected decisions of the Board, Regional Commissioners and District Directors. They also contain Attorney General decisions. A cumulative index is occasionally published in these volumes. The last cumulative index appears in volume 15.

7. The unbound decisions contain the same types of decisions as the bound volumes. They are periodically collected and placed in a bound edition.

8. However, both Board of Immigration Appeals and court cases deal largely with questions of substantive law and do not often address matters of Board procedures.

extremely limited before an appellate body. However, this is not the case with the Board of Immigration Appeals. Roughly estimated, decisions on motions or appeals from denials of motions before an immigration judge constitute approximately one-fourth of all decisions rendered by the Board.[9]

This article will discuss the basic motions presented before the Board of Immigration Appeals. Those motions covered include motions to reopen, motions to reconsider, motions to remand and motions for stays of deportation. The article will examine filing requirements and the form of the motion, as well as review recent decisions to illustrate some problem areas. Throughout the article, practical aspects of motions practice will be stressed.

MOTIONS TO REOPEN

The motion to reopen is, at base, a request to alter an earlier decision. It must present evidence which is "new" and was not available at the prior hearing.[10] What constitutes "new evidence" is an often-litigated issue which is open to interpretation and depends upon the facts of each case.[11]

The regulatory authority for motions to reopen is contained in sections 3.2 and 3.8 of title 8 of the Code of Federal Regulations.[12]

9. The author conducted an informal survey of cases decided for the period June 23 to June 30, 1982. Of the 141 cases decided, 37 concerned motions.

10. 8 C.F.R. §§ 3.2, 3.8 (1982).

11. *See* Hibbert v. INS, 554 F.2d 17 (2d Cir. 1977); Matter of Escalante, 13 I. & N. Dec. 223 (1969). To illustrate the problem of what constitutes new evidence, consider the following examples: At a deportation hearing, respondent is granted voluntary departure. He appeals his case to the Board on an illegal arrest issue. After the appeal is dismissed, the respondent has been in the United States for more than seven years. He makes a motion to reopen for suspension of deportation, claiming statutory eligibility as one with seven years continuous physical presence under section 244. The evidence of seven years continuous physical presence is clearly "new evidence" under the regulations since it is evidence that arises after the Board's order and was not available at the prior hearing.

On the other hand, the respondent who is found deportable and, knowing the option is available, does not apply for voluntary departure, cannot, after an unsuccessful appeal, ask that his case be reopened so that he may apply for voluntary departure. The respondent has not shown "new evidence" under the regulations. There are no substantial changed circumstances, and he cannot now reopen his case.

12. 8 C.F.R. §§ 3.2, 3.8 (1982). Also helpful to review are sections 103.5 and 242.22, the regulations pertaining to motions to reopen before immigration judges and other adjudicators. These regulations provide further guidance on motions generally and sometimes must be read in conjunction with the regulations governing the Board. 8 C.F.R. §§ 103.5, 242.22 (1982).

These sections provide the framework within which motions are adjudicated. A thorough understanding of these regulations is essential to a successful motion. Many motions to reopen that, if fully developed, might have been granted by the Board, have been denied merely because an essential element contained in the pertinent regulations was overlooked.[13]

Filing

Generally, motions to reopen are directed to the administrative authority that last made a decision in the case. If the Board made the last decision, the motion should be directed there.[14] All motions to reopen, however, are filed with the INS district office having control over the case.[15]

Filing the motion to reopen with the proper INS district office cannot be overemphasized. Too often, motions with applications and fees are received directly at the Board. These misfiled motions are returned to the local INS district office which controls the case, seriously delaying processing of the motion. Further, when filing a motion to reopen directed at the Board at an INS district office, it is useful to note prominently on the face of the motion that it is directed to the Board of Immigration Appeals. This can save considerable processing time.[16]

Standing for filing motions to reopen must be considered in light of the underlying proceeding. Obviously, the Immigration and Naturalization Service, as a party in interest, has standing in most circumstances to file a motion to reopen.[17] Aside from the

13. Matter of Sipus, 14 I. & N. Dec. 229 (1972); Matter of Wong, 13 I. & N. Dec. 258 (1969).

14. Note, however, that if a case has already been reopened by the Board and is being reconsidered by the immigration judge, for example, any futher motions should be directed to the immigration judge, not the Board.

15. *See* 8 C.F.R. § 3.8(b) (1982). There are practical reasons for this procedure. First, motions to reopen usually require a fee. The Board does not have facilities for receiving fees. The district offices, which handle many applications, accept fees through cashiers. Also, the record of proceeding files are not stored at the Board. After a decision is rendered by the Board of Immigration Appeals, the record file is sent to the appropriate INS district office and is consolidated with the INS administrative file. When a motion is filed, it is connected with the corresponding administrative file and a record of proceeding is culled out of the administrative file. The record file is sent to the Board, together with the motion. *See generally* 8 C.F.R. § 3.5 (1982) regarding forwarding of record files. This procedure allows the Board to receive the motion and record file together, thus facilitating review of the case.

16. If the INS clerk processing the motion can quickly and easily see that the motion is to go to the Board, s/he will set up a record file and send the motion to the proper destination.

17. See Matter of Vizzarra-Delgadillo, 13 I. & N. Dec. 51 (1968); Matter of Talanoa, 12 I. & N. Dec. 187 (1967).

government, it is apparent that in deportation proceedings, only the respondent may move to reopen,[18] while in exclusion proceedings, the applicant may move to reopen. In visa petition proceedings, however, only the petitioner, and not the beneficiary, may move to reopen.[19] Although this appears to be elementary, standing should be kept in mind, particularly in the visa petition context, where beneficiaries will often attempt to move to reopen a case.

The motion to reopen should be filed in triplicate.[20] This facilitates review[21] and allows all interested parties access to the motion.

Form and Content

The form of the motion to reopen varies with the type of motion filed. However, certain basic principles apply to almost all motions to reopen. Generally, a formal written motion should be drafted and filed, and should include the following items: cover sheet, purpose of the motion, legal authority for the motion itself, any concurrent court litigation, supporting documentation, a brief, and a request for oral argument, if necessary. The motion should always contain a statement of the new facts to be proven if the case is reopened.

It is essential that the motion clearly state its goals and contents. Toward this end, the motion should contain a cover sheet, plainly outlining the thrust of the motion and summarizing the evidence that supports it. This cover sheet will serve to highlight the key elements of the motion, eliminating any possibility that some important item will be overlooked. In addition, the cover sheet adds a sense of organization to the motion, thus enhancing its chances for success.

The purpose of the motion should be clearly and succinctly stated. Motions are sometimes self-explanatory. Filing form I-485, for example, obviously means that the respondent is moving to re-

18. However, if the respondent has left the United States after a deportation order has been entered by the immigration judge, subsequent motions cannot be properly filed. 8 C.F.R. § 3.2 (1982); Matter of Yih-Hsiung Wang, I.D. No. 2834 (1980).

19. Matter of Kurys, 11 I. & N. Dec. 315 (1965).

20. *See* 8 C.F.R. § 3.8(b) (1982).

21. The trial attorney, for example, may have access to the motion immediately and can formulate a response without waiting for the original to come to him.

open for adjustment of status to permanent resident. A respondent filing form I-256(a) is applying for suspension of deportation. There are other motions not designated by specific forms, such as motions for the granting of voluntary departure anew, motions for change of designation of country of deportation, and motions to reopen to consider recently acquired exculpatory evidence. The purpose of these motions is not patently obvious; consequently, it is critical to clearly state the purpose so as not to create confusion and delay at the Board.

Pertinent legal authority should be cited for the motion. Sections 3.2 and 3.8 of title 8 of the Code of the Federal Regulations are almost always included since they are the basic regulations governing motions. Any Board precedents or court decisions bearing on the motion should be cited as well. In addition, the statutory basis upon which the motion rests should be noted.[22]

Accompanying court litigation concerning the case should be presented.[23] Because of the nature of immigration practice, court actions often take place contemporaneously with a motion to reopen before the Board. It is not unusual that a petition for a writ of habeas corpus is filed in a district court or a petition for review is filed with the circuit court of appeals while a motion is pending at the Board. The Board of Immigration Appeals should be provided with this information, as collateral litigation may have an effect on its ruling.[24]

Aside from the cover sheet and written motion, the motion to reopen must include supporting documentation.[25] Often this documentation is voluminous.[26] As it is a difficult task to amass this evidence, it is similarly difficult for the Board to review and evaluate it. It is important, therefore, to have the supplemental documentation assembled, organized and indexed.[27]

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22. For instance, on an adjustment of status application the pertinent section of law should be noted. For example, a respondent basing the adjustment of status application on immediate relative status would cite Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (1976). A respondent basing the adjustment of status application on sixth preference would cite Immigration and Nationality Act § 203(a)(6), 8 U.S.C. § 1153(a)(6) (Supp. IV 1980).

23. 8 C.F.R. § 3.8(a) (1982).

24. *See, e.g.*, Matter of Sipus, 14 I. & N. Dec. 229 (1972).

25. 8 C.F.R. § 3.8(a) (1982).

26. In the case of a motion to reopen for asylum, it is not unusual to have the application itself, multiple supplemental affidavits, newspaper and magazine articles, scholarly treatises, Amnesty International Reports, State Department publications and other documents. As an example of a case which involves voluminous documentation in an asylum context, see Matter of McMullen, I.D. No. 2831 (1980). *See also* McMullen v. INS, 658 F.2d 1312 (9th Cir. 1982).

27. A separate index to the documentation, with short summaries of the contents, can be most helpful to the Board in its consideration of the motion. Bear in mind that the moving party normally carries the burden to clearly justify the re-

A brief in support of the motion to reopen is sometimes essential. A routine motion may cite any necessary legal authority in the motion itself.[28] As a general rule, briefs should accompany the motion where government opposition is expected or where a complex legal issue is perceived. The brief should be written as concisely as possible, in order to facilitate the Board's review.

The majority of motions are decided on the basis of the moving papers. However, motions regulations make oral argument discretionary with the Board. Oral argument must be specifically requested,[29] and in practice, is not often heard on motions to reopen. Oral argument should be reserved for complex or novel cases only.[30]

Prima Facie Case

The motion to reopen must present evidence which comprises a prima facie case for reopening as a matter of law. This issue has been extensively litigated over the years.[31] The litigation usually revolves around the amount and quality of the evidence required to support each element of the motion. Perhaps the most effective way to review the necessary prima facie requirements is to examine several leading cases discussing the most common types of motions to reopen.

In *Matter of Lam*,[32] respondent moved to reopen for suspension of deportation. A prima facie showing of the three statutory elements of suspension of deportation was required: seven years of continuous physical presence, good moral character and extreme hardship.[33] In support of his claim of extreme hardship, the re-

opening of a case. Therefore, an organized presentation of supporting documentation is essential.

28. Most adjustment applications under Immigration and Nationality Act, § 245, 8 U.S.C. § 1255 (1976) *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1614, for example, are routine and therefore, a brief is not required.

29. 8 C.F.R. § 3.8(a) (1982).

30. The time element should also be considered. Since the Board's oral argument calendar is usually booked months in advance, it often takes a considerable period of time for oral argument to be heard. Consequently, oral argument will often delay the decision-making process at the Board.

31. *See infra* notes 32-59 and accompanying text.

32. 14 I. & N. Dec. 98 (1972).

33. Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

spondent submitted a conclusory affidavit that he would not be able to support himself in Hong Kong, he would be unable to obtain a job, he might starve to death, he feared the Communists in Hong Kong and he would become physically and emotionally ill if he had to leave the United States. His affidavit was found to be inadequate to support a prima facie case of extreme hardship,[34] the claim was unsubstantiated by supporting evidence and the thrust of the claim appeared to be economic.[35] The Board denied the motion, because the respondent failed to make out a prima facie case for suspension of deportation.[36]

In *Matter of Sipus*,[37] the Board considered an appeal from a denial by an immigration judge of a motion to reopen for suspension of deportation. The Board dismissed the appeal as not stating a prima facie case, noting:

> If there are other facts in counsel's possession which would tend to make out a case of extreme hardship, he has not made them known. The special inquiry officer cannot be expected to act on conjecture. Counsel's unsupported and conclusory assertion in the motion that he "is prepared to present the necessary evidence at the time of hearing" does not tell us or the special inquiry officer what evidence he is prepared to present and does not satisfy us that the additional delay entailed in a reopening would likely be worthwhile. We conclude that the special inquiry officer properly denied the motion to reopen.[38]

The Supreme Court recently commented on regulations governing motions to reopen to the Board of Immigration Appeals and what constitutes a prima facie case in *INS v. Wang*.[39] In a motion to reopen for suspension of deportation, the evidence before the Board on the issue of extreme hardship consisted of allegations not supported by sworn affidavits or other evidentiary materials.[40] The Board denied the motion to reopen on the basis that no prima facie showing of extreme hardship had been made,[41] and the Ninth Circuit reversed.[42]

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34. 14 I. & N. Dec. 98, 100 (1972).

35. Economic hardship alone has generally been held to be insufficient to establish extreme hardship. *Id.* at 99; *see also* Matter of Anderson, 16 I. & N. Dec. 596 (1978).

36. The Board also denied the motion to reopen as a matter of discretion. *See infra* notes 60-67 and accompanying text.

37. 14 I. & N. Dec. 229 (1972).

38. *Id.* at 231-32.

39. 450 U.S. 139 (1981) (per curiam); *see generally* Loue, *What Went Wrong With Wang?: An Examination of* INS v. Wang, 20 SAN DIEGO L. REV. 59 (1982).

40. *Id.* at 143. The respondents claimed their two United States citizen children would suffer extreme hardship because of lost educational opportunities. Allegations were also made that respondents owned a dry cleaning business, real estate and other assets. *See also* 8 C.F.R. 3.8(a) (1982).

41. The Board noted that economic hardship was not enough and there was no showing of lost educational opportunities, considering the affluence of the respondents. 450 U.S. at 142.

42. The Ninth Circuit stated that the suspension of deportation statute

The case was appealed to the Supreme Court and in a per curiam decision, the Court reversed the Ninth Circuit.[43] The Court determined that the Wangs had not met the requirement of supporting their case by affidavits and other evidentiary material.[44] They also found that the Board was acting within its authority in narrowly construing the definition of extreme hardship.[45] In sum, *Wang* places emphasis on strict compliance with the regulations.

The recent *Matter of Martinez-Romero*[46] illustrates the problem of what constitutes a prima facie case for reopening in asylum proceedings. Respondent, a native of El Salvador, received voluntary departure in a deportation proceeding.[47] Subsequently, she filed a motion to reopen for political asylum under section 208 of the Immigration and Nationality Act.[48] The motion was denied by the immigration judge and an appeal was taken to the Board of Immigration Appeals.[49] The thrust of the motion was that she, as a student in United States schools, would be a prime target for political persecution in El Salvador.[50] She openly criticized the oppression and killing caused by the El Salvador military. The Board dismissed the appeal,[51] finding the general statements contained in the motion papers insufficient to establish a prima facie case for reopening.[52] It noted that the respondent had not shown evidence that she would be singled out for persecution as the statute requires,[53] and it stressed she had not given a satisfactory explanation as to why she did not apply for asylum at the original hearing.[54]

"should be liberally construed to effect its ameliorative purpose. . . ." Wang v. INS, 622 F.2d 1341, 1346 (9th Cir. 1980).

43. INS v. Wang, 450 U.S. 139 (1981) (per curiam).

44. *Id.* at 142; *see also* 8 C.F.R. § 3.8(a) (1982).

45. 450 U.S. at 145. The "narrow construction" language of *Wang* may have a strong impact outside the suspension of deportation area. There appears to be no reason why the Board could not apply a narrow construction to any discretionary relief situation.

46. I.D. No. 2872 (1981).

47. *Id.* at 2.

48. *Id.* at 3.

49. *Id.* at 5. The motion consisted of the asylum application, the affidavit of the respondent and nine newspaper articles citing general conditions in El Salvador.

50. *Id.* at 3.

51. *Id.* at 9.

52. *Id.* at 8.

53. *Id.* at 7.

54. *Id.* at 8. This satisfactory explanation is an additional requirement for mo-

The leading case addressing what constitutes a prima facie case for reopening in adjustment of status is *Matter of Garcia*.[55] In *Garcia* respondent moved to reopen his deportation proceeding for adjustment of status based on a simultaneously filed application for adjustment of status and relative visa petition.[56] The Board ruled that if the application has been properly filed, the application and supporting documents[57] appear to make out a prima facie case, and the respondent does not appear clearly ineligible for relief, then the showing has been sufficient to reopen the case.[58] This is so even though the visa petition has not yet been approved.[59]

A properly constructed motion to reopen must include not only a clear showing of prima facie eligibility as a matter of law, but must also make an equally clear showing as a matter of discretion. Two recent Board decisions illustrate the point. *Matter of Rodriguez-Vera*[60] concerns a motion to reopen a deportation proceeding for section 212(c) relief.[61] The respondent had been convicted of murder, and had been given a lengthy prison sentence.[62] The Board noted that a prima facie showing of statutory eligibility had been made, but that alone was insufficient.[63] A showing that the case should be reopened as a matter of discretion was not made out and the motion was denied.[64]

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tions to reopen for asylum under 8 C.F.R. § 208.11. It is a particularly important regulation to note in asylum matters. *See* 8 C.F.R. § 208.11 (1982).

55. 16 I. & N. Dec. 653 (1978); *see also supra* note 22.

56. 16 I. & N. Dec. 653, 654 (1978).

57. The adjustment of status motion does not, as a general proposition, require the voluminous documentation of an asylum or suspension of deportation application since the elements of relief are more simply proven. However, as *Garcia* implies, it is important to supply enough evidence to establish a prima facie case for adjustment of status. *See id.* at 657.

58. Although this case was reopened, the Board stressed it was not laying down an inflexible rule to be followed in all cases. *Id.*

59. *Id.*; *see also* 8 C.F.R. § 245.2(a)(2) (1982).

60. 17 I. & N. Dec. 105 (1979).

61. *See* Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c) (1976). *See generally* Griffith, *Relief from Exclusion and Deportation*, 15 SAN DIEGO L. REV. 79, 93-97 (1977). Section 212(c) provides for a discretionary waiver of most grounds of excludability (including the criminal ground of 212(a)(9)). The alien must show that he is a permanent resident with an unrelinquished lawful domicile of seven consecutive years. It was originally available only to residents returning from abroad but is now also available to residents in the United States. *See also* Francis v. INS, 532 F.2d 268 (2nd Cir. 1976).

62. Matter of Rodriguez-Vera, 17 I. & N. Dec. 105, 106.

63. *Id.* at 107. The alien's showing of United States citizen and resident father, mother, brother and sister were considered inadequate to offset the serious adverse factor of the murder conviction and sentence. There was no evidence presented on rehabilitation, an important consideration to the Board. This suggests that a practitioner faced with a similar fact pattern may wish to present evidence of remorse, rehabilitation, restitution, or any other ameliorative factor.

64. The Service, in opposing the motion, stressed the remote possibility of ulti-

In *Matter of Reyes*[65] the Board reaffirmed its long-held position on discretionary denials of motions to reopen. In this case, the respondent was attempting to have his case reopened for suspension of deportation.[66] The Board, in clear, unequivocal language, stated:

> Finally, we note that it is clear that this Board can pretermit threshold issues of eligibility for relief if we are satisfied that an application would be denied in the exercise of discretion whether or not eligibility is established. *INS v. Bagamasbad*, 429 U.S. 24 (1976). This principle has been held applicable in adjudicating motions to reopen. *See Hibbert v. INS*, 554 F.2d 17, 21-22 (2d Cir. 1977).
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> Accordingly, we reaffirm our long held position that, even assuming statutory eligibility for the underlying relief sought, motions to reopen can be denied for purely discretionary reasons where a review of the record reflects either little likelihood of success on the merits or significant reasons for denying reopening based on the respondent's actions.[67]

This showing as a matter of discretion becomes critical when there are adverse factors present in the record.

If the motion is successful and the case is reopened, the general rule is that the case is reopened for all purposes unless reopening is specifically limited in purpose by the Board's order.[68] Therefore, after reopening, if subsequent relief becomes available to the respondent in a deportation hearing, it may be addressed without a separate motion to reopen.

MOTIONS TO RECONSIDER

Like motions to reopen, the procedure for motions to reconsider to the Board of Immigration Appeals is governed by sections 3.2 and 3.8 of title 8 of the Code of Federal Regulations. Attorneys sometimes confuse the two motions, referring to a motion to reopen as a motion to reconsider. However, they are separate types of motions, with key differences in purpose and form. To correctly prepare a motion to reconsider, these differences should be thoroughly understood.

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mate success on the 212(c) waiver given the serious nature of the offense. *Id.* at 106.

65. I.D. No. 2907 (1982).

66. The case had been to the Ninth Circuit which had remanded it to the Board for reconsideration of an initial denial of reopening. Reyes v. INS, 673 F.2d 1087 (9th Cir. 1982). The Board again declined to reopen the case, citing respondent's long history of flouting the immigration laws, including refusing to leave when ordered and hiding from immigration authorities. *Id.* at 1088-89.

67. *Id.* at 1088.

68. Matter of Patel, 16 I. & N. Dec. 600 (1978).

The motion to reconsider is a request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked,[69] while the motion to reopen is usually based upon new evidence or a change in factual circumstances.[70] A motion to reconsider is generally made soon after the Board has rendered its decision but before further appeal to the courts.[71] It requests a second look at a case.

Filing procedures are similar to those in a motion to reopen. The motion to reconsider is filed in triplicate in the INS district office having control over the case.[72] It is not to be filed directly with the Board as that will result in delay.[73]

Although similar in form to the motion to reopen, the motion to reconsider is based on legal argument and requires a full brief. The brief should fully discuss pertinent precedent and concisely set out the arguments to be considered by the Board. A deportation proceeding additionally requires discussion of any collateral civil or criminal court proceedings involving the respondent.[74]

It must be remembered that it is very difficult to prevail on a motion to reconsider. The Board has already examined the record and made its decision. Having done that, it is not likely to reverse that decision. A mere reargument and rehash of the case is probably a waste of effort.[75] If the potential moving party is convinced of the correctness of its legal position after an adverse Board decision, the better practice would be to take an appeal to the courts.[76]

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69. For an example of a motion to reconsider containing a complex legal issue, see Matter of Belenzo, 17 I. & N. Dec. 374, 377 (1980).

70. *See supra* notes 10-11 and accompanying text.

71. The regulations do not state a time limit for motions to reconsider.

72. 8 C.F.R. § 3.8(b) (1982).

73. *See supra* note 15 and accompanying text.

74. 8 C.F.R. § 3.8(a) (1982).

75. This is not to say that the Board will never reconsider its decision. Recently, in Matter of Lin, I.D. No. 2900 (1982), on a Service motion to reconsider based on additional legal arguments, the Board reversed its earlier decision on an entry question. This is a rare occurrence. Most successful motions to reconsider involve change in law or changes in interpretation of the law. *See* Matter of Clahar, I.D. No. 2852 (1981).

76. Judicial review is governed by Immigration and Nationality Act § 106, 8 U.S.C. § 1105(a) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620, and Immigration and Nationality Act § 279, 8 U.S.C. § 1329 (1976). The recent Senate-passed revision of the immigration laws would end judicial review of exclusion orders except for habeas corpus. S. 2222, 97th Cong., 2d Sess. § 123 (1982); H.R. 5872, 97th Cong., 2d Sess. § 123 (1982).

MOTIONS TO REMAND

During the pendency of the appeal, circumstances such as new evidence or a new form of relief becoming available may give rise to a request that the case be remanded for consideration in light of the changed circumstances.[77] This request is made in the form of a motion to remand.

The motion to remand is not expressly supported by any regulation or direct authority. However, it has developed as a practical procedure at the Board.

The form and substantive requirements of the motion to remand are similar to those of the motion to reopen. The motion to remand must, at a minimum, contain new evidence and a prima facie showing of eligibility as a matter of law and as a matter of discretion.[78]

One major difference between the motion to remand and the motion to reopen is the place of filing. If the case file is physically at the Board, the motion to remand is sent directly to the Board.[79] If the appeal has been filed but the record file is still physically at the INS district office awaiting completion of transcription or other processing, the motion to remand should be filed with the INS district office to be included in the record file for Board consideration.[80]

Most of the same caveats apply to motions to remand as to motions to reopen. The evidence presented must be as complete as possible to properly support the motion. Every key element must

77. A typical situation calling for a motion to remand occurs when a respondent in an appeal from denial of suspension of deportation marries a United States citizen. An application for adjustment of status and visa petition are filed. The respondent is now in a position to request the Board to remand the case to the immigration judge on a motion to remand.

78. Because the requirements are so similar to motions to reopen, 8 C.F.R. § 3.2 and 8 C.F.R. § 3.8 should be consulted before drafting a motion to remand. *See generally* 8 C.F.R. §§ 3.2, 3.8 (1982).

79. If the motion to remand involves the filing of an application such as adjustment of status or suspension of deportation, the original application with the fee must be filed in the INS district office controlling the case. Copies of the application and a copy of the fee receipt should be included in the motion to the Board.

80. One alternative to a motion to remand is to withdraw the appeal, thereby vesting jurisdiction with the lower decision-maker, and file a motion to reopen below. This is occasionally done to save time. It should only be done with great caution since withdrawal of appeal usually means waiver of appeal. 8 C.F.R. § 3.4 (1982). It is usually done when there is no opposition to the motion to reopen and grant below is reasonably certain.

be covered. Briefs should be included when the legal questions are complex or opposition is expected. Care should be taken at every step to clearly inform the Board of all pertinent reasons for granting the motion.

STAYS OF DEPORTATION

Section 3.6 of title 8 of the Code of Federal Regulations outlines procedures for stays. Direct appeals automatically stay deportation under section 3.6(a).[81] Section 3.6(b) states, however, that motions to reopen or reconsider do not automatically stay the order of deportation.[82] When an order of deportation is final, therefore, and a motion to reopen or reconsider is filed for the Board's consideration, it is often necessary to obtain a stay.[83]

The motion for a stay should set out the reasons for the stay, stressing any hardships that might result from deportation and listing any equities that exist for the respondent. The motion should also include the scheduled date for deportation, if known, to inform the Board of the time remaining in which to decide the stay. Perhaps most crucial to the success of the stay is the strength of the underlying motion. As in most stay contexts, the Board tends to grant stays when the underlying motion appears meritorious.

The situation sometimes occurs when a motion or appeal from a denial of a motion has been filed for the Board's review and the alien is in imminent danger of deportation. The written stay request accompanying the moving papers is ineffective because by the time the papers reach the Board, the alien will have been deported, thereby mooting the matter. The Board, recognizing this problem, has developed a procedure known as a telephonic stay request[84] which is to be used only in these emergency situations.[85] At a minimum, the following factors should be present to justify the telephonic stay request:

1. The alien must be in imminent danger of deportation. Gener-

81. 8 C.F.R. § 3.6(a) (1982).

82. 8 C.F.R. § 3.6(b) (1982).

83. Assuming that the District Director has denied a stay of deportation and is prepared to deport the respondent and a motion or appeal from denial of a motion has been filed for the Board's attention, a written motion for a stay of deportation should also be included with the chief motion sent to the Board. *See generally* 8 C.F.R. §§ 3.6(b), 3.8(a) (1982).

84. There is no direct authority for this procedure but it stems from the general stay authority of 8 C.F.R. § 3.6.

85. It must be stressed that the telephonic stay request is to be used only as a last resort and only under truly emergency conditions. The normal, accepted manner of requesting a stay is through a formal, written request. 8 C.F.R. §§ 3.6(b), 3.8(a) (1982).

ally, this means that the alien is (or is about to be) in INS custody and is to be deported within hours or days.

2. The Board must have proper jurisdiction over the case. The motion papers or appeal from a denial of a motion must already be filed with the local INS district office, vesting jurisdiction in the Board.[86] A promise to file is not sufficient.
3. There must be no reasonable chance that a written stay request accompanying the main motion would reach the Board before deportation takes place.
4. All other administrative remedies for a stay should be exhausted. A stay should be requested of the District Director first, as s/he has the discretion to grant a stay.[87] Also, in appropriate circumstances, a stay should be requested of the immigration judge.[88] Only after these remedies have been unsuccessfully attempted should a stay request be made to the Board.

If the telephonic stay request is appropriate, the following procedure is employed. Counsel for the alien calls the Board directly in Falls Church, Virginia. A secretary of the Board is assigned to take counsel's statement over the telephone. The statement should set out brief biographical data on the alien, the reasons for the stay request, the nature and purpose of the underlying motion, any hardships or equities, any accompanying court proceedings, the custody status of the alien and the travel plans for deportation, if known. Counsel should also indicate the location of the INS office involved, whether the case has previously been before the Board, the date of filing the motion or appeal that vests jurisdiction with the Board and the names and telephone numbers of INS officers, particularly the deportation officer, involved in the case. The statement should be as clear and concise as possible because this is the only information for the alien that the Board will have when considering the stay request.

Once the statement is taken it is reduced to writing and distributed to all Board members and the INS appellate trial attorney. The appellate trial attorney reviews the statement, speaks with the appropriate officer at the local INS district office involved, gathers information pertaining to the case and formulates a posi-

86. 8 C.F.R. § 3.1(b) (1982).
87. 8 C.F.R. § 243.4 (1982).
88. *See* 8 C.F.R. §§ 3.6(b), 242.22 (1982).

tion on the stay request. He or she then orally delivers the Service position on the request to the Board members. The Board meets, rules on the request,[89] and both sides are immediately informed of the decision. As time is of the essence, the entire procedure can sometimes take less than one hour.

CONCLUSION

The motions discussed vary widely in purpose and scope. Several important points concerning all of the motions can be distilled from this discussion.

Knowledge of procedure is extremely important. Sections 3.2 and 3.8 must be thoroughly understood. The success or failure of a motion often depends upon the speed with which it is decided. Filing a motion in the wrong location or even failing to file the proper number of copies could result in a fatal delay.

Organization and clarity of the motion are critical. The motion is an attempt to persuade the Board to take action. The burden is on the moving party to convince the Board that such action should be taken. The motion must be constructed with an eye toward facilitating the Board's review. The strongest points of the motion must be stressed and fully developed so as not to be overlooked. Everything in the motion should be presented in an orderly fashion.

Perhaps most important, completeness is the key to a successful motion. In a motion to reopen or to remand, for example, every bit of relevant evidence should be included in the motion. Nothing should be held for presentation at a possible later hear-

89. It should be noted that the telephonic procedure is used to rule on stay requests only. The Board's ruling is not a decision on the underlying motion, which must still be forwarded by the Service for the Board's review. This is particularly important to remember as counsel will sometimes mistakenly represent to the district court or circuit court of appeals that an underlying motion has been denied by the Board, when in fact all that has been denied is a stay request. Reyes v. INS, 571 F.2d 505 (9th Cir. 1978), states that a petition for review under section 106 of the Immigration and Nationality Act cannot be properly filed to review the Board's stay denial when the motion in chief has not yet been adjudicated. *Id.* at 506. There has been an unreported case in at least one circuit in which a petition for review was allowed based upon the Board's stay denial. Mouzakitis v. INS, No. 79-1146 (3d Cir. Mar. 23, 1979). It is the author's view that the *Reyes* decision is correct, since allowing petitions for review based upon stay denials would open up a large area of possible abuse (the filing of multiple, frivolous petitions for review) and would encourage multiple litigations. The *Reyes* view, restricting petitions for review exclusively to motions to reopen, supports congressional intent to create a "single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens. . . ." H.R. REP. No. 1086, 87th Cong., 1st Sess. 22-23 (1961); *see also* Reyes v. INS, 571 F.2d at 507.

ing. The Board must view the entire picture to determine if the later hearing is justified.

Motions practice before the Board of Immigration Appeals is complex and exacting. As in most legal matters, successful motions require knowledge of the applicable law and procedure as well as attention to detail. It is hoped that this discussion furnishes some guidance to those who file motions before the Board.