Motions to Reopen After Mata

Raed Gonzalez, JD LLM

Author Contact Information:
Raed Gonzalez, JD LLM
Gonzalez Olivieri LLC
2200 Soutwest Fwy Ste 550,
Houston, TX 77098

rgonzalez@gonzalezolivierillc.com
713-481-3040

MOTIONS TO REOPEN AFTER *MATA V. LYNCH* – PRACTICE ADVISORY
Raed Gonzalez, JD LLM

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I.   Background

Before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), motions to reopen and reconsider existed only as regulatory provisions promulgated by the Attorney General in 1958 after the establishment of the Board of Immigration Appeals ("BIA").[1] The final rule was codified at 8 C.F.R. § 3.2 (1958), which formed the basis for the current regulatory provision. There existed no time or number limitations for these motions until the Department of Justice ("DOJ") issued a regulation that provided for these limitations.[2] This new regulation allowed the alien to file *one* motion to reopen *within 90 days* of the date of entry of a final administrative order.[3] With the enactment of IIRIRA, Congress adopted the DOJ recommendations and codified the alien's ability to file a motion to reopen and created certain evidentiary requirements.[4] These provisions are found in INA §§ 240(c)(6) (motion to reconsider) and 240(c)(7) (motion to reopen) and establish an alien's statutory right to file such motions.

The Supreme Court has held that motions to reopen are an "important safeguard" intended to ensure a "proper and lawful disposition."[5]

II.   Time/Numerical Limits & their Exceptions

As provided by the statute, an alien may file one motion to reopen proceedings and it shall state "the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."[6] The motion must establish that the evidence is material, was unavailable at the former hearing, and could not have been discovered or presented at the former hearing.[7]

The time and number limits to a motion to reopen are subject to certain exceptions. There is no time limit if the motion is being filed to apply for asylum relief based on changed country conditions.[8] If the petitioner is a battered spouse or child seeking certain forms of relief under the Violence Against Women Act, then the motion may be filed within one year, or at any time under

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[1] *See Dada v. Mukasey*, 554 U.S. 1, 13-14 (2008) (discussing the historical context of motions to reopen and reconsider).

[2] *Id*. at 13; *see also* Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 Fed.Reg. 18900, 18901, 18905 (1996); 8 C.F.R. § 3.2 (1996).

[3] *Id*.; it also allowed for one motion to reconsider to be filed within 30 days of the final administrative decision.

[4] *Id*. at 14 (noting that IIRIRA "transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien); *see also* INA § 240(c)(6)-(7), 8 U.S.C. § 1229a(c)(6)-(7); 8 C.F.R. § 1003.2(c)(2).

[5] *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. at 18 (2008)).

[6] INA § 240(c)(7)(A)-(B).

[7] *See* 8 C.F.R. § 1003.2(c)(1).

[8] INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); 8 C.F.R. § 1003.23(b)(4)(i).

certain circumstances.[9] If the motion is based on an *in absentia* order or removal, it may be filed at any time provided that the alien can show he/she did not receive proper notice of the hearing; or within 180 days if the alien can show that his/her failure to appear was because of exceptional circumstances.[10] However, for any other reason (such as adjustment of status), a motion to reopen an *in absentia* order must be filed within 90 days.[11]

a. Reopening based on ineffective assistance of counsel under *Matter of Lozada*

Additionally, a motion to reopen may also be filed on the basis of ineffective assistance of counsel ("IAC") if the alien can meet the requirements set forth under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). In *Lozada*, the BIA held that a motion to reopen or reconsider based upon a claim of IAC requires that (1) the motion be supported by an affidavit of the alien setting forth the agreement entered into with the counsel and how the counsel failed to act competently; (2) the counsel must be given an opportunity to respond; and (3) the motion must reflect whether a complaint has been filed with the disciplinary authorities with regard to the violation of counsel's ethical or legal duties, and if not, why not.[12] The alien also must show that he was prejudiced by his counsel's performance unless the counsel's ineffectiveness resulted in an entry of an *in absentia* order of removal.[13]

In general, a motion to reopen based on IAC must meet the 90-day deadline. However, the BIA has recognized that for an order of removal entered *in absentia*, the IAC can amount to exceptional circumstance warranting a reopening if the motion is filed within 180 days.[14] In the context of *in absentia* orders, the BIA has declined to create "an exception" to the reopening deadlines where there is ineffective assistance.[15]

Beyond these deadlines, an alien may be able to file a motion to reopen that would otherwise be considered untimely based on the principles of equitable tolling – a long-recognized principle through which courts extend non-jurisdictional filing deadlines when a claimant acts

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[9] INA § 240(c)(7)(C)(iv).

[10] INA § 240(c)(7)(C)(iii); *see also* INA § 240(e)(1) (defining exceptional circumstances); 8 C.F.R. § 1003.2(c)(3)(i); 8 C.F.R. § 1003.23(b)(4)(iii). However, for *in absentia* orders of deportation or exclusion entered prior to June 13, 1992, a less stringent "reasonable cause" standard applies. *See e.g., Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

[11] *Matter of Monges*, 25 I&N Dec. 246 (BIA 2010) (the 90-day period to reopen of adjustment of status applies to in absentia orders and the 5-year bar on discretionary relief under former INA § 242B(e)(1) is not an exception to the 90-day period).

[12] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *Matter of Grijalva-Barrera*, 21 I&N Dec. 472, 473-74 (BIA 1996).

[13] *Id.* at 638 (citing *Mohsseni Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986) and *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984)).

[14] *Matter of Grijalva-Barrera*, 21 I&N Dec. at 474; INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii).

[15] *Matter of A-A-*, 22 I&N Dec. 140, 143-44 (BIA 1998).

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