



CATHOLIC LEGAL
IMMIGRATION
NETWORK, INC.

Practice Advisory

Motions to Reopen for DACA Recipients with Removal Orders

Michelle Mendez and Rebecca Scholtz¹

¹ Copyright 2018, The Catholic Legal Immigration Network, Inc. (CLINIC). This guide is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice, nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction. The authors of this practice advisory are Michelle Mendez, Training and Legal Support Managing Attorney, and Rebecca Scholtz, Training and Legal Support Staff Attorney, of CLINIC's Defending Vulnerable Populations Project. The authors would like to thank the following individuals for their invaluable contributions to this advisory: Bradley Jenkins, BIA Pro Bono Project Manager, CLINIC; Katherine M. Lewis, Senior Associate Attorney at Van Der Hout, Brigagliano & Nightingale, LLP; Rachel Naggar, Remote Bond Project Attorney, CLINIC; Victoria Neilson, Senior Attorney, CLINIC; Gail Pendleton, Co-Director, ASISTA Immigration Assistance, and Trina Realmuto, Directing Attorney, American Immigration Council.

CONTENTS

I. INTRODUCTION.....	3
II. DACA RECIPIENTS WITH REMOVAL ORDERS.....	4
III. OVERVIEW OF TYPES OF REMOVAL ORDERS AND THEIR CONSEQUENCES	7
A. Removal Orders Issued by an Immigration Judge	7
1. Removal Orders Issued at a Hearing Where the Respondent Is Present.....	7
2. Voluntary Departure Order That Converts to a Removal Order.....	9
3. <i>In Absentia</i> Removal Order	11
B. Removal Orders Issued by an Immigration Officer	12
1. Expedited Removal Orders.....	12
2. Reinstated Removal Orders	13
IV. LEGAL REMEDIES FOR INDIVIDUALS WITH REMOVAL ORDERS.....	14
A. Motions to Reopen for Individuals with Orders Issued by an IJ or the BIA	14
1. Motions to Reopen Generally	15
2. Equitable Tolling of the Motion to Reopen Deadline.....	17
3. Motions to Reopen Based on Ineffective Assistance of Counsel	22
4. Motions to Reopen Based on VAWA Relief.....	22
5. Motions to Reopen Based on Changed Country Conditions Related to Asylum Eligibility	24
6. Joint Motions to Reopen	26
7. Motions to Reopen Based on <i>Sua Sponte</i> Authority	27
B. Motions to Reopen for Individuals with <i>In Absentia</i> Orders	32
1. Did the Respondent Fail to Appear?.....	33
2. Did DHS Meet Its Burden to Prove Removability by “Clear, Unequivocal, and Convincing Evidence”?.....	34
3. Statutory Bases to Rescind and Reopen <i>In Absentia</i> Orders.....	35
C. Strategies for Overcoming the Ten-Year Bar to Immigration Relief After Overstaying a Grant of Voluntary Departure	40
D. Legal Remedies for DACA Recipients with Reinstatement Orders.....	42
V. PRACTICAL CONSIDERATIONS FOR MOTIONS TO REOPEN.....	45
A. Investigating the Case and Preparing the Motion to Reopen	45
B. Strategic Considerations	46
C. Filing the Motion to Reopen.....	47
VI. CONCLUSION.....	49

I. INTRODUCTION

President Donald Trump announced on September 5, 2017 that he was rescinding the Deferred Action for Childhood Arrivals (DACA) program.² On January 9, 2018, the U.S. District Court for the Northern District of California ordered the Department of Homeland Security (DHS) “to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017, including allowing DACA enrollees to renew their enrollments, with the exceptions (1) that new applications from applicants who have never before received deferred action need not be processed; (2) that the advance parole feature need not be continued for the time being for anyone; and (3) that defendants may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application.”³ U.S. Citizenship and Immigration Services (USCIS) subsequently resumed accepting renewal requests from DACA recipients.⁴ At the time of this practice advisory, it remains unclear how long the injunction would remain in place or what the ultimate outcome of the federal litigation would be.⁵

Under the DACA program, which President Barack Obama established in 2012, certain youth who had come to the United States as children and met other requirements were able to obtain deferred action, a form of prosecutorial discretion where the government does not take action to deport a person who lacks lawful status. The DACA program was expressly available to youth with prior removal orders, so long as they met the DACA requirements. Some number of DACA recipients, whose DACA protection may now lapse if DACA rescission goes forward, have prior removal orders. When their DACA protection expires, these individuals will be subject to the possibility of swift deportation at any time despite growing up in the United States since childhood. In fact, some practitioners have reported receiving call-in letters from their local Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) Field Office for DACA clients with prior orders of removal.⁶

This practice advisory discusses potential legal options available to DACA recipients with prior removal orders. Section II provides background about the DACA program and particular considerations for DACA recipients with removal orders. Section III gives an overview of common types of removal orders that DACA recipients may have. Section IV provides strategies for remedying the removal order, with practice tips tailored to the DACA context. Section V discusses practical considerations in filing motions to reopen.

² See, e.g., White House, *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration* (Sept. 5, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-restores-responsibility-rule-law-immigration>; Memorandum from Elaine C. Duke, Acting Sec’y, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017), available at <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

³ *Regents of Univ. of California v. U.S. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2018 WL 339144, at *27 (N.D. Cal. Jan. 9, 2018) (noting exceptions including that no new initial applications need be processed nor advance parole continued). On February 13, 2018, the U.S. District Court for the Eastern District of New York also issued a preliminary injunction requiring USCIS to accept DACA renewal applications from those previously issued DACA protection. *Batalla v. Nielson*, No. 16-CV-4756, --- F. Supp. 3d ---, 2018 WL 834074 (E.D.N.Y. Feb. 13, 2018).

⁴ USCIS, *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

⁵ On February 26, 2018, the U.S. Supreme Court denied the DHS’s request for *certiorari* before judgment in the *Regents* case, stating that “[i]t is assumed that the Court of Appeals will proceed expeditiously to decide this case.” *Dep’t. of Homeland Sec. v. Regents of Univ. of California*, No. 17-1003 (U.S., order issued Feb. 26, 2018), available at https://www.supremecourt.gov/orders/courtorders/022618zor_j426.pdf.

⁶ An e-mail shared on an immigration practitioner listserv in November of 2017 reported that a client whose DACA protection was valid until 2019 had been issued a call-in letter from ICE and subjected to reporting requirements due to an old *in absentia* order of removal.

II. DACA RECIPIENTS WITH REMOVAL ORDERS

On June 15, 2012, President Obama announced the creation of the DACA program. The purpose of the DACA program was to implement some of the DREAM Act provisions after Congress repeatedly failed to pass that bill into law.⁷ President Obama created DACA as a temporary protection “in the hope that Congress would eventually pass the Dream Act and broader immigration changes.”⁸ During DACA’s five-year existence prior to President Trump’s rescission announcement, nearly 800,000 youth were approved for DACA.⁹ To be eligible to receive DACA, the applicant had to demonstrate that he or she:¹⁰

Entered the United States before age 16

- Continuously resided in the United States from June 15, 2007 to the present
- Was physically present, without lawful status, and under the age of 31 on June 15, 2012
- Was currently in school or had graduated or obtained a certificate of completion from high school, or obtained a general education development (GED) certificate, or had been honorably discharged from the U.S. Coast Guard or Armed Forces, and
- Had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, nor posed a threat to national security or public safety.

Youth approved for DACA were issued an employment authorization document, could obtain a Social Security number, and could apply for a driver’s license.¹¹ Based on a 2017 national survey of DACA recipients, 91 percent of survey respondents reported being employed, 45 percent reported being in school, 5 percent reported having started their own business after receiving DACA,¹² 16 percent reported purchasing their first home after receiving DACA, and 65 percent reported purchasing their first car.¹³ Researchers have estimated that DACA recipients would contribute \$460.3 billion to the U.S. gross domestic product over the next decade if

7 See Yamiche Alcindor & Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Again Try to Legalize “Dreamers,”* N.Y. TIMES, Sept. 5, 2017, <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html> (describing history of DREAM Act legislative failings).

8 *Id.*

9 See USCIS, Data Set: Form I-821D Deferred Action for Childhood Arrivals, <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals> (data set for fourth quarter of fiscal year 2017 shows 798,980 cumulative initial requests approved). This webpage also provides a breakdown of the number of DACA requests accepted, pending, denied, and approved during specified time periods.

10 The DACA requirements can be found on the USCIS website, <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>.

11 See National Immigration Law Center, Access to Driver’s Licenses for Immigrant Youth Granted DACA, <https://www.nilc.org/issues/drivers-licenses/daca-and-drivers-licenses/>.

12 This rate of business start-ups is higher than that of both the American public as a whole—at 3.1 percent—and the entire immigrant population—at 3.6 percent. Center for American Progress, *DACA Recipients’ Economic and Educational Gains Continue to Grow* (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>.

13 Center for American Progress, *DACA Recipients’ Economic and Educational Gains Continue to Grow* (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>; see also Center for American Progress, *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes* (Oct. 18, 2016), <https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes/> (reporting results of 2016 study); Migration Policy Institute, *A Profile of Current DACA Recipients by Education, Industry, and Occupation* (Nov. 2017), <https://www.migrationpolicy.org/research/profile-current-daca-recipients-education-industry-and-occupation> (providing additional details about DACA population including fields of employment and degree of educational attainment).

the program is permitted to continue.¹⁴ As a CATO Institute policy analyst concluded, “[e]ach DACA permit canceled is like burning tens of thousands of dollars in Washington.”¹⁵

According to USCIS data from September 2017, the ten countries with the largest numbers of DACA recipients are, in descending order: Mexico, El Salvador, Guatemala, Honduras, Peru, South Korea, Brazil, Ecuador, Colombia, and the Philippines.¹⁶ DACA recipients live throughout the United States; the ten states with the largest number of DACA recipients are California, Texas, Illinois, New York, Florida, Arizona, North Carolina, Georgia, New Jersey, and Washington.¹⁷

The authors do not have data on the number of DACA recipients with prior orders of removal, or the breakdown in types of removal orders. However, DACA was expressly available to youth with removal orders who otherwise qualified,¹⁸ and the Form I-821D asked for information about when and where any previous removal proceedings took place.¹⁹ Any DACA recipient who was actually removed or left the United States under a voluntary departure order would have had to have departed and returned to the United States before June 15, 2007 to meet the continuous residence requirements.²⁰

Given the eligibility requirements for DACA, it is likely that many DACA recipients with removal orders may share the following characteristics, which could be relevant to potential relief and avenues to reopening the removal order (discussed in section IV below):

- Many may have been very young children when the removal order was issued
- Many likely lacked legal representation when the removal order was issued, given the lack of government-appointed counsel in civil immigration proceedings
- All DACA recipients have resided continuously in the United States for more than ten years, since at least June 15, 2007, and
- All DACA recipients with removal orders will have other positive equities that could bear on potential relief, such as educational attainment in the United States, positive employment history, lack of serious criminal history, and strong community ties, including immediate family members who are U.S. citizens or have a lawful immigration status.

Regardless of whether the DACA program is rescinded and on what timeline, DACA recipients with orders of removal face significant risks. DHS could terminate the DACA protections of those whose DACA has

14 Center for American Progress, *A New Threat to DACA Could Cost States Billions of Dollars* (July 21, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/07/21/436419/new-threat-daca-cost-states-billions-dollars/>.

15 David Bier, CATO Institute, *Five Myths About DACA* (Sept. 7, 2017), <https://www.cato.org/publications/commentary/five-myths-about-daca>.

16 USCIS, *Approximate Active DACA Recipients: Country of Birth* (Sept. 4, 2017), available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf.

17 *Id.*

18 See USCIS, Frequently Asked Questions, <https://www.uscis.gov/archive/frequently-asked-questions> (“This process is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those . . . with a final order, or with a voluntary departure order (as long as they are not in immigration detention).”).

19 USCIS, I-821D, Consideration of Deferred Action for Childhood Arrivals, <https://www.uscis.gov/i-821d>. Some DACA recipients who sought to reopen their removal proceedings after obtaining DACA saw the IJ deny the motion because the removal order did not affect DACA eligibility.

20 See USCIS, Frequently Asked Questions, Q58, <https://www.uscis.gov/archive/frequently-asked-questions> (classifying departure under voluntary departure or removal order as not “brief, casual and innocent” and thus breaking the continuous residence period).

not expired and seek to enforce the removal order.²¹ Immigration and Customs Enforcement (ICE) could detain and deport DACA recipients simply because they have a removal order, despite their achievements, lack of a criminal record, acculturation, and contributions to U.S. society. For example, in August of 2017 a 22-year-old DACA recipient mother with an order of removal went to pay a bond for another individual and was detained for a week at five different facilities before being released.²² Furthermore, if DACA rescission is allowed to proceed, as President Trump has ordered, the risks for DACA recipients with removal orders would significantly increase. For example, contact with local law enforcement could prompt the local law enforcement officer to check the DACA recipient's name in the National Crime Information Center (NCIC) database and subsequently discover a civil immigration warrant for that person, at which time the officer could contact ICE.²³ Moreover, on January 10, 2018, ICE issued a policy directive, indicating that ICE will engage in civil immigration enforcement actions inside courthouses, including "actions against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, *aliens who have been ordered removed from the United States but have failed to depart*, and aliens who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted aliens are present at that specific location."²⁴

Detention and swift deportation without warning leads to constant fear and anxiety that present mental and physical health risks for DACA recipients with removal orders.²⁵ As noted above, DACA recipients have much to lose if deported, including their families, property, business, and in many instances, the only home they have ever known. Once detained, there is typically no opportunity for release to wrap up one's life in the United States or say goodbye to family. To decrease the risks of detention and deportation, DACA recipients with removal orders may become insular and detached from public life. Family members who depend on DACA recipients may experience a decreased standard of living, at best, and fall into poverty, at worst. This translates into stunted productivity, thwarted professional goals, and deprioritized health care needs for DACA recipients and the family members who depend on them. This stands in stark contrast to lives DACA recipients enjoyed – and the United States benefited from – thanks to DACA protections.

21 See USCIS, Frequently Asked Questions, <https://www.uscis.gov/archive/frequently-asked-questions> ("Question 27: Can my deferred action under the DACA process be terminated before it expires? A27: Yes. DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion.").

22 Mark Curnutte, *Immigrant Mom's Joy upon Release: "My Heart, It Feels So Happy,"* CINCINNATI ENQUIRER, Aug. 24, 2017, available at <http://cin.ci/2xw3YWa>.

23 In the aftermath of the September 11, 2001 attacks, then Attorney General John Ashcroft authorized inclusion of civil immigration records in the NCIC. See John Ashcroft, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002) (transcript available at <https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>) (announcing registration requirement for certain noncitizens and stating, "[w]hen aliens violate these rules, we will place their photographs, fingerprints, and information in the National Crime Information Center (or NCIC) system"). Since then, ICE has continued to populate the NCIC with immigration records that include orders of removal. Federal Bureau of Investigation, National Crime Information Center (NCIC), <https://www.fbi.gov/services/cjis/ncic> (noting that "Immigration Violator" file contains "[r]ecords on criminal aliens whom immigration authorities have deported and aliens with outstanding administrative warrants of removal"). The Fourth Circuit in *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013), concluded that local law enforcement lacked authority to detain an individual based on a civil immigration warrant, but the NCIC continues to include these records and local law enforcement continues to detain those with removal orders. See, e.g., Paul P. Murphy & Deanna Hackney, *Police Answered Immigrant's Call for Help, Then Gave Him to ICE*, CNN, Feb. 13, 2018, <https://www.cnn.com/2018/02/13/us/tukwila-police-ice-detain-trnd/index.html>.

24 ICE, *Directive Number 11072.1: Civil Immigration Enforcement Actions Inside Courthouses* (Jan. 10, 2018), available at <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf> (emphasis added).

25 Cf. Ruben Castaneda, *DACA Recipients Cope with Health Challenges in Face of Uncertainty*, U.S. NEWS & WORLD REPORT, Oct. 12, 2017, <https://health.usnews.com/wellness/articles/2017-10-12/daca-recipients-cope-with-health-challenges-in-face-of-uncertainty>; Karla Cornejo Villavicencio, *The Psychic Toll of Trump's DACA Decision*, N.Y. TIMES, Sept. 8, 2017, <https://www.nytimes.com/2017/09/08/opinion/sunday/mental-health-daca.html>.

III. OVERVIEW OF TYPES OF REMOVAL ORDERS AND THEIR CONSEQUENCES

The Immigration and Nationality Act (INA) describes various types of removal orders. This section will briefly describe common types of removal orders and their legal consequences.²⁶ Section IV will then describe grounds for reopening removal orders that might be most applicable to DACA recipients. As an initial matter, this section contains only a brief discussion of the legal consequences and inadmissibility bars caused by removal orders; a full discussion of these issues is beyond the scope of this advisory. Although the below discussion notes a number of serious inadmissibility consequences that various types of removal orders trigger, in some situations it may be possible for an individual to seek certain waivers of these grounds of admissibility in connection with an application for humanitarian relief such as U or T nonimmigrant status or Violence Against Women Act (VAWA) relief.²⁷ Whether a waiver is available will depend on the type of removal order, as well as the form of relief sought; a discussion of waivers is beyond the scope of this advisory, but practitioners are encouraged to consult existing resources.

A. Removal Orders Issued by an Immigration Judge

An immigration judge (IJ) can issue different types of orders during removal proceedings under section 240 of the INA. Three variations of IJ-issued orders are described below: (1) a removal order issued at a hearing where the respondent is present; (2) a voluntary departure order that converts to a removal order when the respondent fails to depart within the requisite time period; and (3) a removal order issued at a hearing where the respondent does not appear, called an *in absentia* order of removal.

1. Removal Orders Issued at a Hearing Where the Respondent Is Present

Description. This is perhaps what people envision most commonly when they think of a removal order. In this situation, the respondent appears at his or her immigration court proceedings, and at the end of the proceedings the IJ issues a removal order. In some cases, this happens after the respondent has presented a claim for relief, a merits hearing (called an individual hearing) has been conducted, and the IJ denies the person's application for relief and orders his or her removal. In other cases, the respondent never has a merits hearing, and the IJ orders removal at what is called a "master calendar" hearing. This may occur because the respondent wishes to be ordered removed and does not want to fight his or her case. Unfortunately, this sometimes occurs because the respondent received poor advice or ineffective assistance of counsel. There are other situations in which an IJ may order removal against the respondent's wishes and despite the fact that he or she may be eligible for relief. For example, if the respondent is trying to pursue a form of relief in another forum and the IJ refuses to grant additional continuances or administrative closure, the IJ could instead order removal.

Legal Consequences. Immigration regulations specify when a removal order issued by an IJ becomes final. An IJ removal order of the type described here typically becomes final after the Board of Immigration Appeals (BIA) dismisses an appeal, when the respondent waives appeal, or after the 30-day appeal period expires if the

²⁶ This advisory does not discuss all types of removal orders. For example, it does not discuss administrative removal orders for non-lawful permanent residents with aggravated felony convictions, stipulated removal orders, and judicial orders of removal as these types of removal orders are likely uncommon among DACA recipients.

²⁷ For a comparison of some of the common forms of humanitarian relief, see Krisztina E. Szabo, Spencer Cantrell & Leslye E. Orloff, Nat'l Immigrant Women's Advocacy Project, State Justice Initiative, Am. Univ. Washington College of Law, *Comparison Chart of U Visa, T Visa, Violence Against Women Act (VAWA) Self-Petition, Special Immigrant Juvenile Status (SIJS), and Deferred Action for Childhood Arrivals (DACA)* (July 10, 2015), available at <http://library.niwap.org/wp-content/uploads/IMM-Chart-U-T-VAWA-SIJS-DACA7.10.15.pdf>.

respondent reserves appeal but does not file an appeal.²⁸ Once the order is final, ICE may take steps to remove the individual from the United States. If the person is in immigration detention, this will usually occur very quickly. If the person is not in detention, ICE may issue what is commonly known as a “bag-and-baggage” letter directing the person to report to ICE at a particular time for physical removal from the United States.²⁹

Once an individual departs the United States after being ordered removed, a number of immigration consequences attach. The person will be subject to an inadmissibility bar preventing his or her lawful return for ten years,³⁰ unless the person obtains advance permission from DHS to reenter.³¹ A separate ten-year “unlawful presence” bar will also apply to those individuals who had been unlawfully present in the United States for a year or more before they depart the United States or are removed pursuant to an order of removal,³² unless the individual is eligible for and is granted a waiver of this ground of inadmissibility.³³ A separate permanent bar applies regardless of age to anyone who has been unlawfully present in the United States for an aggregate period of more than one year or was ordered removed and then enters or attempts to reenter the United States without being admitted.³⁴ There is generally no waiver available for this ground of inadmissibility unless the individual has spent ten years abroad and applies for and is granted permission.³⁵ If an individual reenters the United States illegally after being removed, he or she is subject to federal criminal prosecution for illegal reentry after removal, which carries a maximum prison sentence of two years for a simple offense, and up to 20 years if the person has an aggravated felony conviction.³⁶ A person who reenters illegally after removal would also be subject to reinstatement of the removal order by DHS without the benefit of having a hearing before an IJ unless he or she expresses fear of return to the home country and passes a “reasonable fear” interview.³⁷

On the other hand, if a person is ordered removed by an IJ and does not depart, he or she is subject to a number of potential consequences. ICE could detain and quickly remove that person without a hearing, thereby

28 8 CFR § 1241.1.

29 *Cf. Gao v. Gonzales*, 481 F.3d 173, 176 (2d Cir. 2007) (“[F]or an alien to become a fugitive, it is not necessary that anything happen other than a bag-and-baggage letter be issued and the alien not comply with the letter.”).

30 INA § 212(a)(9)(A)(ii) (ten-year bar if ordered removed under INA § 240 and 20-year bar if second or subsequent removal and permanent bar if the respondent has an aggravated felony conviction); INA § 212(a)(9)(A)(i) (five-year bar if ordered removed under INA § 235(b)(1) or at the end of proceedings under INA § 240 initiated upon the individual’s arrival in the United States); see USCIS Academy Training Ctr., *Instructor Guide: Inadmissibility, Deportability and Waivers*, at 87 (Jan. 2015), AILA Doc. No. 15082634, available at <http://www.aila.org/infonet> (“Emphasize that no provision of § 212(a)(9) applies until the alien departs the United States.”).

31 INA § 212(a)(9)(A)(iii).

32 INA § 212(a)(9)(B)(i)(II) (ten-year unlawful presence bar); INA § 212(a)(9)(B)(i)(I) (three-year unlawful presence bar applies if noncitizen is unlawfully present for more than 180 days, but less than one year and then departs or is removed from the United States). For purposes of the three- and ten-year unlawful presence bars, unlawful presence does not accrue for individuals below the age of 18, see INA § 212(a)(9)(B)(iii)(I), so many DACA recipients, if they filed for DACA before turning 18, may not be subject to the separate unlawful presence bar.

33 INA § 212(a)(9)(B)(v) (a waiver is available for an immigrant who is the spouse or son or daughter of a U.S. citizen or lawful permanent resident and can demonstrate extreme hardship to the qualifying relative should a waiver not be granted).

34 INA § 212(a)(9)(C)(i). While the plain language of the statute applies regardless of the individual’s age, practitioners could consider making arguments that the permanent bar should not apply to minors. For possible arguments, see Brief for American Immigration Lawyers Association as Amicus Curiae, In the Matter of L-J-C-A (BIA filed Aug. 9, 2011), AILA Doc. No. 11081069, available at <http://www.aila.org/infonet>. However, the authors are not aware of legal precedent recognizing an exception for minors.

35 INA § 212(a)(9)(C)(ii) (exception to permanent bar for those who, at least ten years after departure, obtain the advance permission of DHS to reapply for admission). See also INA § 212(a)(9)(C)(iii) (VAWA exception).

36 See INA § 276 (8 USC § 1326). In fiscal year 2016, federal criminal prosecutions for illegal reentry and other immigration violations comprised 52 percent of all federal criminal prosecutions – more than all other federal prosecutions for drugs, weapons, and violent crimes combined. Transactional Records Access Clearinghouse, *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, <http://trac.syr.edu/tracreports/crim/446/>.

37 8 CFR § 208.31; see discussion of reinstatement process *infra* at section III.B.2.

executing the removal order. The INA also provides for a daily fine of \$500³⁸ and a prison sentence of up to four years for certain individuals who willfully fail or refuse to depart pursuant to a removal order or to present themselves for removal as required.³⁹ Additionally, the BIA held in a 1985 decision that respondents who failed to report for deportation after receiving notice that their deportation had been scheduled did not merit discretionary reopening of proceedings.⁴⁰ Some U.S. courts of appeal have applied the “fugitive disentitlement doctrine” as the basis to dismiss a petition for review, and DHS sometimes invokes the doctrine in refusing to release FOIA records.⁴¹

DACA Example. Mario was placed in removal proceedings with his mother and older sister when he was four years old. He does not remember it, but his mother applied for asylum for herself and both children. The asylum claim was denied by the IJ and Mario was ordered removed. He never left the United States. Thus, Mario is subject to a final order of removal that could be executed by ICE. Mario requested DACA in 2013, when he was 17 years old, and that application was approved.

2. Voluntary Departure Order That Converts to a Removal Order⁴²

Description. Voluntary departure refers to an order that allows a respondent to leave the United States without incurring a removal order.⁴³ As one U.S. court of appeals described it: “Voluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government.”⁴⁴ An IJ can grant voluntary departure to certain respondents in lieu of a removal order.⁴⁵ The maximum period of voluntary departure that an IJ can grant is 120 days.⁴⁶ When an IJ grants voluntary departure, he or she also issues an alternate order of removal.⁴⁷ If a respondent fails to depart during the voluntary departure period, the IJ’s alternate order of removal takes effect.⁴⁸ Likewise, if a respondent is ordered to pay a voluntary departure bond and fails to post it within the

38 INA § 274D (8 USC § 1324d).

39 INA § 243 (8 USC § 1253(a)(1)) (maximum prison time increases to ten years for those with specified grounds of deportability).

Note that INA § 243 only applies to individuals subject to INA § 237.

40 *Matter of Barocio*, 19 I&N Dec. 255 (Comm. 1985). *But see Matter of A-N- & R-M-N-*, 22 I&N Dec. 953 (BIA 1999) (declining to apply *Barocio* to bar reopening to seek asylum based on changed country conditions, where the respondents had failed to appear at a hearing and received an *in absentia* order).

41 For information on the fugitive disentitlement doctrine and possible arguments to argue it does not apply, see Emily Creighton, American Immigration Council, *Practice Advisory, The Fugitive Disentitlement Doctrine: FOIAs and Petitions for Review* (Apr. 29, 2013), available at https://www.americanimmigrationcouncil.org/practice_advisory/fugitive-disentitlement-doctrine-foia-and-petitions-review; see also Patrick J. Glen, *The Fugitive Disentitlement Doctrine and Immigration Proceedings*, 27 GEORGETOWN IMMIGR. L. REV. 749 (2013), available at <https://ssrn.com/abstract=2486788>. A former statute, which applies to those whose deportation or exclusion proceedings started before April 1, 1997, barred various forms of relief for a five year period for individuals with final deportation orders who failed to report for deportation at the time and place ordered, unless due to exceptional circumstances. INA § 242B(e)(3)(A) (repealed).

42 For further information about voluntary departure and the consequences of failure to depart, see American Immigration Council, *Practice Advisory, Voluntary Departure: When the Consequences of Voluntary Departure Should and Should Not Apply* (Dec. 21, 2017), available at https://www.americanimmigrationcouncil.org/practice_advisory/voluntary-departure-when-consequences-failing-depart-should-and-should-not-apply [hereinafter “AIC Voluntary Departure Advisory”].

43 See INA § 240B; 8 CFR § 1240.26 (voluntary departure granted by IJ), *see also* 8 CFR § 240.25 (voluntary departure granted by an immigration officer).

44 *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006).

45 INA § 240B; 8 CFR § 1240.26.

46 INA § 240B(a)(2)(A); 8 CFR § 1240.26(e) (60 days maximum for voluntary departure at the conclusion of proceedings). DHS, but not the IJ, can extend the voluntary departure period, but the maximum total period cannot exceed 120 days (pre-conclusion voluntary departure) or 60 days (post-conclusion voluntary departure) as set forth in INA § 240B.. 8 CFR § 1240.26(f).

47 See 8 CFR § 1240.26(d) (“Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.”).

48 8 CFR § 1241.1(f).

required five business days, the alternate order of removal is instituted.⁴⁹

While filing a BIA appeal does not terminate a voluntary departure order, it automatically terminates if the respondent files a petition for review of the final removal order with the applicable U.S. court of appeals,⁵⁰ or if the respondent files a motion to reopen or reconsider during the voluntary departure period.⁵¹ An individual who files a motion to reopen after a grant of voluntary departure but before the expiration of the departure period will not face the penalties under INA § 240B(d) for failure to depart during the voluntary departure period.⁵² However, an individual who seeks reopening after the expiration of the voluntary departure period is subject to the penalties set forth in INA § 240B(d), such as ineligibility for certain kinds of relief from removal.⁵³

Voluntary departure carries a number of benefits. First, because it is not a removal order, leaving the United States under voluntary departure does not trigger the inadmissibility ground under INA § 212(a)(9)(A) for those ordered removed. In addition, because it is not a removal order, voluntary departure does not subject a person to reinstatement of removal should that person subsequently reenter the United States without authorization.⁵⁴ Finally, voluntary departure allows the individual to leave on his or her own, avoiding the stigma and dangers of being identified as a deportee from the United States.⁵⁵ Respondents who most benefit from a grant of voluntary departure in lieu of removal are those beneficiaries (or future beneficiaries) of an I-130 relative petition who are limited to consular processing because they do not qualify for adjustment of status.⁵⁶ However, an individual who departs pursuant to voluntary departure would still be subject to a ten-year bar if he or she accrued one year or more of unlawful presence in the United States after his or her 18th birthday.⁵⁷ Furthermore, if an individual reenters the United States without being admitted after departing on a grant of voluntary departure, he or she could be subject to the “permanent bar” found at INA § 212(a)(9)(C) if he or she had accrued a year or more of unlawful presence before departure, even if the unlawful presence accrued while the individual was a minor.

Some DACA recipients likely received voluntary departure orders as young children and failed to depart; those orders have since converted into removal orders with the additional penalties set forth under INA § 240B(d). As young children, these DACA recipients had no choice in requesting voluntary departure, no intention of violating the voluntary departure order, and no ability to depart the United States.

49 *Id.* However, the regulations allow for certain respondents who were granted voluntary departure at the conclusion of proceedings to retain the voluntary departure benefit despite not paying the bond on time if they depart the United States “no later than 25 days following the failure to post bond,” prove their departure to DHS, and prove to DHS that they remain outside of the United States. 8 CFR § 1240.26(c)(4).

50 8 CFR § 1240.26(i).

51 8 CFR § 1240.26(e)(1). The IJ and BIA have discretion to reinstate voluntary departure after reopening removal proceedings, if the reopening happens for a reason other than solely to seek voluntary departure and the case is reopened before the original voluntary departure period ends. 8 CFR § 1240.26(f); *Matter of A-M-*, 23 I&N Dec. 737, 744 (BIA 2005).

52 8 CFR § 1240.26(e)(1). The regulations do not replicate the Supreme Court’s holding in *Dada v. Mukasey*, 554 U.S. 1 (2008), allowing unilateral withdrawal of a request for voluntary departure by the respondent, but EOIR justified the automatic termination approach as more streamlined, less confusing for respondents, and consistent with the Supreme Court’s reasoning. Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76927, 76930 (Dec. 18, 2008).

53 8 CFR § 1240.26(e)(2).

54 See 8 CFR § 241.8(a) (describing reinstatement of removal).

55 See, e.g., Julianne Hing, *Home in Name Only, Deportees Struggle to Survive in an Unfamiliar and Unwelcoming Place: the Country of Their Birth*, COLORLINES, Oct. 20, 2009, <https://www.colorlines.com/articles/home-name-only>; Jennifer Hough, *Deported Guatemalans Cling to American Dream*, THE IRISH TIMES, July 27, 2015, www.irishtimes.com/news/world/deported-guatemalans-cling-to-american-dream-1.2297733.

56 See USCIS, Consular Processing, <https://www.uscis.gov/greencard/consular-processing>.

57 INA § 212(a)(9)(B)(i)(II).

Legal Consequences. Failure to comply with the terms of a voluntary departure grant results in the alternate removal order taking effect.⁵⁸ If an individual's voluntary departure order converts to a removal order, the same consequences of removal orders described in the section immediately above attach. In addition to these consequences, the INA penalizes those who "voluntarily fail[] to depart" after a grant of voluntary departure with a potential fine of \$1,000 to \$5,000⁵⁹ and with a ten-year bar to seeking "any further relief" under specified parts of the INA, including adjustment of status and cancellation of removal.⁶⁰ There is no requirement that the ten-year period be spent outside the United States. The removal order does not expire and must be reopened or executed by leaving, which will trigger the removal order consequences discussed above in section III.A.1.

If a person who fails to depart during the voluntary departure period (and thus a removal order takes effect) later departs voluntarily, the person "shall be considered to have been deported, excluded and deported, or removed."⁶¹

DACA Example. Jane came to the United States when she was two years old with her parents. Jane's family was placed in removal proceedings when Jane was five years old because they had overstayed their visitor visas. An IJ granted them voluntary departure, but neither Jane's parents nor Jane ever left. She eventually requested and received DACA in 2012, when she was 21 years old. It was in the process of filing for DACA that Jane learned about her immigration procedural history, and that her failure to depart under a voluntary departure order had resulted in a removal order.

3. In Absentia Removal Order

Description. An *in absentia* removal order happens when a respondent does not appear at a scheduled immigration court hearing, and the IJ issues a removal order against that individual even though he or she is not present in the courtroom. Under the current statute, an IJ may issue an *in absentia* order "if the Service establishes by clear, unequivocal, and convincing evidence" that the respondent had written notice and is removable.⁶² There are many reasons why a respondent may fail to appear at a removal hearing, including lack of notice of the hearing, sickness, a breakdown in transportation, or because the respondent is a child without the help of a responsible adult who can assist him or her in getting to the hearing. These types of reasons may be especially common for DACA recipients with *in absentia* orders, who in many cases may have received such an order as a young child.

Legal Consequences. An *in absentia* removal order is a type of removal order, and thus the consequences include those described in section III.A.1. An *in absentia* order becomes final immediately when the IJ enters the order.⁶³ The INA imposes additional penalties on those with *in absentia* removal orders, barring them for ten years from eligibility for many forms of immigration relief, including adjustment of status and cancellation

⁵⁸ 8 CFR § 1241.1(f).

⁵⁹ The regulations further specify that a rebuttable presumption sets the fine at \$3,000 unless the IJ orders a different amount. 8 CFR § 1240.26(j).

⁶⁰ INA § 240B(d). A previous statute in effect until April 1, 1997 barred certain discretionary relief for a period of five years for individuals who failed to depart voluntarily after receiving written and oral notice "other than because of exceptional circumstances." INA § 242B(e)(2) (repealed). It is important for practitioners to understand what statute applies given the date the client's proceedings commenced.

⁶¹ 8 CFR § 1241.7.

⁶² INA § 240(b)(5); 8 CFR § 1003.26. If an individual's proceedings started before April 1, 1997, different laws applied. Practitioners should ensure they are applying the correct law based on when the proceedings occurred. For more information, see section IV.B below and Beth Werlin, American Immigration Council, *Practice Advisory: Rescinding an In Absentia Order of Removal* (Mar. 2010), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf [hereinafter "AIC In Absentia Practice Advisory"].

⁶³ 8 CFR § 1241.1(e).

of removal.⁶⁴ Those who fail to attend removal proceedings “without reasonable cause” are inadmissible for five years from the date of a subsequent departure or removal.⁶⁵

DACA Example. Sara and her father were placed in removal proceedings in 2002, when Sara was ten years old. A hearing notice was sent to an old address and Sara’s father never actually received it. Sara and her father missed their first court hearing and were ordered removed *in absentia*. Sara requested and received DACA in 2012.

B. Removal Orders Issued by an Immigration Officer

Some individuals with removal orders never had the opportunity to present their case to an IJ. Two common types of removal orders issued by an immigration officer are expedited removal orders and reinstated orders of removal.

1. Expedited Removal Orders

Description. Expedited removal is a summary removal that is authorized by the INA allowing an immigration officer to issue a removal order without a hearing before an IJ. It applies to people arriving at a port of entry who are inadmissible for misrepresentation, INA § 212(a)(6)(C), or for lack of proper entry documents, INA § 212(a)(7).⁶⁶ The statute also authorizes immigration authorities to apply expedited removal against other individuals inadmissible under INA § 212(a)(6)(C) or (a)(7), who have not been admitted or paroled, and “who ha[ve] not affirmatively shown . . . that [they have] been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.”⁶⁷ As of the date of this advisory, DHS has only applied expedited removal to those inadmissible for the above-mentioned reasons who either arrive at a port of entry, or are apprehended within 14 days of entry without inspection and 100 miles of an international land border.⁶⁸ If a person subjected to expedited removal indicates an intention to apply for asylum or expresses a fear of persecution, the immigration officer must refer him or her for a credible fear interview.⁶⁹ If the individual is found to have a credible fear, he or she is placed into section 240 proceedings.⁷⁰

Under the provisions enacted via the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), “unaccompanied alien children”⁷¹ from non-contiguous countries cannot be subjected to expedited removal; instead, they are entitled to have their case heard before an IJ in section 240 proceedings.⁷² Unaccompanied children from contiguous countries may be permitted to withdraw an application for admission, such that it may be rare that these children are subjected to expedited removal.⁷³ Even before the TVPRA was enacted, a 1997 agency policy memo counseled against subjecting “unaccompanied minors” to expedited removal, and gave

64 INA § 240(b)(7). A previous statute in effect prior to April 1, 1997 barred certain discretionary relief for a period of five years for individuals who received an *in absentia* order of deportation “other than because of exceptional circumstances.” INA § 242B(e)(2) (repealed). It is important for practitioners to understand what statute applies given the date the client’s proceedings commenced.

65 INA § 212(a)(6)(B).

66 INA § 235(b)(1)(A)(i).

67 INA § 235(b)(1)(A)(iii)(II).

68 See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48879 (Aug. 11, 2004).

69 INA § 235(b)(1)(A)(ii).

70 8 CFR § 208.30(e)(5). If the asylum officer makes a negative credible fear determination, that determination can be reviewed by the IJ. 8 CFR § 1003.42. If the IJ finds there is a credible fear, the individual is placed in section 240 proceedings. 8 CFR § 1003.42(f).

71 This term is defined at 6 USC § 279(g)(2).

72 8 USC § 1232(a)(5)(D).

73 8 USC § 1232(a)(2)(B).

officers discretion to permit accompanied minors to withdraw applications for admission where appropriate.⁷⁴ A common scenario in which a minor child may be subjected to expedited removal is when he or she is accompanied by a parent and they are apprehended at or near the border.

Legal Consequences. Individuals subjected to expedited removal proceedings are often detained while they undergo any credible fear process, and if determined not to have a fear either by an asylum officer or by an IJ reviewing the asylum officer's determination,⁷⁵ until they are removed.⁷⁶ In contrast to a respondent ordered removed by an IJ, who may appeal the decision to the BIA, an individual who has been issued an expedited removal order does not have such appeal rights.⁷⁷ A person who is removed via expedited removal is inadmissible for a period of five years unless he or she obtains consent to reapply for admission.⁷⁸ As a type of removal order, the other consequences described in section III.A.1 also apply to persons who have been removed via expedited removal.

DACA Example. Antonio's mother fled Honduras with her three young children (including Antonio) in 2005. She told immigration officers at a U.S. port of entry that she was afraid to return, but they issued expedited removal orders against all four family members and removed them. Antonio's mother reentered without permission a week later, bringing her three children with her. Antonio was granted DACA in 2013. Note that Antonio is also subject to reinstatement of removal, discussed immediately below, since he reentered the United States after having been removed.

DACA recipients, by definition, have been in the country far longer than 14 days (or 2 years) and therefore would not currently be vulnerable to the expedited removal process. Any DACA holder who leaves the United States without advance parole would lose DACA. As such, the expedited removal process would be inapplicable to DACA recipients. Instead, expedited removal would only be relevant to DACA recipients if the DACA holder received an expedited order of removal prior to obtaining DACA, as in the example above. Those DACA recipients would thus be subject to reinstatement of removal. For these reasons, this practice advisory does not discuss legal remedies for persons with expedited removal orders, but covers remedies for those with reinstatement orders below at section IV.D.

2. Reinstated Removal Orders

Description. Another form of removal order that is issued by DHS without a hearing is a reinstatement of removal order. This type of removal applies to noncitizens who have been previously removed, or departed voluntarily while under an order of removal, and then illegally reentered the United States.⁷⁹ In this situation, the statute directs that the "prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed."⁸⁰ The reinstatement provisions only apply to noncitizens who have previously physically departed under an order of removal and then reentered the United States without authorization; reinstatement does not apply to those ordered removed who never departed. A person placed in reinstatement proceedings is typically swiftly removed, unless he or she expresses a fear of return, in which case the regulations provide for

⁷⁴ Memorandum from Paul Virtue, Acting Exec. Assoc. Comm'r, INS, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997), AILA Doc. No. 97082191, available at www.aila.org/infonet.

⁷⁵ 8 CFR § 1003.42 (describing procedure for IJ review of an immigration officer's negative credible fear finding).

⁷⁶ See INA § 235(b)(1)(B)(iii)(IV).

⁷⁷ INA § 235(b)(1)(C) (limited exception permitting review for those claiming to be a lawful permanent resident, asylee, or refugee); 8 CFR § 235.3(b)(2)(ii).

⁷⁸ INA § 212(a)(9)(A)(i) (period extends to 20 years after subsequent removal and is permanent for persons with aggravated felony convictions). If the person reenters without permission, he or she will also be subjected to the "permanent bar" found at INA § 212(a)(9)(C), barring admission for ten years and requiring advance permission to reapply after ten years.

⁷⁹ INA § 241(a)(5); 8 CFR § 241.8.

⁸⁰ INA § 241(a)(5).

referral to an asylum officer for a reasonable fear interview.⁸¹

Legal Consequences. The INA states that an individual with a reinstated removal order is “not eligible and may not apply for any relief under this chapter.”⁸² However, the regulations governing reinstatement proceedings allow such an individual to apply for withholding of removal or relief under the Convention Against Torture.⁸³ As a reinstatement order is a form of removal order, the consequences described in section III.A.1 also apply. For individuals who have been removed multiple times, a 20-year bar to seeking admission is triggered, unless the person receives advance consent to seek admission.⁸⁴

DACA Example. Antonio’s mother fled Honduras with her three young children (including Antonio) in 2005. She told immigration officers at a U.S. port of entry that she was afraid to return, but they issued expedited removal orders against all four family members and removed them. Antonio’s mother reentered without permission a week later, bringing her three children with her. Shortly after they crossed the border, immigration officers detained them and issued reinstatement orders against all four of them, and they were again removed. Antonio’s mother crossed with her children without apprehension a few days later and Antonio has lived in the United States since that time. He requested and received DACA in 2013.

IV. LEGAL REMEDIES FOR INDIVIDUALS WITH REMOVAL ORDERS

A. Motions to Reopen for Individuals with Orders Issued by an IJ or the BIA

Motions to reopen are frequently the only remedy available to prevent final execution of a removal order.⁸⁵ The Supreme Court has characterized motions to reopen as an “important [procedural] safeguard designed to ensure a proper and lawful disposition of immigration proceedings.”⁸⁶ This part discusses remedies for individuals with a removal order that was issued by an IJ and/or the BIA. It does not apply to removal orders issued by DHS, which will be discussed in section IV.D below. There are different standards for different types of motions to reopen. It is important to determine which motion to reopen grounds apply in the DACA recipient’s case. Because of time and number restrictions on motions to reopen, it is usually best to argue all possible grounds for reopening in a single motion.

In providing examples where U.S. courts of appeal and the BIA have considered various types of motions to reopen, this advisory at times cites to unpublished decisions of those courts. These unpublished decisions are not precedential. However, they may be helpful to practitioners in developing potential arguments and can be employed as a persuasive tool in making arguments to the IJ or BIA.

⁸¹ 8 CFR §§ 241.8(e); 208.31. The reasonable fear process is discussed further in section IV.D *infra*.

⁸² INA § 241(a)(5).

⁸³ 8 CFR §§ 241.8(e); 208.31.

⁸⁴ INA § 212(a)(9)(A)(i)-(iii).

⁸⁵ While the standard and most straightforward way to seek review of a removal order issued by an IJ is to file an appeal with the BIA and thereafter seek review in federal court through a petition for review, this practice advisory does not discuss appeals and petitions for review given that strict filing deadlines apply to that process, which may mean it is not an option for many DACA recipients with old removal orders. Similarly, this advisory does not discuss motions to reconsider because a motion to reconsider is likely not a viable option for many DACA recipients with old removal orders, given the 30-day deadline, and also given that motions to reconsider must be based on legal or factual error in the previous decision, as opposed to new facts or circumstances. *See* INA § 240(c)(6); 8 CFR 1003.23(b)(2) (motion to reconsider an IJ decision); 8 CFR § 1003.2(b)(1) (motion to reconsider a BIA decision).

⁸⁶ *Kucana v. Holder*, 558 U.S. 233, 250 (2010) (internal quotations omitted).

1. Motions to Reopen Generally

Generally, a respondent may file only one motion to reopen proceedings,⁸⁷ and must file the motion within 90 days of the date on which the final administrative decision was rendered in the proceeding sought to be reopened.⁸⁸ However, there are important exceptions to these limitations, which are discussed below and in footnote 87. The motion to reopen “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.”⁸⁹ A motion to reopen filed in order to apply for relief must be accompanied by the “appropriate application for relief and all supporting documentation.”⁹⁰ The motion to reopen must establish that the “evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.”⁹¹ A motion to reopen to apply for discretionary relief must be based on circumstances that arose after the hearing, or establish that the respondent was not fully apprised of his or her right to apply for such relief or provided the opportunity to do so at the former hearing.⁹² Pursuant to 8 CFR § 1003.23(b)(v), this type of motion does not automatically stay removal and, instead, the practitioner can seek a discretionary stay of removal with the entity that has jurisdiction over the motion (IJ or BIA) as well as with ICE.

In *Matter of Coelho*, the BIA stated that the person seeking reopening has a “heavy burden” to establish that the new evidence “would likely change the result.”⁹³ *Matter of Coelho* involved a respondent who had been convicted of conspiracy to possess with intent to distribute cocaine. The respondent admitted possessing about two pounds of cocaine, which he had intended to sell for \$50,000. The BIA noted that reopening may be denied if the respondent does not establish a *prima facie* case of eligibility for the relief sought, if there is no previously unavailable and material evidence, or where the respondent has not shown he merits the requested relief as a matter of discretion.⁹⁴ However, in *Matter of L-O-G-*, a case decided four years later filed by a mother and her teenage daughter, the BIA suggested that the “heavy burden” standard articulated in *Coelho* might be reserved for cases where there were “special, adverse” or “egregious” factors such as dilatory tactics or where the respondent had already had an opportunity to present and litigate the claim for relief.⁹⁵ The BIA further explained that “[w] here an alien is seeking previously unavailable relief and has not had an opportunity to present her application before the Immigration Judge, the Board will look to whether there is sufficient evidence proffered to indicate a reasonable likelihood of success on the merits, so as to make it worthwhile to develop the issues further at a full

87 INA § 240(c)(7)(A); 8 CFR § 1003.23(b)(1) (IJ motions to reopen); Immigration Court Practice Manual Ch. 5.7(d); 8 CFR § 1003.2(c)(2) (BIA motions to reopen); BIA Practice Manual Ch. 5.6(d). Common exceptions include those based on a request for asylum and related relief premised on changed circumstances, joint motions, VAWA based motions under INA § 240(c)(7)(C) (iv), and requests for *sua sponte* reopening. 8 CFR § 1003.23(b)(4)(ii); Immigration Court Practice Manual Ch. 5.7(e); 8 CFR § 1003.23(b)(4); BIA Practice Manual Ch. 5.6(e); 8 CFR § 1003.2(c)(3). In addition, the numerical limitations do not apply to *in absentia* orders entered in deportation proceedings, *see* 8 CFR § 1003.23(b)(4)(iii)(D), but only one motion to rescind and reopen an *in absentia* order entered in removal proceedings pursuant to INA § 240(b)(5) may be filed, 8 CFR § 1003.23(b)(4)(ii). Some U.S. courts of appeal have concluded that the numerical limitation is, or may be, subject to equitable tolling. *See, e.g., Ruiz-Turcios v. Att’y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013) (remanding to BIA to determine whether the limitation could be tolled); *Zhao v. INS*, 452 F.3d 154, 159–60 (2d Cir. 2006); *Joshi v. Ashcroft*, 389 F.3d 732, 734–35 (7th Cir. 2004); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2001); *Davies v. INS*, 10 F. App’x. 223 (4th Cir. 2001) (per curiam) (unpublished).

88 INA § 240(c)(7)(C)(i); 8 CFR § 1003.2(c)(2) (BIA); 8 CFR § 1003.23(b)(1) (IJ).

89 INA § 240(c)(7)(B); *see also* 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).

90 8 CFR § 1003.2(c)(1) (BIA); *see* 8 CFR § 1003.23(b)(3) (IJ).

91 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).

92 8 CFR § 1003.2(c)(1) (BIA); 8 CFR § 1003.23(b)(3) (IJ).

93 20 I&N Dec 464, 473 (BIA 1992).

94 *Id.* at 472.

95 21 I&N Dec. 413, 420 (BIA 1996). The BIA acknowledged that U.S. Supreme Court applied the “heavy burden” standard in *INS v. Abudu*, 485 U.S. 94 (1988), a case decided before the INA contained a provision for motions to reopen which involved a physician who overstayed a student visa and was placed in proceedings after being convicted of fraudulently obtaining narcotic drugs.

evidentiary hearing.”⁹⁶ To warrant reopening, a respondent need not make a “conclusive showing on elements of eligibility which involve the exercise of judgment.”⁹⁷

One common basis for a motion to reopen is when the respondent becomes eligible for adjustment of status via marriage to a U.S. citizen and has a pending immediate relative petition with USCIS.⁹⁸ A review of unpublished BIA decisions⁹⁹ shows that reopening has been granted in circumstances where the respondent:

- Submitted evidence of his marriage to a U.S. citizen, pending I-130 petition, bona fides of the marriage, that he had been granted DACA, and that he had obtained advance parole and was paroled back into the United States and thus was eligible to apply for adjustment¹⁰⁰
- Had previously been denied a section 212(h) waiver, submitted additional evidence regarding hardship, including evidence of his son’s medical condition and a statement from the respondent’s wife about the hardship she fears she would suffer if the respondent were removed¹⁰¹
- Filed a petition for U nonimmigrant status after obtaining a signed law enforcement certification¹⁰²
- Had filed a VAWA self-petition and had shown that he could not have made a VAWA claim during his removal proceedings because the abuse occurred after his hearing¹⁰³
- Had previously been denied voluntary departure because of his criminal history and submitted evidence that he had married a U.S. citizen with whom he had a U.S. citizen child since his last removal hearing,¹⁰⁴ and
- Had previously been denied asylum, submitted evidence of facts that were relevant to his asylum claim that he had not known about during his removal hearing, because his father had not told him of the facts due to trauma and fear.¹⁰⁵

DACA Context. Most DACA recipients with removal orders have orders that were issued more than 90 days ago. Unable to meet the 90-day motion to reopen deadline, DACA recipients must rely on an equitable tolling argument, discussed below. Along with an equitable tolling argument, DACA recipients should also argue for the *Matter of L-O-G*- “reasonable likelihood of success” standard given the sympathetic factors in these cases and lack of special, adverse considerations, unlike those present in *Matter of Coelho*.

⁹⁶ 21 I&N Dec. at 420.

⁹⁷ *Id.* at 419.

⁹⁸ See *Matter of Velarde*, 23 I&N Dec. 253, 256 (BIA 2002) (recognizing reopening as appropriate where motion timely filed, not numerically or procedurally barred, shows clear and convincing evidence of marriage’s bona fides, and where DHS does not oppose it); *Matter of Lamus*, 25 I&N Dec. 61, 64-65 (BIA 2009) (mere fact of government’s opposition not sufficient to deny motion to reopen based on ability to adjust status through marriage to a U.S. citizen; rather the IJ or BIA should consider DHS’s arguments and exercise independent judgment).

⁹⁹ Of course, practitioners should also review relevant U.S. court of appeals decisions in their jurisdiction.

¹⁰⁰ *Nishantkumar Patel*, A073-546-027 (BIA July 11, 2017) (unpublished), available at <https://www.scribd.com/book/354710446/Nishantkumar-Patel-A073-546-027-BIA-July-11-2017>.

¹⁰¹ *Giles Chibuzor Mbonu*, A057-731-341 (BIA Feb. 27, 2017) (unpublished), available at <https://www.scribd.com/book/342617478/Giles-Chibuzor-Mbonu-A057-731-341-BIA-Feb-27-2017>.

¹⁰² *Adan Ramirez-Rios*, A088-658-419 (BIA Feb. 29, 2016) (unpublished), available at <https://www.scribd.com/book/304204056/Adan-Ramirez-Rios-A088-658-419-BIA-Feb-29-2016>.

¹⁰³ *C-C-G-*, AXXX-XXX-045 (BIA May 11, 2015) (unpublished), available at <https://www.scribd.com/book/266017722/C-C-G-XXX-XXX-045-BIA-May-11-2015>.

¹⁰⁴ *Luis Muniz*, A200-141-905 (BIA Jan. 26, 2015) (unpublished), available at <https://www.scribd.com/book/254827067/Luis-Muniz-A200-141-905-BIA-Jan-26-2015>.

¹⁰⁵ *Benjamin Luis-Garcia*, A098-237-658 (BIA Jan. 21, 2011) (unpublished), available at <https://www.scribd.com/book/173103309/Benjamin-Luis-Garcia-A098-237-658-BIA-Jan-21-2011>.

2. Equitable Tolling of the Motion to Reopen Deadline

Courts have recognized that “limitations periods are customarily subject to equitable tolling” unless tolling would be inconsistent with the statute’s text.¹⁰⁶ The equitable tolling doctrine effectively extends deadlines to treat an otherwise untimely action as timely in extraordinary circumstances for parties who have been prevented from complying with them through no fault or lack of diligence of their own.¹⁰⁷ Courts have long recognized equitable tolling’s importance in promoting access to a fair and just legal system, and have applied it in a variety of cases.¹⁰⁸

All U.S. courts of appeal that have reached the issue have concluded that equitable tolling is available to excuse untimely motions to reopen in the immigration context filed outside of the 90-day deadline.¹⁰⁹ Under U.S. Supreme Court precedent, generally to obtain equitable tolling of a deadline, an individual must demonstrate that “(1) . . . he has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way” to prevent timely filing.¹¹⁰ Thus, even if tolling is available, tolling requires that the person acted with diligence in pursuing the claim.¹¹¹ Diligence must be exercised in learning of a claim and also in pursuing rights once the person has learned of the claim.¹¹² The particular equitable tolling standard may vary by U.S. court of appeals, so practitioners should be sure to review the precedents in their jurisdiction.

Examples of cases where a U.S. court of appeals or the BIA in an unpublished decision¹¹³ has granted an untimely motion to reopen finding that equitable tolling is warranted include the following:

- Ineffective assistance of counsel¹¹⁴ (see section IV.A.3 below for a discussion of the procedural requirements for filing a motion to reopen based on ineffective assistance of counsel)

106 *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotations omitted).

107 *See, e.g., Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014) (concluding that equitable tolling did not apply to the Hague Convention).

108 *See, e.g., Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874) (applying equitable tolling to time-barred civil action, where there were allegations of fraud); *Neversen v. Farquharson*, 366 F.3d 32 (1st Cir. 2004) (concluding that equitable tolling applied to time-barred federal habeas corpus actions but that tolling was not warranted in this case); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (applying equitable tolling to sexual harassment lawsuit deadline based on plaintiff’s mental health issues).

109 *See, e.g., Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. Att’y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (per curiam); *Alzaarir v. Att’y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Gabero v. Mukasey*, 516 F.3d 590, 594-597 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001); *Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000); *see also Mata v. Lynch*, 135 S. Ct. 2150, 2155 n.3 (2015) (leaving open the possibility that the deadline can be equitably tolled). For further discussion of equitable tolling of motions to reopen, see for example Post-Deportation Human Rights Project, Ctr. for Human Rights & Int’l Justice at Boston Coll., *Equitable Tolling of Motions to Reopen* (Dec. 2013), available at http://www.bc.edu/content/dam/files/centers/humanrights/pdf/Equitable%20tolling%20of%20motions%20to%20reopen_FINAL.pdf (note that portions of this advisory are outdated).

110 *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

111 *See, e.g., Holland v. Florida*, 560 U.S. 631, 653 (2010) (to warrant tolling, claimant must exercise reasonable diligence, not “maximum feasible diligence” (internal quotations omitted)).

112 *See Rashid v. Mukasey*, 533 F.3d 127 (2d Cir. 2008).

113 The BIA has not affirmed the availability of equitable tolling in a published decision but has applied it in unpublished decisions.

114 *See, e.g., Avagyan v. Holder*, 646 F.3d 672, 682 (9th Cir. 2011) (tolling warranted in recognition of fact that “many, many immigrants fall victim to incompetent or fraudulent counsel” preventing timely or adequate filing); *Mezo v. Holder*, 615 F.3d 616 (6th Cir. 2010) (remanding for further fact-finding); *Zhao v. INS*, 452 F.3d 154, 160 (2d Cir. 2006); *Roy Alberto Ramirez Calderon*, A200-423-316 (BIA Mar. 9, 2017) (unpublished), available at <https://www.scribd.com/book/342622208/Roy-Alberto-Ramirez-Calderon-A200-423-316-BIA-March-9-2017>; *Maria Guadalupe Silva Ramirez*, A205-527-911 (BIA Feb. 11, 2016) (unpublished), available at <https://www.scribd.com/book/303204084/Maria-Guadalupe-Silva-Ramirez-A205-527-911-BIA-Feb-11-2016>; *Carlos Alberto Zambrano*, A088-741-973 (BIA Sept. 5, 2014) (unpublished), available at <https://www.scribd.com/book/239443314/Carlos-Alberto-Zambrano-A088-741-973-BIA-Sept-5-2014>.

- Fraud¹¹⁵
- Government interference¹¹⁶
- Due process violation at the prior removal hearing¹¹⁷
- A respondent's severe mental health issues or lack of mental competence, and¹¹⁸
- A court precedent issued after the removal proceeding creates a change in the prevailing interpretation of a ground of removal, rendering the individual's charge of inadmissibility or deportability no longer sustainable or making the individual eligible for relief.¹¹⁹

As an example of the last point listed above, the BIA in an unpublished decision¹²⁰ followed the U.S. Court of Appeals for the Fifth Circuit decision in *Lugo-Resendez v. Lynch* holding that equitable tolling applied to the 90-day motion to reopen filing deadline.¹²¹ After the *Lugo-Resendez v. Lynch* decision, Mr. Lugo-Resendez's case was remanded to the immigration court to determine whether equitable tolling should apply to his case. Mr. Lugo-Resendez had filed his motion to reopen two months after learning that the post-departure bar to motions to reopen no longer applied pursuant to *Garcia-Carias v. Holder*.¹²² The IJ ruled that Mr. Lugo-Resendez could not benefit from equitable tolling because he did not file his motion to reopen within a reasonable time after the Supreme Court decision years earlier invalidating the previous interpretation of the ground of deportability and thus "the importance of finality" outweighed equitable tolling considerations. The BIA disagreed, holding that Mr. Lugo-Resendez's actions showed "reasonable diligence" for equitable tolling purposes. It cited to the reasoning in *Lugo-Resendez v. Lynch* that the court should give "due consideration to the reality that many departed aliens are poor . . . and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions."¹²³ The BIA also held that Mr. Lugo-

115 See, e.g., *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

116 E.g., *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008) (allegations that BIA never sent notice of its decision and petitioner relied on assurances from DHS officers); cf. *Lawrence v. Lynch*, 826 F.3d 198, 203 (4th Cir. 2016) (noting that "[g]overnment's wrongful conduct" could be grounds); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011) (noting that "governmental interference" could be a ground for equitable tolling).

117 See *Valdovinos-Lopez v. Att'y Gen.*, 628 F. App'x 817 (3d Cir. 2015) (unpublished) (remanding to BIA to consider equitable tolling argument); *Juvenal Valdovinos-Lopez*, A200-684-816 (BIA June 29, 2016) (unpublished), available at <https://www.scribd.com/book/318828163/Juvenal-Valdovinos-Lopez-A200-684-816-BIA-June-29-2016> (noting that the respondent may have been misinformed of his rights and possible eligibility for relief at the prior hearing).

118 See, e.g., *Rafwayi v. Sessions*, 692 F. App'x 815 (9th Cir. 2017) (unpublished) (remanding for consideration of equitable tolling based on argument that petitioner could "not credibly testify during her immigration proceedings because she suffered from severe mental conditions"); *Saul Rincon-Garcia*, A034-338-426 (BIA Nov. 27, 2017) (unpublished), available at <https://www.scribd.com/book/367642745/Saul-Rincon-Garcia-A034-338-426-BIA-Nov-27-2017> ("In light of the unique factors presented by this case, including the fact that the respondent suffers from severe mental illness, the lack of resources he faced following his removal, and the actions he took upon learning of the [change in law], we find that the respondent has demonstrated both the existence of exceptional circumstances and that he has exercised due diligence such that equitable tolling is warranted."); see also *Kim Stevens*, A035-172-124 (BIA Oct. 12, 2011) (unpublished), available at <https://www.scribd.com/book/199185203/Kim-Stevens-A035-172-124-BIA-Oct-12-2011> (concluding that the respondent was not barred due to lack of diligence where he was not mentally competent to take action).

119 See, e.g., *Jose Guerrero-Soto*, A091-225-150 (BIA Nov. 17, 2015) (unpublished), available at <https://www.scribd.com/book/291132258/Jose-Guerrero-Soto-A091-225-150-BIA-Nov-17-2015> (remanding to consider whether deadline should be tolled). But see *Omar v. Lynch*, 814 F.3d 565, 570 (1st Cir. 2016) (tolling of motion to reconsider deadline not warranted based on change in law rendering petitioner eligible for section 212(c) relief).

120 *Sergio Lugo-Resendez*, A034-450-500 (BIA Dec. 28, 2017) (unpublished), available at <https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/01/17/unpub-bia-equitable-tolling-victory-matter-of-lugo-resendez-dec-27-2017.aspx?Redirected=true&Redirected=true>.

121 *Lugo-Resendez v. Lynch*, 831 F.3d 337, 343-45 (5th Cir. 2016).

122 697 F.3d 257 (5th Cir. 2012).

123 *Lugo-Resendez*, 831 F.3d at 345.

Resendez had experienced “extraordinary circumstances . . . beyond his control” that prevented him from filing his motion until 2014. Although the change in law impacting his removal case occurred in 2006 (three years after his removal order was issued), he was prevented from filing a motion to reopen until the U.S. Court of Appeals for the Fifth Circuit made it legally possible to file motions to reopen from abroad through its *Garcia-Carias v. Holder* decision in 2012. Mr. Lugo-Resendez did not learn about this opportunity until May 2014, and it took him two months to retain legal counsel and file the motion to reopen.

A motion to reopen arguing equitable tolling must thus demonstrate that diligence was exercised from the time the removal order was entered, or from the time the individual became aware (or reasonably should have been aware) that the order was entered or that there was a basis for filing a motion to reopen, depending on the circumstances. This must be shown as specifically as possible, through affidavits and other evidence demonstrating exactly when the individual became aware of the removal order or basis for the claim, what circumstances prevented the individual from filing earlier, and what steps were taken to pursue the claim.¹²⁴

DACA Context. For those DACA recipients who were ordered removed many years prior to obtaining DACA, and have not taken any action to investigate a possible claim for reopening until now, it may be difficult to argue that the filing deadline should be tolled. However, equitable tolling may be useful for DACA recipients who only recently discovered they had a removal order – or a possible basis for reopening a removal order – during or after the process of applying for DACA.

In exploring equitable tolling arguments, practitioners should carefully review the record of proceedings and audio recordings or transcript of the hearing(s), in addition to interviewing the client about what happened during and after the removal proceedings. They should investigate whether there was a defect during the removal proceedings, or during the 90-day motion to reopen period after a removal order was entered, that prevented the client from timely filing a motion to reopen. As described below, these defects might include ineffective assistance of counsel, due process or regulatory violations, or failures by an adult with responsibility to protect the interests of the child respondent.

If the client was represented during the removal proceedings or sought the assistance of a legal representative during the 90-day reopening period, practitioners should investigate whether there is a tolling argument based on ineffective assistance or fraud by the representative. For example, in *Gordillo v. Holder*,¹²⁵ the U.S. Court of Appeals for the Sixth Circuit concluded that tolling could be warranted where the respondents had been eligible for NACARA relief during their removal proceedings but their attorney did not raise it. Their attorney had also filed an appeal to the BIA but never informed them when the BIA affirmed the IJ’s decision. The respondents thus did not find out about the BIA’s decision until 18 months after the fact, when their work authorization renewal applications were denied. At that point, they sought legal advice but were advised incorrectly that they had no available relief. It was not until four years later, when one respondent was arrested by DHS, that they learned from a different attorney about their eligibility for relief, and they filed a motion to reopen a week after first meeting with the attorney.

Regardless of whether the client was represented during the removal proceedings, practitioners should also look for defects in the manner that the IJ conducted the proceeding. This could include due process violations such as for failure advise of eligibility for relief and failure to comply with regulatory duties.¹²⁶ If the client was

¹²⁴ See *Gonzalez-Cantu v. Sessions*, 866 F.3d 302, 305 (5th Cir. 2017).

¹²⁵ 640 F.3d 700 (6th Cir. 2011) (remanding to BIA for further diligence analysis).

¹²⁶ See, e.g., *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004) (finding, in illegal reentry case, that noncitizen’s due process rights were violated where the IJ failed to advise him of eligibility for relief or of his right to appeal); cases cited at note 117; see also *Serrano-Alberto v. Att’y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017) (finding due process violation where IJ’s conduct prevented the petitioner from reasonably presenting case, explaining that due process requires “a full and fair hearing that allows

a child at the time of the removal proceedings, practitioners should be mindful of the heightened procedural requirements in children's cases.¹²⁷ Further, if the client was in proceedings along with a parent or other adult who was treated as the child's legal guardian, practitioners should examine whether that adult failed to act in the child's legal interests, such as by failing to seek available relief on behalf of the child or to pursue an appeal. All of these factors could contribute to an argument that extraordinary circumstances prevented timely filing of a motion to reopen. Practitioners will also want to address how the client's failure to find out about the basis for reopening earlier was reasonable. It is wise to review case law in the applicable jurisdiction to determine the relevant standard and explore arguments, such as the need to assess reasonableness due to the client's age and other particular circumstances, or that the client's reliance on the statements of his or her representative, the IJ, or another adult were reasonable in preventing earlier discovery of the claim.¹²⁸

DACA recipients could also explore age-based arguments that extraordinary circumstances prevented timely filing of a motion to reopen. It is possible that many DACA recipients with removal orders might not have known about the order or a basis for reopening given their age. Many DACA recipients may not have learned about or understood their immigration history until they began applying for financial aid for college or a driver's license. Even if a DACA recipient knew about his or her lack of lawful status, he or she may not have known about or understood the implications of a removal order. In these circumstances, practitioners should look to the prevailing case law in their jurisdiction to determine if arguments are available that the DACA recipient's youth and lack of competence¹²⁹ could combine with other factors to amount to an extraordinary circumstance that prevented timely filing. An individual in this situation could argue that the time limitation should be tolled until he or she became aware of the removal order or the claim to reopen the order. Practitioners could analogize to the asylum one-year filing deadline extraordinary circumstances exceptions, which specify that a "legal disability" is an extraordinary circumstance. Although the regulations do not define the term "legal disability," they offer as illustration the example of an applicant who "was an unaccompanied minor or suffered from a mental impairment."¹³⁰ A DHS training manual further expands on this point, explaining that all minors should be considered to be under a legal disability and meet the definition of an "extraordinary circumstance" for the purpose of satisfying the exception to the one-year asylum filing deadline.¹³¹ In an unpublished decision, the BIA held that those under 18 years of age categorically qualify for the extraordinary circumstances exception to the one-year asylum filing deadline.¹³² The BIA further held that the youth of a person between ages 18 and 21 remains a factor to consider in determining whether an applicant qualifies for the extraordinary circumstances

[petitioners] a reasonable opportunity to present evidence on their behalf" (internal quotations omitted)). For further discussion of BIA precedent and regulatory authority for the IJ's duty to develop the record, see Brief for American Immigration Council as Amicus Curiae Supporting Respondents, In the Matter of C-C-C- & H-B-C- (BIA filed Aug. 17, 2015), *available at* www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/re_c-c-c_amicus_brief.pdf.

127 See, e.g., discussion *infra* at section IV.B.2.

128 See, e.g., *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011) ("We cannot penalize individuals in such circumstances for reasonably relying on the advice of counsel, even if that counsel turns out to have been incompetent or predatory."); *Rosanna Zicca*, A031-119-162, 2008 WL 4420127, at *2 (BIA Sept. 12, 2008) (unpublished) ("[W]e consider that it was not unreasonable for the respondent not to have filed her motion earlier premised on her reliance on her former counsel's continued reassurances; and that only upon her detention by DHS, did she become fully aware of the grievous consequences of her former counsel's egregious conduct, and then acted diligently in submitting the instant motion, and has raised a *prima facie* claim for relief from removal.").

129 Cf. cases cited *supra* note 118 and accompanying text.

130 8 CFR § 208.4(a)(5)(ii).

131 USCIS, RAO Combined Training Course, *Children's Claims*, at 78 (Aug. 21, 2014), *available at* www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/RAIO_Directorate_Officer_Training_Manual.pdf ("The same logic underlying the legal disability ground listed in the regulations is relevant also to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.").

132 See *A-D-*, AXXX XXX 526, at 5 (BIA May 22, 2017) (unpublished), *available at* <https://www.scribd.com/book/351904250/A-D-AXXX-XXX-526-BIA-May-22-2017>.

exception.¹³³ Practitioners could apply this same reasoning in support of equitable tolling for DACA youth while under the age of 21. If DACA was obtained before or shortly after the 21st birthday, the practitioner could argue that DACA was a new extraordinary circumstance further tolling the filing deadline, as described below.

It may be possible that multiple extraordinary circumstances exist, and different extraordinary circumstances may toll different periods of time. For example, if the client became aware of the removal order or the basis for reopening during or after the DACA application process, he or she could explore an extraordinary circumstances argument based on DACA itself. The extraordinary circumstance would be the advent of DACA, a DHS-sponsored program that permitted those with removal orders to apply for it and thereby obtain protection from removal. This argument is supported by another definition of extraordinary circumstance found in the regulations discussing the one-year filing deadline for asylum applications. That regulation provides that one extraordinary circumstance exempting an applicant from the deadline is if the applicant “maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application.”¹³⁴ Practitioners can argue that a similar standard should be applied where an individual discovers the existence of a removal order, or a claim to reopen a removal order, in the process of applying for DACA, but waits to file the motion to reopen until his or her DACA protection is rescinded or otherwise terminates. DACA recipients could argue that they reasonably relied on the existence of this government program, which expressly included and protected eligible individuals with removal orders. Furthermore, given all the developments regarding the status of the DACA program following litigation and President Trump’s vows to find a permanent solution for DACA youth, it is likely that many DACA recipients are confused about the status of the program.¹³⁵ Like Mr. Lugo-Resendez’s case, equitable tolling arguments should include all hurdles preventing the filing of a motion to reopen, including confusion rendering one “unable to follow developments in the American legal system—much less read and digest complicated legal decisions.”¹³⁶

In addition to arguing that exceptional circumstances stood in the way of timely filing, to be eligible for tolling the DACA recipient will also need to demonstrate due diligence in pursuing the motion to reopen. Practitioners should consider whether factors, such as age and lack of ability to search for, pay for, or arrange transportation to visit an attorney given the DACA recipient’s age (including statistics on scarcity of free legal services in the jurisdiction during the relevant period), could factor into the diligence analysis. DACA recipients may also argue that requesting DACA, which is available despite a removal order, and maintaining the DACA protection, may suffice to show diligence. The argument would be that pursuing DACA as a protection from removal shows sufficient diligence warranting tolling during that period.¹³⁷ Practitioners could argue that like in Mr. Lugo-Resendez’s case, DACA recipients would need some amount of time following the expiration of the extraordinary circumstance to confer with legal counsel and for that counsel to submit the motion to reopen. It will be very important for legal counsel to diligently prepare and quickly file the motion to reopen once retained.

In sum, in pursuing a late-filed motion to reopen, where possible, practitioners should argue equitable tolling,

¹³³ See *id.* at 5–8.

¹³⁴ See 8 CFR § 208.4(a)(5)(iv). In addition, an extraordinary circumstance argument could be used to overcome the one-year filing deadline for DACA recipients who wish to file a motion to reopen to apply for asylum and related relief based on changed country conditions that occurred while they maintained DACA. See USCIS, Asylum Officer Basic Training Course, *One-Year Filing Deadline*, at 17 (Mar. 23, 2009), AILA Doc. No. 16102840, available at www.aila.org/infonet (explaining that the purpose of the “maintained lawful status” extraordinary circumstances exception is to “avoid forcing a premature application” by allowing individuals who might seek asylum to wait and see if conditions in their countries improve).

¹³⁵ See, e.g., *supra* section I & *infra* note 180.

¹³⁶ *Lugo-Resendez v. Lynch*, 831 F.3d 337, 345 (5th Cir. 2016).

¹³⁷ Cf. *Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (“Contrary to the government’s arguments before us, the mere passage of time—even a lot of time—before an alien files a motion to reopen does not necessarily mean she was not diligent.”).

rather than merely rely on the IJ or BIA's regulatory *sua sponte* authority, discussed below in section IV.A.7. Many federal courts have concluded that they lack jurisdiction to review the BIA's discretionary decision declining to exercise *sua sponte* authority.¹³⁸ Further, a motion to reopen under the statutory authority is governed by legal standards that may be easier to establish compared to the exceptional circumstances standard under discretionary *sua sponte* authority.

3. Motions to Reopen Based on Ineffective Assistance of Counsel¹³⁹

Many courts of appeal have recognized that ineffective assistance of counsel can be a basis for equitable tolling of the 90-day deadline and numerical limitations.¹⁴⁰ In order to argue equitable tolling on the basis of ineffective assistance of counsel, the respondent must comply with the requirements in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The BIA in *Matter of Lozada* recognized that ineffective assistance of counsel in removal proceeding can be a Fifth Amendment due process violation “if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.”¹⁴¹ To prevail on an ineffective assistance claim, the claimant must show deficient performance and prejudice.¹⁴² A motion to reopen based on alleged ineffective assistance of counsel must meet certain procedural requirements:

- It must be accompanied by an affidavit from the respondent providing the relevant facts, including the agreement entered into with prior counsel as to what actions were to be taken and what representations counsel made
- Prior counsel must be notified and given the opportunity to respond to the allegations, and the claimant should include any response or failure to respond with the motion, and
- If the conduct is alleged to have violated ethical or legal duties, the motion should state whether a complaint has been filed with the appropriate disciplinary authority and if not, why not.¹⁴³

It is best practice to fully comply with the *Lozada* requirements, even though some U.S. courts of appeal have held that only “substantial compliance” is required.¹⁴⁴ It is possible to assert ineffective assistance of counsel against multiple prior attorneys to show that the individual continuously received ineffective representation and was diligent in trying to present his or her case.

4. Motions to Reopen Based on VAWA Relief

¹³⁸ See note 185 *infra*.

¹³⁹ For an excellent practice advisory on this subject, see American Immigration Council, *Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases* (Jan. 2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_remedies_for_ineffective_assistance_of_counsel_in_immigration_cases_practice_advisory.pdf [hereinafter “AIC Ineffective Assistance Advisory”]. The authors drew on this advisory in drafting this section.

¹⁴⁰ See, e.g., cases cited in note 114 *supra*; *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); *Rashid v. Mukasey*, 533 F.3d 127, 130 (2d Cir. 2008).

¹⁴¹ 19 I&N Dec. at 638 (BIA 1988); see *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) (affirming *Lozada* and noting that many courts have recognized that respondents can articulate a due process violation if counsel “prevents the respondent from meaningfully presenting his or her case” even though there is no right to appointed counsel). Many but not all U.S. courts of appeal have recognized a due process right to effective assistance of counsel in removal proceedings. See discussion of case law in AIC Ineffective Assistance Advisory, *supra* note 139, at 13-15.

¹⁴² Practitioners should examine precedents in their jurisdiction to determine the applicable deficient performance and prejudice standards.

¹⁴³ *Lozada*, 19 I&N Dec. at 639.

¹⁴⁴ See, e.g., *Yang v. Gonzales*, 478 F.3d 133, 143 (2d Cir. 2007), *Fadiga v. Att’y Gen.*, 488 F.3d 142, 155-57 (3d Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226-27 (9th Cir. 2002). But see, e.g., *Hernandez-Ortiz v. Holder*, 741 F.3d 644, 647-48 (5th Cir. 2014); *Lin Xing Jiang v. Holder*, 639 F.3d 751, 755 (7th Cir. 2011) (requiring strict compliance).

The 90-day time limit and the one-motion rule do not apply to individuals seeking reopening in order to apply for VAWA relief, in the form of a VAWA self-petition, VAWA cancellation of removal, or VAWA suspension (for those placed into proceedings before April 1, 1997).¹⁴⁵ Instead, motions to reopen filed under this provision can be filed within a year of the final removal order, but the Attorney General can waive this one-year deadline in extraordinary circumstances or situations of “extreme hardship to the alien’s child.”¹⁴⁶ The motion must meet the substantive requirements for motions to reopen discussed previously, and in particular must be accompanied by the VAWA self-petition that has been or will be filed with USCIS or the cancellation of removal application that will be filed with the immigration court.¹⁴⁷ The respondent must also be physically present in the United States at the time the motion is filed.¹⁴⁸ The filing of a motion to reopen under this provision stays the removal of a “qualified alien” while the motion is pending, “including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.”¹⁴⁹ “Qualified alien” is defined to include individuals with an approved VAWA self-petition, a pending VAWA self-petition setting forth a *prima facie* case, an approved VAWA suspension or cancellation application, or a pending VAWA suspension or cancellation application setting forth a *prima facie* case.¹⁵⁰

DACA Context. A discussion of the requirements for VAWA relief is beyond the scope of this practice advisory. Some DACA recipients could be eligible for VAWA relief based on abuse by a spouse or parent who is a U.S. citizen or permanent resident.¹⁵¹ Others could be eligible for VAWA relief as the child of a self-petitioner, for example if the DACA recipient’s parent has filed for VAWA relief as an abused spouse of a U.S. citizen or permanent resident.¹⁵² VAWA cancellation may also be available to a DACA recipient who is the parent of an abused child¹⁵³ of a U.S. citizen or permanent resident, even where the DACA recipient is not married to the child’s parent.¹⁵⁴ DACA recipients who may be eligible for this relief should also consider arguments that the one-year time limitation for filing a motion to reopen should be waived, by setting forth extraordinary circumstances or establishing extreme hardship to a child. A motion to reopen under this provision should state on the cover page that the respondent meets the requirements for the statutory stay. In the motion, the practitioner should establish that the DACA recipient is a “qualified alien,” along with an approved petition,

145 INA § 240(c)(7)(A), (c)(7)(C)(iv). INA § 240(c)(7)(C)(iv)(I) states that the limitation on deadlines for filing motions to reopen shall not apply “if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 204(a)(1)(A), clause (ii) or (iii) of section 204(a)(1)(B) [VAWA self-petitioners, except for parents subject to battery or extreme cruelty by U.S. citizen sons or daughters], section 240A(b)(2) [VAWA cancellation], or section 244(a)(3) (as in effect on March 31, 1997) [VAWA suspension].”

146 INA § 240(c)(7)(C)(iv)(III). Under 2005 VAWA amendments, there is no deadline for motions to reopen *deportation* proceedings (those commenced before April 1, 1997) in order to seek VAWA adjustment or suspension, if the motion is accompanied by a suspension application or self-petition. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(b), 119 Stat. 2960, 3064 (Jan. 5, 2006).

147 INA § 240(c)(7)(C)(iv)(II).

148 INA § 240(c)(7)(C)(iv)(IV).

149 INA § 240(c)(7)(C)(iv).

150 8 USC § 1641(c)(1)(B) (does not include as part of the definition VAWA self-petitioning parents subject to battery or extreme cruelty by U.S. citizen sons or daughters, as set forth INA § 204(a)(1)(A)(vi)).

151 See USCIS, Battered Spouse, Children & Parents, <https://www.uscis.gov/humanitarian/battered-spouse-children-parents>. Note that VAWA relief is also available to parents abused by a U.S. citizen son or daughter, but abuse by a U.S. citizen son or daughter will not confer the VAWA motion to reopen benefit discussed in this part, despite the misleading title which includes “parents.” See INA § 240(c)(7)(C)(iv)(I) (not including cross reference to VAWA self-petition statute discussing parents of abusive U.S. citizens). Instead reopening in this scenario would need to be sought under the general reopening provisions or through a request for *sua sponte* reopening.

152 See INA § 204(a)(1)(A)(iii), (a)(1)(B)(ii). Children included in their parent’s VAWA self-petition are known as derivative children. To be included in the parent’s self-petition, derivative children must be unmarried and under 21 at the time of filing. These children are “derivatives” or “derivative beneficiaries” because they derive a benefit from the parent’s application for legal immigration status.

153 See INA § 101(b)(1) (defining “child”).

154 INA § 240A(b)(2)(A)(i)(I)-(II).

prima facie determination, or copy of the application,¹⁵⁵ and argue that a *prima facie* showing has been made.¹⁵⁶

5. Motions to Reopen Based on Changed Country Conditions Related to Asylum Eligibility

Another type of motion to reopen that does not have the numerical or 90-day time limitation is a motion based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, where the purpose is to apply or reapply for asylum or withholding of removal.¹⁵⁷ The new evidence presented must be material and “not available and would not have been discovered or presented at the previous proceeding.”¹⁵⁸ The BIA has interpreted the standard for this type of reopening to include the applicant’s “heavy burden to show that his proffered evidence is material, reflects changed country conditions arising in the country of nationality, and supports a *prima facie* case for a grant of asylum.”¹⁵⁹ The change does not, however, have to be dramatic.¹⁶⁰ The “previous proceeding” refers to the proceedings before the IJ, not the BIA.¹⁶¹ The change in country conditions must have materially worsened,¹⁶² and not be merely “more of the same.”

The Immigration Court and BIA Practice Manuals state that a motion to reopen based on changed country conditions “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.”¹⁶³ The respondent must include evidence of the alleged changed circumstances.¹⁶⁴ U.S. courts of appeal and BIA decisions have upheld the denial of motions to reopen based on changed country conditions where:

- The changes asserted were merely changed personal circumstances, rather than changed country conditions¹⁶⁵
- The changes asserted were merely more evidence of the same country conditions that previously existed,¹⁶⁶ and
- The changed conditions presented were general conditions, instead of a showing of individual and

155 VAWA self-petitions are filed on Form I-360, while VAWA cancellation is filed on Form EOIR 42-B.

156 For further information on motions to reopen under the VAWA provisions, see IMMIGRANT LEGAL RESOURCE CENTER, THE VAWA MANUAL: IMMIGRATION RELIEF FOR ABUSED IMMIGRANTS § 10.6 (7th Ed. 2017).

157 INA § 240(c)(7)(C)(ii); 8 CFR § 1003.2(c)(3)(ii); 8 CFR § 1003.23(b)(4)(i).

158 INA § 240(c)(7)(C)(ii); 8 CFR § 1003.2(c)(3)(ii); 8 CFR § 1003.23(b)(4)(i).

159 *Matter of J-G-*, 26 I&N Dec. 161, 169 (BIA 2013).

160 See *Joseph v. Holder*, 579 F.3d 827, 831-35 (7th Cir. 2009).

161 See, e.g., *Norani v. Gonzales*, 451 F.3d 292, 294 (2d Cir. 2006); *Filja v. Gonzales*, 447 F.3d 241, 252-54 (3d Cir. 2006).

162 See *Yang Zhao-Cheng v. Holder*, 721 F.3d 25, 28-29 (1st Cir. 2013) (reasoning that “that slight temporal fluctuation in the level of ever-prevailing persecution is, itself, a continuing circumstance—not a ‘changed circumstance[]’ as required by the regulation”). However, in arguing that there has been sufficient change in circumstances, practitioners may examine “whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution.” *Malty v. Ashcroft*, 381 F.3d 942, 945 (9th Cir. 2004).

163 Immigration Court Practice Manual Ch. 5.7(e)(i); BIA Practice Manual Ch. 5.6(e)(i).

164 Immigration Court Practice Manual Ch. 5.7(e)(i); BIA Practice Manual Ch. 5.6(e)(i).

165 See, e.g., *Ming Chen v. Holder*, 722 F.3d 63, 67 (1st Cir. 2013); *Xiu Zhen Zheng v. Holder*, 548 F. App’x 869, 870 (4th Cir. 2013) (unpublished); *Averianova v. Holder*, 592 F.3d 931, 937 (8th Cir. 2010); *Alvarez v. Holder*, 608 F.3d 638, 641 (9th Cir. 2010); *Chen v. Att’y Gen.*, 565 F.3d 805, 809-10 (11th Cir. 2009) (per curiam); *Liu v. Att’y Gen.*, 555 F.3d 145, 151 (3d Cir. 2009); *Bi Feng Liu v. Holder*, 560 F.3d 485, 492 (6th Cir. 2009); *Qi Hua Li v. Holder*, 354 F. App’x 46, 48 (5th Cir. 2009); *Wei v. Mukasey*, 545 F.3d 1248, 1254-57 (10th Cir. 2008); *Yuen Jin v. Mukasey*, 538 F.3d 143 (2d Cir. 2008); *Cheng Chen v. Gonzales*, 498 F.3d 758 (7th Cir. 2007); *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007). At least in some jurisdictions, practitioners may be able to defeat this hurdle by arguing that the changed country conditions were “made relevant by a change in the petitioner’s personal circumstances.” See, e.g., *Chandra v. Holder*, 751 F.3d 1034, 1038 (9th Cir. 2014).

166 See, e.g., *Sugiarto v. Holder*, 761 F.3d 102 (1st Cir. 2014); *Zhao v. Gonzales*, 440 F.3d 405 (7th Cir. 2005); see also *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 for late motions of this type.”).

particularized risk.¹⁶⁷

This type of motion does not automatically stay removal; rather, an individual can seek a discretionary stay of removal with the entity that has jurisdiction over the motion (IJ or BIA), as well as with ICE.¹⁶⁸ The regulations state that if the original asylum application was denied based on a frivolous finding,¹⁶⁹ the respondent is not eligible to file a motion to reopen, reconsider, or for a stay.¹⁷⁰

DACA Context. DACA recipients with old removal orders may have received them many years ago, in the 1980s, 1990s, or 2000s. Practitioners should consider whether there are now changed circumstances that have created eligibility for asylum, withholding of removal, and Convention Against Torture relief in the alternative.¹⁷¹ Practitioners evaluating a changed country conditions-based motion to reopen for a DACA recipient must consider whether country conditions have materially changed since the date of the immigration court hearing or proceeding. Even though changed personal circumstances are distinct from changed country conditions, DACA recipients may argue that the country conditions have changed materially as to his or her personal circumstances. For example, consider the hypothetical scenario of a DACA recipient who was ordered removed as a small child and years later recognized his sexual orientation. He also learns that since the removal order's issuance, in his home country there has been an increase in violence against individuals due to their sexual orientation and that the police have increasingly done nothing, a change in country conditions made relevant due to his changed personal circumstances.

In conducting country conditions research, practitioners should use the wealth of resources available,¹⁷² starting with the client's (or client's family members') own knowledge of changed conditions. Practitioners should include specific incidents that may have happened to the client's family or friends in the home country that are relevant to the client's fear of return. In preparing a motion to reopen based on changed country conditions, it is best practice to engage an expert who can write a declaration discussing how the changed circumstances present an individual and particularized risk to the applicant. For asylum purposes, there may be one-year deadline exception arguments to be made based on changed circumstances or extraordinary circumstances, such as the applicant's youth or mental health issues.

167 See, e.g., *Simarmata v. Holder*, 752 F.3d 79 (1st Cir. 2014). But see *Salim v. Lynch*, 831 F.3d 1133, 1140 (9th Cir. 2016) (remanding where petitioner had shown “heightened individualized risk if returned”).

168 8 CFR § 1003.23(b)(4)(i); see 8 CFR § 1003.2(f).

169 See 8 CFR § 1208.20 (“[A]n asylum application is frivolous if any of its material elements is deliberately fabricated.”). The authors are not aware of case law on whether a minor derivative would face the severe consequences of a frivolous finding, however he or she would have strong arguments that he or she did not “deliberately” fabricate if he or she was young at the time or if he or she was not involved in preparing the asylum application.

170 8 CFR § 1003.23(b)(4)(i). Note that where there was a previous frivolous finding, a motion to reopen based on changed country conditions may still be available for the purpose of applying for withholding of removal and Convention Against Torture protection as they are not barred by a frivolous finding. See 8 CFR § 1208.20 (“a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal”). CAT relief is not considered a “benefit under this Act” as the legal authority for CAT resides in the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (1998), and not in the INA.

171 The ten countries with the largest numbers of DACA recipients are Mexico, El Salvador, Guatemala, Honduras, Peru, South Korea, Brazil, Ecuador, Colombia, and the Philippines. See USCIS, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012–2017* (Sept. 30, 2017), available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr4.pdf.

172 One excellent source of country conditions material is the Center for Gender and Refugee Studies, which provides litigation support materials to those who request assistance via the organization's web page, found at <https://cgrs.uchastings.edu/search-materials/cgrs-litigation-support-materials>.

6. Joint Motions to Reopen

The regulations governing reopening provide an exception to time and numerical limitations in cases where a motion to reopen is “agreed upon by all parties and jointly filed.”¹⁷³ The BIA in *Matter of Yewondwosen* reasoned that “the parties have an important role to play in these administrative proceedings, and . . . their agreement on an issue or proper course of action should, in most instances, be determinative.”¹⁷⁴ In fact, a joint motion to reopen may be granted even when the applicant does not include an application for relief.¹⁷⁵ In unpublished decisions the BIA has reversed IJ denials of joint motions to reopen.¹⁷⁶

Depending on the administration and the DHS office in question, practitioners should consider reaching out to DHS to see if they would join in the motion, particularly if the IJ likes to see motions where the parties have tried to reach agreement before filing.¹⁷⁷ If this is the IJ’s preference, but DHS declined to join the motion, the practitioner can explain in the subsequently filed motion attempts made at reaching an agreement with DHS prior to filing.¹⁷⁸ In the past, DHS has joined motions to reopen in cases of clear relief, such as an approved I-130 petition when the applicant is eligible to adjust status, an approved I-360 petition, an approved U nonimmigrant status petition, or a strong claim for asylum with a solid one-year filing deadline exception. One specific context where DHS has traditionally agreed to join in motions to reopen is for adjustment of status purposes. A 2001 memo directs that the predecessor agency to DHS, the Immigration and Naturalization Service, may join in a motion to reopen for adjustment of status if: (1) adjustment was not available to the respondent at the former hearing; (2) the respondent is statutorily eligible for adjustment; and (3) the respondent merits a favorable exercise of discretion.¹⁷⁹ Although this memo has not been expressly rescinded, it is no longer on the ICE website, and some ICE OPLA offices may regard it as being rescinded.

DACA Context. Practitioners should ascertain the current DHS policy on joining motions to reopen. If it is still possible in some circumstances or jurisdictions to obtain DHS agreement to join a motion to reopen, practitioners could argue to DHS that DACA cases certainly merit DHS’s favorable discretion. In presenting a request to DHS to join a motion, practitioners could consider the following strategies:

- Note that President Trump has indicated that DACA recipients should be protected and are deserving of a permanent solution via legislation¹⁸⁰

173 8 CFR § 1003.23(b)(4)(iv); 8 CFR § 1003.2(c)(3)(iii).

174 21 I&N Dec. 1025, 1026 (BIA 1997).

175 *Id.* at 1027.

176 *Oscar Diaz-Medina*, A096-188-908 (BIA Feb. 11, 2016) (unpublished), available at <https://www.scribd.com/book/303203515/Oscar-Diaz-Medina-A096-188-908-BIA-Feb-11-2016>; see also *Hernan Antonio Reyes*, A095-084-205 (BIA Sept. 18, 2015) (unpublished), available at <https://www.scribd.com/book/285239784/Hernan-Antonio-Reyes-A095-084-205-BIA-Sept-18-2015>; *Adam Laurence*, A200-867-388 (BIA Feb. 7, 2014) (unpublished), available at <https://www.scribd.com/document/208246334/Adam-Laurence-A200-867-388-BIA-Feb-7-2014>.

177 The Immigration Court Practice Manual directs that “[t]he party filing a motion should make a good faith effort to ascertain the opposing party’s position on the motion,” should state the opposing party’s position in the motion, and should explain efforts made to contact the opposing party if the filing party “was unable to ascertain the opposing party’s position.” Ch. 5.2(i).

178 The 90-day motion to reopen deadline is generally not tolled while a practitioner awaits DHS’s response regarding whether that office will join the motion. See, e.g., *Alzaarir v. Att’y Gen.*, 639 F.3d 86, 90-91 (3d Cir. 2011); *Valeriano v. Gonzales*, 474 F.3d 669, 673-75 (9th Cir. 2007). Thus in cases where the 90-day deadline is still in play and the practitioner is seeking to have DHS join the motion, he or she may need to file the motion to meet the deadline despite not having a response from DHS. In other cases, the deadline has already passed and the only alternative basis for the motion is *sua sponte*.

179 See Memorandum from Bo Cooper, General Counsel, INS, *Motions to Reopen for Consideration of Adjustment of Status* (May 17, 2001), AILA Doc. No. 01070333, available at www.aila.org/infonet.

180 See, e.g., Katie Reilly, *Here’s What President Trump Has Said About DACA in the Past*, TIME, Sept. 5, 2017, <http://time.com/4927100/donald-trump-daca-past-statements/> (stating, for example, that the administration would show “great heart,” that DACA recipients were “mostly” “absolutely incredible kids,” that he “love[s] these kids,” that they “shouldn’t be very worried” and

- Note that (if still true) Congress is actively working on legislation to protect DACA recipients
- Argue that the above points show the executive and legislative intent to protect DACA recipients, and
- Document and emphasize all of the positive equities in the particular client's case, including, if applicable, the client's young age and lack of culpability at the time the order was issued.

In addition to these arguments, some DACA recipients have adjustment of status options that would strengthen a request for a joint motion to reopen. Those who were “admitted” into the United States on a visa,¹⁸¹ most recently entered on a grant of advance parole, or are the beneficiary of a petition under INA § 245(i), are examples of DACA recipients who may be adjustment eligible. DACA recipients with removal orders who were previously admitted into the United States may have become eligible for adjustment since their removal proceedings, such as by marriage to a U.S. citizen. In such cases, practitioners should submit a written request to DHS asking that agency to join the motion to reopen, along with supporting evidence showing the client's eligibility, including the adjustment of status application the respondent plans to file, a proposed joint motion, a proposed order, and a copy of the I-130 petition approval notice, where appropriate.¹⁸²

7. Motions to Reopen Based on Sua Sponte Authority

The regulations give the IJ and BIA *sua sponte* authority to reopen a case in which that body has made a decision at any time, with no time or numerical limitations.¹⁸³ The BIA has noted that its *sua sponte* power is limited to “exceptional situations” and “is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.”¹⁸⁴ Federal courts have generally held that they do not have jurisdiction to review the BIA's discretionary denial to reopen *sua sponte*.¹⁸⁵ Therefore, it is best to ask for *sua sponte* reopening in the alternative where possible, perhaps first arguing that the respondent is entitled to equitable tolling of the 90-day deadline or that the respondent's motion falls under another statutory reopening ground that does not have a deadline, such as changed country conditions for asylum purposes.

would be taken care of); Statement from President Donald J. Trump (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump> (promising to deal with the “DACA issue with heart and compassion – but through the lawful Democratic process”); *The Latest: Trump Vows to Revisit DACA If Congress Stumbles*, U.S. NEWS & WORLD REPORT, Sept. 5, 2017, www.usnews.com/news/politics/articles/2017-09-05/the-latest-trump-says-congress-needs-to-act-on-immigration.

181 For discussion of what constitutes an “admission” for purposes of adjustment of status, see American Immigration Council, *Practice Advisory: Inspection, Entry and Admission* (Oct. 2015), available at https://www.americanimmigrationcouncil.org/practice_advisory/inspection-and-entry-port-entry-when-there-admission.

182 For a sample request, see <https://cliniclegal.org/sites/default/files/toolkits/pd/JMTR-and-Terminate4-Redacted-Sample.pdf>.

183 8 CFR § 1003.23(b)(1) (IJ may “upon his or her own motion at any time” reopen “any case in which he or she has made a decision, unless jurisdiction is vested with the [BIA]”); 8 CFR § 1003.2(a) (BIA may “at any time reopen . . . on its own motion any case in which it has rendered a decision”).

184 *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); see also *Matter of Yewondwosen*, 21 I&N Dec. at 1027 (noting that the BIA “has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone would not preclude such action”).

185 See, e.g., *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Lenis v. Att’y Gen.*, 525 F.3d 1291, 1294 (11th Cir. 2008); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Doh v. Gonzales*, 193 F. App’x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999). But see, e.g., *Sang Goo Park v. Att’y Gen.*, 846 F.3d 645, 654 (3d Cir. 2017) (noting limited exceptions where court can review denial of *sua sponte* reopening); *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (as amended) (noting that the court has jurisdiction to review BIA decisions “denying *sua sponte* reopening for the limited purpose of reviewing the reasoning behind the decisions for legal or constitutional error”); *Anaya-Aguilar v. Holder*, 697 F.3d 1189 (7th Cir. 2012) (noting that the court is not foreclosed from reviewing “the Board's denial of a motion to reopen *sua sponte* in cases where a petitioner has a plausible constitutional or legal claim that the Board misapplied a legal or constitutional standard”).

Practitioners may rely on the same facts that would support a tolled 90-day deadline argument and should emphasize any pending application for relief or the client's eligibility for a form of relief. The below subsections discuss various types of cases in which the BIA has granted *sua sponte* reopening and which may be relevant in the DACA context.¹⁸⁶ Because *sua sponte* reopening is reserved for exceptional situations, practitioners should carefully develop, document, and present all equities in the client's case, in addition to establishing a basis for *sua sponte* reopening. Practitioners should review BIA cases to see in what circumstances the BIA has exercised its *sua sponte* authority to reopen. The Immigrant and Refugee Appellate Center index is an excellent source of unpublished BIA decisions.¹⁸⁷

a. Sua Sponte - Pursue Previously Unavailable Relief or Acquires Lawful Status

A common basis for seeking reopening is in order to pursue new, previously unavailable relief from removal. Examples of situations where the BIA has reopened *sua sponte* in light of new available relief include:

- Evidence that the respondent's U nonimmigrant status petition was conditionally approved via a letter from USCIS¹⁸⁸
- Evidence that the respondent had been granted DACA, had married a U.S. citizen, and had an approved I-130 petition (to pursue adjustment of status)¹⁸⁹
- Evidence that respondent, a TPS recipient, had returned on a grant of advance parole and was now eligible for adjustment of status through her U.S. citizen spouse¹⁹⁰
- Evidence that the respondent had an approved Special Immigrant Juvenile Status (SIJS) petition, or a pending state court custody action where SIJS findings would be sought¹⁹¹
- Evidence of an approved or pending visa petition filed by a U.S. citizen spouse or child¹⁹²

¹⁸⁶ There are other bases for *sua sponte* motions not covered in this advisory. For example, while *sua sponte* motions to reopen based on a change in criminal convictions are generally an option, this reopening ground would not likely apply to DACA recipients because a conviction serious enough to make an individual removable or ineligible for relief would have rendered him or her ineligible for DACA. Another ground for *sua sponte* reopening not specifically covered here is where there has been a "profound" change in law, *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999); see *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998) (*sua sponte* reopening warranted after "fundamental" change in asylum law allowing claims based on coercive population control policies). Practitioners are encouraged to review unpublished BIA decisions and explore creative arguments for other bases for *sua sponte* motions not covered here.

¹⁸⁷ Information about how to purchase the IRAC index can be found on the IRAC website, at <http://www.irac.net/unpublished/index/>.

¹⁸⁸ *Dirav Dolatbhai Patel*, A201-183-819 (BIA Sept. 15, 2017) (unpublished), available at <https://www.scribd.com/document/362582274/Dirav-Dolatbhai-Patel-A201-183-819-BIA-Sept-15-2017>.

¹⁸⁹ See, e.g., *Miguel Yun Wi*, A072-443-439 (BIA Dec. 11, 2017) (unpublished), available at https://www.scribd.com/document/369892346/Miguel-Yun-Wu-A072-443-439-BIA-Dec-11-2017?secret_password=hno7Vt8tnIrse6wIIQqf; *Francisco Villagrana-Robles*, A094-984-254 (BIA Mar. 27, 2017) (unpublished), available at <https://www.scribd.com/document/346336602/Francisco-Villagrana-Robles-A094-984-254-BIA-March-27-2017>.

¹⁹⁰ *Ketlie Augustin*, A097-199-166 (BIA Mar. 17, 2017) (unpublished), available at <https://www.scribd.com/document/346334508/Ketlie-Augustin-A097-199-166-BIA-March-17-2017>.

¹⁹¹ *B-A-M-G-*, AXXX-XXX-558 (BIA Dec. 27, 2016) (unpublished), available at <https://www.scribd.com/document/337536726/B-A-M-G-AXXX-XXX-558-BIA-Dec-27-2016> (pending custody action in state court); *S-D-A-A-*, AXXX-XXX-716 (BIA Dec. 27, 2016) (unpublished), available at <https://www.scribd.com/document/337536365/S-D-A-A-AXXX-XXX-716-BIA-Dec-27-2016> (approved SIJS petition; reopening *in absentia* removal order).

¹⁹² See, e.g., *Lassana Dembele*, A075-835-755 (BIA Dec. 22, 2017) (unpublished), available at https://www.scribd.com/document/369893495/Lassama-Dembele-A075-835-755-BIA-Dec-22-2017?secret_password=roLwAbBsGoKmIeIXxG7W (noting other positive discretionary factors such as lack of criminal record, history of employment and payment of taxes, lengthy residence in the United States, and seven U.S. citizen children); *Tunde Olayinka Awaye*, A076-971-012 (BIA July 1, 2016) (unpublished), available at <https://www.scribd.com/document/318844376/Tunde-Olayinka-Awaye-A076-971-012-BIA->

- Evidence that the respondent feared return to her home country due to past abuse by her partner¹⁹³
- Evidence of an approved VAWA self-petition¹⁹⁴
- DACA recipient had obtained permission to travel on advance parole to visit her mother after surgery, but could not depart the United States with an outstanding removal order without “self-deporting”¹⁹⁵
- To pursue voluntary departure,¹⁹⁶ including where the IJ failed to advise *pro se* respondent of the option of voluntary departure,¹⁹⁷ and
- So that respondent could pursue I-601A waiver and DACA adjudication while residing in the United States.¹⁹⁸

In some situations, a request for *sua sponte* reopening may be based on the applicant’s having already obtained lawful status. In such situations, the applicant may be asking the IJ or BIA to reopen and terminate at the same time based on the person’s having lawful status. For example, an individual having obtained U nonimmigrant status or having adjusted status through U status could seek *sua sponte* reopening and termination based on the acquisition of lawful status. Similarly, in unpublished decisions the BIA has reopened and terminated *sua sponte* where the respondent has acquired derivative asylee status.¹⁹⁹

DACA Context. Given the characteristics discussed in section II above, many DACA recipients may be or may become eligible for relief that was unavailable at the time of the removal proceedings, such as non-LPR cancellation of removal,²⁰⁰ family-based adjustment, or humanitarian relief like VAWA or U nonimmigrant status. DACA recipients with potential asylum claims may also consider making *sua sponte* arguments in the alternative to statutory arguments based on changed country conditions, as discussed in section IV.A.5. While the statutory argument is certainly preferable, an alternative *sua sponte* argument may be warranted particularly

July-1-2016; Luis Eduardo Munoz-Castellon, A094-230-428 (BIA Sept. 24, 2015) (unpublished), available at <https://www.scribd.com/document/285938690/Luis-Eduardo-Munoz-Castellon-A094-230-428-BIA-Sept-24-2015>

193 Iris Jeanette Benites-Maurisio, A099-679-349 (BIA Sept. 3, 2015) (unpublished), available at <https://www.scribd.com/document/281170813/Iris-Jeanette-Benites-Maurisio-A099-679-349-BIA-Sept-3-2015> (rescinding *in absentia* order and reopening proceedings).

194 E-F-, AXXX-XXX-802 (BIA May 5, 2015) (unpublished), available at <https://www.scribd.com/doc/265986142/E-F-AXXX-XXX-802-BIA-May-5-2015>.

195 Yessica Mayeli Colotl-Coyotl, A200-599-796 (BIA Oct. 6, 2016) (unpublished), available at <https://www.scribd.com/document/328157753/Yessica-Mayeli-Colotl-Coyotl-A200-599-796-BIA-Oct-6-2016>.

196 Rosa Amparo Salmeron, A072-163-739 (BIA Oct. 24, 2013) (unpublished), available at <https://www.scribd.com/document/182343652/Rosa-Amparo-Salmeron-A072-163-739-BIA-Oct-24-2013>; Carlos Andres Palaez, A096-985-160 (BIA Sept. 27, 2013) (unpublished), available at <https://www.scribd.com/doc/178496061/Carlos-Andres-Palaez-A096-985-160-BIA-Sept-27-2013>.

197 Jose Israel Chavarria-Reyes, A206-274-376 (BIA Apr. 10, 2017) (unpublished), available at <https://www.scribd.com/document/346342741/Jose-Israel-Chavarria-Reyes-A206-274-376-BIA-April-10-2017>.

198 Juan Luis Avalos Avalos, A205-834-943 (BIA Dec. 31, 2013) (unpublished), available at <https://www.scribd.com/document/198429668/Juan-Luis-Avalos-Avalos-A205-834-943-BIA-Dec-31-2013> (remanding for IJ for further consideration because IJ gave insufficient reasoning for his decision).

199 Ming Yue Piao, A096-187-617 (BIA Dec. 15, 2016) (unpublished), available at <https://www.scribd.com/document/337533566/Ming-Yue-Piao-A096-187-617-BIA-Dec-15-2016> (approved I-730); Yu Qing Chen, A077-977-214 (BIA Oct. 20, 2016) (unpublished), available at <https://www.scribd.com/document/330537440/Yu-Qing-Chen-A077-977-214-BIA-Oct-20-2016>; Jin Wei Gao, A079-692-001 (BIA Jan. 31, 2007) (unpublished), available at <https://www.scribd.com/document/339404202/Jin-Wei-Gao-A079-692-001-BIA-Jan-31-2007>.

200 In assessing cancellation eligibility, practitioners would need to look at the date the original NTA was served and analyze whether the NTA stop-time rule operated to terminate the period of continuous physical presence before the required ten years was accrued. For more information on requirements for non-LPR cancellation, see CLINIC, *Practice Advisory: Non-Lawful Permanent Resident Cancellation of Removal Under INA 240A(b) for DACA Recipients* (forthcoming 2018), which will be available on the CLINIC website at www.cliniclegal.org.

in cases where there are hurdles to meeting the statutory requirements, such as if the asylum claim is based on changed personal circumstances but it may be more difficult to show changed country conditions.

b. Sua Sponte - Ineffective Assistance of Counsel

Ineffective assistance of counsel can serve as a basis for seeking *sua sponte* reopening. As discussed above, it can also be grounds for argument that the 90-day deadline should be tolled.²⁰¹ Practitioners may want to argue for both in the alternative, as the BIA may be more inclined in some instances to grant *sua sponte* reopening than to recognize that the requirements for equitable tolling have been met. On the other hand, federal court review of a denied untimely motion may be more likely if based on equitable tolling rather than *sua sponte* authority.²⁰² In unpublished decisions, the BIA has granted *sua sponte* reopening due to counsel error in circumstances including:

- The respondent missed the filing deadline set by the IJ for submitting an application for cancellation of removal due to his representative's admitted error²⁰³
- The respondent's counsel failed to identify relevant immigration relief, including failure to develop or present an asylum claim,²⁰⁴ or
- The respondent's former attorney did not tell him about the hearing until the night before (respondent lived in New York and the hearing was in Atlanta), resulting in an *in absentia* removal order.²⁰⁵ In this case, the BIA had previously denied the motion for failure to comply with *Lozada* and granted the motion after *Lozada* compliance.

c. Sua Sponte – Claim to Acquired U.S. Citizenship

Another basis for *sua sponte* reopening that has been recognized by the BIA in unpublished decisions is where there is a claim to acquired or derived²⁰⁶ U.S. citizenship.

A person may have acquired U.S. citizenship at birth despite being born abroad if at least one U.S. citizen parent meets the relevant requirements of residence in the United States.²⁰⁷ The law governing how long a U.S. citizen parent must have resided in the United States in order to convey citizenship to a child born abroad has changed over the years.²⁰⁸ The length of time the parent must have lived in the United States before his or her child born

201 See section IV.A.2-3 *supra*.

202 See note 185 *supra* and accompanying text.

203 *Luis Alberto Sosa-Alvarado*, A200-718-257 (BIA Jan. 17, 2017) (unpublished), available at <https://www.scribd.com/document/339309391/Luis-Alberto-Sosa-Alvarado-A200-718-257-BIA-Jan-17-2017>.

204 *F-M-A-*, AXXX-XXX-656 (BIA July 13, 2015) (unpublished), available at <https://www.scribd.com/document/274420825/F-M-A-XXX-XXX-656-BIA-July-13-2015>.

205 *Tashthed Haider Kabir*, A096-114-231 (BIA Jan. 21, 2011) (unpublished), available at <https://www.scribd.com/document/173113823/Tashthed-Haider-Kabir-A096-114-231-BIA-Jan-21-2011>.

206 It is unlikely that DACA recipients derived U.S. citizenship under the current and former law. One of the conditions of derivative citizenship is obtaining lawful permanent residency. Under such circumstances, a child would not have needed DACA. For more information on derivation of citizenship by children born abroad, practitioners should refer to the Immigrant Legal Resource Center's (ILRC) chart on this topic. ILRC, *Chart C: Derivative Citizenship – Lawful Permanent Resident Children Gaining Citizenship through Parents' Citizenship* (June 2017), available at http://www.ilrc.org/sites/default/files/resources/natz_chart_c-20170627.pdf.

207 INA §§ 301, 309.

208 Per the U.S. Supreme Court, both unwed fathers and unwed mothers are currently subject to the same physical presence requirements under INA § 301(g). See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (holding that on or after June 13, 2017 unwed mothers would be subject to the same five-year physical presence requirement in INA § 301(g) as unwed fathers and married couples).

abroad will acquire citizenship depends on which law was in effect on the date of the child's birth and whether the child was born in or out of wedlock. For example, for children born in wedlock on or after November 14, 1986, to one U.S. citizen and one noncitizen parent, the U.S. citizen parent must have been physically present in the United States or its possessions for at least five years prior to the child's birth, two of which were after the parent turned 14 years of age.²⁰⁹ If the child was born out of wedlock to a U.S. citizen father, the statute specifies that proof of legitimation and of meeting other eligibility requirements must be provided.²¹⁰ A child born out of wedlock may qualify as legitimate if he or she was born in a country or state that has eliminated all legal distinctions between children based on the marital status of their parents, or had a residence or domicile in such a country or state (including a state within the United States).²¹¹ If the child's parent does not meet the physical presence requirement, the child may rely on the physical presence of the child's U.S. citizen grandparent to meet the requirement.²¹² Like the citizen parent, a grandparent's physical presence is calculated in the aggregate and includes time accrued in the United States during periods when the grandparent was not a U.S. citizen.²¹³ For more information on acquisition of citizenship by children born abroad, practitioners should refer to the ILRC charts setting out the requirements for acquisition of citizenship by children born abroad.²¹⁴

The BIA has granted *sua sponte* reopening for citizenship claims in circumstances such as where:

- The respondent submitted proof that the Department of State had issued him a passport, even though the IJ and BIA had previously denied his citizenship claim,²¹⁵ and
- The respondent submitted evidence that he had derived citizenship while under the age of 18, including copies of his green card and birth certificate and a copy of his mother's naturalization certificate.²¹⁶

DACA Context. The mass deportations of Mexicans from the 1930s until the 1950s ensnared U.S. citizens of Hispanic origin.²¹⁷ There may thus be DACA recipients who have a U.S. citizen parent or parents or U.S. citizen grandparents who themselves may be unaware of their own claim to U.S. citizenship but may nonetheless have transmitted citizenship at birth to the DACA recipient. For this reason, it is important to ask about the citizenship of grandparents in addition to the citizenship of parents, which could establish a claim to derived or acquired U.S. citizenship.

209 INA §301(g).

210 INA §309(a); see *Miller v. Albright*, 523 U.S. 420, 431 (1998); *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (discussing legitimation in Mexico); *Anderson v. Holder*, 673 F.3d 1089, 1097-1101 (9th Cir. 2012); *Matter of Rowe*, 23 I&N Dec. 962 (BIA 2006) (discussing legitimation in Guyana) (overruled in part); *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008) (discussing legitimation in Jamaica) (overruled in part).

211 *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015).

212 INA § 322(a)(2)(B).

213 See USCIS, *Policy Manual*, Vol. 12, Pt. H, Ch. 5, available at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter5.html>.

214 ILRC, *Chart A: Determining Whether Children Born Outside the U.S. Acquired Citizenship at Birth* (Aug. 2017), available at http://www.ilrc.org/sites/default/files/resources/natz_chart_a-20170905.pdf; ILRC, *Chart B: Acquisition of Citizenship Determining If Children Born Abroad Out of Wedlock Acquired U.S. Citizenship at Birth* (2017), available at http://www.ilrc.org/sites/default/files/resources/natz_chart-b-2017-8-23.pdf.

215 *Nidal Shawkat Salem*, A046-010-157 (BIA Oct. 24, 2016) (unpublished), available at <https://www.scribd.com/document/330538575/Nidal-Shawkat-Salem-A046-010-157-BIA-Oct-24-2016> (remanding to IJ for further proceedings rather than terminating).

216 *Heyman Martinez*, A073-661-308 (BIA July 27, 2012) (unpublished), available at <https://www.scribd.com/document/148370353/Heyman-Martinez-A073-661-308-BIA-July-27-2012> (remanding for further proceedings before the IJ).

217 Eyder Peralta, *It Came Up in the Debate: Here Are 3 Things to Know About "Operation Wetback,"* NPR, Nov. 11, 2015, <https://www.npr.org/sections/thetwo-way/2015/11/11/455613993/it-came-up-in-the-debate-here-are-3-things-to-know-about-operation-wetback>.

d. Sua Sponte - Humanitarian Reasons

The BIA may also grant *sua sponte* reopening where there are compelling equities and the applicant demonstrates the availability of some form of relief. Examples of cases with available relief where the BIA granted *sua sponte* reopening citing humanitarian factors include:

- The respondent presented evidence of U.S. citizen immediate family members serving in the Armed Forces²¹⁸
- The respondent presented evidence of a serious medical problem affecting the respondent or a U.S. citizen or lawful permanent resident family member,²¹⁹ and
- The respondent presented evidence of significant ties, including length of presence in the United States and U.S. citizen family members.²²⁰

DACA Context. Due to the nature of the DACA benefit, DACA recipients will likely have multiple compelling humanitarian factors they can emphasize in a request for *sua sponte* reopening, such as length of time in the United States, U.S. citizen or permanent resident family members, family service in the Armed Forces, and educational attainment. Of course, equities should be presented along with evidence and arguments of new, previously unavailable evidence that would likely have changed the outcome, such as eligibility for a previously unavailable form of immigration relief.

B. Motions to Reopen for Individuals with *In Absentia* Orders

An *in absentia* order can be reopened by filing a motion to rescind and reopen under INA § 240(b)(5)(C).²²¹ It is important to note that the current law governing reopening of *in absentia* orders went into effect on April 1, 1997. For individuals whose proceedings commenced prior to that date, different rules apply.²²² This section will focus on statutory motions to rescind and reopen under INA § 240(b)(5)(C).

Even if a respondent does not meet one of the statutory bases discussed below for a motion to rescind and reopen an *in absentia* order, the regulations discussed in sections IV.A.6 and IV.A.7 above apply in the *in absentia* context and provide for reopening without a deadline where DHS joins the motion or in an exercise of the court's *sua sponte* authority. Practitioners should review sections IV.A.6 and IV.A.7 for a discussion of

218 Rolando Protocarrero Tello, 097-659-598 (BIA Sept. 5, 2017) (unpublished), available at <https://www.scribd.com/document/360078234/Rolando-Protocarrero-Tello-A097-659-598-BIA-Sept-5-2017> (remanding for consideration of adjustment or status or any other available relief).

219 Albaji Shoku Lamin, A079-236-239 (BIA July 18, 2017) (unpublished), available at <https://www.scribd.com/document/357068700/Alhaji-Shoku-Lamin-A079-236-239-BIA-July-18-2017> (respondent had sickle cell disease and had approved I-130 petition based on a U.S. citizen spouse); Kanubhai Lalbhai Bhatt, A073-183-507 (BIA Oct. 28, 2013) (unpublished), available at <https://www.scribd.com/document/183270217/Kanubhai-Lalbhai-Bhatt-A073-183-507-BIA-Oct-28-2013> (LPR wife had serious health issues); Jose Adan Robles, A-073-567-320 (BIA Aug. 30, 2011) (unpublished), available at <https://www.scribd.com/doc/199158553/Jose-Adan-Robles-A073-567-320-BIA-Aug-30-2011> (respondent presented evidence of the medical condition of the mother of his U.S. citizen children; remanded to apply for cancellation).

220 Cristobal Villatoro, A077-751-555 (BIA Jan. 31, 2017) (unpublished), available at <https://www.scribd.com/document/339404020/Cristobal-Villatoro-A077-751-555-BIA-Jan-31-2017> (adjustment-eligible and had approved petition with current visa number).

221 For further resources on reopening of *in absentia* orders, see Asylum Seeker Advocacy Project & CLINIC, *A Guide to Assisting Asylum Seekers with In Absentia Removal Orders* (Dec. 2016), available at <https://cliniclegal.org/resources/guide-assisting-asylum-seekers> [hereinafter "Guide for Asylum Seekers with *In Absentia* Orders"]; AIC *In Absentia Practice Advisory*, *supra* note 62. The authors relied heavily on these helpful resources in writing this section.

222 INA § 242B (pre-IIRIRA statute); see AIC *In Absentia Practice Advisory*, *supra* note 62 (discussing legal frameworks that applied before June 13, 1992 and before April 1, 1997).

joint and *sua sponte* motions. When crafting *sua sponte* arguments, practitioners should review unpublished BIA decisions finding *sua sponte* reopening warranted in the *in absentia* context.²²³ Unlike statutory motions to rescind and reopen an *in absentia* order discussed here, the regulatory motions do not provide an automatic stay of removal, and judicial review of BIA decisions on this type of motion may be more limited than for statutory motions. For these reasons, where possible, practitioners should assert regulatory grounds in the alternative to one or more of the statutory bases. For example, where applicable, practitioners should argue *sua sponte* reopening in addition to a tolling of the 180-day deadline for extraordinary circumstances based statutory motions, discussed below.

Where applicable, and although the statute indicates different reopening rules for *in absentia* orders, practitioners filing a motion to reopen within 90 days of the *in absentia* removal order may argue under both general motion to reopen rules described at INA § 240(c)(7) and the *in absentia* rules.²²⁴ In practice, some IJs may be more willing to reopen an *in absentia* removal order based on the more familiar INA § 240(c)(7) grounds. The mechanisms for reopening under INA § 240(c)(7) are discussed above in section IV.A.1.

1. Did the Respondent Fail to Appear?

The *in absentia* provisions apply to a noncitizen who “does not attend” a removal proceeding after written notice.²²⁵ A first line of attack to consider is whether the respondent really failed to appear. In some situations, a respondent may have come to court on the day of the hearing but a removal order was issued because he or she arrived late. Some federal courts and the BIA in unpublished decisions have concluded that a late arrival is not a failure to appear. These arguments may be particularly successful where the respondent arrived while the IJ was still on the bench,²²⁶ arrived only a short amount of time after the hearing,²²⁷ or there were other unforeseen

223 See, e.g., *A-A-R-C-*, AXXX-XXX-104 (BIA Dec. 20, 2017) (unpublished), available at https://www.scribd.com/document/369893062/A-A-R-C-AXXX-XXX-104-BIA-Dec-20-2017?secret_password=ae4f7wFtZb0U0xIOjdN (reopening *sua sponte* where the respondent was five years old when her parents abandoned her in the United States and she was potentially eligible for SIJS. The child had been in proceedings with her father, who had been personally served and had failed to change his address with the court); *Isela Esmeralda Hernandez-Reyes*, A098-719-936 (BIA Dec. 9, 2016) (unpublished), available at <https://www.scribd.com/document/334719052/Isela-Esmeralda-Hernandez-Reyes-A098-719-936-BIA-Dec-9-2016> (reopening an 11-year old *in absentia* order where the parties had jointly filed a motion to reopen); *Bilal Hassan Dyook*, A076-305-737 (BIA July 22, 2015) (unpublished), available at <https://www.scribd.com/document/274512169/Bilal-Hassan-Dyook-A076-305-737-BIA-July-22-2015> (reopening 14-year old *in absentia* order where the parties had filed a joint motion to reopen and terminate for the respondent to pursue adjustment of status).

224 See *Matter of Monges-Garcia*, 25 I&N Dec. 246 (BIA 2010) (90-day motion to reopen an *in absentia* deportation order was proper vehicle in order to pursue adjustment of status).

225 INA § 240(a)(5)(A).

226 *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008) (respondent arrived two hours late due to car failure while IJ still in courtroom); *Sukhdev Singh*, A209-154-612 (BIA Aug. 25, 2017) (unpublished), available at <https://www.scribd.com/document/360077856/Sukhdev-Singh-A209-154-612-BIA-Aug-25-2017>; *Mingyue Hu*, A205-625-592 (BIA May 19, 2017) (unpublished), available at <https://www.scribd.com/document/351904150/Mingyue-Hu-A205-625-592-BIA-May-19-2017>.

227 See, e.g., *Abu Hasirah v. DHS*, 478 F.3d 474 (2d Cir. 2007) (respondent was 15 minutes delayed; holding that “brief, innocent lateness does not constitute a failure to appear”); *Cabrera Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006) (respondent arrived 15 to 20 minutes late; concluding that “[w]hen the delay is as short as it was here, there have been no prior instances of tardiness, and the IJ is either still on the bench or recently retired and close by, it is a due process violation to treat the tardiness as a failure to appear”); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005) (respondent arrived 20 minutes late; concluding that “[w]hen . . . (1) there is no failure but only a slight tardiness, (2) the IJ is either still on the bench or recently retired and still close by, and (3) the time of the immigrant’s delayed arrival is still during ‘business hours,’ it is an abuse of discretion—if not worse—to treat such slight tardiness as a non-appearance”); *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999) (respondent was 15 to 20 minutes late and arrived while IJ still on the bench; concluding failure to reopen or continue “unreasonably deprived Jerezano of his due process right to a full and fair hearing”); *Gabino Rolando Cortez-Talavera*, A096-748-656 (BIA July 10, 2015) (unpublished), available at <https://www.scribd.com/document/274419844/Gabino-Rolando-Cortez-Talavera-A096-748-656-BIA-July-10-2015> (respondent arrived 30 minutes late). But see *Thomas v. INS*, 976 F.2d 786 (1st Cir. 1992) (reopening not warranted where respondent and counsel arrived 10 minutes late).

reasons for the late arrival such as car trouble.²²⁸ In these circumstances, the practitioner can argue that the *in absentia* order was issued in error and the case should be reopened on that basis.²²⁹

2. Did DHS Meet Its Burden to Prove Removability by “Clear, Unequivocal, and Convincing Evidence”?

The *in absentia* removal provision is triggered when a noncitizen fails to appear at a removal hearing “if the Service establishes by clear, unequivocal, and convincing evidence . . . that the alien is removable.”²³⁰ Practitioners should carefully examine the record of proceedings to determine whether there are arguments that DHS failed to meet its burden to prove removability. Practitioners should examine whether the documents submitted by DHS are unreliable and whether DHS submitted sufficient evidence to support the charge of removability.²³¹ For example, in an unpublished decision from September of 2017, the BIA granted the respondent’s motion to reopen and terminated removal proceedings.²³² In that case, the respondent was seven or eight years old at the time the IJ ordered removal *in absentia*, and the only evidence supporting removability came from a Form I-213 that “contained false information and was not reliable.” The BIA noted that the source of the information in the Form I-213 was an adult male who at first claimed to be the child’s father but was not, and that the I-213 stated that the source of information about the child was a guardian who was not present at the border encounter. In these circumstances, practitioners should argue that reopening and termination is warranted because DHS did not meet its burden to prove removability by clear, unequivocal, and convincing evidence.²³³

Practitioners should consider additional arguments for clients whose *in absentia* order was issued against them as a child, grounded in regulatory protections required in children’s cases. Immigration regulations prohibit the IJ from accepting an admission of removability from an unrepresented and unaccompanied child under the age of 18.²³⁴ In such cases, the IJ must “direct a hearing on the issues.”²³⁵ In *Matter of Amaya*, the BIA noted that the regulations presume that a minor is “incapable of determining whether a charge applies to him.”²³⁶ The BIA thus held that an IJ “must exercise particular care” in determining removability, taking into account the child’s “age and pro se and unaccompanied status,” and conducting a “comprehensive and independent inquiry” to determine

228 *Higinio Rivas-Diaz*, A208-362-593 (BIA July 18, 2017), available at <https://www.scribd.com/document/357068801/Higinio-Rivas-Diaz-A208-362-593-BIA-July-18-2017>.

229 If filing the motion to reopen within 90 days of the removal order, practitioners may seek to argue under the general motion to reopen rules that the *in absentia* removal order was issued in error. In addition, practitioners may argue that the IJ’s finding that the individual failed to appear constituted an exceptional circumstance.

230 INA § 240(a)(5)(A).

231 *Al Mutarreb v. Holder*, 561 F.3d 1023 (9th Cir. 2009) (vacating the removal order and concluding that the IJ had no statutory authority to order removal *in absentia* where “the record contains not an iota of evidence, let alone substantial evidence, to support the IJ’s removability finding” that the respondent had violated the terms of his student visa).

232 *Jordan Omar Nunez-Zepeda*, A097-315-824 (BIA Sept. 29, 2017) (unpublished), available at <https://www.scribd.com/document/362583713/Jordan-Omar-Nunez-Zepeda-A097-315-824-BIA-Sept-29-2017> (reopening where the NTA was not properly served and where the Form I-213 was not reliable).

233 See also Helen Lawrence, Kristen Jackson, Rex Chen & Kathleen Glynn, *Practice Advisory: Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, at 18-19 (Mar. 2015), available at https://cliniclegal.org/sites/default/files/strategies_for_suppressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf (discussing reliability concerns with I-213s in children’s cases). If more than 180 days have passed since the removal order’s issuance, practitioners could argue that the 180-day deadline should not apply where DHS has not met its burden to prove removability, could argue for equitable tolling, and could argue for *sua sponte* reopening in the alternative. Of course, if notice arguments are available as well, those should be included.

234 8 CFR § 1240.10(c) (covering children “not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend”).

235 *Id.*

236 21 I&N Dec. 583, 586 (BIA 1996).

“where there is clear, unequivocal, and convincing evidence” to support the NTA charge(s).²³⁷ The IJ “must consider the reliability of the testimony given by such a minor in response to the factual allegations made against him.”²³⁸ Another regulation directs that all children apprehended by DHS must be given Form I-770, Notice of Rights and Disposition.²³⁹ If the child is under 14 or unable to understand the notice, it must be read to the child in a language he or she understands.²⁴⁰ Given these special protections and after listening to the recording of the hearing, practitioners should consider arguments that the IJ did not conduct the *in absentia* hearing with the particular care required in determining removability of a *pro se* child and that the ground(s) of removability was thus not established by “clear, unequivocal, and convincing evidence” as required to proceed *in absentia*.

3. Statutory Bases to Rescind and Reopen *In Absentia* Orders

The statute provides for rescission and reopening of an *in absentia* order where: (1) the respondent did not receive proper notice; (2) the respondent was in federal or state custody and the failure to appear was not the fault of the respondent; or (3) exceptional circumstances caused the failure to appear.²⁴¹ Filing a motion to rescind and reopen based on any of these grounds results in an automatic stay of removal while the motion is pending with the IJ.²⁴²

a. Notice-Based Arguments: No Deadline

Motions to rescind and reopen *in absentia* removal orders based on lack of notice can be filed at any time.²⁴³ The respondent must be served with the charging document, called the Notice to Appear or NTA (pre-Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) —meaning pre-April 1, 1997—it was called an Order to Show Cause or OSC), and must receive written notice of all hearings. Certain information must be provided in the NTA in order for it to constitute sufficient notice. That information includes the nature of the proceedings, the legal authority for the proceedings, the alleged conduct of the respondent and charges, with statutory provisions alleged to have been violated.²⁴⁴ The NTA must also inform the respondent of the option of being represented by counsel, the obligation to inform the court of change in address or phone number and the consequences of failing to do so, and the consequences of failing to appear at removal proceedings.²⁴⁵ The hearing notice must inform the respondent of the time and place of the hearing and the consequences of failure to appear.²⁴⁶

In proceeding *in absentia*, DHS must prove that the respondent received written notice as described in the above paragraph.²⁴⁷ The rules governing proper service differ depending on whether the person’s proceedings started before IIRIRA went into effect on April 1, 1997 or after. For removal proceedings that began on or after April 1, 1997, service can be effectuated either through personal service or by mail, including attempted delivery by regular mail to the last address provided by the respondent and mail to counsel of record.²⁴⁸ For respondents

²³⁷ *Id.* at 587.

²³⁸ *Id.*

²³⁹ 8 CFR § 236.3(h).

²⁴⁰ *Id.*

²⁴¹ INA § 240(a)(5)(C).

²⁴² *Id.* In *in absentia* deportation cases commenced before April 1, 1997, the stay continues if the IJ denies the motion to reopen and the individual appeals to the BIA. See *Matter of Rivera*, 21 I& Dec. 232, 234 (BIA 1996).

²⁴³ INA § 240(a)(5)(C)(ii); 8 CFR § 1003.23(b)(4)(iii)(A)(2).

²⁴⁴ INA § 240(a)(5)(A), referencing INA § 239(a)(1) & (2). For pre-IIRIRA requirements, see former INA § 242B(a)(1)(A)-(D).

²⁴⁵ INA § 239(a)(1)(E), (F), (G). For pre-IIRIRA requirements, see former INA § 242B(a)(1)(E)-(F).

²⁴⁶ INA § 239(a)(2). For pre-IIRIRA requirements, see former INA § 242B(a)(2).

²⁴⁷ INA § 240(a)(5).

²⁴⁸ INA § 239(c) (“Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).”); INA § 239(a)(1); 8 CFR § 1003.13.

whose charging document (then called an Order to Show Cause) was issued on or after June 13, 1992 but before April 1, 1997, service could be made personally or by certified mail to the respondent or the respondent's counsel of record.²⁴⁹ If service of the charging document was done through certified mail, a certified mail receipt had to be signed by the respondent or a responsible person at that address.²⁵⁰ For respondents whose cases started before June 13, 1992, service could be accomplished by personal service or routine service; however, if a respondent did not appear for the hearing or acknowledge receipt in writing after routine service, then personal service was required, which included certified mail and required that the respondent or another responsible person in the household sign the return receipt.²⁵¹

Rebuttable Presumption of Delivery by Mail. There is a presumption of delivery when a notice is sent by certified mail.²⁵² This presumption can be overcome by showing that the Postal Service did not deliver or improperly delivered the document.²⁵³ There is a weaker presumption of effective delivery for notices sent by regular mail that were "properly addressed mailed according to normal office procedures."²⁵⁴ The IJ must consider "all relevant evidence" when deciding if a respondent can overcome the presumption of delivery for documents sent by regular mail, including:

- Declarations from the respondent and others who are knowledgeable about whether notice was received
- "[T]he respondent's actions upon learning of the *in absentia* order, and whether due diligence was exercised in seeking to redress the situation"
- Any prior applications for relief that would indicate an incentive to appear, and
- The respondent's prior appearance at immigration proceedings, if applicable.²⁵⁵

Practitioners evaluating a notice-based challenge to an *in absentia* order should look at BIA cases as well as U.S. court of appeal decisions in their circuit discussing the presumption of delivery and what types of evidence have been deemed sufficient to overcome the presumption.²⁵⁶

Service by Mail to the Respondent. When service of the NTA is accomplished by mail and the respondent fails to appear at a removal hearing, a notice-based challenge to an *in absentia* removal order can be made if the address where the NTA was mailed was an address provided before the person was in removal proceedings

249 INA § 242B(a)(1) (effective June 13, 1992; now repealed); see *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995) ("...[i]n cases where service of a notice of a deportation proceeding is sent by certified mail through the United States Postal Service and there is proof of attempted delivery and notification of certified mail, a strong presumption of effective service arises," which "may be overcome by the affirmative defense of nondelivery or improper delivery by the Postal Service.").

250 *Grijalva*, 21 I&N Dec. at 32.

251 See former INA § 242(b)(1) (repealed); 8 CFR § 242.1(c) (repealed); 8 CFR § 103.5a(a)(2) (no longer in effect), **redesignated as 8 CFR § 103.8 and revised by 76 Fed. Reg. 53781 (Aug. 29, 2011)**; *Matter of Huete*, 20 I&N Dec. 250 (BIA 1991).

252 *Matter of Grijalva*, 21 I&N Dec. 27, 37 (BIA 1995).

253 *Id.*

254 *Matter of M-R-A-*, 24 I&N Dec. 665, 673 (BIA 2008).

255 *Id.* at 674; *Matter of C-R-C-*, 24 I&N Dec. 677, 680 (BIA 2008) (respondent overcame presumption of delivery of NTA sent by regular mail where he submitted "an affidavit claiming that he has continued to reside at the address to which the Notice to Appear was sent," demonstrated "he had an incentive to appear at proceedings," and exercised "diligence in promptly seeking to redress the situation by obtaining counsel and requesting reopening").

256 See, e.g., *Diaz v. Lynch*, 824 F.3d 758 (8th Cir. 2016); *Hernandez v. Lynch*, 825 F.3d 266 (5th Cir. 2016); *Sanchez v. Holder*, 627 F.3d 226 (6th Cir. 2010); *Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156 (2d Cir. 2008); *Kozak v. Gonzales*, 502 F.3d 34 (1st Cir. 2007); *Santana Gonzalez v. Att'y Gen.*, 506 F.3d 274 (3d Cir. 2007); *Sembiring v. Gonzales*, 499 F.3d 981 (9th Cir. 2007); *Lopes v. Gonzales*, 468 F.3d 81 (2d Cir. 2006); *Nibagwire v. Gonzales*, 450 F.3d 153 (4th Cir. 2006); *Maknojiya v. Gonzales*, 432 F.3d 588 (5th Cir. 2005); *Ghounem v. Ashcroft*, 378 F.3d 740 (8th Cir. 2004); *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002).

and thus before receiving notice of the requirement to update the address for removal proceedings purposes.²⁵⁷ This type of challenge will not be successful if the NTA was mailed to the correct address but the person failed to collect his or her mail.²⁵⁸ If the notice was sent to the correct address but the respondent did not receive it “through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper service will have been effected.”²⁵⁹ If a notice was sent to an incorrect address because a respondent failed to keep the court updated as required after receiving notice of these requirements on the NTA, a notice-based challenge will likely fail.²⁶⁰

Service on the Legal Representative. Service on the respondent’s attorney is considered proper service.²⁶¹ If the attorney did not inform the respondent of the hearing after the attorney received notice, this may be a basis for a motion to reopen based on ineffective assistance of counsel. For further information on requirements for ineffective of assistance of counsel-based motions to reopen, see section IV.A.3 above.

Special Service Rules for Children. Special rules govern service of the NTA in cases of child respondents. The regulations provide specific instructions for service of an NTA in the case of a child under 14 years of age. In such cases, the service “shall be made upon the person with whom . . . the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend.”²⁶² If a child will be residing with a parent in the United States, the BIA has interpreted the regulations to require “service on the parents, whenever possible, in addition to service that may be made on an accompanying adult or more distant relative.”²⁶³ The Ninth Circuit has more stringent service rules for children, requiring that where a child under the age of 18 is released from immigration custody to a parent or relative’s custody, the adult assuming custody of the minor must be served.²⁶⁴ Thus, for individuals with *in absentia* orders who were served the NTA before the age of 14 (or in the Ninth Circuit, before the age of 18), noticed-based challenges to the order can be made when DHS “fail[s] to demonstrate clear, unequivocal, and convincing evidence of proper service of the Notice to Appear” under the more stringent notice requirements for minors.²⁶⁵

DACA Context. Many DACA recipients with *in absentia* orders may have received those orders at a young age. For children who were under 14 at the time the NTA was served, there may be arguments for notice-based rescission and reopening if there is no proof that the NTA was served on a responsible adult as required by the regulation found at 8 CFR § 103.8(c)(2)(ii).²⁶⁶ Those who resided within the jurisdiction of the Ninth Circuit, had been released from federal custody to an adult, and were under 18 at the time the NTA was served, can argue for notice-based rescission and reopening if there is no proof that the responsible adult was served with the NTA as required by *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004). Others may be able to

257 *Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001).

258 *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002) (“It is not reasonable to allow the respondent to defeat service by neglecting or refusing to collect his mail.”).

259 *Matter of G-Y-R-*, 23 I&N Dec. at 189 (citing *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995)).

260 See INA § 240(a)(5)(A).

261 INA § 239(a)(1); INA § 242B(a) (repealed; pre-IIRIRA); see, e.g., *Cruz Gomez v. Lynch*, 801 F.3d 695 (6th Cir. 2015); *Garcia v. INS*, 222 F.3d 1208 (9th Cir. 2000). In the Ninth Circuit, if a respondent is represented and a notice of appearance has been filed, service on the respondent without serving the representative is not considered adequate service. *Hamazaspyan v. Holder*, 590 F.3d 744, 749 (9th Cir. 2009). But see *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997). Practitioners outside the Ninth Circuit should examine whether precedent would allow for a similar argument, where applicable.

262 8 CFR § 103.8(c)(2)(ii).

263 *Matter of Mejia-Andino*, 23 I&N Dec. 533, 536 (BIA 2002).

264 *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004).

265 *Mejia-Andino*, 23 I&N Dec. at 537.

266 This was the case in *Matter of Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002). At the time of the *Mejia-Andino* decision, the regulation was found at 8 CFR § 103.5a(c)(2)(ii); 8 CFR § 103.5a was redesignated as 8 CFR § 103.8 by 76 Fed. Reg. 53781 (Aug. 29, 2011).

formulate notice arguments grounded in other age-based theories, for example:

- If the hearing notice was mailed to the adult caretaker who never informed the child respondent. Note that in *Matter of G-Y-R-*, the BIA stated that “[a]n alien can, in certain circumstances, be properly charged with receiving notice, even though he or she did not personally see the mailed document.”²⁶⁷ In that case, the BIA stated that if the NTA “reaches the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper service will have been effected.” However, practitioners might argue that the minimum due process requirements for children are different, and distinguish this case on the basis of the age and mental incapacity of the child respondent who was dependent on the caretaker to provide him or her with notice.
- If the notice was sent to the adult caretaker, who did give it to the child respondent, but due to the child’s age he or she did not understand the notice. In *Matter of G-Y-R-*, the BIA stated that respondent need not “personally receive, read, and understand the Notice to Appear for the notice requirements to be satisfied.”²⁶⁸ However, practitioners might argue that the minimum due process requirements for children are different, and distinguish this case on the basis of the age and mental incapacity of the child respondent who was dependent on the caretaker to provide him or her with notice.

Respondent in Custody When In Absentia Order Entered. The statute also allows for rescission and reopening of an *in absentia* order where the respondent was in custody at the time of its issuance and was not responsible for the failure to appear.²⁶⁹ For example, a respondent who failed to appear because he or she was being held in federal ICE or ORR custody or federal or state criminal custody and was not transported to his or her hearing could file a motion to rescind and reopen on this ground.²⁷⁰ There is no filing deadline for this type of motion to reopen.²⁷¹ Practitioners should investigate whether this ground applies by ascertaining where the DACA recipient client was residing at the time of the order’s issuance, looking for instances where for example he or she was in ORR custody or state custody related to criminal charges, foster care, or delinquency.

No Oral Notice of Consequences for Failure to Appear and Respondent Eligible for Relief. The BIA in *Matter of M-S-*²⁷² analyzed a prior version of the statute discussing limitations on discretionary relief for those with *in absentia* orders. The statutory language, now found at INA § 240(a)(7), states that if a respondent is “provided oral notice, either in the alien’s native language or in another language the alien understands, of the time and place of the proceedings and of the consequences . . . of failing . . . to attend” removal proceedings, he or she is barred from certain relief for ten years. The BIA held that a respondent who was not given these required oral warnings and qualified for relief that was not available at the time of the *in absentia* hearing could file a motion to reopen, under the “regular” rules governing motions to reopen, rather than the rules for rescinding and reopening an *in absentia* order.²⁷³

²⁶⁷ *Matter of G-Y-R-*, 23 I&N Dec. at 189.

²⁶⁸ *Id.*

²⁶⁹ INA § 240(a)(5)(C)(ii); 8 CFR § 1003.23(b)(4)(iii)(A)(2).

²⁷⁰ See *Benjamin Milton Geovani Gale Vargas*, A205-718-884 (BIA Oct. 31, 2014) (unpublished), available at <https://www.scribd.com/document/246506097/Benjamin-Milton-Geovani-Gale-Vargas-A205-718-884-BIA-Oct-31-2014> (rescinding and reopening where respondent was in California county jail at time of *in absentia* hearing); *Matter of Evra*, 25 I&N Dec. 79 (BIA 2009) (the fact that a respondent is arrested and jailed for criminal conduct does not constitute “fault” for purposes of the *in absentia* provision).

²⁷¹ INA § 240(a)(5)(C)(ii); 8 CFR § 1003.23(b)(4)(iii)(A)(2).

²⁷² 22 I&N Dec. 349 (BIA 1998).

²⁷³ The rules include a filing deadline of 90 days from the time of the removal order. No automatic stay accompanies this type of motion to reopen, unlike the motion to rescind and reopen an *in absentia* removal order under INA § 240(b)(5)(C). See section IV.A.1 *supra*.

b. Exceptional Circumstances-Based Arguments: 180-Day Deadline or Argue Equitable Tolling

The statute also provides for rescission and reopening of an *in absentia* order “if the alien demonstrates that the failure to appear was because of exceptional circumstances.”²⁷⁴ The statute defines this term as “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.”²⁷⁵ An exceptional circumstances-based motion must be filed within 180 days of the order. For deportation proceedings that started before June 13, 1992 and for exclusion proceedings, there is no deadline for filing a motion to reopen an *in absentia* order, and a less strict “reasonable cause” standard applies.²⁷⁶

To decide whether a respondent’s failure to appear was the result of exceptional circumstances, the BIA has directed that a “totality of the circumstances” test be used to look at the reasons why the respondent did not appear.²⁷⁷ Practitioners should examine BIA case law and precedents in their jurisdiction that discuss what amounts to exceptional circumstances. For example, while serious illness may be an exceptional circumstance under INA § 240(e)(1), the BIA in *Matter of J-P*²⁷⁸ concluded that a respondent’s headache was not. In that case the BIA found it relevant that the respondent had failed to provide evidence that the headache was serious such as details regarding its severity, cause, or treatment, medical records, affidavits from witnesses “attesting to the extent of his disability and the remedies used,” or evidence of absence from work. The BIA also found that the fact that the respondent had not attempted to contact the immigration court to notify it of his absence undermined his exceptional circumstance claim.²⁷⁹ The BIA has found that ineffective assistance of counsel may amount to an exceptional circumstance.²⁸⁰ There are excellent practice advisories available discussing exceptional circumstances and examining precedential cases as well as unpublished BIA decisions.²⁸¹

Equitable Tolling. While the BIA has not recognized equitable tolling of the 180-day deadline in a published decision,²⁸² every U.S. court of appeals that has addressed the issue in a published decision has found equitable tolling applies.²⁸³ Equitable tolling generally is discussed above at section IV.A.2. Practitioners should review precedents in their jurisdiction to examine the viability of equitable tolling arguments for a motion to rescind

274 INA § 240(b)(5)(C)(i).

275 INA § 240(e)(1).

276 *Matter of N-B*, 22 I&N Dec. 590, 593 (BIA 1999); *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1159 (BIA 1999); *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988).

277 *Matter of W-F*, 21 I&N Dec. 503 (BIA 1996) (concluding that being on a fishing boat for work was not an exceptional circumstance).

278 22 I&N Dec 33 (BIA 1998).

279 See also *Matter of B-A-S*, 22 I&N Dec. 57 (BIA 1998) (respondent’s foot injury not an exceptional circumstance where he did not explain why he did not contact the immigration court before the hearing and did not provide supporting documentation such as medical records).

280 *Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996); *Matter of Rivera*, 21 I&N Dec. 599 (BIA 1996) (must meet *Lozada* requirements).

281 See Guide for Asylum Seekers with *In Absentia* Orders, *supra* note 221; AIC *In Absentia Practice Advisory*, *supra* note 62.

282 See *Matter of A-A*, 22 I&N Dec. 140 (BIA 1998). But see *Seidi Elda Sandoval Landero*, A088-056-174 (BIA Nov. 20, 2015) (unpublished), available at <https://www.scribd.com/document/293444660/Seidi-Elda-Sandoval-Landero-A088-056-174-BIA-Nov-20-2015>; *Luis Alfredo Castro*, A200-226-899 (BIA Oct. 29, 2015) (unpublished), available at <https://www.scribd.com/document/290079633/Luis-Alfredo-Castro-A200-226-899-BIA-Oct-29-2015>.

283 See, e.g., *Avila-Santoyo v. Att’y Gen.*, 713 F.3d 1357, 1364 n.4 (11th Cir. 2013) (en banc); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Pervais v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); see also *Davies v. INS*, 10 Fed. App’x 223, 224 (4th Cir. 2001) (per curiam) (unpublished); cf. *Vaz Dos Reis v. Holder*, 606 F.3d 1, 4 n.3 (1st Cir. 2010) (noting that the First Circuit has not decided this question); *Pafe v. Holder*, 615 F.3d 967, 968 (8th Cir. 2010) (per curiam) (noting that the Eighth Circuit has not decided this issue in the *in absentia* motion to reopen context); *Scorteanu v. INS*, 339 F.3d 407, 413 (6th Cir. 2003) (not reaching issue of tolling in the *in absentia* context).

and reopen an *in absentia* order that is more than 180 days old based on exceptional circumstances.

DACA Context. Most likely, a DACA recipient with an *in absentia* order received it a long time ago, before he or she requested or received DACA. Were it not for the deadline problem, many DACA recipients might have compelling exceptional circumstances arguments for why he or she failed to attend. If an exceptional circumstances-based motion to rescind and reopen is untimely under the 180-day statutory deadline, practitioners should examine whether equitable tolling of the deadline may be available. Practitioners should argue for equitable tolling of the 180-day deadline and make *sua sponte* arguments in the alternative.

C. Strategies for Overcoming the Ten-Year Bar to Immigration Relief After Overstaying a Grant of Voluntary Departure²⁸⁴

Respondents who fail to depart after a grant of voluntary departure are ineligible to pursue certain immigration relief including adjustment of status, cancellation of removal, and voluntary departure for a period of ten years under INA § 240B(d)(1)(B), or five years if the voluntary departure order was issued in proceedings commenced before April 1, 1997.²⁸⁵ Depending on the jurisdiction, this relief bar may apply even if the individual is successful in obtaining reopening of the removal order.²⁸⁶ In many cases, DACA recipients have received voluntary departure more than five or ten years ago, in which case the voluntary departure five- or ten-year bar to seeking “any further relief” under specified parts of the INA would no longer apply.²⁸⁷ However, the removal order remains and will impede many adjustment of status options. During past administrations, DHS was willing to join motions to reopen in cases in which the respondent had a departure order from over ten years ago and presented an adjustment of status option.

However, DACA recipients whose failure to depart was due to exceptional circumstances (pre-IIRIRA) or was involuntary (post-IIRIRA) may not be subject to the failure to depart consequences.²⁸⁸ Prior to the enactment of IIRIRA, the penalty for failure to depart contained an “exceptional circumstances” exception for failing to depart within the allotted time.²⁸⁹ The term “exceptional circumstances” meant “exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.”²⁹⁰ IIRIRA eliminated the “exceptional circumstances” exception and added a new narrow exception at INA § 240B(d)(1) specifying that the penalties apply to an individual who

²⁸⁴ For a more in-depth discussion of potential strategies, see AIC Voluntary Departure Advisory, *supra* note 42.

²⁸⁵ See INA § 240B(d)(1)(B) (rendering respondent “ineligible, for a period of 10 years,” for voluntary departure under section 240B, cancellation of removal under section 240A, adjustment of status under section 245, change of nonimmigrant classification under section 248, and registry benefits under section 249); INA § 242B(e)(2)(A) (repealed) (applying to individuals whose proceedings commenced prior to April 1, 1997 and making the noncitizen ineligible for five years “after the scheduled date of departure or the date of unlawful reentry” for the following relief: voluntary departure under former section 242(b)(1), suspension of deportation or voluntary departure under former section 244, and adjustment or change of status under section 245, 248, or 249).

²⁸⁶ Compare *Orchitch v. Gonzales*, 421 F.3d 595 (7th Cir. 2005) (concluding that reopening eliminates the ten-year relief bar) with *Odogwu v. Gonzales*, 217 F. App’x 194, 197 (4th Cir. 2007) (unpublished); *DaCosta v. Gonzales*, 449 F.3d 45, 50–51 (1st Cir. 2006); *Singh v. Gonzales*, 468 F.3d 135, 139–40 (2d Cir. 2006).

²⁸⁷ Under former INA § 242B(e)(2)(A), the five-year penalty period begins to run “after the scheduled date of departure or the date of unlawful reentry.” Under current INA § 240B(d)(1)(B), the individual “shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 240A, 245, 248, and 249.”

²⁸⁸ In 1996, Congress amended the penalty provision for failure to depart pursuant to a grant of voluntary departure in a number of ways. IIRIRA eliminated the “exceptional circumstances” exception and added a new clause specifying that the penalties apply to an alien who “fails voluntarily to depart.” See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. at 3009-597.

²⁸⁹ INA § 242B(e)(2)(A) (repealed).

²⁹⁰ INA § 242B(e)(2)(B) (repealed).

“voluntarily fails to depart.”²⁹¹ The BIA has held that an individual who “through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart” does not incur the failure to depart penalties.²⁹² The BIA reasoned that for the bar to come into effect, the failure to depart must be voluntary, and thus a “respondent who, through no fault of her own, remains unaware of the grant of voluntary departure until after the period for voluntary departure has expired cannot be said to have ‘voluntarily’ failed to depart within the period of voluntary departure.”²⁹³ Proving the “voluntariness” exception is thus a basis for reopening the removal order that resulted from failure to depart on an order of voluntary departure, by showing that relief is not barred by section 240B(d)(1).

The voluntary departure statute also provides an exception to the ten-year relief bar for individuals seeking VAWA cancellation, adjustment of status through a VAWA self-petition, or suspension of removal under former INA § 244(a)(3), if “extreme cruelty or battery was at least one central reason for the alien’s overstaying the grant of voluntary departure.”²⁹⁴

DACA Context. For DACA recipients who failed to depart after a grant of voluntary departure, practitioners should explore arguments that the failure to depart was not voluntary and thus the ten-year bar to relief should not apply.²⁹⁵ These may be particularly compelling for those DACA recipients who were very young when the voluntary departure order was issued and thus could not understand the consequences of not leaving and were not able to leave on their own, or who were subjected to ineffective assistance of counsel. For example, in *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), the respondent’s attorney accepted voluntary departure without consulting with the respondent or obtaining the respondent’s informed consent resulting in ineffective assistance of counsel. In unpublished cases, the BIA has concluded that a respondent’s failure to depart was not voluntary and did not trigger the ten-year bar for relief. For example, in one case the respondent was nine years old at the time of the voluntary departure order and “due to her young age, she did not understand the consequences of not leaving under the voluntary departure order, and was likely unable to depart on her own.”²⁹⁶ As children at the time of the voluntary departure order, DACA recipients would have been financially dependent on an adult and limited in physical mobility. It would thus be unreasonable to expect a child lacking independence to clear the logistical and financial hurdles to voluntarily depart from the United States. Such voluntariness exception arguments would serve as the basis for seeking reopening *sua sponte* in cases where relief is otherwise available, thus removing the ten-year bar to immigration relief caused by failure to depart. In addition, practitioners should also explore notice-based arguments that the bar does not apply, such as analyzing whether the client received proper notice of the voluntary departure order and whether proper advisals were given at time of the voluntary departure grant.²⁹⁷

291 See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, § 304(a)(3), 110 Stat. at 3009-597.

292 *Matter of Zmijewska*, 24 I&N Dec. 87, 94 (BIA 2007).

293 *Id.*

294 INA § 240B(d)(2).

295 If the voluntary departure order was issued in proceedings that commenced before IIRIRA’s effective date, the DACA recipient would be bound by the broader exceptional circumstances standard.

296 *E-R-*, AXXX-XXX-571 (BIA Dec. 21, 2016) (unpublished), available at <https://www.scribd.com/document/337535116/E-R-XXX-XXX-571-BIA-Dec-21-2016>; see also *Valerie Lee Maedgen*, A093-407-562 (BIA May 30, 2014) (unpublished), available at <https://www.scribd.com/document/234123443/Valerie-Lee-Maedgen-A093-407-562-BIA-May-30-2014> (failure to depart not voluntary where respondent stayed in United States relying on promise made by IJ to reopen proceedings if the I-130 was granted during the voluntary departure period).

297 See, e.g., INA § 240B(d)(3) (“The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.”); 8 CFR § 1240.26(c)(3) (before granting voluntary departure, IJ must inform the respondent of conditions to be imposed and give him or her opportunity to decline); 8 CFR § 240.25(b) (“A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.”).

D. Legal Remedies for DACA Recipients with Reinstatement Orders

Some DACA recipients will be subject to reinstatement of a prior removal order, be it an IJ order or a DHS order. These DACA recipients would likely have departed the United States following an order of removal and then been brought back to the United States illegally before the age of 16. Before discussion of potential avenues to relief for DACA recipients with reinstatement orders, it is helpful to briefly summarize the reinstatement process.

The INA provides for reinstatement of removal for noncitizens who reentered the United States illegally after being removed or departing voluntarily under a removal order.²⁹⁸ In such circumstances, “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed,” the noncitizen is barred from seeking most relief from removal, and “shall be removed under the prior order at any time after the reentry.”²⁹⁹ There is no IJ hearing in reinstatement proceedings.³⁰⁰ In reinstatement proceedings, the regulations require that the immigration officer make several determinations:

- That the noncitizen has been subject to a prior removal order. The officer “must obtain the prior order.”³⁰¹
- “The identity of the alien, i.e. whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation or removal.” If identity is disputed, the officer must compare the subject’s fingerprints with those of the individual previously removed. If there are no fingerprints and identity is disputed, the noncitizen “shall not be removed” through reinstatement proceedings.³⁰²
- That the noncitizen unlawfully reentered the United States. The officer must consider “all relevant evidence” in making this determination including any statement or evidence from the noncitizen. If the noncitizen claims to have been lawfully admitted, the officer must “attempt to verify” the claim including checking government records.³⁰³

If the officer makes the above determinations and proceeds with reinstatement, he or she must give the noncitizen written notice of the determination and advise the noncitizen that he or she can make a statement contesting the determination.³⁰⁴ If the noncitizen makes a statement contesting the determination, the officer must consider whether the statement warrants reconsideration of the reinstatement determination.³⁰⁵

If the noncitizen expresses a fear of returning to the country of origin, he or she “shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture.”³⁰⁶ The noncitizen can be represented by counsel at the non-adversarial interview.³⁰⁷ If the noncitizen is

298 Certain individuals are exempt from reinstatement proceedings. For a listing of exempt groups, see American Immigration Council & National Immigration Project of the National Lawyers Guild, *Practice Advisory: Reinstatement of Removal*, at 3 (Apr. 29, 2013), available at http://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_29Apr_reinstate-removal.pdf [hereinafter “Reinstatement Practice Advisory”]. The authors relied heavily on this helpful advisory in drafting this section.

299 INA § 241(a)(5); see section III.B.2 *supra*.

300 8 CFR § 241.8(a).

301 8 CFR § 241.8(a)(1).

302 8 CFR § 241.8(a)(2).

303 8 CFR § 241.8(a)(3).

304 8 CFR § 241.8(b). If the noncitizen is represented, the representative should also be provided notice. 8 CFR 292.5(a).

305 8 CFR § 241.8(b).

306 8 CFR § 241.8(e).

307 8 CFR § 208.31(c).

determined by the asylum officer to have a reasonable fear of persecution or torture, he or she is referred to the immigration court for “withholding-only” removal proceedings during which the regulations provide that the noncitizen is limited to seeking withholding and/or CAT relief before the IJ.³⁰⁸ If the asylum officer does not find a reasonable fear, the noncitizen can have the decision reviewed by an IJ.³⁰⁹ The IJ can affirm the asylum officer’s negative reasonable fear determination, in which case the noncitizen cannot appeal to the BIA,³¹⁰ but may seek review of the reinstatement order and the negative reasonable fear determination by filing a petition for review directly with the relevant U.S. court of appeals.³¹¹ Or the IJ can vacate the negative reasonable fear determination, in which case the noncitizen proceeds with withholding-only removal proceedings.³¹²

While some DACA recipients will want to seek withholding and/or CAT,³¹³ which would serve as a legal remedy to a reinstated order of removal, others will want to approach DHS to seek that agency’s exercise of some form of prosecutorial discretion, such as by cancelling the reinstatement order and instituting section 240 removal proceedings instead.³¹⁴ Because the likelihood of prosecutorial discretion will depend on the administration, practitioners should consider challenging the reinstatement order, a negative reasonable fear determination, and/or, the ultimate denial of withholding and/or CAT relief in withholding-only proceedings. If a DACA recipient is currently being subjected to reinstatement proceedings, the representative should ask for a copy of all documents related to the proceedings.³¹⁵ If the DACA recipient has signed any documents or waived any rights, the practitioner may request to withdraw those signatures and waivers immediately, supplementing the record with any evidence supporting withdrawal. The practitioner also should submit a statement contesting the reinstatement determination where there is a basis to do so, and seek to review the evidence with the client to determine whether there are viable arguments to be made.³¹⁶ It is important to make a record before the agency in order to preserve the issue for potential federal court review.

If a reinstatement order is issued, the practitioner can appeal the order to the relevant U.S. court of appeals

308 8 CFR § 208.31(e). Some courts of appeals have held that a noncitizen in this situation is barred from applying for asylum. *See, e.g., Cazun v. Att’y Gen.*, 856 F.3d 249 (3d Cir. 2017); *Mejia v. Sessions*, 866 F.3d 573 (4th Cir. 2017); *Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1074-82 (9th Cir. 2016); *Jimenez-Morales v. Att’y Gen.*, 821 F.3d 1307, 1310 (11th Cir. 2016); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 489-90 (5th Cir. 2015). Given the ongoing litigation on this issue, and depending on the facts of the case, practitioners may want to preserve the statutory and international law arguments that the government should not preclude asylum seekers from applying for asylum in withholding-only proceedings before an IJ.

309 8 CFR § 208.31(f), (g).

310 8 CFR § 208.31(g)(1). There is no appeal of an IJ’s decision concurring with the asylum officer that there is no reasonable fear of persecution or torture. *Id.*

311 See below discussion about U.S. court of appeals review of a reinstatement order.

312 8 CFR § 208.31(g)(2).

313 If the DACA recipient has a fear of return, the practitioner could assist the DACA recipient in asserting fear and scheduling a reasonable fear interview with an asylum officer. The practitioner should inform the DHS deportation officer orally and in writing that the DACA recipient has a fear of returning and requests a reasonable fear interview. The practitioner can also contact the Asylum Office with jurisdiction explaining that the DACA recipient has requested a reasonable fear interview through DHS and is awaiting scheduling. The practitioner should help the client to prepare ahead of the reasonable fear interview and attend the interview. *See* Katharine Ruhl & Christopher Strawn, *Assessing Protection at the Border: Pointers on Credible Fear and Reasonable Fear Interviews*, Immigration Practice Pointers (2015), AILA Doc. 14072246a, available at www.aila.org/infonet.

314 See *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1081 (9th Cir. 2016) (noting that “the government has discretion to forgo reinstatement and instead place an individual in ordinary removal proceedings”); *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) (noting the agency has “discretion to afford an alien a new plenary removal hearing”). If for some reason a client is not subjected to the reasonable fear process and instead ICE places the individual in the credible fear interview process and/or issues an NTA and places the individual into removal proceedings pursuant to INA § 240, practitioners could argue that DHS has applied favorable discretion and the person is thus not subject to reinstatement. Should DHS attempt to file a motion to terminate the proceedings to institute reinstatement proceedings, practitioners should oppose such a motion.

315 See 8 CFR § 292.5(a) (discussing notice and service rights for representatives generally); 8 CFR § 241.8(b) (requiring DHS to provide written notice of reinstatement determination to noncitizen).

316 8 CFR § 241.8(b).

through a petition for review (PFR) filed within thirty days of the order.³¹⁷ There is no automatic stay of removal when seeking PFR review of a reinstatement order; instead the petitioner can file a motion for a judicial stay of removal with the same U.S. court of appeals where the PFR is filed.³¹⁸ A thorough discussion of possible arguments that could be raised in a PFR is beyond the scope of this advisory.³¹⁹ Arguments to consider might include:

- The individual is a U.S. citizen³²⁰
- There is no prior removal order
- The individual never departed under an order of removal and was never removed
- The individual's reentry was legal
- DHS failed to follow the regulations governing reinstatement proceedings (such as verification of identity, obtaining the prior order, or asking if the person has a fear of return), resulting in prejudice, and
- It may be possible to attack the underlying (prior) removal order, although jurisdiction-stripping provisions could make this difficult. Practitioners should research and determine whether the U.S. court of appeals in their jurisdiction would conclude that it has jurisdiction to consider the legality of the underlying order.³²¹

In reviewing a challenge to a reinstatement order or negative fear-based determination through a PFR, the court of appeals is limited to the administrative record before it, and DHS's factual findings are viewed as "conclusive unless any reasonable adjudicator would be compelled to the contrary."³²² Thus practitioners should be sure that the record below has the necessary evidence to support the arguments, including by supplementing the administrative record before the agency.

317 INA § 242(b)(1). All courts of appeals have concluded there is jurisdiction to review reinstatement orders under INA § 242(b)(1). See *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Warner v. Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001). Practitioners should research the case law of the relevant jurisdiction to determine whether the circuit has also found jurisdiction to review the negative reasonable fear determination. See, e.g., *Ayala v. Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2017) (finding jurisdiction to review the negative reasonable fear determination); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 831 (9th Cir. 2016). The deadline for filing a petition for review for a reinstatement of removal order is 30 days from the date of the order, i.e., the date DHS signed the bottom portion of Form I-871 (Decision, Order and Officer's Certification). INA § 242(b)(1); *Lemos v. Holder*, 636 F.3d 365, 366-67 (7th Cir. 2011); *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 342-43 (1st Cir. 2004). However, where a person indicates a fear of return and DHS refers that person for a reasonable fear interview before an asylum officer, some circuits have held expressly that the 30-day petition for review clock does not begin until the conclusion of reasonable fear proceedings. See, e.g., *Ponce-Osorio v. Johnson*, 824 F.3d 502 (5th Cir. 2016); *Jimenez-Morales v. Atty. Gen.*, 821 F.3d 1307 (11th Cir. 2016); *Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015); *Ortiz-Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012). As a practical matter, unless and until this issue is resolved by the Supreme Court, practitioners may consider filing a petition for review within 30 days of the reinstatement order as a protective measure, and a second petition for review at the conclusion of reasonable fear proceedings in order to preserve an individual's right to judicial review.

318 See CLINIC, *Practice Advisory: Stays of Removal for DACA Recipients with Removal Orders* (Mar. 2018), which will be available on the CLINIC website at www.cliniclegal.org [hereinafter "CLINIC Stay Advisory"].

319 For further information about remedies for reinstatement orders, practitioners should consult Reinstatement Practice Advisory, *supra* note 298.

320 See INA § 242(b)(5).

321 See INA § 241(a)(5); INA § 242(a)(2)(D). For further discussion see Reinstatement Practice Advisory, *supra* note 298.

322 INA § 242(b)(4)(A)-(B).

It may also be possible to seek reopening or reconsideration of the reinstatement order, or the underlying order, by filing an administrative motion to reopen or reconsider with DHS under 8 CFR § 103.5 or, if an IJ issued the original removal order, seeking reopening of the underlying order with the IJ.³²³ If the individual is not already in reinstatement proceedings, but has reentered unlawfully, filing a motion to reopen or reconsider a prior order could trigger ICE detention, reinstatement proceedings, and/or criminal prosecution for illegal reentry after removal. It is important to discuss risks and benefits of any strategy with the client before proceeding so that the client can make an informed decision.³²⁴

None of the strategies discussed above confers an automatic stay of removal; it would instead be necessary to seek a discretionary stay with the appropriate entity.

V. PRACTICAL CONSIDERATIONS FOR MOTIONS TO REOPEN

A. Investigating the Case and Preparing the Motion to Reopen

Providing clients with removal orders with accurate information about their options is key. To meet this goal, it is necessary first to gather as much information as possible about the client's immigration history and particularly his or her previous removal order(s). In situations where the client's previous encounter was at the border, it can be especially difficult to ascertain with certainty whether the client has an order of removal (as opposed to, for example, voluntary return or withdrawal of application for admission) without seeing government records of the encounter. Further, it is necessary to know what type of removal order was issued to determine the appropriate remedy. The information gathering process should include:

- Detailed questioning of the client to get as much information as possible about any encounter with immigration authorities or a removal process.
- Thorough review of all documents in the client's possession that were issued by immigration authorities, including any documents received while in immigration detention.
- Calling the EOIR case status information hotline at 1-800-898-7180 to find out if the client has a removal order issued in immigration court.³²⁵ It is necessary to know the client's A number to get information via this hotline.³²⁶
- Requesting a copy of the client's immigration file via a Freedom of Information Act (FOIA) request

323 For further discussion of this regulatory motion to reopen provision, see Reinstatement Practice Advisory, *supra* note 298. For an example of an unpublished case where the BIA granted reopening, applying equitable tolling principles, of a prior IJ-issued removal order for an individual in reinstatement proceedings, see *Juvenal Valdovinos-Lopez*, A200-684-816 (BIA June 29, 2016) (unpublished), available at <https://www.scribd.com/document/318828163/Juvenal-Valdovinos-Lopez-A200-684-816-BIA-June-29-2016>.

324 See also discussion *infra* at section V.B about ethical and criminal liability issues.

325 Practitioners should not solely rely on the EOIR hotline. The hotline was established in 1995 and it includes pre-1995 cases, but the hotline will only issue information for the most recent case before EOIR. For example, if a person had a case pre-1995 and that was the only case with EOIR, then the hotline will offer that information. However, if the individual has had another encounter with EOIR since that first encounter pre-1995, then the hotline will offer only the most recent information.

326 If the A number is unknown, consider whether an FBI background check or an InfoPass appointment attended by the representative might be tools to obtain the A number. The latter would be possible if the client has had a previous application with USCIS. The practitioner can attend the InfoPass with a Form G-28 signed by the client and ask for the person's A number or other pertinent immigration information at the appointment. Information about scheduling an Infopass appointment is available on the USCIS website, my.uscis.gov/appointment.

to EOIR, if the client has a removal order from immigration court proceedings.³²⁷ In addition, if the practitioner is able to visit the immigration court where the removal order was issued, he or she could inquire with the local court about procedures for reviewing a file (and ensure that the file is indeed still physically at that court).³²⁸

- Requesting an Office of Biometric Identity Management FOIA³²⁹ or FBI background check,³³⁰ if the removal order was issued by a DHS officer rather than in immigration court. A FOIA request could also be filed with other relevant entities, such as Customs and Border Protection, ICE, or USCIS.³³¹
- Obtaining the client's signature on Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, in case DHS detains the client as DHS will request this from the practitioner before discussing the individual's case.

Practitioners should research case law in their jurisdiction to determine whether equitable tolling doctrine would allow for filing for and awaiting the results of a FOIA request before filing a motion to reopen, in order for the practitioner to be able to properly advise on what grounds for the motion may exist and not contradict something already in the record.³³² However, if time is of the essence, such as in cases where the client is detained or is still within the statutory time frame for timely filing, the practitioner may not have the luxury of awaiting a FOIA response. In this situation, practitioners should make all available arguments in the motion given the number limitation on filing motions to reopen and then seek to supplement the pending motion with new information obtained through a records request while the motion is pending.³³³

B. Strategic Considerations

Once the practitioner has determined that a removal order in fact exists, and what type of order it is, practitioners should consider, among other factors:

- Any filing deadline or arguments that an exception to the deadline exists
- Whether the motion to reopen would confer an automatic stay of removal, and if not, the likelihood that the relevant adjudicator would issue a discretionary stay³³⁴
- The benefits and risks of pursuing a motion to reopen

327 Information on filing an EOIR FOIA request can be found on the EOIR website, <https://www.justice.gov/eoir/foia-facts>.

328 A listing of immigration courts along with their contact information can be found on the EOIR website, <https://www.justice.gov/eoir/eoir-immigration-court-listing>.

329 DHS, Office of Biometric Identity Management: Privacy Information, <https://www.dhs.gov/obim-privacy-information>.

330 Information about requesting an FBI background check is found on the FBI website, <https://www.fbi.gov/services/cjis/identity-history-summary-checks>.

331 The USCIS website contains a helpful chart indicating what agencies have which records. USCIS, Submitting FOIA Requests, <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/submitting-foia-requests>. Note that for a copy of the A-file, the request should go to USCIS. For any records requests, the practitioner should request that the disclosures be sent to his or her office address if this address is more reliable than the client's due to the client's personal circumstances.

332 See, e.g., *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099-1100 (9th Cir. 2005).

333 Cf. *Einstein Markov Dauphin*, A099-508-343 (BIA Aug. 24, 2016) (unpublished), available at <https://www.scribd.com/document/324230360/Einstein-Markov-Dauphin-A099-508-343-BIA-Aug-24-2016-pdf> (concluding that "equitable tolling of the motion deadline was warranted to allow [the respondent] to supplement the record with evidence of his prima facie eligibility for adjustment of status," where the respondent timely filed a motion to reopen which initially lacked evidence regarding his eligibility for relief and supplemented with further information while the motion was pending).

334 Consider reaching out to knowledgeable practitioners in the jurisdiction to determine the preferred practices of the particular adjudicator.

- What underlying relief is available to the individual, and the likelihood of prevailing³³⁵
- Whether the individual is able to retain an attorney to represent him or her in pursuing the underlying relief, in the event that the removal order is remedied, and
- Whether the individual can afford all the fees associated with the motion to reopen, if applicable, the applications or petitions for relief, and resources required to adequately prepare the case.

Having evaluated these various factors, practitioners should convey the options, and the risks and benefits of each, to the client so that the client can make an informed decision about how to proceed. It may be wise to convey these advisals to the client in writing, explaining all the risks of taking action, along with timing considerations, and of not taking action (including what future options might be available). For example, when it is unlikely that the motion to reopen will prevail and the individual is not in danger of imminent removal, practitioners should inform the client that filing the motion to reopen may attract ICE's attention and possibly lead to the client's detention. Conversely, when the client is detained and in danger of imminent removal, that reality would compel the filing of a motion to reopen even if just under *sua sponte* grounds along with a motion for a stay of removal. Part of this discussion should also include the fugitive disentitlement doctrine³³⁶ and criminal penalties associated with having a removal order. It is important for practitioners to consider applicable ethical rules and even the potential for personal exposure to criminal penalties. In this regard, practitioners must be mindful of the distinction between explaining the potential consequences of various courses of action, versus advocating for a particular course of conduct that could be perceived as an effort to evade law enforcement detection.³³⁷

Usually, when to file the motion to reopen is part of the discussion of whether to file a motion to reopen in the first place since timing considerations are often a main legal issue. This decision will largely depend on the motion to reopen ground. For example, a motion to reopen arguing equitable tolling should be filed while the exceptional circumstances exist or a diligence argument applies. A motion to reopen based on *sua sponte* authority is the riskiest given its basis in regulatory authority rather than the INA, high evidentiary standard, and lack of automatic stay of removal. Practitioners may therefore wish to wait until the client is detained or removal is imminent to file the motion. While a no notice *in absentia* motion to reopen has no filing deadline as well as an automatic stay of removal, if the current relief from removal is weak or speculative, the practitioner may wish to wait until Congress definitively decides the fate of DACA youth. It is an assessment that practitioners must conduct on a case-by-case basis and is ultimately the decision of the client after a full understanding of the possible risks and benefits.

C. Filing the Motion to Reopen

As always, it is important to follow the rules governing practice in the relevant jurisdiction. For example, if a motion is to be filed with the immigration court, practitioners should carefully follow the Immigration Court Practice Manual in addition to complying with the statutes and regulations governing those filings. Likewise, filings with the BIA should comply with the BIA Practice Manual.³³⁸

335 For sample screening materials, see, for example, CLINIC, *Screening Tool*, <https://cliniclegal.org/sites/default/files/resources/presidential-transition/images/Screening-Tool.pdf>; CLINIC, *Is There an Immigration Benefit Available to You?*, cliniclegal.org/sites/default/files/resources/is-there-an-immigration-benefit-available-to-you-english.pdf; CLINIC, *¿Hay Algún Beneficio Migratorio Para Usted?*, cliniclegal.org/sites/default/files/resources/is-there-an-immigration-benefit-available-to-you-spanish.pdf.

336 For more information about how this doctrine has been applied by courts in the immigration context, see resources cited *supra* note 41.

337 For information on ethical issues pertaining to the practice of immigration law, see the resources available to members on the American Immigration Lawyers Association website, <http://www.aila.org/practice/ethics>.

338 This part provides a basic overview of the filing process but not a comprehensive list of what to file and filing procedures. For

Practitioners should be sure to enter a notice of appearance on the appropriate form along with the filing, file a change of address form where appropriate. As with other motions, a representative filing the motion should also submit a proposed order (for IJ motions), and proof of service on the ICE Office of Principal Legal Advisor (OPLA). Service on the ICE OPLA office usually occurs by mail or personal service, although some offices allow for service by email.³³⁹ As required by the regulations, the motion to reopen should be accompanied by the relevant application for relief and supporting documentation, especially since this shows incentive to appear at reopened proceedings. The motion should be filed with the immigration court “having administrative control over the Record of Proceeding,”³⁴⁰ or with the BIA in cases where the BIA last made a decision.³⁴¹ Motions to reopen must be accompanied by a \$110 fee (BIA) or fee receipt (IJ) or a fee waiver request,³⁴² unless an exception applies.³⁴³ If the removal order was issued at an immigration court that does not have jurisdiction over the respondent’s current place of residence, the motion to the IJ should also be filed in conjunction with a motion for change of venue to the immigration court with jurisdiction over the respondent’s current place of residence, along with a proposed order.³⁴⁴ Otherwise, the immigration court will schedule the respondent for a master calendar hearing and the respondent may be forced to travel to attend the master calendar hearing, should the IJ reopen the proceedings. Practitioners should obtain a file-stamped copy of the filing and ensure that the client has a copy of the file-stamped filing.

Practitioners should analyze whether the type of remedy confers an automatic stay upon filing (such as for a motion to rescind and reopen an *in absentia* removal order based on lack of notice). If it does, the practitioner should note prominently “automatic stay” on the cover page. If it does not, the practitioner should consider whether to seek a discretionary stay concurrently with the motion to reopen and, if so, note “stay of removal” on the motion’s cover page. For more information about requesting a stay of removal, see CLINIC’s practice advisory about seeking stays of removal for DACA recipients with removal orders.³⁴⁵ Regardless of whether a stay is sought concurrently with the motion to reopen, it is wise to have a stay request prepared so that it can be filed quickly if necessary.

another resource, see American Immigration Council, *Practice Advisory: The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 7, 2018), available at https://www.americanimmigrationcouncil.org/practice_advisory/basics-motions-reopen-eoir-issued-removal-orders.

339 For service by mail, practitioners should use the mailing address on the ICE OPLA Contact website, <https://www.ice.gov/contact/legal>. ICE OPLA also now offers an eService portal, which is only available in some jurisdictions: <https://eserviceregistration.ice.gov>. Whether to file by mail or by eService may be a strategic decision.

340 8 CFR § 1003.23(b)(1)(ii).

341 8 CFR § 1003.2(a).

342 8 CFR §§ 1003.8(a), 1003.2(g)(2)(1), 1103.7(b)(2); Immigration Court Practice Manual Ch. 3.4(e)(i); BIA Practice Manual Ch. 3.4(d).

343 The procedures for IJ and BIA motion to reopen filing fees and fee waiver requests can be found in the regulations and the relevant practice manuals. See Immigration Court Practice Manual Ch. 3.4 (fee procedures for filings with the IJ); 8 CFR § 1003.24 (same); BIA Practice Manual Ch. 3.4 (fee procedures for filings with the BIA); 8 CFR § 1003.8 (same); 8 CFR § 1003.2(g)(2)(i); see also 8 CFR § 1003.24(d) (fee waivers for IJ motions to reopen); 8 CFR § 1003.8(a)(3) (fee waivers for BIA motions to reopen). A filing fee is not required for motions to reopen based exclusively on a claim for asylum, 8 CFR §§ 1003.24(b)(2)(i), 1003.8(a)(2)(ii); a joint motion to reopen, 8 CFR §§ 1003.24(b)(2)(vii), 1003.8(a)(2)(vii); a motion to reopen filed under a law, regulation, or directive that does not require a filing fee, 8 CFR §§ 1003.8(a)(2)(viii), 1003.24(b)(2)(viii); and motions to reopen an *in absentia* removal (filed under INA § 240(b)(5)(C)(ii)) or deportation order (filed under INA § 242B(c)(3)(B), as it existed prior to April 1, 1997) if based on lack of notice, 8 CFR § 1003.24(b)(2)(v).

344 “Parties are strongly discouraged from filing compound motions, which are motion that combine two separate requests.” Immigration Court Practice Manual Ch. 5.4. As such, practitioners should avoid filing a motion to reopen that also requests a change of venue, but could file two separate motions simultaneously.

345 See CLINIC Stay Advisory, *supra* note 318.

VI. CONCLUSION

The fate of the DACA program is currently uncertain, given President Trump's DACA rescission announcement, pending federal court litigation, and possible legislative solutions. Regardless, DACA recipients with removal orders are in a vulnerable position, and that vulnerability would increase greatly if DACA rescission were to go fully into effect. Practitioners provide a great benefit to DACA recipient clients with removal orders by proactively assessing what remedies may be available to reopen the underlying removal order, taking into account the risks and benefits of each option as well as timing considerations. DACA recipients with removal orders can then make informed choices about how to proceed (and on what timeline) in order to best protect themselves and their families.

The Catholic Legal Immigration Network's commitment to defending the vulnerable

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—more than 330 organizations in 47 states and the District of Columbia—is the largest in the nation.

In response to growing anti-immigrant sentiment and to prepare for policy measures that will hurt immigrant families, CLINIC launched the Defending Vulnerable Populations Project. The project's primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, the Defending Vulnerable Populations Project conducts court skills training for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against retrogressive policy changes; and expands public awareness on issues faced by vulnerable immigrants.

By increasing access to competent, affordable representation, the project's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

The DVP Project offers a variety of written resources including timely practice advisories and guides on removal defense tactics, amicus briefs before the BIA and U.S. courts of appeal, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice pointer on *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), a guide on how to obtain a client's release from immigration detention, amicus briefs on the "serious nonpolitical crime" bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution."

**Get free resources to help you defend immigrants at
cliniclegal.org/defending-vulnerable-populations!**