

5 Motions before the Board

5.1 Who May File

(a) Parties. — Only an alien who is the subject of an underlying appeal before the Board, the alien's representative, or DHS may file a motion. A motion must identify all parties covered by the motion and state clearly their full names and alien registration numbers ("A numbers"), including all family members. See Appendix F (Sample Cover Page). The Board will *not* assume that a motion includes all family members (or group members in a consolidated proceeding). See Chapter 4.10 (Combining and Separating Appeals).

(b) Representatives. — Motions may be filed either by a party, if unrepresented ("pro se"), or by a party's representative. See Chapter 2 (Appearances before the Board). Whenever a party is represented, the party should submit all motions to the Board through the representative. See Chapter 2.1(d) (Filings and communications).

(i) Motions to reopen and motions to reconsider. — All motions to reopen and motions to reconsider must be accompanied by a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27), even if the representative is already the representative of record. See Chapter 2 (Appearances before the Board).

(ii) All other motions. — On any motion that is not a motion to reopen or a motion to reconsider, if a representative is already the representative of record, the motion need not be accompanied by a Notice of Appearance. However, if a representative is appearing for the first time, the representative must file a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27) along with that motion. See Chapter 2 (Appearances before the Board).

(c) Persons not party to the proceeding. — Only a party to a proceeding, or a party's representative, may file a motion pertaining to that proceeding. Family members, employers, and other third parties may not file a motion. If a third party seeks Board action in a particular case, the request should be made through one of the parties. Third parties who wish to appear as *amicus curiae* should consult Chapter 2.10 (Amicus Curiae).

5.2 Filing a Motion

(a) Jurisdiction. — Motions must be filed in the right place. See Appendix K (Where to File a Motion). The Board may entertain motions only in those cases in which it has jurisdiction.

(i) Cases never before the Board. — The Board cannot entertain motions for cases that have never been before it. Cases “never before the Board” include both appeals that were never filed and appeals that were rejected for a filing defect that was never remedied.

(ii) Cases pending before the Board. — Where an appeal is pending before the Board, all motions regarding that appeal should be filed with the Board.

(iii) Cases already decided by the Board. —

(A) Motions to reopen and motions to reconsider. — As a general rule, where an appeal has been decided by the Board and no case is currently pending, a motion to reopen or a motion to reconsider may be filed with the Board. See Chapters 5.6 (Motions to Reopen), 5.7 (Motions to Reconsider). Parties should be mindful of the strict time and number limits on motions to reopen and motions to reconsider. See Chapters 5.6(c) (Time limits), 5.6(d) (Number limits), 5.7(c) (Time limits), 5.7(d) (Number limits).

(B) Motions subsequent to remand. — Once a case has been remanded to the Immigration Judge, the only motion that the Board will entertain is a motion to reconsider the decision to remand. All other motions must be filed with the Immigration Judge. Motions to reconsider a remand order are not favored, and concerns regarding the decision to remand should be presented to the Immigration Judge.

(C) Motions on appeals dismissed for lack of jurisdiction. — Where an appeal has been dismissed for lack of jurisdiction, the Board cannot consider a motion to reopen. See *Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974). The only motion that the Board may entertain is a motion to reconsider the Board’s finding that it lacks jurisdiction.

(D) Motions on appeals dismissed as untimely. — Where an appeal has been dismissed as untimely, the Board does not have jurisdiction to consider a motion to reopen. The only motion that the Board may entertain is a motion to reconsider the Board's finding that the appeal was untimely. See *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998).

(E) Motions on appeals affirmed without opinion. — By regulation, the Board cannot entertain a motion based solely on an argument that the case should not have been affirmed without opinion. See Chapter 4.15 (Summary Affirmance). Otherwise, the Board retains jurisdiction over any motion to reconsider or motion to reopen filed after a summary affirmance order. See Chapters 5.6 (Motions to Reopen) and 5.7 (Motions to Reconsider).

(b) Form. — There is no official form for filing a motion before the Board. Motions should *not* be filed on a Notice of Appeal (Form EOIR-26), which is used exclusively for the filing of appeals.

Motions and supporting documents must comply with the general rules and procedures for filing. See Chapter 3 (Filing with the Board). The Board prefers that motions and supporting documents be assembled in a certain order. See Chapter 3.3(c)(i)(B) (Motions).

A motion should be characterized and labeled as accurately as possible. The Board construes a motion according to its content, not its title, and applies time and number limits accordingly. See Chapter 5.3 (Motion Limits).

Motions should clearly contain all pertinent information, and the Board recommends that parties use captions containing the following material:

- title (Example: "Respondent's Motion to Reopen")
- the full name (as it appears on the charging document) for each alien included in the motion
- the alien registration number ("A number") for each alien involved in the motion (if an alien has more than one number, all the numbers should appear on the motion)

- the type of hearing or adjudication underlying the motion (e.g., removal, deportation, exclusion, bond, visa petition)
- the adjudicator whose decision underlies the motion (e.g., the Immigration Court, the DHS officer, or the Board), where appropriate

All motions must be made in writing, signed, and served on all parties. A motion must identify *all* persons included in the motion. See Chapter 5.1(a) (Parties). A motion must state with particularity the grounds on which it is based and must identify the relief or remedy sought by the moving party.

If a motion involves a detained or incarcerated alien, the motion should clearly state that information. The Board recommends that the cover page to the motion be prominently marked “DETAINED” in the upper right corner and highlighted, if possible. See Appendix F (Sample Cover Page).

(c) Proof of Service. — All motions must be served on the other party and must contain Proof of Service. See Chapter 3.2 (Service), Appendix G (Sample Proof of Service).

(d) Motion fee and fee waivers. — Where required, a motion must be accompanied by the appropriate filing fee or Appeal Fee Waiver Request (Form EOIR-26A). See Chapter 3.4 (Filing Fees).

(e) Copy of underlying order. — Motions to reopen and motions to reconsider should be accompanied by a copy of the Board’s order.

(f) Evidence. — Statements made in a motion are not evidence. If a motion is predicated upon evidence that was not made part of the record by the Immigration Judge, that evidence should be submitted with the motion. Such evidence includes sworn affidavits, declarations under the penalty of perjury, and documentary evidence. The Board will not suspend or delay adjudication of a motion pending the receipt of supplemental evidence.

Any material that is not in the English language must be accompanied by a certified English translation. 8 C.F.R. §§ 1003.2(g)(1), 1003.33. See Chapter 3.3(a) (Language). Documents regarding criminal convictions must comport with the requirements set forth in 8 C.F.R. § 1003.41.

(g) Application for relief. — A motion based upon eligibility for relief must be accompanied by a copy of the application for that relief, if an application is normally required. See 8 C.F.R. § 1003.2(c)(1).

The application for relief must be duly completed and executed, in accordance with the requirements for such relief. The original of an application for relief is generally not required, but should be held by the filing party for submission to the Immigration Judge or DHS following the Board's ruling on the motion. See Chapter 12.3 (Submitting Completed Forms). The copy that is submitted to the Board should be accompanied by a copy of the appropriate supporting documents.

If a certain form of relief requires an application, *prima facie eligibility for that relief cannot be shown without it*. For example, if a motion to reopen is based on adjustment of status, a copy of the application for that relief (Form I-485) should be filed *with* the motion, along with the necessary documents. See subsection (h), below.

Application fees are *not* paid to the Board and should not accompany the motion. Fees for applications should be paid if and when the case is remanded to the Immigration Judge in accordance with the filing procedures for that application. See Chapter 3.4(i) (Application fees).

(h) Visa petitions. — If a motion is based on adjustment of status and there is an underlying visa petition that has been approved, evidence of the approved visa petition should accompany the motion. When a petition is subject to visa availability, evidence that a visa is immediately available to the beneficiary should also accompany the motion (e.g., a copy of the State Department's Visa Bulletin reflecting that the petition is "current").

If a motion is based on adjustment of status and the underlying visa petition has not yet been adjudicated, a copy of that visa petition should accompany the motion. If the visa petition has already been filed with DHS, evidence of that filing should accompany the motion.

Parties are advised that, in certain instances, an approved visa petition is required. See, e.g., *Matter of H-A-*, 22 I&N Dec. 728 (BIA 1999), *modified by Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

Filing fees for visa petitions are *not* paid to the Board and should not accompany the motion. The filing fee for a visa petition is submitted to DHS when the petition is filed with DHS.

(i) *Oral argument.* — The Board generally does not grant requests for oral argument on a motion. See Chapter 8.2(b) (Motions).

(j) *Draft orders.* — Parties should not include draft orders in the motion filing. The Board always issues its own order.

(k) *Confirmation of receipt.* — The Board issues filing receipts for motions to reopen and motions to reconsider. The Board does not issue filing receipts for other types of motions. See Chapter 3.1(d) (Filing receipts). The Board will, however, return a conformed copy of a filed motion if it complies with Chapter 3.1(d)(iii) (Conformed copies).

5.3 Motion Limits

Certain motions are limited in time (when the motion must be filed) and number (how many motions may be filed). Motions to reopen and motions to reconsider are limited in both time and number. See Chapters 5.6 (Motions to Reopen), 5.7 (Motions to Reconsider). Motions to accept a late-filed brief are limited in number. See Chapter 4.7(d) (Untimely briefs). These time and number limits are strictly enforced.

A compound motion is a motion that combines a motion to reopen or a motion to reconsider with another motion (or with each other). Time and number limits on motions to reopen and motions to reconsider apply even when part of a compound motion, and the Board will consider only that portion of the motion that is not time or number barred. For example, if a motion seeks both reopening and reconsideration, and is filed more than 30 days after the Board's decision but within 90 days of that decision, the Board will entertain the portion of the motion that seeks reopening, but not the portion that seeks reconsideration.

5.4 Motion Briefs

A motion need not be supported by a brief. However, if a brief is filed, it should accompany the motion. See 8 C.F.R. § 1003.2(g)(3). A brief filed in opposition to a

motion must be filed within 13 days from the date of service of the motion. 8 C.F.R. § 1003.2(g)(3).

Motion briefs should generally follow the filing requirements, writing guidelines, formatting requirements, and citation conventions set forth in Chapter 4.6 (Appeal Briefs). Motion briefs should also comport with the requirements set out in Chapter 3.3 (Documents).

The Board does not issue briefing schedules on motions.

5.5 Transcript Requests

The Board does not prepare a transcript of proceedings in response to a motion. If a party feels that a transcript is necessary, the party should file a motion articulating why a transcript is necessary. See generally Chapter 4.2(f) (Transcription).

Parties are reminded that tape recordings of proceedings are generally available for review at the Immigration Court at which the proceedings before the Immigration Judge were conducted.

5.6 Motions to Reopen

(a) Purpose. — A motion to reopen asks the Board to reopen proceedings in which the Board has already rendered a decision in order to consider new facts or evidence in the case.

(b) Requirements. —

(i) Filing. — Motions to reopen must comply with the general requirements for filing a motion. See Chapter 5.2 (Filing a Motion). Depending on the nature of the motion, a filing fee may be required. See Chapter 3.4 (Filing Fees).

(ii) Content. — A motion to reopen must state the new facts that will be proven at a reopened hearing, and the motion must be supported by affidavits or other evidentiary material. 8 C.F.R. § 1003.2(c)(1).

A motion to reopen will not be granted unless it appears to the Board that the evidence offered is material and was not available and could not have been discovered or presented at an earlier stage in the proceedings. See 8 C.F.R. § 1003.2(c)(1).

A motion to reopen based on an application for relief will not be granted if it appears the alien's right to apply for that relief was fully explained and the alien had an opportunity to apply for that relief at an earlier stage in the proceedings (unless the relief is sought on the basis of circumstances that have arisen subsequent to that stage of the proceedings). See 8 C.F.R. § 1003.2(c)(1).

(c) Time limits. — As a general rule, a motion to reopen must be filed within 90 days of the Board's final administrative decision. 8 C.F.R. § 1003.2(c)(2). (For cases decided by the Board before July 1, 1996, the motion to reopen was due on or before September 30, 1996. 8 C.F.R. § 1003.2(c)(2).) There are few exceptions. See subsection (f), below.

(d) Number limits. — A party is permitted only one motion to reopen. 8 C.F.R. § 1003.2(c)(2). There are few exceptions. See subsection (f), below.

(e) Other limits. — The Board will not entertain a motion to reopen made by or on behalf of a person in removal proceedings after that person has departed the United States. 8 C.F.R. § 1003.2(d).

(f) Exceptions to the limits on motions to reopen. — A motion to reopen may be filed outside the time and number limits in very specific circumstances. See 8 C.F.R. § 1003.2(c)(3).

(i) Changed circumstances. — When a motion to reopen is based on a request for asylum, withholding of removal, or relief under the Convention Against Torture, and it is premised on new circumstances, the motion must contain a complete description of the new facts that comprise those circumstances and articulate how those circumstances affect the party's eligibility for relief. See 8 C.F.R. § 1003.2(c)(3)(ii). Motions based on changed circumstances must also be accompanied by evidence of the changed circumstances alleged. See 8 C.F.R. § 1003.2(c).

(ii) In absentia proceedings. — There are special rules pertaining to motions to reopen following an alien's failure to appear for a hearing. An "in

absentia” order (an order entered when the alien did not come to the hearing) cannot be appealed to the Board. *Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999). If an alien misses a hearing and the Immigration Judge orders the alien removed from the United States, the alien must file a motion to reopen with the Immigration Judge, explaining why he or she missed the hearing. (Unlike the in absentia order, the Immigration Judge’s ruling on the motion can be appealed.) Such motions are subject to strict deadlines under certain circumstances. See 8 C.F.R. §§ 1003.2(c)(3)(i), 1003.23(b)(4)(ii), 1003.23(b)(4)(iii).

(iii) Joint motions. — Motions that are agreed upon by all parties and are jointly filed are not limited in time or number. See 8 C.F.R. § 1003.2(c)(3)(iii).

(iv) DHS motions. — For cases in removal proceedings, DHS may not be subject to time and number limits on motions to reopen. See 8 C.F.R. § 1003.2(c)(2), (3). For cases brought in deportation or exclusion, DHS is subject to the time and number limits on motions to reopen, unless the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum. See 8 C.F.R. § 1003.2(c)(3)(iv).

(v) Pre-9/30/96 motions. — Motions filed before September 30, 1996, do not count toward the one-motion limit.

(vi) Other. — In addition to the regulatory exceptions for motions to reopen, exceptions may be created in accordance with special statutes, case law, directives, or other special legal circumstances. The Board may also reopen proceedings at any time on its own initiative. 8 C.F.R. § 1003.2(a).

(g) Evidence. — A motion to reopen must be supported by evidence. See Chapter 5.2(f) (Evidence).

(h) Motions filed while an appeal is pending. — Once an appeal is filed with the Board, the Immigration Judge no longer has jurisdiction over the case. See Chapter 4.2(a)(ii) (Appeal to the Board vs. motion before the Immigration Judge). Thus, motions to reopen should not be filed with an Immigration Judge after an appeal is taken to the Board. A motion to reopen that is filed with the Board during the pendency of an appeal is generally treated as a motion to remand for further proceedings before an Immigration Judge. 8 C.F.R. § 1003.2(c)(4). See Chapter 5.8 (Motions to Remand).

(i) Administratively closed cases. — When proceedings have been administratively closed, the proper motion is a motion to recalendar, *not* a motion to reopen. See Chapter 5.9(h) (Motion to recalendar).

(j) Automatic stays. — A motion to reopen that is filed with the Board does not automatically stay an order of removal or deportation. See Chapter 6 (Stays and Expedite Requests).

(k) Criminal convictions. — A motion claiming that a criminal conviction has been overturned, vacated, modified, or disturbed in some way *must* be accompanied by clear evidence that the conviction *has actually been disturbed*. Thus, neither an intention to seek post-conviction relief nor the mere eligibility for post-conviction relief, without more, is sufficient to reopen proceedings.

5.7 Motions to Reconsider

(a) Purpose. — A motion to reconsider either identifies an error in law or fact in a prior Board decision or identifies a change in law that affects a prior Board decision and asks the Board to re-examine its ruling. A motion to reconsider is based on the existing record and does not seek to introduce new facts or evidence.

(b) Requirements. — Motions to reconsider must comply with the general requirements for filing a motion. See Chapter 5.2 (Filing a Motion). A filing fee or a fee waiver request may be required. See Chapter 3.4 (Filing Fees).

(c) Time limits. — A motion to reconsider must be filed within 30 days of the Board's decision. 8 C.F.R. § 1003.2(b)(2). (For cases decided by the Board before July 1, 1996, the motion to reconsider was due on or before July 31, 1996. 8 C.F.R. § 1003.2(b)(2).)

(d) Number limits. — As a general rule, a party may file only one motion to reconsider. See 8 C.F.R. § 1003.2(b)(2). Motions filed prior to July 31, 1996, do not count toward the one-motion limit. Although a party may file a motion to reconsider the denial of a motion to reopen, a party may not file a motion to reconsider the denial of a motion to reconsider. 8 C.F.R. § 1003.2(b)(2).

(e) Other limits. —

(i) Summary affirmance orders. — A motion to reconsider may not be based solely on an argument that an Immigration Judge's decision should not have been affirmed without opinion. See 8 C.F.R. § 1003.2(b)(3).

(ii) Persons outside the United States. — The Board does not entertain motions to reconsider made by or on behalf of a person in removal proceedings after that person has departed from the United States. 8 C.F.R. § 1003.2(d).

(f) Exceptions to the limits on motions to reconsider. —

(i) Alien motions. — There are no exceptions to the time and number limitations on motions to reconsider when filed by an alien.

(ii) DHS motions. — DHS motions to reconsider are subject to certain limitations. See 8 C.F.R. § 1003.2(b)(2).

(iii) Other. — Exceptions to the time and number limits on motions to reconsider may be created by statute, published case law, or regulation. The Board may also reconsider proceedings at any time on its own initiative. 8 C.F.R. § 1003.2(a).

(g) Identification of error. — A motion to reconsider must state with particularity the errors of fact or law in the prior Board decision, with appropriate citation to authority and the record. If a motion to reconsider is premised upon changes in the law, the motion should identify the changes and, where appropriate, provide copies of that law. See Chapter 4.6(d)(vii) (Statutes, rules, regulations, and other legal authorities and sources).

(h) Motions filed while an appeal is pending. — Once an appeal is filed with the Board, the Immigration Judge no longer has jurisdiction over the case. See Chapter 4.2(a)(ii) (Appeal to the Board vs. motion before the Immigration Judge). Thus, motions to reconsider should not be filed with an Immigration Judge after an appeal is taken to the Board. A motion to reconsider that is filed with the Board during the pendency of an appeal is generally treated as a motion to remand for further proceedings before an Immigration Judge. 8 C.F.R. § 1003.2(c)(4). See Chapter 5.8 (Motions to Remand).

(i) **Automatic stays.** — A motion to reconsider does not automatically stay an order of removal or deportation. See Chapter 6 (Stays and Expedite Requests).

(j) **Criminal convictions.** — When a criminal conviction has been overturned, vacated, modified, or disturbed in some way, the proper motion is a motion to reopen, not a motion to reconsider. See Chapter 5.6(k) (Criminal convictions).

5.8 Motions to Remand

(a) **Purpose.** — A motion to remand seeks to return jurisdiction of a case pending before the Board to the Immigration Judge. Parties may, in appropriate circumstances, move to remand proceedings to the Immigration Judge to consider newly available evidence or newly acquired eligibility for relief.

(b) **Requirements.** — Motions to remand are subject to the same substantive requirements as motions to reopen. See *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). Accordingly, evidence and applications for relief, if involved, must be submitted with the motion.

The Board may deny a motion to remand where the evidence was discoverable at an earlier stage in the proceedings, is not material or probative, or is otherwise defective. As with motions to reopen, parties submitting new evidence should articulate the purpose of the new evidence and explain its prior unavailability. See Chapter 5.2(f) (Evidence).

(c) **Limitations.** — Unlike motions to reopen, motions to remand are not limited in time or number because they are made during the pendency of an appeal.

(d) **Remands to DHS.** — Where an appeal is taken from a decision made by a DHS officer, the Board may remand the case to DHS. For example, the Board may remand a visa petition denial to DHS for further development of the petition record. Where an appeal is taken from an Immigration Judge decision, however, the Board cannot remand proceedings to DHS. For example, the Board cannot remand proceedings to a DHS Asylum Office once an Immigration Judge has ruled on an asylum application.

(e) **Post-remand appeals.** — If the Board grants a motion to remand resulting in a new Immigration Judge decision, a party may file a new appeal. In that new appeal, the party may pursue any new issues or any unresolved issues from the prior appeal.

5.9 Other Motions

(a) **Motion to expedite.** — See Chapter 6.5 (Expedite Requests).

(b) **Motion to withdraw appeal.** — Motions to withdraw an appeal are discussed in Chapter 4.11 (Withdrawing an Appeal). Parties are reminded not to confuse a motion to withdraw an appeal with a motion to remand. If a party wishes a case returned to the Immigration Judge for consideration of a newly available form of relief (e.g., adjustment of status), the correct motion is a *motion to remand*. In contrast, when a motion to withdraw an appeal is filed, the decision of the Immigration Judge immediately becomes final as if no appeal had ever been filed. If an appeal is withdrawn, DHS may remove or deport the alien, if the Immigration Judge so ordered. See Chapter 4.11 (Withdrawing an Appeal), 5.8 (Motions to Remand).

(c) **Motion to withdraw as counsel or representative.** — See Chapter 2.3(i) (Change in representation).

(d) **Motion to stay deportation or removal.** — See Chapter 6 (Stays and Expedite Requests).

(e) **Motion to consolidate.** — See Chapter 4.10 (Combining and Separating Appeals).

(f) **Motion to sever.** — See Chapter 4.10 (Combining and Separating Appeals).

(g) **Motion to join.** — See Chapter 4.10 (Combining and Separating Appeals).

(h) **Motion to recalendar.** — When proceedings have been administratively closed or continued indefinitely and a party wishes to “reopen” those proceedings, the proper motion is a motion to recalendar, *not* a motion to reopen. A motion to recalendar should provide the date and the reason for the case being closed. If available, a copy of the closure order should be attached to the motion. Motions to recalendar should be properly filed, clearly captioned, and comply with the general motion requirements. See Chapter 5.2 (Filing a Motion), Appendix F (Sample Cover Page). To ensure that the Board has the alien’s current address, a Change of Address Form (EOIR-33/BIA) should also be filed. Motions to recalendar are not subject to time and number restrictions.

(i) Motion to hold in abeyance. — The Board does not normally entertain motions to hold cases in abeyance while other matters are pending (e.g., waiting for a visa petition to become current, waiting for a criminal conviction to be overturned).

(j) Motion to stay suspension. — Motions involving the discipline of an attorney or accredited representative are discussed in Chapter 11 (Discipline of Practitioners).

(k) Motion to amend. — The Board will entertain a motion to amend a previous filing in limited situations (e.g., to correct a clerical error in a filing). The motion should clearly articulate what needs to be corrected in the previous filing. The filing of a motion to amend does not affect any existing appeal or motion deadlines.

(l) Other types of motions. — The Board will entertain other types of motions, as appropriate to the facts and law of each particular case, provided that the motion is properly filed, is clearly captioned, and complies with the general motion requirements. See Chapter 5.2 (Filing a Motion), Appendix F (Sample Cover Page).

5.10 Decisions

Upon the entry of a decision, the Board serves its decision upon the parties by regular mail. See Chapter 1.4(d) (Board decisions).

5.11 Effect of Departure

The alien's departure from the United States while a motion is pending, even if the departure is authorized or compelled by DHS, constitutes withdrawal of that motion. 8 C.F.R. § 1003.2(d). Subsequent return to the United States does not reinstate the motion or circumvent any applicable time and number limits. *Matter of Crammond*, 23 I&N Dec. 179 (BIA 2001).

5.12 Non-Opposition to Motion

A motion will be deemed unopposed unless the opposing party responds within 13 days from the date of service of the motion. See 8 C.F.R. § 1003.2(g)(3). However, the opposing party's failure to oppose a motion, or affirmative non-opposition to a motion, will

not necessarily result in a grant of that motion. See Chapter 4.12 (Non-Opposition to Appeal).

