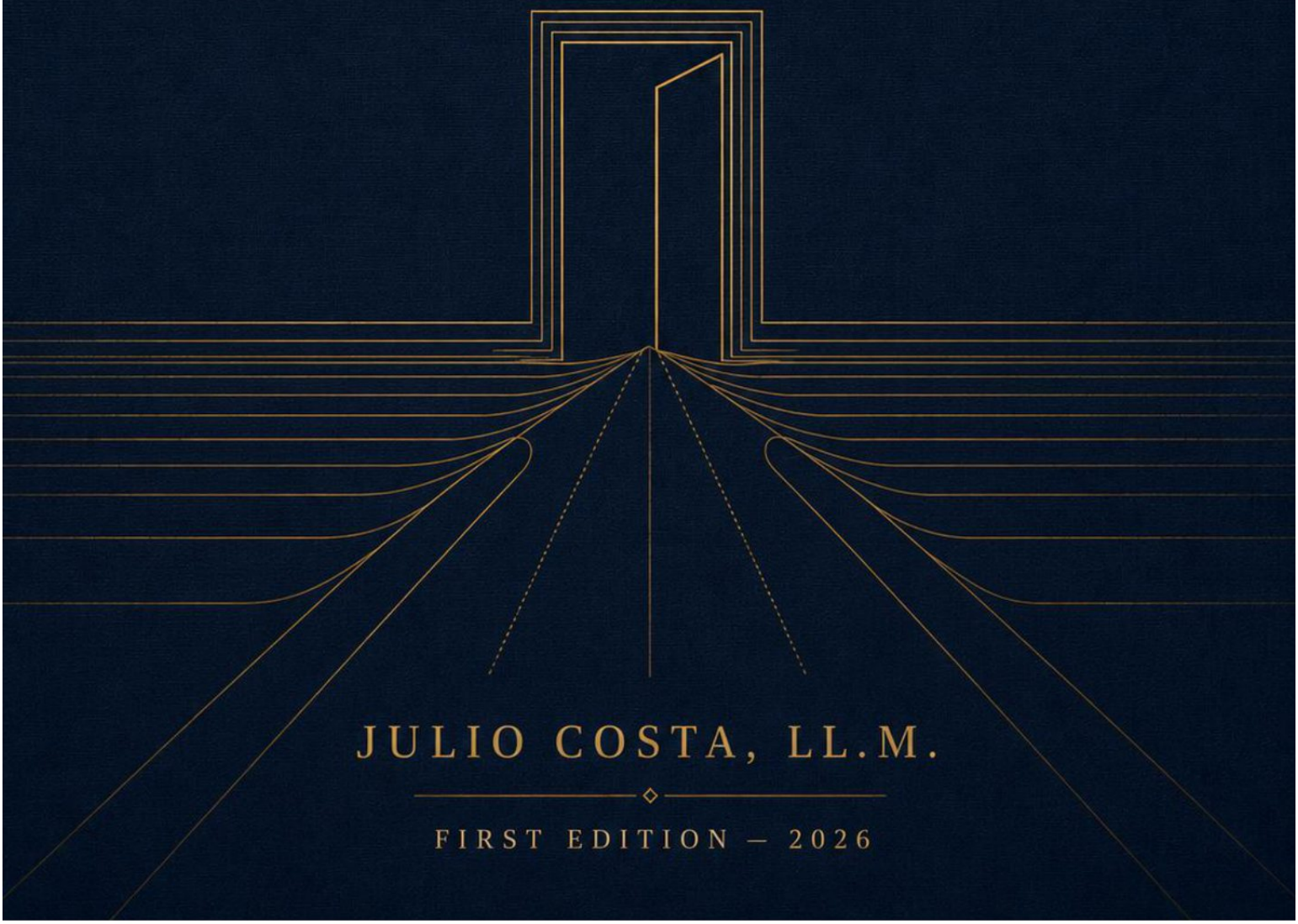
THE EOIR MOTION TO REOPEN

PRACTICE MANUAL

A Practitioner's Guide to Strategy, Authority, and Filing-Ready Frameworks in Removal Defense



JULIO COSTA, LL.M.

FIRST EDITION — 2026

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A Practitioner's Guide to Strategy, Authority, and Filing-Ready Frameworks in Removal Defense

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The general legal cutoff for this edition is September 15, 2026. Fee amounts in Chapter 11 and the Quick-Reference Motion Matrix (Appendix B) reflect the update effective October 1, 2026. Immigration law changes frequently through legislation, regulations, agency guidance, judicial decisions, local court requirements, and filing instructions.

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FOREWORD

The EOIR Motion to Reopen Practice Manual

There are few things more gratifying to a lawyer than watching a colleague whom you have had the privilege of mentoring develop professionally and, ultimately, become a teacher to others.

I have had the pleasure of knowing and working with Julio Costa, and I have watched firsthand his development in immigration law. It is therefore with particular pride that I write this foreword to *The EOIR Motion to Reopen Practice Manual*.

A motion to reopen is among the most important—and often most challenging—tools available to an immigration practitioner. It can provide a critical opportunity to correct an error, present evidence that was not previously available, or bring a case back before the Immigration Court when circumstances demand it. Yet the practice is highly technical. Success often depends not merely upon recognizing that a motion to reopen may be available, but upon understanding the governing law, identifying the appropriate procedural vehicle, developing the evidentiary record, and presenting the argument in a manner that addresses each of the requirements that the adjudicator must consider. Julio's manual brings all of these elements together.

What distinguishes this work is its exceptional attention to detail. Julio does not simply describe the law governing motions to reopen. He provides practitioners with something far more valuable: a practical roadmap. He takes what can seem like a complicated and sometimes daunting area of immigration practice and organizes it into a thoughtful, logical, and usable framework.

For the practitioner preparing a motion to reopen, that organization matters. A successful filing requires discipline. It requires the attorney to ask the right questions, identify the relevant authority, anticipate potential obstacles, develop the necessary facts and evidence, and present the case in a coherent and persuasive manner. This manual provides a framework for doing precisely that.

I am particularly pleased to see Julio's experience translated into a resource that can benefit other attorneys. The best practice manuals are not merely compilations of statutes, regulations, and case law. They reflect the judgment that comes from extensive experience working through the difficult questions that arise in actual cases. Julio has brought that practical perspective to this book.

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For those who practice before the Executive Office for Immigration Review, this manual should become a valuable part of the practitioner's library. Whether you are an experienced immigration attorney looking to refine your approach or a newer practitioner learning how to navigate the motion-to-reopen process, you will find here a detailed and carefully constructed guide.

I highly recommend *The EOIR Motion to Reopen Practice Manual* to immigration practitioners. Although the main thrust of this book is for defense counsel, it will prove to be equally valuable to Department of Homeland Security prosecutors and immigration judges. It is a thoughtful, exceptionally detailed, and practical resource.

The Hon. Marna M. Rusher (Ret.)
Former Immigration Judge, U.S. Department of Justice
Former Assistant Chief Counsel, U.S. Immigration and Customs Enforcement

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PART TWO — THE MOTIONS

Part Two applies the governing rules to each motion-to-reopen ground addressed in this Manual. Each chapter is designed to serve as the primary working document for that motion type, with cross-references to Chapter 2 where the underlying legal framework applies.

Before using Part Two, confirm the reopening grounds identified through the Decision Tree in Chapter 1, jurisdiction (§ 2.2), and the applicable deadlines (§ 2.3). Use the relevant Part Two chapters to prepare the ground-specific showing. Before filing, complete the Pre-Filing Assembly Checklist (Appendix A), returning to Chapter 1 if the grounds or procedural posture require reassessment.

Chapters:

Chapter 3 — *In Absentia* Motion to Reopen (Improper / Defective Notice)

Chapter 4 — *In Absentia* Motion to Reopen (Exceptional Circumstances)

Chapter 5 — Motion to Reopen Based on Ineffective Assistance of Counsel

Chapter 6 — VAWA-Based Motions to Reopen

Chapter 7 — General Motion to Reopen Based on New & Material Evidence

Chapter 8 — *Sua Sponte* Motion to Reopen

Chapter 9 — *Calderón Jiménez* JMTRD (Time-Limited Class Action Settlement Framework)

Chapter Structure:

Chapters 3 through 8 use the same seven-part structure listed below. Chapter 9 instead uses a settlement-specific organization reflecting its time-limited class-action framework.

(1) Purpose of the Motion — What this motion does and its legal basis
(2) Threshold Screening — Requirements and screening questions for the applicable route
(3) Strategic Risk Assessment — Red flags that counsel against filing even when the gates are met
(4) Required Documents and Evidence — Organized checklist grouped by function
(5) Affidavit Guidance — What to include and what to avoid in the respondent's affidavit
(6) Common Failure Points — How an otherwise-viable motion is lost to errors in preparing and presenting it
(7) Strategic Notes — Circuit splits, timing considerations, and edge cases

The common structure helps practitioners assign drafting tasks and check each motion for required components.

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Chapter 5 — MOTION TO REOPEN BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

5.1 Purpose of the Motion

A motion to reopen based on ineffective assistance of counsel seeks to restore a meaningful opportunity for relief where prior counsel's deficient performance deprived the respondent of that opportunity. Unlike motions premised on changed circumstances or new evidence, IAC motions challenge the integrity of the underlying proceedings themselves — the claim is that the result cannot stand because the process that produced it was fundamentally compromised by counsel's incompetence.

An IAC motion ordinarily proceeds under INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7), together with the applicable reopening regulation — 8 C.F.R. § 1003.23 before the Immigration Court, or 8 C.F.R. § 1003.2 before the Board. For ordinary reopening, the practitioner generally must establish three components, subject to the governing circuit's standards: (1) deficient performance — counsel's conduct fell objectively below professional norms; (2) prejudice — the deficiency deprived the respondent of a meaningful opportunity to pursue viable relief; and (3) procedural compliance with *Matter of Lozada*, which ordinarily requires the respondent's affidavit describing the agreement and deficiencies, notice to prior counsel with an opportunity to respond, and a disciplinary complaint or an adequate explanation for not filing one. Statutory *in absentia* rescission and appellate reissuance require the route-specific analysis in § 4.7.1 and § 5.7.4.[288]

Most circuits ground IAC claims in the Fifth Amendment due process guarantee, though the constitutional footing varies by circuit[289]; for the circuit-by-circuit treatment, including

---

[288] *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Circuits apply variations of the *Strickland v. Washington*, 466 U.S. 668, 694 (1984), prejudice standard. *Compare Fadiga v. Att'y Gen.*, 488 F.3d 142, 159 (3d Cir. 2007) ("reasonable likelihood" the outcome would have been different), *with Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005) (requiring a reasonable probability that, but for counsel's error, the outcome would have been different). *See also Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826 (9th Cir. 2003) (holding that the presumption of prejudice arising when counsel's failure caused the loss of BIA appellate review was rebutted where the petitioner lacked "plausible grounds for relief").

[289] *See* § 5.7.3, Constitutional Right to Effective Counsel, below. *Guandique-de Romero v. Bondi*, 150 F.4th 332, 342–47 (4th Cir. 2025) (recognizing a Fifth Amendment right to effective retained counsel); *Rafiyev v. Mukasey*, 536 F.3d 853, 860 (8th Cir. 2008) (rejecting a freestanding constitutional right). For the Seventh Circuit's conflicting approaches, *see* § 5.7.3 and its cited authorities.

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the Eighth Circuit's contrary rule, *see* § 5.3, Red Flag 7, and § 5.7.3, Constitutional Right to Effective Counsel, below.

For treatment of IAC as an exceptional circumstance excusing failure to appear in motions to rescind *in absentia* orders, *see* Chapter 4, § 4.7.

5.2 Threshold Screening: When This Ground Applies

Screen the six matters below before drafting. The applicable requirements depend on the relief and procedural route sought; statutory *in absentia* rescission and appellate reissuance do not simply replicate an ordinary reopening motion.

i. Timeliness or Equitable Tolling.

An ordinary motion to reopen generally must be filed within 90 days after entry of the final administrative order of removal. Identify the operative order and calculate timely receipt under § 2.3.1; statutory rescission follows its own deadline rules in § 4.2.[290] Where the motion is untimely, assess equitable tolling under the governing circuit's law. To obtain equitable tolling, the movant must show diligent pursuit of the claim and an extraordinary circumstance that stood in the movant's way and prevented timely filing.[291] Courts may review whether established facts satisfy the legal standard for equitable tolling, including diligence. Disputes about what historically occurred remain factual, and reviewability does not eliminate deferential review of primarily factual applications.[292] The diligence required is "reasonable diligence," not "maximum feasible diligence," assessed in the person's circumstances over the entire period sought to be tolled, including efforts to discover the error and to act after actual or constructive discovery.

In *Matter of Morales-Morales*, the BIA overruled *Matter of Liadov* and held that the 30-day BIA appeal deadline is a claim-processing rule — not jurisdictional — and subject to equitable tolling under the framework of *Holland v. Florida*.[293] For a missed notice of appeal, address the appeal deadline and the extraordinary circumstance that prevented

---

[290] INA § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i). For comprehensive treatment of filing deadlines, numerical limits, and jurisdictional prerequisites, *see* Chapter 2 (Universal Motion Requirements).
[291] *Holland v. Florida*, 560 U.S. 631, 649–50, 653 (2010); *Matter of Morales-Morales*, 28 I&N Dec. 714, 716–18 (BIA 2023) (Board appeals); *Rashid v. Mukasey*, 533 F.3d 127, 132–33 (2d Cir. 2008) (diligence before and after actual or constructive discovery).
[292] *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225, 227–28 (2020); *Wilkinson v. Garland*, 601 U.S. 209, 221–25 (2024); *Urias-Orellana v. Bondi*, 607 U.S. 537, 544–45, 550 (2026).
[293] *Morales-Morales*, 28 I&N Dec. at 716–18 (overruling *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006)).

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timely filing; this holding concerns Board appeals, not the separate motion-to-reopen deadline.

ii. *Lozada* Procedural Compliance.

The motion must satisfy *Matter of Lozada*'s three procedural requirements: (a) a respondent affidavit or declaration complying with 28 U.S.C. § 1746 describing the agreement with prior counsel and the specific deficient acts or omissions; (b) evidence that prior counsel was informed of the allegations and given an opportunity to respond; and (c) proof of a disciplinary complaint filed against prior counsel, or a reasoned, evidence-supported explanation for why no complaint was filed.[294] In 2026 the Board made the proof dimension explicit — a motion asserting that a disciplinary complaint was filed must include a copy of the complaint as actually filed together with proof of its filing, or else an explanation why no complaint was filed.[295] The threshold varies by circuit — some require strict compliance with each element, others recognize substantial compliance where *Lozada*'s purposes are otherwise satisfied (*see* § 5.7.1, *Lozada* Compliance Standard below).

> **PRACTICE NOTE:**
>
> In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled *Chevron* deference, holding that courts must exercise independent judgment rather than defer to an agency's interpretation of an ambiguous statute. That holding has prompted arguments that *Lozada* — an agency-created compliance framework — can no longer bind respondents. The Eleventh Circuit's published opinion in *Gutierrez-Mikan* rejects the argument, reasoning that *Lozada* does not rest on the interpretation of an ambiguous INA provision at all; it is an exercise of the BIA's authority to regulate reopening practice, which *Loper Bright* leaves untouched.[296] Do not build a challenge to *Lozada* compliance requirements on *Loper Bright*.

---

[294] *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). The Third Circuit has excused the complaint requirement where prior counsel unequivocally admitted the error, supplied evidence confirming it, and assisted in remediation. *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155–58 (3d Cir. 2007). This exception is circuit-specific.

[295] *Matter of L-R-M-C- & V-A-M-M-*, 29 I&N Dec. 757, 759–61 (BIA 2026).

[296] *Gutierrez-Mikan v. U.S. Att'y Gen.*, 163 F.4th 1331, 1335 (11th Cir. 2026).

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iii. Deficient Performance.

Prior counsel's conduct must have fallen objectively below minimum standards of professional competence — not a strategic choice the practitioner disagrees with in hindsight.[297]

Alleged deficiencies include failure to file applications, briefs, or appeals that were due; affirmative misadvice causing the respondent to miss hearings, waive relief, or forego appeals; abandonment of representation without notice; pursuit of legally foreclosed theories while ignoring viable claims; or failure to file an opening brief on appeal, causing dismissal of the petition for review.[298] The line between deficient performance and disfavored strategy is addressed in § 5.3, Red Flag 1 (The "Tactical Decision" Defense).

iv. Prejudice.

For ordinary reopening, the Board generally requires a reasonable probability that, but for counsel's errors, the outcome would have been different; apply the governing circuit's formulation.[299] Prejudice requires demonstrating that counsel's errors foreclosed a procedurally or substantively viable avenue of relief — not that relief would certainly have been granted.[300] The precise formulation varies by circuit (*see* § 5.7.2, Prejudice Standard below). Statutory rescission for counsel-caused nonappearance has a distinct prejudice inquiry; the Fifth and Ninth Circuits do not require a separate merits-prejudice showing in that setting.[301] *See* § 4.7.1 for the procedural and circuit qualifications.

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[297] *Jiang v. Mukasey*, 522 F.3d 266, 270 (2d Cir. 2008) (holding that counsel did not render ineffective assistance by reasonably recommending withdrawal of questionable asylum and withholding claims in favor of voluntary departure); *Mena-Flores v. Holder*, 776 F.3d 1152, 1169 (10th Cir. 2015) ("An attorney's objectively reasonable tactical decisions do not qualify as ineffective assistance.").

[298] *E.g.*, *Rabiu v. INS*, 41 F.3d 879, 882–83 (2d Cir. 1994) (failure to file § 212(c) application despite eligibility and clear instructions); *Lo v. Ashcroft*, 341 F.3d 934, 936–39 (9th Cir. 2003) (failure to appear caused by counsel's office affirmatively misinforming the clients of their hearing date was ineffective assistance constituting an "exceptional circumstance" requiring rescission of the *in absentia* removal order); *id.* at 937 n.4 ("We seldom reject ineffective assistance of counsel claims solely on the basis of *Lozada* deficiencies."); *Li v. Bondi*, 139 F.4th 1113, 1116, 1121–24 (9th Cir. 2025) (requiring a reasoned agency response to a claim based on failure to file the court-of-appeals opening brief).

[299] *Matter of Melgar*, 28 I&N Dec. 169, 171 (BIA 2020).

[300] *Nehad v. Mukasey*, 535 F.3d 962, 971 (9th Cir. 2008) (assessing whether counsel's deficient performance may have affected the outcome and whether the underlying claims were plausible enough to warrant consideration on remand).

[301] *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 803 n.6 (5th Cir. 2007); *Lo*, 341 F.3d at 939 n.6; *Sanchez Rosales v. Barr*, 980 F.3d 716, 719–20 (9th Cir. 2020); *cf. Matter of Rivera-Claros*, 21 I&N Dec. 599, 603 n.1 (BIA 1996) (former statutory rescission framework).

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v. *Prima Facie* Case for Underlying Relief.

When reopening is sought to pursue relief that counsel failed to present, establish *prima facie* eligibility with supporting evidence. The IJ and Board regulations require the appropriate application and supporting documentation to accompany a motion to reopen for the purpose of acting on an application for relief. This is not a full merits adjudication. For an omitted asylum application, submit the completed I-589 and evidence supporting the claim. Statutory rescission does not impose a separate merits-eligibility prerequisite; *see* § 4.7.1.[302]

vi. Numerical Eligibility.

The motion counts against the one-motion limit under INA § 240(c)(7)(A), 8 U.S.C. § 1229a(c)(7)(A) unless an exception applies.[303] Review prior motions and the route-specific exceptions in §§ 2.4.1–2.4.2. Deadline tolling does not itself resolve a number bar: § 2.4.3 addresses *Matter of M-M-L-J-* and governing circuit law. A request for discretionary own-motion reopening is a separate route under Chapter 8, not an additional statutory motion entitlement.

5.3 Strategic Risk Assessment: When NOT to File

Even where the threshold gates are technically satisfied, evaluate the following red flags before investing time in the filing. Each identifies a condition that can defeat an otherwise-eligible claim.

[302] 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3); *INS v. Abudu*, 485 U.S. 94, 104–05 (1988) (identifying independent grounds for denying reopening). For statutory rescission, *E.A.C.A. v. Rosen*, 985 F.3d 499, 512 (6th Cir. 2021) (rejecting a separate requirement of *prima facie* eligibility for relief).
[303] INA § 240(c)(7)(A), 8 U.S.C. § 1229a(c)(7)(A).

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RED FLAG 1 — THE "TACTICAL DECISION" DEFENSE. If the government or IJ will characterize prior counsel's choices as strategic rather than deficient, your motion is at risk even if the strategy was terrible. Courts reject IAC claims based on hindsight criticism of tactical choices within the range of competent representation — including evidentiary strategy, questioning style, or argument emphasis.[304] The line falls where counsel's choice had no objectively reasonable basis in law or fact. Pursuing a legal theory foreclosed by binding authority crosses the line; choosing one viable theory over another generally does not. Before filing, explain why counsel's choice was objectively unreasonable in light of the facts, law, engagement, and instructions at the time. Use relevant authority and the case record to explain why the conduct was unreasonable under governing law; do not make the analysis turn solely on locating a decision involving the identical tactic.

[304] *Jiang v. Mukasey*, 522 F.3d 266, 270 (2d Cir. 2008); *Mena-Flores v. Holder*, 776 F.3d 1152, 1169 (10th Cir. 2015).

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RED FLAG 2 — UNEXPLAINED POST-DISCOVERY DELAY. Unexplained delay after discovery of counsel's error can defeat equitable tolling. Also address diligence before the error was or should have been discovered.[305] The Ninth Circuit's *Perez-Camacho v. Garland* upheld denial of equitable tolling where the petitioner waited 21 years after conviction—13 years after the final removal order—to seek modification based on alleged IAC. He provided no basis to find reasonable efforts to pursue relief and no explanation for the exceedingly long delay.[306] The Third Circuit's *Ragbir v. United States* held, for purposes of coram nobis timeliness, that a petitioner's "pursuit of administrative remedies cannot constitute a sound reason for delay" where a collateral challenge could have been pursued concurrently and the immigration relief sought depended on that challenge.[307] In an unpublished decision, the Eleventh Circuit found a delay of roughly one year after denial of a petition for review insufficiently diligent — and a special concurrence argued the majority's approach effectively required "maximum feasible diligence" by demanding simultaneous pursuit of judicial and administrative remedies.[308]

PRACTICE NOTE:

Although there is no fixed outer limit on how long after discovery an IAC claim may be raised, adjudicators routinely deny tolling where there is extended, unexplained delay. IAC-based motions are most persuasive when filed promptly after discovery — commonly within days or weeks, not months or years. Where substantial delay exists, document every reason for it with contemporaneous evidence. If the delay is too long to credibly support tolling, consider framing IAC as an alternative or preservation argument rather than the primary reopening theory. An alternative or preservation label does not excuse the theory's independent time, number, or compliance requirements.

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[305] *Rashid v. Mukasey*, 533 F.3d 127, 132–33 (2d Cir. 2008); *Avagyan v. Holder*, 646 F.3d 672, 679–80 (9th Cir. 2011); *Alzaarir v. Att'y Gen.*, 639 F.3d 86, 91 (3d Cir. 2011).
[306] *Perez-Camacho v. Garland*, 54 F.4th 597, 607 (9th Cir. 2022).
[307] *Ragbir v. United States*, 950 F.3d 54, 64 (3d Cir. 2020).
[308] *Point du Jour v. U.S. Att'y Gen.*, No. 23-11630, slip op. at 5–10 (11th Cir. Sept. 5, 2025) (per curiam) (unpublished) (applying *Holland*'s reasonable-diligence standard de novo to undisputed facts; assuming without deciding that the filing period was tolled until the decision that put the respondent on notice of appellate counsel's deficiency, and holding that a delay of roughly one year — during which he pursued rehearing en banc and certiorari, followed by three unexplained months — did not constitute reasonable diligence, while expressly declining to decide whether to adopt the simultaneous-pursuit rule of *Galvez-Pineda v. Gonzales*, 427 F.3d 833, 839 (10th Cir. 2005)); *Point*

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Red Flag 3 — Same Counsel at IJ and BIA (Exhaustion Catch-22). Where the same attorney represented the respondent before both the immigration judge and the BIA, the respondent ordinarily had no realistic opportunity to raise the attorney's ineffectiveness before the agency — yet an ineffective-assistance claim ordinarily must first be presented to the Board. INA § 242(d)(1), 8 U.S.C. § 1252(d)(1), is a nonjurisdictional exhaustion rule; distinguish exhaustion of remedies available as of right from the obligation to present the IAC issue to the agency. The Seventh Circuit confronted this problem in *Bustos-Millan v. Garland*. Because the petitioners had not raised ineffective assistance before the Board, the court held it could not consider the claim, while acknowledging that the rule "creates something of a catch-22" where the same counsel appeared at both levels and observing that "equitable considerations might militate in favor of an exception to the exhaustion requirement." That observation is dictum; the court created no exception and declined to reach the unexhausted IAC claim. Where the same attorney appeared at both levels, present the ineffective-assistance claim to the Board first — ordinarily through a motion to reopen filed by new counsel — and, if the government asserts a failure to exhaust on judicial review, argue for an equitable exception while acknowledging that *Bustos-Millan* did not recognize one. Do not rely on that possibility instead of making a timely agency presentation.[309]

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du Jour, No. 23-11630, slip op. at 5–7 (Geraghty, D.J., concurring specially) (characterizing the majority's simultaneous-pursuit expectation as "maximum feasible diligence" rather than the "reasonable diligence" *Holland* requires); *see also Thomas v. U.S. Att'y Gen.*, 992 F.3d 1162, 1179 (11th Cir. 2021) (de novo review of the application of equitable tolling law to undisputed facts). The concurrence, slip op. at 4–7, would have treated pursuit through judicial review as diligent but agreed the post-certiorari delay defeated the claim.

[309] *Bustos-Millan v. Garland*, 111 F.4th 841, 848–49 (7th Cir. 2024). *Santos-Zacaria v. Garland*, 598 U.S. 411, 423–25, 430–31 n.10 (2023) (holding that INA § 242(d)(1) is nonjurisdictional and does not require discretionary reconsideration; reserving broader issue-exhaustion questions).

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Red Flag 4 — Strict *Lozada* Jurisdictions Without a Disciplinary Complaint. Failure to file a complaint may be excused by an adequate explanation, but an unexplained omission is ordinarily fatal.[310] Evaluate any explanation under governing circuit law and the purposes of *Lozada*. Prior counsel's death or disbarment may provide a valid explanation; neither is an automatic exception. Counsel's admission alone is insufficient under *Melgar*. Do not assume suspension, inability to locate counsel, reluctance, or asserted futility excuses nonfiling. For unauthorized preparers, apply § 5.7.6 rather than treating nonattorney status as an automatic complaint exception.[311]

Red Flag 5 — Supplemental Filings Treated as Separate Motions. The BIA held in *Matter of D-E-B-* that a supplemental filing raising claims fundamentally different from those in the original motion is treated as a separate motion, subject to its own filing requirements — including the time and number limits.[312] The original motion asserted IAC and changed personal circumstances; a later supplement alleged abuse and sought VAWA reopening. The Board treated those fundamentally different claims as a separate motion. Include available grounds in the original filing where feasible. Before supplementing, determine whether the filing supports an existing claim or presents a fundamentally different one, and address the filing rules and any exception applicable to a separate motion. A shared factual background is not a safe harbor.

Red Flag 6 — The First Circuit Equitable Tolling Gap. As of this writing, the First Circuit has not definitively decided whether equitable tolling applies to the 90-day MTR statutory deadline. The First Circuit has assumed without deciding that the deadline is tollable and has described equitable tolling as a rare remedy reserved for unusual circumstances.[313] In the First Circuit, frame any tolling argument with heightened care and address the absence of binding authority directly — address both availability and the governing diligence and extraordinary-circumstance requirements.

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[310] *Guzman-Torralva v. Garland*, 22 F.4th 617, 620–21 (6th Cir. 2022) (respondent's statement that he was "not interested" in filing a bar complaint held inadequate); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1363 (10th Cir. 2004) (no entitlement to equitable tolling where the petitioner failed to satisfy the *Lozada* requirements).
[311] *Matter of Melgar*, 28 I&N Dec. 169, 170–71 (BIA 2020).
[312] *Matter of D-E-B-*, 29 I&N Dec. 83, 84, 88–89 (BIA 2025).
[313] *Gyamfi v. Whitaker*, 913 F.3d 168, 174–75 (1st Cir. 2019); *Kim v. Blanche*, No. 24-2042, slip op. at 5–6 (1st Cir. July 30, 2026) (published) (continuing to reserve whether the 90-day limit is subject to equitable tolling).

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RED FLAG 7 — NO CONSTITUTIONAL RIGHT IN THE EIGHTH CIRCUIT. Do not frame IAC as a constitutional claim in the Eighth Circuit — this circuit does not recognize a right to effective counsel in removal proceedings. The Eighth Circuit rejects a freestanding constitutional right to effective retained counsel and applies the statutory, regulatory, and *Lozada* reopening framework. When a complaint is asserted, it requires proof of submission or an adequate explanation for nonfiling; national BIA precedent now likewise requires the filed complaint and proof, or an explanation (*see* § 5.4 below; *see also* the Failure Point "Disciplinary Complaint Filed but No Proof Retained" below).[314] If you are litigating an IAC motion in the Eighth Circuit, adjust both the legal framework and the evidentiary package accordingly.

> **PRACTICE NOTE: Alternative Grounds Strategy**
>
> Where the case qualifies for statutory or regulatory exceptions to time or numerical limits — changed country conditions, VAWA, lack of notice — consider whether IAC should be the primary theory or an alternative ground. A genuinely independent ground may avoid IAC-specific compliance disputes. Asserting IAC as an alternative still requires addressing its own procedural, prejudice, time, and number rules; the pleading order does not cure a defective IAC claim. Assess whether the benefits of asserting IAC as the primary theory outweigh the procedural and evidentiary risks, particularly where alternative grounds are legally stronger or procedurally cleaner.

RED FLAG 8 — DOCUMENT PREPARERS WHO DID NOT HOLD OUT AS ATTORNEYS. In *Matter of Z-R-C-N-*, 29 I&N Dec. 523 (BIA 2026), the Board rejected an ineffective-assistance claim involving a document preparer who neither was an attorney nor held himself out as one.[315] The decision did not address an authorized accredited representative accurately identifying that role. Determine the person's actual authorization and representations before applying the preparer rule.

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[314] *Rafiyev v. Mukasey*, 536 F.3d 853, 860 (8th Cir. 2008); *Irias v. Bondi*, 167 F.4th 1003, 1007 (8th Cir. 2026); *Matter of L-R-M-C- & V-A-M-M-*, 29 I&N Dec. 757, 760–61 (BIA 2026).

[315] *Z-R-C-N-*, 29 I&N Dec. at 524–25; *see also Jean Louis v. Att'y Gen. U.S.*, 914 F.3d 189, 191–92 (3d Cir. 2019) (following the bad advice of a person the petitioner believed to be a lawyer, but who did not hold himself out as such, does not constitute an exceptional circumstance for rescinding an *in absentia* removal order); *Gunawan v. Gonzales*, 132 F. App'x 997, 1000 n.4 (3d Cir. 2005)

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