



“Motions to Reopen: How Are They Working for You?” January 28, 2009

1. **Motion to Reopen vs. Appeal** - A caller asked what the procedural distinction is between a motion to reopen or reconsider and an appeal. Can USCIS elaborate on the procedural differences?

USCIS Response: While motions to reopen, motions to reconsider, and appeals are similar, there are certain differences. A motion to reopen is based on factual grounds – such as the discovery of new evidence or changed circumstances – and, therefore, the motion must "state the new facts to be proved at the reopened hearings and shall be supported by affidavits or other evidentiary material." 8 CFR § 103.5(a)(2). A motion to reconsider, on the other hand, is based on legal grounds. It must establish that the decision was incorrect based on the evidence in the record at the time of the initial decision; and it must "state the reasons upon which the motion is based and shall be supported by ..." relevant precedent decisions. 8 CFR § 103.5(a)(3). Motions to reopen and reconsider are submitted to the same adjudicating authority that made the initial decision.

An appeal is a request for review of a decision by a superior adjudicating authority. When an applicant or petitioner appeals a decision, the adjudicating officer will first review the record of proceeding to determine whether the evidence or argument submitted in support of the appeal warrants reopening or reconsidering the denial decision and approving the application or petition. If the adjudicating officer determines that reopening or reconsidering the decision is not warranted, the case will be forwarded to the Administrative Appeals Office (AAO) or the Board of Immigration Appeals,¹ whichever has jurisdiction over the application or petition type at issue. Please note, however, that not all cases may be appealed. If the application or petition can be appealed, the appropriate appellate authority and any applicable deadlines will be provided with the denial or revocation notice.

Also, with an appeal, an applicant or petitioner may be permitted additional time to submit a brief and/or supporting evidence; however, no such provision applies to motions. Any additional evidence must be submitted concurrently with the motion.

2. **Forwarded to AAO** - A caller described a situation in which his motion to reopen was denied, but USCIS forwarded the case to the Administrative Appeals Office (AAO). The caller indicated that he explicitly marked his submission as a motion to reopen and not as

¹ The BIA is part of the Executive Office for Immigration Review – a separate federal agency that is a component of the Department of Justice.

an appeal. In what cases would a submission clearly designated as a motion to reopen or reconsider be forwarded to the AAO and treated as an appeal?

USCIS Response: If an applicant or petitioner files a motion to reopen or a motion to reconsider a field office decision, and subsequently learns that the record of proceeding has been mistakenly sent to the Administrative Appeals Office (AAO) then the applicant or petitioner should notify USCIS. USCIS will contact the AAO and request that the record of proceeding be returned to the field office with jurisdiction over the motion. The AAO has jurisdiction only on motions filed to reopen or reconsider an AAO decision, not a field office decision.

3. **Processing Times** - A caller stated that she filed a motion to reopen based on a USCIS error. Resolution of the motion took six to nine months. Are motions to reopen or reconsider based on an obvious or patent error by USCIS more quickly resolved than other motions to reopen or reconsider? How long do motions to reopen take to resolve?

USCIS Response: Motions to reopen/reconsider are processed in the order in which they are received. Because of limitations with USCIS' systems, the processing time for Form I-290B is not broken down by category (i.e., appeals, motions to reopen, and motions to reconsider). The actual time it takes for motions to be resolved will vary. To assist customers, USCIS plans to update its customer call scripts so that service requests can be made with the National Customer Service Center at **1-800-375-5283** if a motion is pending more than 90 days.

4. **Adjudicator to Review Case** - Another caller described an experience in which his case was denied by an adjudicator who the customer felt did not adequately understand the legal issues involved. He expressed concern that the same adjudicator would review and deny the motion to reopen or reconsider. How does USCIS address customer concerns that the same adjudicator who issued the decision in a case will review the motion to reopen or reconsider?

USCIS Response: If the adjudicating officer still believes that the original decision was correct, that decision will be reviewed by a supervisor before the motion is denied. An applicant or petitioner who files a motion to reconsider, he or she should be very clear in explaining why the original decision was in error. Similarly, when an applicant or petitioner files a motion to reopen, he or she should be very clear in explaining what new information should be considered.

5. **Clear USCIS Error** - Another caller relayed a situation in which a customer was severely prejudiced by the denial of an immigration benefit based on what she characterized as a clear USCIS error. Would USCIS consider creating a separate category of expedited motions to reopen or reconsider based on clear USCIS error? In addition, what is the best way to notify USCIS of such an error?

USCIS Response: Because there is often a discrepancy between what an applicant perceives as "service error" and what the agency considers as "service error;" USCIS will not be able to create an expedited request for motions. By definition a motion to

reconsider is based on the assumption that the Service incorrectly applied the law or a Service policy.

Written correspondence is not a motion. Certain motions must be submitted on Form I-290B.² Please note, however, motions to reopen on an asylum decision have different filing procedures.³ If a customer submits written correspondence and USCIS determines that it was not clear agency error, the customer risks missing the filing date for what could otherwise be a legitimate motion or appeal since Form I-290B would be required. (Note: Although the regulations do permit the late filing of a motion to reopen to be excused, that is only for cases where the late filing is reasonable and beyond the control of the applicant or petitioner.)

- 6. Correspondence for Motions** - One caller stated that he has often received a faster response when he sends a letter to USCIS moving to reopen or reconsider a decision rather than filing a Form I-290B. Is a Form I-290B required to file a motion to reopen or reconsider? Is correspondence a faster way to obtain a decision on a motion to reopen or reconsider? Another caller indicated that he wrote a letter to USCIS explaining that the evidence he submitted warranted an approval of his case, rather than the denial he received. However, he did not designate his letter as a motion to reopen or reconsider. For customers who write a letter to a USCIS office, must they explicitly state that they are moving to reopen or reconsider the decision?

USCIS Response: USCIS will review all correspondence submitted by a customer. Corrective action will be taken on any correspondence that establishes clear USCIS error. Please note, however, that written correspondence is not a motion. All motions must be submitted on Form I-290B. *See* 8 CFR § 103.5(a)(1)(iii).

If a customer submits written correspondence and USCIS determines that it was not clear agency error, the customer risks missing the filing date for what could otherwise be a legitimate motion or appeal since Form I-290B would be required. (Note: Although the regulations do permit the late filing of a motion to reopen to be excused, that is only for cases where the late filing is reasonable and beyond the control of the applicant or petitioner.)

- 7. Supplemental Information/ New Evidence** - Another caller asked if USCIS accepts the submission of supplemental information on motions to reopen. In addition, what constitutes “new evidence” for a motion to reopen?

USCIS Response: A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. Generally, new evidence is factual information or changed factual circumstances that were not considered and could not have been presented in the initial proceeding. Supplemental information will only be considered if it meets this definition.

² *See* 8 CFR § 103.5(a)(1)(iii)

³ *See* Section III.M.2 of the Affirmative Asylum Procedures Manual

8. **Derivatives** - A caller stated that USCIS has no automatic reopening or reconsideration for derivative beneficiaries in cases where the principal's case is denied. Therefore, each derivative beneficiary must file a motion to reopen or reconsider. Do derivative beneficiaries have to file separate motions to reopen or reconsider and pay a separate \$585 fee when the principal's case is denied?

USCIS Response: Yes, each application or petition that is denied requires its own motion with separate fees.

9. **Lack of Tracking** - Several callers commented on the lack of a uniform tracking mechanism for motions to reopen or reconsider. This issue appeared to be particularly problematic for cases at the service centers. One caller spoke with the National Customer Service Center, but stated that she was unable to make a service request because there were no processing times posted for motions to reopen or reconsider. How does USCIS suggest its customers follow up or make inquiries on the status of motions to reopen or reconsider that were filed with the service centers?

USCIS Response: Applicants or petitioners will receive a receipt notice when a properly filed Form I-290B is received. The status of the motion can be checked using Case Status Online. Applicants or petitioners who do not have computer access may contact the National Customer Service Center at 1-800-375-5283 for assistance.

In addition, USCIS is updating its customer call scripts so that customers can ask for a service request if the motion is pending more than 90 days. For those cases that have been forwarded as appeals, please refer to the AAO webpage on www.uscis.gov for processing times.

10. **Transfers of Cases** - Another caller recently discovered that USCIS transferred her motion to reopen from the Nebraska Service Center to the Los Angeles District Office. In what cases would a motion to reopen or reconsider filed with a service center be transferred?

USCIS Response: Motions to reopen are generally handled by the office that made the original decision, unless the applicant has moved to the jurisdiction of another office, in which case the office having jurisdiction over the new residence handles the motion. USCIS would need the caller's specific information to determine the basis for the transfer.