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Perpetual Finality: In Immigration Removal Proceedings, Motions to Reopen Create More Problems Than They Solve

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PERPETUAL FINALITY: IN IMMIGRATION REMOVAL PROCEEDINGS, MOTIONS TO REOPEN CREATE MORE PROBLEMS THAN THEY SOLVE

By: Robert L. Koehl

ABSTRACT

Immigrants who have been ordered removed may challenge their final removal order by filing a motion for the court to reopen their case. Motions to reopen removal cases are common within the immigration system, but offer little chance for an alien to actually receive relief. These motions are typically subject to strict time and numerical limitations. And the legal bases for reopening an immigrant's case render the alien's chances unlikely.

Current statute and case law provide seven grounds for an immigrant to reopen a case. These grounds stem from United States Code, the Code of Federal Regulations, and the Board of Immigration Appeals' precedential case law. Some of these grounds require such a perfect storm of unlikely circumstances that reopening becomes de facto impossible for an alien to attain. Some grounds are confusing, with requirements that are difficult for aliens, their attorneys, or even judges to understand. The remaining grounds have bright-line rules but are couched in ambiguous language. This leads attorneys to pursue reopening in cases that do not merit reopening, but seem to merit reopening because of the ambiguity.

This Comment outlines the current legal bases for an alien seeking to reopen a removal case. It will explore the problems and shortcomings inherent to these bases. And it will recommend reforms to the current structure which will render the immigration post-conclusion structure fairer to the alien, clearer for the private attorneys, and more efficient for the government.

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I. INTRODUCTION

People often use the word “broken” to describe the United States immigration system.¹ Unfortunately, previous attempts to fix it have focused on sweeping changes to overhaul the entire system, often missing the smaller details such as the myriad procedures that make up immigration enforcement.² One such detail that has consistently eluded politicians, but accounts for a large portion of the resources exhausted on immigration removal procedure, is post-conclusion relief. This typically takes the form of a motion to reopen³ or a motion to reconsider.⁴ Motions to reconsider focus on the narrow topic of legal or factual error in an immigration hearing.⁵ Motions to reopen

1. LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 137–38 (2009).

2. Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 405–06 (“Congress and policy analysts must stop hunting for the magical alchemy that can transform immigration law enforcement into a perfect or ‘golden’ system . . . we must turn our energies into energies to developing a better understanding of the fundamental elements that combine or divide and shape the existing process . . . the statutory approaches reflect a search for a miracle ‘mercury’ . . .”).

3. See 8 U.S.C. § 1229a(c)(7) (2012).

4. See § 1229a(c)(6).

5. § 1229a(c)(6)(C).

exist in much broader circumstances⁶ and are thus more common. As such, this Comment will focus on motions to reopen.

In fiscal 2012, immigration courts received 14,758 motions to reopen, which was comparable to each of the previous four years.⁷ The Board of Immigration Appeals (“BIA”) received an additional 7,090 motions to reopen and 1,829 appeals from an Immigration Judge’s (“IJ’s”) denial of a motion to reopen.⁸ These numbers were also comparable to each of the prior four years.⁹

This reveals a problem on many levels. First, it clogs up the immigration courts, further delaying a process that already presents aliens with a multi-year delay in seeking relief and closure. Second, it wastes government resources responding to, and adjudicating, these motions. And in many cases it also shows immigration attorneys taking money from aliens to pursue hopeless motions with little chance of success. The current framework allows this. But minor reforms to existing statutes, regulations, and case law could create more efficient structure. Such reforms would promote finality while providing a more solid relief avenue to aliens who merit it.

This Comment will address issues inherent to the current framework for motions to reopen, and recommend possible solutions. The first section of this Comment will provide an overview of immigration removal procedures and the current legal bases for motions to reopen. The second section will discuss the problems with the existing legal grounds for reopening an immigration case. The third section will make recommendations for changes that Congress, the Attorney General, or the BIA could implement to streamline and improve post-conclusion motions practice. These recommended changes are: (1) remove all discretionary bases for reopening, and replace them with mandatory bases; (2) establish and clarify bright-line rules for all bases for reopening; and (3) create and enforce stronger penalties for attorneys who file frivolous post-conclusion motions.

II. THE KINDERGARTENER’S GUIDE TO IMMIGRATION PROCEDURE AND MOTIONS TO REOPEN

To understand the problems inherent in the current post-conclusion structure, one must first understand the basics of immigration enforcement and where these motions fit into that process. For that reason, this section provides a quick overview of the agencies involved in immigration enforcement, the legal process by which the government

6. See § 1229a(c)(7)(B)–(C).

7. DEP’T. OF JUSTICE: EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2012 STATISTICAL YEAR BOOK at B7 (March 2013), <http://www.justice.gov/eoir/statspub/fy12syb.pdf>.

8. *Id.* at T1.

9. *Id.*

removes immigrants, and the current forms of post-conclusion relief available to immigrants who have been ordered removed.

A. *Immigration Enforcement – The People*

Two federal agencies share immigration enforcement responsibilities: the Department of Homeland Security (“DHS”)¹⁰ and the Department of Justice (“DOJ”).¹¹ DHS handles the majority of enforcement issues through its various subdivisions.¹² The U.S. Citizenship and Immigration Services (“CIS”) division handles lawful immigration.¹³ Several other DHS subdivisions arrest and detain aliens suspected of “inadmissibility” or “removability.”¹⁴ But the Immigration and Customs Enforcement (“ICE”) division prosecutes removal cases in immigration court and represents the government in all removal hearings.¹⁵

The DOJ adjudicates these contested removal hearings because the U.S. Attorney General has the final word on most removal matters within the immigration enforcement administrative process.¹⁶ The DOJ division dealing directly with immigration is the Executive Office for Immigration Review (“EOIR”).¹⁷ Removal adjudication occurs within this DOJ division.¹⁸ EOIR operates fifty-nine immigration courts, which hear cases including removals, asylum applications, and adjustments of status.¹⁹ The BIA oversees these immigration courts, and is the highest authority within EOIR.²⁰ The BIA is the final Article I administrative body in which immigration matters may be disputed without going into an Article III courtroom.²¹ The BIA handles other matters as well, such as disciplining attorneys who appear in immigration courts.²²

10. See § 1103(a) (2009) (outlining DHS’s responsibilities).

11. See § 1103(g) (outlining DOJ’s responsibilities).

12. See § 1103(a).

13. *What We Do*, U.S. CITIZENSHIP & IMMIGRATION SERV., <http://www.uscis.gov/about-us/what-we-do> (last updated Sept. 2, 2009).

14. See *infra* notes and accompanying text 24–28 (discussing inadmissibility and removability).

15. *History of ICE*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/history/index.htm> (last visited Feb 22, 2014).

16. § 1103(g).

17. See 8 C.F.R. § 1003.0 (2007) (establishing EOIR within the DOJ).

18. *Id.*

19. *EOIR at a Glance*, DEP’T. OF JUSTICE: EXEC. OFFICE FOR IMMIGRATION REVIEW (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

20. See 8 C.F.R. § 1003.1(b) (2009) (outlining the BIA’s jurisdiction).

21. *Id.*

22. See DEP’T. OF JUSTICE: EXEC. OFFICE FOR IMMIGRATION REVIEW, FACT SHEET: EOIR’S DISCIPLINARY PROGRAM AND PROFESSIONAL CONDUCT RULES FOR IMMIGRATION ATTORNEYS AND REPRESENTATIVES (Feb. 27, 2013), <http://www.justice.gov/eoir/press/2013/EOIRsDisciplinaryProgramFactSheet02272013.pdf>; see also 8 C.F.R. § 292.3 (1996).

B. Immigration Enforcement – The Process²³

There are two types of aliens subject to removal procedures: inadmissible aliens²⁴ and removable aliens.²⁵ Inadmissible aliens are those who are here illegally, and those trying to come to the United States despite ineligibility or lack of documentation.²⁶ Removable aliens are generally those who have committed certain crimes²⁷ or failed to comply with the conditions of their admission.²⁸ Being either inadmissible or removable will subject an alien to removal proceedings, so the first issue in the immigration enforcement process concerns whether an alien falls into one of those two categories.²⁹

Removal proceedings begin with the issuance of a Notice to Appear (“NTA”).³⁰ This document informs the alien of the specific grounds for inadmissibility or removability which the government is alleging.³¹ While many divisions of DHS may create an NTA and provide it to the alien,³² ICE is primarily responsible for filing NTAs with the court and it may cancel the NTA for any reason prior to filing.³³ Once ICE has filed the NTA, the EOIR court assumes authority over the case.³⁴ The EOIR court with jurisdiction over the NTA then sends the alien a Notice of Hearing (“NOH”), providing the time and location at which the alien must appear.³⁵

Once the NTA is filed, the alien typically attends two types of hearings. The first is a master calendar hearing, which resembles an arraignment in criminal proceedings.³⁶ At this hearing, the court

23. Please note: The BIA has established a unique citation format for its decisions. Where the BIA format conflicts with *The Bluebook: A Uniform System of Citation*, citations to BIA decisions in this article defer to the BIA’s format. BIA citation guidelines are available at BIA. PRAC. MAN. APP. J, CITATION GUIDELINES, 2003 WL 21660505 (EOIR 2003).

24. See 8 U.S.C. § 1182 (2012) (describing the grounds for inadmissibility).

25. See § 1227 (describing the grounds for removability).

26. § 1182.

27. See § 1227(a)(2) (listing criminal offenses which will justify removal).

28. See § 1227(a)(1)(C) (violating status or conditions of entry).

29. § 1229a(a)(1)–(2) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility . . . or any applicable ground of deportability”).

30. See § 1229(a) (discussing the requirements for an NTA at the initiation of removal proceedings).

31. *Id.*

32. See 8 C.F.R. § 239.1(a) (2005) (listing those officers who are authorized to issue an NTA).

33. DEP’T. OF JUSTICE: EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL at 55 (April 1, 2008), <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf>.

34. See 8 C.F.R. § 1003.14(a) (2008) (“Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.”).

35. PRACTICE MANUAL, *supra* note 33, at 65.

36. *Id.* at 64–66.

informs the alien of the charges, takes any pleadings, and determines the destination country should the alien be ultimately removed.³⁷ The second type of hearing is a merits hearing.³⁸ At this hearing, the alien and government present evidence to answer two issues: (1) whether the alien is inadmissible/removable³⁹ and (2) whether the alien is entitled to any form of relief.⁴⁰ The court will often determine inadmissibility/removability at the master calendar hearing, narrowing the merits hearing to relief.⁴¹

On the first issue, the burden of proof depends on the charges. If the charge is inadmissibility, the alien has the burden to show lawful presence by clear and convincing evidence.⁴² If the charge is removability, then the government has the burden to show removability by clear and convincing evidence.⁴³ If the alien is not inadmissible or removable, then removal proceedings end, and the alien legally remains in the United States.

If the court determines that an alien is inadmissible or removable, the next question is whether the alien merits any form of relief that may delay or prevent removal.⁴⁴ The alien's circumstances usually dictate the available forms of relief.

If an alien fears returning to the country of origin, generally three types of relief are available: asylum,⁴⁵ withholding of removal,⁴⁶ and relief pursuant to the Convention Against Torture ("CAT").⁴⁷ Asylum is the most desirable of the three. It is a discretionary form of relief,⁴⁸ but it may lead directly to Lawful Permanent Resident

37. *Id.*

38. *Id.* at 75.

39. 8 U.S.C. § 1229a(c)(1)(A) (2012) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable . . .").

40. *See* § 1229a(c)(4) (discussing the alien's application for relief).

41. *See generally* PRACTICE MANUAL, *supra* note 33, at 65, 67 (stating that the IJ must "identify and narrow factual and legal issues," and the alien may admit charges in NTA).

42. § 1229a(c)(2)(B) ("[T]he alien has the burden of establishing . . . by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission").

43. § 1229a(c)(3)(A) (requiring that "in cases of deportable aliens . . . the Service has the burden of establishing by clear and convincing evidence . . . the alien is deportable").

44. § 1229a(c)(4).

45. § 1158.

46. *See* § 1231(b)(3) (mandating that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion").

47. 8 C.F.R. § 208.16(c) (2009).

48. 8 U.S.C. § 1158(b)(1)(A) (2012) (stating that the Secretary of Homeland Security or the Attorney General *may* grant asylum).

(“LPR”) status.⁴⁹ An IJ may grant asylum once the alien has proven four elements: (1) past harm or a well-founded fear of future harm;⁵⁰ (2) that the fear is based on one of five statutory grounds—race, religion, nationality, political opinion, or membership in a particular social group;⁵¹ (3) that the alien filed for asylum within one year of entering the United States;⁵² and (4) that the alien merits favorable discretion.⁵³ If circumstances do not justify asylum, an alien may pursue withholding of removal instead.⁵⁴ This is a mandatory form of relief,⁵⁵ but it does not lead to LPR status⁵⁶ unless the alien successfully pursues LPR status by some other means, such as marrying a U.S. citizen.⁵⁷ An IJ must allow withholding if an alien can prove a threat to either the alien’s life or freedom, which is connected to one of the five statutory grounds.⁵⁸ Finally, if the alien can only prove a fear of torture at the hands of the government (or with the government’s acquiescence) unrelated to any statutory grounds, the alien may pursue CAT relief.⁵⁹

If a removable/inadmissible alien wishes to remain in the United States, but has no articulable fear of returning to the country of origin, the alien may pursue cancellation of removal.⁶⁰ This is a discretionary form of relief⁶¹ for which the alien must first prove eligibility.⁶² The elements for this relief differ depending on whether the alien is an

49. § 1159(b) (outlining conditions under which the DOJ or DHS “may adjust to the status of alien lawfully admitted for permanent residence the status of any alien granted asylum”).

50. § 1158(b)(1)(B)(i) (noting circumstances where “the applicant is a refugee, within the meaning of section 1101(a)(42)(A)”); § 1101(a)(42)(A) (defining refugees as those apprehensive “because of persecution or a well-founded fear of persecution”).

51. §§ 1158(b)(1)(B)(i), 1101(a)(42)(A) (“[R]ace, religion, nationality, membership in a particular social group, or political opinion”).

52. § 1158(a)(2)(B) (requiring that “unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States”).

53. *See* § 1158(b)(1)(A) (employing language stating the government “*may* grant asylum”) (emphasis added).

54. § 1231(b)(3); 8 C.F.R. § 1208.16(a)–(b) (2009).

55. 8 U.S.C. § 1231(b)(3)(A) (2012) (stating that “the Attorney General *may not* remove an alien”) (emphasis added).

56. *Compare* § 1159(b) (allowing asylees to adjust to LPR status) *with* 8 C.F.R. § 1208.16 (omitting any reference to adjustment for withholding grantees).

57. *See generally* 8 U.S.C. § 1255(d)–(e) (2012) (describing adjustment based on marriage).

58. § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if . . . the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”); *see also* 8 C.F.R. § 1208.16(b) (2009).

59. 8 C.F.R. §§ 1208.16(c), 1208.18 (2009).

60. 8 U.S.C. § 1229b(a)–(b) (2012) (describing cancellation of removal).

61. *See id.* (employing the words “the Attorney General *may*” in both paragraphs) (emphasis added).

62. *See, e.g.,* *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2013) (internal citations omitted).

LPR.⁶³ An LPR must only prove five years or more of LPR status, seven years of continuous residency in the United States, and that the alien has no aggravated felony convictions.⁶⁴ A non-LPR must prove ten years of continuous physical presence; good moral character; exceptional/extremely unusual hardship on certain U.S. citizen (or LPR) family members; and no convictions for any moral turpitude crimes, drug crimes, weapons crimes, or any acts of domestic violence.⁶⁵ Once an alien has proven the elements for eligibility, the IJ then determines whether the alien merits cancellation of removal as a matter of discretion.⁶⁶ Finally, certain limited circumstances may enable an inadmissible alien illegally present within the United States to seek adjustment of status.⁶⁷

If an alien is both (a) removable/inadmissible and (b) ineligible for any form of relief, the alien may not remain in the United States.

Not every alien may challenge their removal in proceedings before an IJ. Certain circumstances allow DHS to administratively remove an alien, or subject the alien to expedited removal without going to court.⁶⁸ An Article III court may also remove an alien as part of a criminal sentence⁶⁹ or as part of a plea agreement where an alien agrees to removal.⁷⁰ And finally, if an alien has been ordered removed and illegally reenters the country, the government may reinstate the previous order, automatically rendering the alien ineligible for any future relief.⁷¹ More critically, when an order is reinstated under that circumstance, statute strips jurisdiction from any court to ever revisit the prior order.⁷²

63. See § 1229b(a)–(b) (outlining the requirements for LPRs and non-LPRs).

64. § 1229b(a) (describing cancellation of removal for LPRs).

65. § 1229b(b) (describing cancellation of removal for non-LPRs).

66. § 1229a(c)(4)(A) (requiring that an “alien applying for relief or protection from removal has the burden of proof to establish that the alien (i) satisfies the applicable eligibility requirements; and (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion”).

67. See § 1255(i)–(j) (outlining adjustment of status from non-immigrant to LPR).

68. *E.g.*, § 1228 (allowing expedited removal of non-LPRs convicted of aggravated felonies).

69. § 1228(c)(1) (“[A] United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable . . .”).

70. § 1228(c)(5) (allowing a federal prosecutor to “enter into a plea agreement which calls for the alien, who is deportable under this chapter, to waive the right to notice and a hearing under this section, and stipulate to the entry of a judicial order of removal”).

71. § 1231(a)(5) (“[I]f the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order . . .”).

72. *Id.* (“[T]he prior order of removal . . . is not subject to being reopened or reviewed . . .”).

C. Motions to Reopen

Motions to reopen already exist in virtually every area of civil litigation,⁷³ so it makes sense that such motions would also exist in immigration law. After all, immigration cases are technically civil hearings.⁷⁴ But in reality, immigration cases differ from purely civil litigation in that they may result in life-changing consequences more akin to a criminal hearing.⁷⁵ So immigration statutes and case law have expanded the grounds for reopening an immigration case beyond the traditional “new evidence” requirement in most civil hearings.

Current law provides seven grounds for an alien to reopen an immigration case. Three grounds are generally available for aliens who attended their hearings: the traditional “new evidence” basis;⁷⁶ a new form of relief;⁷⁷ or ineffective assistance of counsel.⁷⁸ Three grounds are available for those removed *in absentia*: the alien never received the NTA;⁷⁹ the alien never received the NOH;⁸⁰ or exceptional circumstances prevented the alien from appearing.⁸¹ An additional ground exists for those who have been denied asylum: changed country conditions.⁸²

1. New Evidence

A motion to reopen so that the court may consider new evidence is the oldest and longest lasting of the post-conclusion motions.⁸³ In fact, EOIR still considers all motions to reopen as technically motions to consider “previously unavailable facts or evidence.”⁸⁴

73. See, e.g., FED. R. CIV. P. 60(b)(2) (establishing that a party may motion a court to reopen a federal civil case based on “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial”).

74. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (noting that “a deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish”).

75. Davis, *supra* note 1, at 139 (noting that immigration law differs from other administrative hearings because of, *inter alia*, “the rights at stake”).

76. 8 C.F.R. §§ 1003.2(c)(1) (regarding new evidence/relief motions before the BIA), 1003.23(b)(3) (2006) (regarding new evidence/relief motions before an IJ).

77. §§ 1003.2(c)(1), 1003.23(b)(3).

78. See *Matter of Lozada*, 19 I&N Dec. 637, 638 (BIA 1988), *aff'd*, *Lozada v. INS*, 857 F.2d 10 (1st Cir. 1988) (establishing the test for reopening an *in absentia* removal order).

79. *Matter of G-Y-R-*, 23 I&N Dec. 181, 187–88 (BIA 2001).

80. See § 1003.23(b)(4)(ii) (“An order entered in absentia . . . may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice . . .”).

81. § 1003.23(b)(4)(ii)–(iii).

82. 8 U.S.C. §§ 1229a(c)(7)(C)(ii), 1158(a)(2)(D) (2012); see also *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007).

83. See Gerald S. Hurwitz, *Motions Practice Before the Board of Immigration Appeals*, 20 SAN DIEGO L. REV. 79, 81 (1982).

84. 2012 STATISTICAL YEAR BOOK, *supra* note 7, at H1.

An IJ may reopen a case based on new evidence.⁸⁵ The new evidence (1) must be material and (2) must have been unavailable or impossible to discover/present at the original hearing.⁸⁶ The evidence must also demonstrate a considerable likelihood that the alien will prevail at a new hearing.⁸⁷ Beyond *prima facie* eligibility, the alien's motion must also demonstrate that the alien merits favorable discretion.⁸⁸ Any adverse facts in the record may cause the IJ or the BIA to deny a motion to reopen, even if the alien is otherwise eligible.⁸⁹ Finally, the alien must submit the motion to reopen within ninety days of the removal order.⁹⁰ If an alien successfully demonstrates that this previously unattainable evidence would have likely led to a favorable result, the IJ may reopen the case for the sole purpose of hearing the new evidence and weighing it against all evidence already admitted.

2. New Forms of Relief

An immigration court may also reopen a case based on a new form of relief becoming available to the alien.⁹¹ As with new evidence, the alien must demonstrate that this form of relief was unavailable at the original hearing.⁹² The alien's motion also bears the burden of demonstrating *prima facie* eligibility for the relief sought.⁹³ The alien must

85. 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3) (2006) ("A motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted . . .").

86. § 1003.2(c)(1) ("A motion to reopen proceedings 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 . . ."); § 1003.23(b)(3) (stating the same standard for a motion to reopen before an IJ).

87. *See* Matter of R-R-, 20 I&N Dec. 547, 550 (BIA 1992) ("An alien must make a *prima facie* showing both that he is statutorily eligible for the relief sought."); *see also* Matter of M-S-, 22 I&N Dec. 349, 357 (BIA 1999) ("[T]he Board will look to whether the alien has proffered sufficient evidence to indicate that there is a reasonable likelihood of success on the merits.").

88. *R-R-*, 20 I&N Dec. at 550 ("An alien must make a *prima facie* showing . . . that he warrants relief in the exercise of discretion.").

89. *See id.* at 550-52.

90. *See* 8 C.F.R. § 1003.2(c)(2) (2006) ("[Such] motion[s] must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened . . .").

91. *See* *M-S-*, 22 I&N Dec. at 357 (holding that an alien may reopen because she "presented an approved visa petition as the spouse of a United States citizen[.]" which was a previously unavailable form of relief).

92. §§ 1003.2(c)(1), 1003.23(b)(3) (stating that "nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing").

93. *See* *R-R-*, 20 I&N Dec. at 550 ("An alien must make a *prima facie* showing . . . that he is statutorily eligible for the relief sought . . .").

also warrant favorable discretion.⁹⁴ An example of this basis for reopening would be if CIS approved an alien's petition to adjust status based on marriage to a U.S. citizen, but did so after the alien had been ordered removed.⁹⁵ The adjustment would not have been available during the hearing, so the first element would be met. And the CIS approval would sufficiently demonstrate the alien's likely *prima facie* eligibility for relief to meet the second element and justify reopening.

The Attorney General may also avoid creating incentive for stalling by refusing to reopen proceedings for those who only became eligible "because of passage of time while their meritless appeals dragged on."⁹⁶ This is not to say that such bad-faith dilatory motions and appeals occur regularly, but the U.S. Supreme Court has acknowledged EOIR's legitimate interest in preventing them.⁹⁷ In *INS v. Rios-Pineda*, a removable alien couple *inter alia* reached the continuous physical presence requirement for cancellation of removal (then known as "suspension of deportation") by filing a series of frivolous appeals.⁹⁸ The Supreme Court found the appeals to be without substance,⁹⁹ and upheld the BIA's denial of the couple's new relief claim,¹⁰⁰ noting that the judiciary should not encourage dilatory motions.¹⁰¹

3. Ineffective Assistance of Counsel

Many immigration lawyers "show up five minutes before trial," leaving their client with an attorney who has "asked [the client] thirty seconds' worth of questions, done no research, gets no background documents, and has told them nothing."¹⁰² Because immigration hearings are civil (as opposed to criminal) hearings, an alien does not have the same rights that they would have in a criminal hearing,¹⁰³ such as the right to government appointed counsel.¹⁰⁴ But aliens may

94. *Id.* ("An alien must make a prima facie showing . . . that he warrants relief in the exercise of discretion.").

95. *See M-S-*, 22 I&N Dec at 357.

96. *INS v. Rios-Pineda*, 471 U.S. 444, 450 (1995).

97. *See id.*

98. *Id.* at 447.

99. *Id.* at 450 ("No substance was found in any of the points raised on appeal, in and of themselves, and we agree with the BIA that they were without merit.").

100. *Id.*

101. *Id.* at 450–51 ("[T]he Attorney General and the INS confront an onerous task without the addition of judicially augmented incentives to take meritless appeals, engage in repeated violations, and undertake other conduct solely to drag out the deportation process.").

102. Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449, 1491 (2006) (internal quotations omitted).

103. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

104. 8 U.S.C. § 1362 (2012) (specifying that the alien's right to procure counsel is "at no expense to the Government").

procure counsel at their own expense.¹⁰⁵ Aliens also have a right to expect counsel to be competent.¹⁰⁶ As such, ineffective assistance of counsel is a viable justification for reopening an immigration case.

To reopen based on ineffective assistance of counsel, an alien must meet three requirements: (1) the alien must show how the ineffective assistance of counsel prejudiced the alien's case; (2) the alien must demonstrate that the allegedly ineffective attorney has been informed of the claim; and (3) the alien must either show that the proper disciplinary authority has been notified, or that a legitimate reason exists for not reporting the attorney.¹⁰⁷ The prejudice caused by the alien's counsel must be substantial, such that the court would likely have granted relief but for the attorney's ineffective assistance.¹⁰⁸ The requirement that the alien file a complaint with the proper disciplinary authority discourages collusion between client and counsel¹⁰⁹ and helps the court prevent future instances of similar ineffective assistance.¹¹⁰ An alien's belief that the prior counsel's ineffective assistance was inadvertent is an inadequate explanation for failure to submit a bar complaint.¹¹¹ To further discourage collusion, some circuits refuse to allow ineffective assistance claims while the alien is still being represented by the allegedly ineffective lawyer.¹¹²

The BIA established the test for an alien trying to reopen a case based on ineffective assistance of counsel in *Matter of Lozada*.¹¹³ There, an alien had been ordered removed for committing a crime of moral turpitude.¹¹⁴ He informed the court of his intention to appeal,

105. *Id.* (stating that the alien "shall have the privilege of being represented . . . by such counsel, authorized to practice in such proceedings, as he shall choose").

106. *See, e.g., Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (defining substantial ineffective assistance of counsel in a removal hearing as "denial of due process").

107. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988) (listing the elements for an ineffective assistance of counsel claim).

108. *See Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994) (specifying that prejudice must be "substantial").

109. *Matter of Rivera-Claros*, 21 I&N Dec. 599, 604, 607 (BIA 1996) ("It also serves to protect against collusion between alien and counsel in which 'ineffective' assistance is tolerated, and goes unchallenged by an alien before disciplinary authorities, because it results in a benefit to the alien in that delay can be a desired end . . .").

110. *Id.* ("[W]e rely on the disciplinary process of the relevant jurisdiction's bar as the first, and ordinarily the fastest, means of identifying and correcting possible misconduct.").

111. *Id.* at 606 ("The respondent states that 'if any error was made in this case it was a postal error or an error of inadvertence by (former counsel).' However, we consider the respondent's explanation . . . to be inadequate and to minimize significantly the questions raised by the attorney's apparent conduct.").

112. *See, e.g., Gutierrez-Morales v. Homan*, 461 F.3d 605, 609 (5th Cir. 2006) ("It would be unreasonable to require an alien to comply with *Lozada*, the necessary prerequisite to an ineffective assistance of counsel claim before the BIA, while still under that counsel's representation.").

113. *See Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).

114. *Id.* at 637-38.

but he never filed an appeal.¹¹⁵ A year later, the BIA dismissed his appeal for failure to identify any error in the court's decision.¹¹⁶ After another six months had passed, his new attorney filed a motion to reopen claiming ineffective assistance of counsel based on the previous attorney's failure to file an appeal brief.¹¹⁷ The BIA rejected the motion but at the same time, announced the standard for future motions based on ineffective assistance.¹¹⁸ Since then, this has become known as the *Lozada* standard,¹¹⁹ rendering the word *Lozada* synonymous with ineffective assistance of counsel.

4. No NTA

Slightly more than one-tenth of removals are ordered *in absentia* because the alien failed to appear at the removal hearing.¹²⁰ The most obvious basis for reopening *in absentia* cases is notice failure. The Supreme Court has long recognized the due-process rights of aliens in various immigration procedures.¹²¹ As such, an alien must receive the traditional due-process elements of "notice" and "an opportunity to be heard."¹²²

Notice failure can take two forms: either the alien never received the original NTA giving notice that proceedings had begun,¹²³ or the alien never received the NOH giving notice of the removal hearing's time and place.¹²⁴ If an alien either did not receive or could not be charged with receipt of their NTA, the alien may motion the court to reopen.¹²⁵ There is no time-bar when an alien claims notice failure, whether it is failure of NTA or NOH service.¹²⁶

115. *Id.* at 638.

116. *Id.*

117. *Id.*

118. *Id.* at 638–39.

119. *See, e.g.*, *Matter of Assaad*, 23 I&N Dec. 553, 557 (BIA 2003, Interim Decision 3487) ("The *Lozada* approach has provided an appropriate framework for analyzing ineffective assistance claims . . .").

120. 2012 STATISTICAL YEAR BOOK, *supra* note 7, at H1.

121. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 31(1982) ("[A] resident alien returning from a brief trip has a right to due process just as would a continuously present resident alien.").

122. *Matter of G-Y-R-*, 23 I&N Dec. 181, 186 (BIA 2001) ("Due process requires that the alien be provided with notice of proceedings and an opportunity to be heard.") (internal quotations omitted).

123. *Id.* at 187–88 (discussing the NTA and requirements that the alien be apprised of the duty to inform the government of the alien's most recent address before constructive NOH service is possible).

124. 8 C.F.R. § 1003.23(b)(4)(ii) (2006) ("An order entered in absentia . . . may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice . . .").

125. *G-Y-R-*, 23 I&N Dec. at 187–88 (discussing constructive notice in circumstance where the alien did not receive actual notice).

126. § 1003.23(b)(4)(ii) (specifying that the alien may file a motion to reopen "at any time" if the alien did not receive notice).

5. No NOH

Failure to receive an NOH is a bit more difficult to prove than failure to receive the NTA. The immigration court itself sends out NOHs.¹²⁷ DHS does not. As such, the alien is in a *de facto* adversarial position against the court when making this claim because the alien is claiming that the court itself either failed to provide notice of the hearing date or it failed to properly determine notice prior to issuing the *in absentia* order.¹²⁸ Further, the alien is constructively served with an NOH when the court sends the NOH to whatever address the alien most recently provided.¹²⁹ Because the NTA puts an alien on notice of the duty to inform DHS and EOIR of any address changes, if an alien moves and never receives an NOH sent to the old address, the alien is still constructively served.¹³⁰ As such, this is one of the most difficult grounds for reopening to prove.

6. Exceptional Circumstances

An alien may also seek reopening of an *in absentia* order if “exceptional circumstances” prevented the alien from appearing.¹³¹ Motions based on exceptional circumstances are subject to a 180-day time bar.¹³² Exceptional circumstances are: (1) death in the alien’s immediate family; (2) either the alien or an immediate family member was seriously ill; or (3) domestic violence.¹³³ No less serious circumstances will substantiate a motion to reopen.¹³⁴

127. 8 C.F.R. § 1003.18 (“The Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing.”); see also IMMIGRATION COURT PRACTICE MANUAL, *supra* note 33, at 65.

128. See 8 U.S.C. § 1229a(b)(5)(A) (stating that the alien shall be removed only upon “clear, unequivocal, and convincing evidence” that the written notice was provided); 8 C.F.R. § 1003.26(b) (2008) (permitting orders if “the Immigration Judge is satisfied that written notice of the time and place of the proceedings and written notice of the consequences of failure to appear . . . were provided to the respondent”).

129. 8 U.S.C. § 1229a(b)(5)(A) (“The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided . . .”).

130. § 1229a(b)(5)(B) (“No written notice shall be required . . . if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.”).

131. § 1229a(b)(5)(C)(i) (“Such an order may be rescinded only upon a motion to reopen . . . if the alien demonstrates that the failure to appear was because of exceptional circumstances . . .”).

132. *Id.* (“Such an order may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal . . .”).

133. § 1229a(e)(1) (providing examples “such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, serious illness or death of the spouse, child, or parent of the alien”); see also 8 C.F.R. § 1003.23(b)(4)(ii)–(iii).

134. 8 U.S.C. § 1229a(e)(1) (excluding “less compelling circumstances”).

7. Changed Country Conditions

Finally, an alien may challenge a final removal order if new conditions arise in the alien's destination country that would now qualify the alien for asylum or withholding.¹³⁵ This type of relief does not apply to aliens removed *in absentia*. An alien cannot show changed country conditions when the alien never appeared to allege initial country conditions.¹³⁶ Further, an alien alleging changed country conditions must merit favorable discretion.¹³⁷

III. PROBLEMS WITH EXISTING GROUNDS FOR MOTIONS TO REOPEN

Courts disfavor motions to reopen.¹³⁸ There is an interest in finality in any hearing, and immigration courts are interested in preventing aliens from delaying their removal in perpetuity by filing successive motions.¹³⁹ As such, many of the bases for reopening are intentionally difficult. The circumstances to justify them are rare. Unfortunately, many of these bases require such a perfect storm of unlikely circumstances that they are *de facto* impossible to achieve. Some bases have been subject to inconsistent application and definition, leading to confusion among immigration lawyers and courts alike as to their requirements. Others just need stronger enforcement of their requirements to stem the flood of borderline frivolous motions.

A. Impossibility

One practical problem with the current legal bases for a motion to reopen is that many of the circumstances that allow reopening are so specific and rare that they are virtually impossible to attain.

135. §§ 1229a(c)(7)(C)(ii), 1158(a)(2)(D); *see also* Matter of S-Y-G-, 24 I&N Dec. 247, 252 (BIA 2007).

136. *See generally* S-Y-G-, I&N Dec. at 252 (“Discretionary denials are appropriate if the movant fails . . . to proffer material, previously unavailable evidence . . .”).

137. *Id.* (“Discretionary denials are appropriate . . . if we are convinced that a favorable exercise of discretion on the asylum application is unlikely . . . we are not inclined to favorably exercise discretion in the case of an alien, such as the applicant, who was previously found to have offered incredible testimony to gain immigration benefits.”).

138. *See* INS v. Doherty, 502 U.S. 314, 323 (1992) (“Motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.”).

139. *See id.* (noting that “every delay works to the advantage of the deportable alien who wishes merely to remain in the United States”); *see also* INS v. Abudu, 485 U.S. 94, 108 (1988) (“Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a *prima facie* case.”).

1. New Evidence

New evidence would seem like the most obvious reason for reopening,¹⁴⁰ but it is nearly impossible for an alien to meet the required elements. In short, an alien must: (1) find new evidence within ninety days; (2) prove that it was unattainable at the original hearing; (3) prove *prima facie* eligibility for relief with this new evidence; and (4) prove that favorable discretion is merited.¹⁴¹

Combined, these requirements create a near insurmountable set of obstacles. First, there is the time bar.¹⁴² An alien must submit the motion to reopen within ninety days of the removal order.¹⁴³ Second, the alien must prove that the evidence was unattainable at the original hearing.¹⁴⁴ Therein lies a paradox: if an alien can find new evidence within ninety days of the removal order, the alien will have a difficult time proving that the evidence was unattainable by reasonable measures prior to the order. If circumstances rendered the evidence truly unattainable, the alien will not likely be able to discover it and file a motion within ninety days. This creates a near insurmountable bar. But even if an alien is able to overcome this bar, he or she will only be half-way to sustaining a motion to reopen.

If the alien manages to find previously unavailable evidence within the statutory timeframe, the alien must still prove both the evidence's *substantial* probative value¹⁴⁵ and that the alien merits favorable discretion.¹⁴⁶ Essentially, the alien must prove *in a motion* that this new evidence would have likely been sufficient to justify relief at the original hearing. Then the alien's motion must also show that the alien merits favorable discretion. If the alien was eligible at the hearing, but the IJ found that the alien did not merit discretion, it is highly unlikely that a single piece of evidence alone could create favorable discretion.

140. See *supra* text accompanying notes 83–84.

141. See *supra* text accompanying notes 86–90.

142. See 8 C.F.R. § 1003.2(c)(2) (2006) (establishing a ninety-day time bar).

143. *Id.*

144. § 1003.2(c)(1) (“A motion to reopen proceedings 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.”); § 1003.23(b)(3) (stating the same standard for a motion to reopen before an IJ).

145. See *Matter of R-R-*, 20 I&N Dec. 547, 550 (BIA 1992) (“An alien must make a *prima facie* showing both that he is statutorily eligible for the relief sought”); see also *Matter of M-S-*, 22 I&N Dec. 349, 357 (BIA 1999) (ruling that “the Board will look to whether the alien has proffered sufficient evidence to indicate that there is a reasonable likelihood of success on the merits”).

146. *R-R-*, 20 I&N Dec. at 550 (“An alien must make a *prima facie* showing . . . that he warrants relief in the exercise of discretion.”).

2. New Forms of Relief

A motion to reopen based on new relief becoming available faces some of the same obstacles as a motion based on new evidence. Essentially, a new form of relief must become available during the same narrow timeframe that is required of new evidence: ninety days.¹⁴⁷ And the relief must not have been available at the previous hearing.¹⁴⁸ If the relief was available, but the alien pursued other legal options instead, then the immigration court will deny a motion to reopen.¹⁴⁹ The relief must have been entirely unavailable. The alien also still needs to prove *prima facie* eligibility, but this is less difficult than proving the probative value of new evidence because the alien will ostensibly be eligible if new relief has become available. The difficult issue is the extreme unlikelihood of entirely new relief becoming available during the ninety-day window.

3. The Alien Never Received an NTA

Another form of a reopening motion that has virtually no chance of success is the claim that the alien never received an NTA. It would seem the obvious claim to an immigration lawyer for the alien who comes into the office having been ordered removed and claiming to not understand why. But the statute and case law are stacked in the government's favor. When DHS encounters an alien and puts that alien into proceedings, the government usually serves the alien with an NTA in person.¹⁵⁰ While a few divisions of DHS will mail NTAs to the alien, these are the exception and not the rule. And even those cases may fall under constructive service.¹⁵¹

B. Confusion

Some bases for reopening are inherently confusing, leaving the alien's counsel unsure of the requirements, and breeding needless litigation.

147. § 1003.2(c)(2) (requiring that a “motion must be filed no later than 90 days after the date on which the final administrative decision was rendered”).

148. § 1003.2(c)(1) (stating that the BIA must be satisfied that the relief was unavailable); § 1003.23(b)(3) (stating that the IJ must be satisfied that the relief was unavailable).

149. §§ 1003.2(c)(1), 1003.23(b)(3) (requiring that “nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing”).

150. See 8 U.S.C. § 1229(a)(1) (2012) (requiring that “written notice . . . shall be given *in person* to the alien”) (emphasis added).

151. See § 1229(c) (“Service by mail . . . shall be sufficient if there is proof of attempted delivery to the last address provided by the alien . . .”).

1. Ineffective Assistance of Counsel

Of all the existing legal grounds for a motion to reopen, the one that has caused the most confusion for immigration lawyers, the government, and the courts alike is the *Lozada* standard for ineffective assistance of counsel.

The first issue with the current *Lozada* standard is that there is no definitive answer as to how incompetent an attorney must be to “substantially” prejudice an alien’s case. The definition of “substantial prejudice” is that if-but-for the attorney’s incompetent actions, the alien would have received relief.¹⁵² But the question of whether a specific action falls into this category is still a case-by-case decision.

The second issue with a *Lozada* claim is that many immigration lawyers are hesitant to report their colleagues to state bar disciplinary authorities. Because *Lozada* requires an alien to either report the previous attorney, or show good cause for not reporting the attorney, many immigration lawyers have experimented with excuses. The BIA has not been receptive. One reason, which has utterly failed, is that the previous attorney’s error was an “honest mistake.” The BIA rejected this reasoning in *Matter of Rivera-Claros*.¹⁵³ In that case the alien claimed that his attorney was doing good work for indigent immigrants, that it was an honest mistake, and that he did not want to harm the other immigrants for whom the attorney was working.¹⁵⁴ The BIA flatly rejected these reasons.¹⁵⁵ If the attorney was ineffective, then whatever work the attorney is doing for other immigrants is, at best, suspect.¹⁵⁶

Additionally, when ineffective assistance leads to an *in absentia* removal, even the BIA is confused. A lawyer’s incompetence should theoretically be a non-issue when the alien failed to appear at the hearing. But there have been cases where a lawyer caused the alien to fail to appear—either by failing to tell the alien about the hearing,¹⁵⁷ telling the alien not to appear,¹⁵⁸ or providing the wrong date or time to the alien.¹⁵⁹ The prejudice this causes to the case should be obvi-

152. See generally *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994) (“In this case, proving prejudice requires the Petitioner to make a prima facie showing that had the application been filed, he would have been entitled to relief . . .”).

153. *Matter of Rivera-Claros*, 21 I&N Dec. 599, 599 (BIA 1996).

154. *Id.* at 603 (“[T]he respondent asserts that she does not wish to file a complaint against her former counsel. The respondent, in her declaration, states that ‘if any error was made in this case, it was . . . an error of inadvertence . . .’”).

155. *Id.* at 603 (holding that “we find this to be an inadequate explanation”).

156. See *id.* at 604 (“[T]his process . . . highlights the standards which should be expected of attorneys who represent aliens in immigration proceedings.”).

157. See, e.g., *Miguel Gutierrez-Ochoa*, A095 439 049, 2010 WL 2390771 at *2 (BIA May 4, 2010) (unpublished).

158. E.g., *Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996, Interim Decision 3284).

159. E.g., *Liang Qing Jiang*, A076 505 249, 2012 WL 3911858 (BIA Aug. 29, 2012) (unpublished).

ous: if-but-for the failure to appear, the alien could have put on a case. The BIA has attempted to remedy this by defining the lawyer's incompetence as an "exceptional circumstance."¹⁶⁰ This essentially "incorporated" *Lozada* claims into exceptional circumstance motions for *in absentia* removals, in a manner similar to the United States Supreme Court's incorporation of rights under the Fourteenth Amendment.¹⁶¹

This patchwork solution has multiple drawbacks. First, it creates confusion regarding the time bar. An alien has ninety days to file a *Lozada* motion.¹⁶² But an alien has 180 days to file an exceptional circumstance motion.¹⁶³ Which time bar applies to an *in absentia* *Lozada* claim, given that the BIA treats such claims as exceptional circumstances? It would be unfair to give non-appearing aliens twice as much time as those who diligently appeared for their hearing. But it would be equally unfair to give some *in absentia* cases only half the time as others. The BIA typically applies the 180-day time bar to these claims,¹⁶⁴ though there is no stated reasoning for choosing this time bar over the standard *Lozada* time bar, particularly when ineffective assistance claims are rooted in case law, not statute. And the BIA has never analyzed the conflict between the two types of *Lozada* time bars.

Another problem is that ineffective assistance is arguably less compelling than death, serious illness, and domestic violence. This would mean that the BIA ran afoul of statute by defining ineffective assistance as an exceptional circumstance.¹⁶⁵ But so far, no court has challenged it on this matter.

In early 2009, outgoing Attorney General Michael Mukasey attempted to fix the current *Lozada* framework, ordering the BIA to consider a new process whereby an alien would send a signed but unfiled bar complaint to the BIA along with the motion to reopen.¹⁶⁶

160. *Grijalva-Barrera*, 21 I&N Dec. at 474 ("[T]he level of incompetence involved in this case establishes that the respondent's absence was the result of exceptional circumstances . . .").

161. *See generally id.*

162. *See* 8 C.F.R. § 1003.2(c)(2) (2006) (establishing the general ninety-day time bar for motions to reopen).

163. § 1003.23(b)(4)(ii) (applying a general 180-day time bar for *in absentia* removals).

164. *See generally* Matter of Lei, 22 I&N Dec. 113 (BIA 1998, Interim Decision 3356).

165. *Compare Grijalva-Barrera*, 21 I&N Dec. at 474 (explaining that "the level of incompetence involved in this case establishes that the respondent's absence was the result of exceptional circumstances"), *with* 8 U.S.C. § 1229a(e)(1) (2012) (explaining exceptional circumstances as, for example, "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but *not including less compelling circumstances*") (emphasis added).

166. Matter of Compean, 24 I&N Dec. 710, 737 (A.G. Jan. 7, 2009) (*Compean I*) ("[T]he alien must attach a completed and signed complaint addressed to the appro-

The BIA would then review the case, and send the complaint to the appropriate state bar if the complaint seemed legitimate.¹⁶⁷ But Mukasey's order also claimed that although EOIR could allow an alien to reopen based on ineffective assistance, reopening was not mandatory because aliens did not have a right to effective assistance.¹⁶⁸ This lasted six months. Incoming Attorney General Eric Holder overruled this framework in the summer of 2009.¹⁶⁹ While acknowledging problems with the *Lozada* framework, Attorney General Holder indicated a belief that Attorney General Mukasey's solutions went too far.¹⁷⁰ He ordered the BIA to analyze *Lozada* to consider improvements.¹⁷¹ But the BIA has made no further serious public efforts to change the *Lozada* requirements.

2. The Alien Never Received the NOH

The claim that an alien never received an NOH will face many of the same difficulties as the claim that an alien never received an NTA.¹⁷² But with this motion attorneys will sometimes mistakenly claim that their client never received an NTA when they mean to say the client never received an NOH.¹⁷³ Maybe the attorneys are confused. It would be understandable because the distinction sometimes even confuses the BIA.¹⁷⁴ Maybe they simply do not know the difference between the two documents. Either way, claiming that an alien never received an NTA will lead to failure when DHS submits a copy of the signed NTA, regardless of whether the alien or attorney intended to claim that the alien never received the NOH.

A further problem with the NOH claim is that the court constructively serves the alien by sending the NOH to the alien's last known

appropriate State bar or disciplinary authorities . . . the alien need not actually file the complaint . . .") *vacated*, 25 I&N Dec. 1 (BIA June 3, 2009).

167. *Id.* at 737–38 (noting the law “leav[es] it to the Board whether to refer the complaint to the State bar”).

168. *Id.* at 710 (“Aliens in removal proceedings have no right to counsel . . . Although the Constitution and immigration laws do not entitle an alien in removal proceedings to relief for his lawyer’s mistakes, the Department of Justice may, as a matter of administrative grace, reopen removal proceedings where an alien shows that he was prejudiced by the actions of private counsel.”).

169. *Matter of Compean*, 25 I&N Dec. 1 (BIA June 3, 2009) (*Compean II*).

170. *Id.* at 3 (“[T]he introduction of a new procedural framework depended in part on Attorney General Mukasey’s conclusion that there is no constitutional right to effective assistance of counsel in removal proceedings.”).

171. *Id.* at 2 (“I direct the Acting Director of the Executive Office for Immigration Review to initiate procedures as soon as practicable to evaluate the *Lozada* framework and to determine what modifications should be proposed for public consideration.”).

172. *See supra* text accompanying notes 150–51.

173. *See, e.g.*, Kenneth Solotis-Nwanko, A46 116 812, 2005 WL 1766748 (BIA May 5, 2005) (unpublished) (providing example where the BIA reverses itself and admits that it erroneously granted a motion to reopen because both it and the respondent confused the NOH for an NTA).

174. *See id.* at *2.

address.¹⁷⁵ If the court had any indication that the alien failed to receive the NOH (such as the post office returning the NOH undelivered), the court would never have proceeded *in absentia*.¹⁷⁶ If the alien had filed a change of address, as required, the court would have sent the NOH to the updated address.¹⁷⁷ As such, in most cases the alien will have lost this motion before even filing it.

C. *Need Better Bright-Line Rules*

Some bases for reopening an immigration case have set bright-line requirements but are couched in language that nevertheless breeds litigation. These bases for reopening simply need to be re-expressed in clearer language.

1. Exceptional Circumstances

There are only three “exceptional circumstances” that will allow the court to reopen an *in absentia* removal order: death in the alien’s immediate family; serious illness; and domestic violence.¹⁷⁸ If an alien misses a hearing for one of these three reasons, then the court rescinds the removal order and reopens the case.¹⁷⁹ These are the only “exceptional circumstances” that will allow the immigration courts to reopen a case¹⁸⁰ (other than the BIA’s odd incorporation of *Lozada* claims into exceptional circumstances for certain *in absentia* cases,¹⁸¹ and the BIA’s occasional and inexplicable inconsistency).¹⁸² Further, exceptional circumstances do not apply to hearings the alien actually appeared—it is only a basis for reopening *in absentia* hearings.¹⁸³

175. See 8 U.S.C. § 1229(c) (2012) (“Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien . . .”).

176. See § 1229a(b)(5)(A) (stating that the alien shall be removed only upon “clear, unequivocal, and convincing evidence” that the written notice was provided).

177. *E.g.*, *Gomez-Palacios v. Holder*, 560 F.3d 354, 360 (5th Cir. 2009) (“[A]n alien’s failure to receive actual notice of a removal hearing due to his neglect of his obligation to keep the immigration court apprised of his current mailing address does not mean that the alien ‘did not receive notice.’”).

178. § 1229a(e)(1) (“The term ‘exceptional circumstances’ refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.”).

179. § 1229a(b)(5)(C)(i) (permitting reopening of case “if the alien demonstrates that the failure to appear was because of exceptional circumstances”).

180. See § 1229a(e)(1) (prohibiting reopening for “less compelling circumstances”).

181. See *supra* notes 160–65.

182. See, *e.g.*, *Juan Manuel Jaimes-Rosad*, A077 087 574, 2010 WL 1747380 (BIA Apr. 20, 2010) (unpublished) (ruling that automobile failure was an exceptional circumstance because it was beyond the alien’s control); *but see* *Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1997, Interim Decision 3331) (holding that heavy traffic causing the alien to miss a hearing was not beyond the alien’s control).

183. See § 1229a(b)(5)(C)(i) (stating that the alien must prove that exceptional circumstances caused a *failure to appear*).

The problem with this basis is the name: “exceptional circumstances.” Despite the statutory definition, many attorneys will still claim circumstances other than those listed to be exceptional.¹⁸⁴ This wastes the court’s time. It wastes DHS’s time. And it wastes the alien’s resources on a futile motion.

2. Changed Country Conditions

Like exceptional circumstances, the major point of confusion with changed country conditions is in the name itself. Because there is no bright-line rule, virtually anything in the country that is worse than it was when the alien tried and failed to attain asylum could be a “changed country condition.” But the BIA has clearly stated that a mere incremental worsening of existing conditions will not suffice to reopen an alien’s case.¹⁸⁵

IV. RECOMMENDED REFORMS FOR POST-CONCLUSION MOTIONS PRACTICE

It would be easy for Congress or EOIR to simplify the post-conclusion process. Congress could amend 8 U.S.C. to reflect a new process, or the Attorney General could amend 8 C.F.R. to reflect new rules. A three-prong approach would create a process that is both more equitable to the alien and more efficient for the government. This approach would: (A) replace all discretionary bases for reopening with mandatory bright-line rules; (B) clarify existing bright-line rules that currently cause confusion; and (C) police the private bar to deter meritless motions. This would not solve every problem with motions to reopen or address every possible scenario. That would likely be impossible, given the complexity of immigration laws and the myriad possible factual circumstances. But this three-prong approach would streamline the process and be an improvement over the current structure.

A. *From Discretionary to Mandatory Reopening*

The key problem with discretionary reopening is that it breeds needless litigation. Currently, reopening a closed immigration case is

184. See, e.g., *S-A-*, 21 I&N Dec. at 1050 (heavy traffic); *Iveth Cristina Valenzuela-Gradis*, A099 661 476, 2012 WL 3277128 (BIA July 12, 2012) (unpublished) (involving alien who wrongly assumed the IJ would grant a continuance); *Ismael Morfi Valdes*, A94 896 569, 2008 WL 3861947 (BIA July 14, 2008) (unpublished) (involving financial hardship for alien to travel to hearing).

185. See *Matter of S-Y-G-*, 24 I&N Dec. 247, 257 (BIA 2007) (“Change that is incremental or incidental does not meet the regulatory requirements . . . [A] new report or new law is not evidence of changed conditions without convincing evidence that the prior version of the law was different, or was differently enforced, in some relevant and material way.”).

essentially an exercise of the Attorney General's discretion.¹⁸⁶ As such, aliens may file motions, which otherwise fail every legal basis for reopening, in hopes of receiving favorable discretion. And some aliens who merit relief may be denied because they are unable to convince an IJ to show favorable discretion.

But removal of discretionary factors would only be the first half of this prong. The other half would be to temper the adversarial factors in these cases. Without a need for favorable discretion, EOIR could review cases *sua sponte* without any input from ICE.¹⁸⁷ The alien's case either does or does not merit reopening. If the case reopens, ICE would return as prosecutor. But with no discretionary factors, EOIR could objectively review cases to determine whether the case merits reopening solely as a matter of law.

1. Mandatory Reopening

If all discretionary factors were removed, EOIR could focus solely on whether an alien's case merits reopening as a matter of law. It would no longer be a question of whether the courts "should" reopen a case. It would be a question of whether the courts "must" reopen a case. With new evidence, new form of relief, and changed country condition claims, this would allow the court to focus on the eligibility elements for each claim, without considering whether the alien merits favorable discretion. The remaining elements would not change—the court would simply no longer need to consider whether the alien merits favorable discretion. Notice failure, exceptional circumstance, and *Lozada* claims already function this way. If the alien meets the elements for the specific basis of reopening, the court reopens the case. Extending this mandatory framework to the remaining grounds for reopening will serve to prevent meritless "sob-story" motions, while creating more certainty of relief for aliens who truly merit it.

The opposite side of the "mandatory reopening" coin would be "mandatory non-reopening." One aspect of motions to reopen that should not change is the numerical bar.¹⁸⁸ Aliens are currently barred from filing more than one motion to reopen.¹⁸⁹ This promotes finality and endeavors to ensure that only meritorious motions get filed.¹⁹⁰ The other aspect that should not change is the ninety-day time bar. In fact, Congress could tighten up this requirement by making the time bar a jurisdictional bar instead of a statutory element of reopening.

186. *INS v. Doherty*, 502 U.S. 314, 323 (1992) ("[T]he Attorney General has 'broad discretion' to grant or deny such motions.").

187. See *infra* text accompanying notes 192–95.

188. See 8 U.S.C. § 1229a(c)(7)(A) (2012) ("An alien may file *one* motion to reopen proceedings . . .") (emphasis added).

189. *Id.*

190. *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) ("These rules are meant to bring finality to immigration proceedings and to redress the problem of abuses resulting from the filing of successive or frivolous motions.").

After all, Congress has already jurisdictionally barred review in some circumstances.¹⁹¹ This would protect the government's interest in finality, while protecting aliens from attorneys who would take their money to pursue a hopeless attempt to toll the time bar.

2. *Sua Sponte* Review of New Evidence and New Forms of Relief

Because new evidence and new forms of relief are largely illusory, the current structure is ripe for a drastic change. The most logical form that this could take would be to allow the alien to motion the court to hear new evidence or to consider new relief under the court's *sua sponte* authority. Immigration courts may already reopen cases *sua sponte* in the most extreme circumstances.¹⁹² And despite the self-contradictory language of "motioning" a court to take *sua sponte* action, it is an accepted practice at EOIR.¹⁹³ This would take ICE out of the loop, allowing the alien a direct line to EOIR during the ninety days that they have to file a motion.

This structure would solve everyone's problems. It would free up ICE to focus resources on active cases. It would allow the alien unchallenged access to EOIR for ninety days following the removal order. And it would allow EOIR to more quickly adjudicate motions because the IJ could make the determination without a full adversarial hearing.

The basic elements of a new evidence or new relief claim would not change. The courts are capable of determining whether a new piece of evidence or form of relief was reasonably available during the original hearing. Since the court is both trier of law and fact, the court can also determine whether new evidence is material.

The only elements that would suggest a need for an adversarial process would be whether the new evidence is likely to change the case's outcome, or whether an alien is likely to merit the new relief. The solution would be to make these a low bar. If there is *any* likelihood that the new evidence would realistically change the outcome, reopening would be mandatory. Or if there is *any* likelihood of prevailing on a new form of relief, reopening would be mandatory. Essentially, if the alien meets the first element of showing reasonable unavailability, they would only fail to reopen for new evidence if the new evidence did not address each element where they failed at trial (or if they failed to address a *prima facie* element of a new form of relief).

191. See § 1231(a)(5) (2006) (stripping jurisdiction from all courts in reinstatement cases).

192. See Matter of G-D-, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (discussing the respondent's motion to reopen *sua sponte*, but denying the motion because the circumstances were not exceptional enough to merit *sua sponte* reopening).

193. See *id.*

3. *Sua Sponte* Review of Notice

Immigration courts already review notice prior to issuing *in absentia* removal orders.¹⁹⁴ An IJ will not allow the hearing to continue *in absentia* or issue a removal order if the IJ finds a failure of either the NTA or NOH's service.¹⁹⁵ If an alien requests the court to reopen based on notice failure, the court can review whether the alien constructively received the NTA or NOH from the existing record. There is no need to involve ICE to provide an adversarial viewpoint. Essentially, an alien should be able to submit a notice failure claim on a boilerplate form to the court, and the court should be able to respond without requiring a formal motion.

4. *Sua Sponte* Review of Changed Country Conditions

If a country's conditions have changed enough to merit reopening, then it should be obvious from the U.S. Country Reports. EOIR should publicize when these changed conditions occur and allow or refuse motions to reopen for changed conditions based on this report. There should be no question when an alien files on this basis as to whether the alien should be allowed to reopen a case. And because country conditions either do or do not support reopening, there is no need for ICE to offer a counter-viewpoint. This too should fall under EOIR's *sua sponte* authority.

B. *Better Bright-Line Rules*

The only places where the current rules create so much confusion as to create a need for better rules are in (1) *Lozada* claims and (2) exceptional circumstance claims.

1. *Lozada* Simplification

The confusing *Lozada* standards for ineffective assistance of counsel should be overhauled. First, the Attorney General should find that *Lozada* outright applies natively to *in absentia* hearings, as it does already in hearings where the alien attended. The BIA's patchwork solution of deciding that such a claim is an exceptional circumstance has created more problems than it has solved. If ineffective assistance of counsel were a native basis for reopening an immigration case, regardless of whether the case was adjudicated *in absentia*, then aliens and attorneys alike would be on notice as to the specific required elements and the applicable time bar. This would also streamline motions for *in absentia* cases because immigration lawyers would no longer waste time stringing together "incorporation" style arguments.

194. See § 1229a(b)(5)(A) (stating that the alien shall be removed only upon "clear, unequivocal, and convincing evidence" that the written notice was provided).

195. *Id.*

A second reform that would improve the existing *Lozada* framework would be to reinstate those portions of the first *Compean* decision that streamlined the filing process.¹⁹⁶ By overruling the entire decision, Attorney General Holder threw the proverbial baby out with the bathwater.¹⁹⁷ Rather than flooding state bar associations with alien complaints,¹⁹⁸ or flooding immigration courts with motions doomed by their failure to report attorneys to the bar,¹⁹⁹ the BIA could take on the role of filter.²⁰⁰ An alien could send a signed (but unsent) bar complaint to the BIA along with the motion to reopen, in lieu of the filing the complaint prior to making a *Lozada* claim.²⁰¹ Then the BIA could either discipline the ineffective attorney directly²⁰² or report the attorney to the state bar association.²⁰³

2. Name the Circumstances

The term “exceptional circumstances” has long been a litigation breeder in the immigration field. Because it only applies to three specific circumstances in *in absentia* cases, it will be easier to clarify. All EOIR needs to do is rename this basis. Instead of “exceptional circumstances,” EOIR could adopt a more specific and descriptive name. For example, EOIR could call this basis for reopening “Non-Appearance for Death, Illness, or Domestic Violence.” This name might not roll off the tongue as easily as “exceptional circumstances,” but it will solve most of the current problems with this reopening basis. It will bring an end to the practice of claiming exceptional circumstances in cases where the alien actually appeared, because the term “non-appearance” is in the title. It will also end the practice of immigration lawyers wrongfully claiming circumstances other than those statutorily identified to be “exceptional,” because the title itself lists the three acceptable circumstances.

C. Better Policing of the Private Immigration Bar

The cornerstone of any post-conclusion reform will be better policing of the private immigration bar. Problems with the private immigration bar are no secret, but malpractice is grossly underreported to

196. See generally Matter of Compean, 24 I&N Dec. 710, 737–38 (A.G. January 7, 2009) (*Compean I*).

197. See generally Matter of Compean, 25 I&N Dec. 1, 1 (BIA June 3, 2009) (*Compean II*).

198. See *Compean I*, 24 I&N at 737 (“[I]t appears that *Lozada* may inadvertently have contributed to the filing of many unfounded or even frivolous complaints.”).

199. E.g., Comfort Afua Afarbea Koli A.K.A. Comfort Araribea Woods, A099 173 114, 2012 WL 1705670 (BIA Apr. 11, 2012) (unpublished); Jose Rufino Mena-Herrera, A029 192 836, 2009 WL 888469 (BIA Mar. 13, 2009) (unpublished); Maryam Jafar Shirley, A28 660 098, 2007 WL 275803 (BIA Jan. 22, 2007) (unpublished).

200. See *Compean I*, 24 I&N at 737–38.

201. *Id.*

202. See *infra* text accompanying notes 207–11.

203. See *Compean I*, 24 I&N at 737–38.

state bar associations.²⁰⁴ A 2012 American Bar Journal article noted immigrants are “susceptible to unscrupulous, or careless, lawyers because of language barriers and their reluctance to initiate contact with government authorities in efforts to undo the mistakes of counsel.”²⁰⁵ Some have gone so far as to say that immigrants are sometimes “better off *pro se*.”²⁰⁶ The BIA currently disciplines private attorneys by forbidding them from practicing in immigration courts or before CIS officers.²⁰⁷ But so far, this has only occurred in the most egregious cases.

The private bar creates some of the problems with the current post-conclusion motion structure because some attorneys file motions regardless of their merit. EOIR has failed to deter private immigration lawyers from filing such frivolous motions. But the blame does not fall solely on the BIA. A legal framework for such sanctions simply does not exist. Immigration courts are not Article III courts. Congress has given IJs the legal authority to sanction attorneys for contempt.²⁰⁸ But this authority is limited to the regulations set out by the Attorney General.²⁰⁹ And no Attorney General has ever written such a regulation into 8 C.F.R. to complete this authority for IJs. So far, only the BIA enjoys disciplinary authority in the regulations.²¹⁰ This leaves IJs powerless to sanction those who come before them. Attorneys can only be disciplined under the BIA’s narrow authority or by referral to their state bar. The Attorney General could easily amend 8 C.F.R. to allow IJs to automatically sanction private attorneys for frivolous motions because 8 U.S.C. already authorizes him to make such an amendment.²¹¹ Granting IJs sanction authority would ensure that attorneys only file the most meritorious of post-conclusion motions. Without the possibility of sanctions, attorneys could still file motions that have no hope of success on behalf of aliens willing to pay for one last shot. If there are negative consequences for wasting the court’s time, attorneys will be less willing to take an alien’s money in exchange for false hope.

204. See G. M. Filisko, *Hot Zone: Immigration Law Raises a Unique Mix of Ethics Issues for Lawyers*, ABA JOURNAL (March 1, 2012, 4:00 AM), available at http://www.abajournal.com/magazine/article/hot_zone_immigration_law_raises_a_unique_mix_of_ethics_issues_for_lawyers/.

205. *Id.*

206. Davis, *supra* note 1, at 141.

207. See EOIR FACT SHEET, *supra* note 22; see also 8 U.S.C. § 1229a(b)(1) (2012).

208. § 1229a(b)(1) (“The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority . . .”).

209. *Id.*

210. See 8 C.F.R. § 292.3(a)(1) (1996) (granting the BIA the authority to punish attorneys).

211. 8 U.S.C. § 1229a(b)(1) (2012).

V. CONCLUSION

The current structure for post-conclusion immigration motions practice is confusing and inefficient. Some bases for reopening are impossible to attain because of their own requirements. Some are so confusing that neither aliens, attorneys, nor the courts completely understand them. And others invite abuse and frivolous filings. But there is no one-size-fits-all solution. Any effort to restructure post-conclusion motions must employ a multi-prong approach because no single common denominator drives all of the problems. Such a reform should include the following: (1) all discretionary grounds for reopening should become mandatory and come under the court's *sua sponte* authority; (2) EOIR must clarify all currently unclear standards; and (3) EOIR must increase efforts to police the private bar, specifically granting IJs the regulatory authority to sanction attorneys.

Transforming reopening from discretionary to mandatory will solve many of the current structure's problems. It will provide aliens notice of exactly which elements they must satisfy to reopen a case. It will protect aliens who meet the elements from being removed simply because the judge thinks that the alien does not merit favorable discretion. It will also reduce the number of meritless motions to reopen, because aliens who do not meet the requirements will no longer try to reopen solely on a compelling story for favorable discretion (i.e., by tugging on a judge's heartstrings). It will also set the stage for removing ICE from the post-conclusion equation, because courts can judge the merits of a reopening request under their existing *sua sponte* authority.

Clarifying existing bright-line rules and better policing of the private bar will also clean up the post-conclusion environment. Simplifying the requirements for an ineffective assistance of counsel claim and clarifying the standards for an exceptional circumstance claim are two easy steps EOIR could take to streamline the post-conclusion process. Better policing of the private bar would solve a large swath of problems. It would deter frivolous motions, and it would allow the BIA to ensure that aliens who hire immigration lawyers receive an acceptable level of quality.

These steps would solve many of the problems with the current post-conclusion environment. While no single restructuring, overhaul, or reform could solve all of the immigration system's problems, these simple steps could solve the problems inherent in this one area of immigration law.