CENTER for HUMAN RIGHTS and
INTERNATIONAL JUSTICE at BOSTON COLLEGE
POST-DEPORTATION HUMAN RIGHTS PROJECT

Boston College Law School, 885 Centre Street, Newton, MA 02459
Tel 617.552.9261 Fax 617.552.9295 Email pdhrp@bc.edu
www.bc.edu/postdeportation

EQUITABLE TOLLING OF MOTIONS TO REOPEN

by Jessica Chicco, Daniel Kanstroom, and Jennifer Monnet[1]
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I. INTRODUCTION[3]

Motions to reopen are "an important safeguard" intended "to ensure a proper and lawful disposition" of removal proceedings.[4] Such motions may also be particularly important for those who have been deported from the United States. Often, they are the only way to redress claims of wrongful removal. Wrongful removals may be due to a wide variety of factors, including ineffective assistance of counsel in criminal or immigration court, changes in law that should be applied retroactively, and newly discovered evidence.[5] In many such cases, the direct appeal process is ineffective. Thus, many courts have now held that such motions are potentially available post-deportation, notwithstanding the so-called post-departure bar regulations. *See, e.g.*, *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (*en banc*).

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[1] Supervising Attorney, Post-Deportation Human Rights Project (PDHRP); Professor of Law and Director of PDHRP; Fellow (2013), PDHRP.

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[4] *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)).

[5] *See also* PDHRP Practice Advisory, *Post-Departure Motions to Reopen and Reconsider* (December 2012).

There are, however, time and number limits to such motions that may be significant impediments for those seeking reopening. The Immigration and Nationality Act (INA) states that a motion to reopen removal proceedings[6] "shall be filed within 90 days of the date of entry of a final administrative order of removal." INA § 240(c)(7)(C)(i). The statute also states that an "alien" may file only one motion to reopen. INA §240(c)(7)(A). Both the statute and the regulations on motions to reopen before the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) set forth limited exceptions to these limitations, listed in detail in the next section. INA § 240(c)(7)(C); 8 CFR § 1003.23(b) and 1003.2(c)(3).

If **motions to reopen immigration proceedings (MTR)** are filed outside of the 90-day period set out in the statute and regulations, practitioners may nevertheless argue that the motion should be deemed timely and/or not number barred under the doctrine of equitable tolling. This is true even if the motion does not fall within one of the statutory or regulatory exceptions. Courts are increasingly recognizing the doctrine of equitable tolling in this context. This Practice Advisory explores how the BIA and Courts of Appeals have treated the concept of equitable tolling with respect to such motions to reopen.[7] This Practice Advisory does not examine the related doctrine of *sua sponte* authority possessed by IJs and the BIA to reopen cases. A future Practice Advisory will do so.

II. STATUTORY AND REGULATORY EXCEPTIONS TO TIME AND NUMBER LIMITATIONS

Certain exceptions to the 90-day deadline and, in some instances, to the numerical limitations for motions to reopen are set out in the INA and corresponding regulations. Though most of the exceptions closely track each other, others only appear in either the statute or the regulations, as noted below.

- MTR to apply for asylum or withholding of removal based on changed country conditions, where evidence is material and was not available and could not have been discovered or presented at previous proceeding:
    - No time limit. INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii), § 1003.23(b)(4)(i).
    - No number limit. 8 C.F.R. § 1003.2(c)(3)(ii); § 1003.23(b)(4)(i).

[6] This Practice Advisory focuses only on motions to reopen removal proceedings before immigration judges and the BIA. Note that a motion to reopen DHS decisions must be filed within 30 days, pursuant to 8 C.F.R. § 103.5.

[7] Though this Practice Advisory discusses motions to reopen, the same concepts should also be applicable by analogy to the less common motions to reconsider. A motion to reopen must be supported by affidavits or other evidence, and must establish that the evidence is material, was unavailable at the time of the original hearing, and could not have been discovered or presented at the original hearing. A motion to reconsider asks that a decision be reexamined in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked. The statute limits motions to reconsider to one and states that it "must be filed within 30 days of entry of a final administrative order of removal." INA § 240(c)(6)(A), (B).

- MTR of *in absentia* removal or deportation order:
    - Must be filed within 180 days of the order if based on "exceptional circumstances" for failure to appear. INA§ 240(b)(5)(C); 8 C.F.R. § 1003.2(c)(3), § 1003.23(b)(4)(ii) (removal), (iii)(A) (deportation).
        - The term "exceptional circumstances" refers to "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." INA § 240(e)(1).
    - Can be filed at any time if based on lack of notice or alien being in federal or state custody and failing to appear through no fault of his own. INA§ 240(b)(5)(C); 8 C.F.R. § 1003.2(c)(3), § 1003.23(b)(4)(ii), (iii)(A).
    - No number limit on MTRs for *in absentia* deportation orders. 8 C.F.R. § 1003.2(c)(3)(i); § 1003.23(b)(4)(iii)(A), (D).[8]

- MTR of *in absentia* exclusion order based on a showing of "reasonable cause" for failure to appear:
    - No time or number limits. 8 C.F.R. § 1003.23(b)(4)(iii)(B); *Matter of N-B-*, 22 I&N Dec. 590 (BIA 1999).

- MTR for battered spouses, children and parents seeking relief as a self-petitioner or through cancellation of removal:
    - May be filed within one year of the final order of removal, as long as the applicant is physically present in the U.S. The Attorney General may waive the one-year limitation in cases of extraordinary circumstances or extreme hardship to the alien's child. INA § 240(c)(7)(C)(iv).
    - No number limit. INA § 240(c)(7)(A).

- Jointly filed MTR (by noncitizen and government):
    - No time or number limits.[9] 8 C.F.R. § 1003.2(c)(3)(iii) (time); § 1003.23(b)(4)(iv) (time and number).

- MTR filed by DHS in removal proceedings.
    - No time or number limits. 8 C.F.R. § 1003.23(b)(i).

- *Sua sponte* MTR:
    - No time or number limits. IJ or BIA may reopen "at any time." 8 C.F.R. § 1003.23(b)(1); § 1003.2(a).

[8] There are also no time or numerical limits to MTRs of *in absentia* deportation orders entered prior to June 13, 1992. *Matter of Cruz-Garcia*, 22 I&N Dec. 1155 (BIA 1999).

[9] ICE considers joint motions to reopen a form of prosecutorial discretion. John Morton, Director, ICE, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (June 17, 2011), p. 3; *see also* Legal Action Center, "Prosecutorial Discretion: How to Advocate for your Client" (June 24, 2011), *available at* http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf.

III. WHAT IS EQUITABLE TOLLING?

Equitable tolling is an equitable principle pursuant to which a statute of limitations will not bar a claim if the claimant, despite diligent efforts, does not discover the circumstances giving rise to the claim until after the filing deadline has passed. The doctrine of equitable tolling "is read into every federal statute of limitations."[10] Courts have long recognized equitable tolling's importance in promoting access to a fair and just legal system; thus they have applied it in a variety of situations.[11] Within the context of MTRs, every circuit has concluded that the deadline on MTRs is a "claim-processing rule" subject to equitable tolling rather than a strict jurisdictional rule.[12] Put another way, agency adjudicators arguably must consider claims of equitable tolling and may not simply decline to adjudicate a late-filed MTR if equitable tolling may apply.

Though the power of the doctrine is clear, equitable tolling has been characterized as a "rare remedy" that should not be treated as "a cure all."[13] The effect of the application of equitable tolling is most typically to "stop the clock" upon one event, and restart it upon another.[14] By tolling a filing deadline, equitable tolling can thereby render a motion to reopen – even if filed beyond the statutory or regulatory deadline – timely.[15]

Moreover, the implications of equitable tolling can be quite complex. For example, whether a motion is deemed to satisfy the time and numerical limitations can affect whether the IJ or BIA will exercise jurisdiction,[16] or whether a circuit court will review the BIA's decision.[17] (See Section V for information on the application of equitable tolling to numerical limitations).

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[10] *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

[11] *See, e.g., Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1874) (applying equitable tolling to time-barred civil action); *Neverson v. Farquharson*, 366 F.3d 32 (1st Cir. 2004) (applying equitable tolling to time-barred federal habeas corpus petition).

[12] A full discussion of the distinction between claim-processing rules and jurisdictional rules is beyond the scope of this Advisory.

[13] *Neves v. Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (citing to *Wallace v. Kato*, 549 U.S. 384, 396 (2007)); *see also Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013) ("guarded and infrequent"); *Akwada v. Holder*, 113 Fed. Appx. 532 (4th Cir. 2004) (unpublished) ("equity must be reserved for those rare instances where…it would be unconscionable to enforce the limitation period against the party and gross injustice would result.").

[14] *Socop-Gonzales v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc).

[15] *See Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) ("by virtue of equitable tolling his motion to reopen was timely filed"); *see also Neves*, 613 F.3d at 36; *Rashid v. Mukasey*, 533 F.3d 127, 131 (2d Cir. 2008); *Running Away From the Regulatory Departure Bar, One Circuit at a Time, in Opposite Directions*, IMMIGRATION LAW ADVISOR, (EOIR), Sept.-Oct. 2013, at 16, note 2.

[16] Whether a motion is deemed to satisfy the time and numerical limitations may affect whether the court will uphold the application of the regulatory bar on post-departure motions to reopen found at 8 C.F.R. § 1003.23(b)(1) and § 1003.2(d). Three circuits reviewing the validity of the post-departure bar have distinguished between statutory and *sua sponte* motions. *See* PDHRP Practice Advisory, *Post-Departure Motions to Reopen and Reconsider* (December 2012), available at http://www.bc.edu/dam/files/centers/humanrights/pdf/MTR%20Advisory%202012%20FINAL.pdf, for a full discussion of potential challenges to the post-departure bar.

[17] All Courts to have considered the issue have held that they lack jurisdiction to review the denial of a *sua sponte* motion to reopen. *See, e.g., Ali v. Gonzales*, 448 F.3d 515 (2d Cir. 2006); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002); *Luis v. INS*, 196 F.3d 36 (1st Cir. 1999).

IV. WHEN DOES EQUITABLE TOLLING APPLY?

Generally, equitable tolling requires proof (1) that the noncitizen has been pursuing rights diligently, and (2) that some extraordinary circumstance stood in the way.[18] Nearly all circuits have adopted a version of this test. These two elements and their interpretation by the circuit courts are discussed more fully below. (*See also* chart of principal decisions by circuit at the end of this Advisory). In reviewing the analysis below, practitioners should keep in mind that IJs and the BIA are generally bound by circuit court precedent in cases arising within that circuit.[19] Specifically, IJs and the BIA will apply the circuit court law of the jurisdiction in which the IJ completed removal proceedings.

A minority approach taken by the First and Sixth circuits is that due diligence is but one of several factors considered in determining whether to equitably toll an untimely motion: "(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim."[20] More recently, however, both circuits have applied the extraordinary circumstance and due diligence criteria without mention of this five factor test.[21]

The Fourth Circuit's test for equitable tolling does not require due diligence, but instead requires either: That an extraordinary circumstance beyond the claimant's control made it impossible to file on time; or that the individual was prevented from asserting the claim by the government's wrongful conduct.[22] Further, the Sixth Circuit has also adopted a requirement that prejudice be shown when equitable tolling is sought due to ineffective assistance of counsel.[23]

A. Extraordinary Circumstances

- Ineffective assistance of counsel

Nearly all circuits to have recognized equitable tolling of deadlines and number bars on motions to reopen have accepted that ineffective assistance of counsel (IAC) may be an extraordinary circumstance.[24] Where equitable tolling is based on a claim of IAC, courts have at times also reviewed the individual's compliance with the requirements set forth in *Matter of*

[18] *See Holland v. Florida*, 560 U.S. 631, 2562 (2010).
[19] *See Matter of Anselmo*, 20 I&N Dec. 3105 (1989).
[20] *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *see also Jobe v. INS*, 238 F.3d 96, 100 (1st Cir. 2001) (*en banc*).
[21] *Neves*, 613 F.3d at 36 (extraordinary circumstance); *Gordillo v. Holder*, 640 F.3d 700, 704 (6th Cir. 2011) (exceptional circumstance).
[22] *Kuusk*, 732 F.3d at 305.
[23] *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Gordillo*, 640 F.3d at 703.
[24] *E.g.*, *Ruiz-Turcios v. US Atty. Gen.*, 717 F.3d 847 (11th Cir. 2013); *Gordillo*, 640 F.3d 700; *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Socop-Gonzales*, 272 F.3d 1176; *Davies v. US INS*, 10 Fed. Appx. 223 (4th Cir. 2001) (per curiam); *Iavorski v. US INS*, 232 F.3d 124 (2d Cir. 2000).

Lozada, 19 I&N Dec. 637, 639 (BIA 1988). Thus, the practitioner should be aware that the underlying claim of IAC may be scrutinized both substantively and procedurally.[25] Under *Lozada*, a petitioner seeking to reopen based on IAC must (1) submit an affidavit describing in detail the agreement with counsel; (2) inform counsel of the allegations and present counsel an opportunity to respond; and (3) report whether a complaint of ethical or legal violations has been filed with the proper authorities, and if not, why not.[26]

The First and Fourth Circuits have assumed, without deciding, that the limits to MTRs may be equitably tolled on the basis of IAC.[27] However, these courts have denied equitable tolling claims on other bases, such as the failure to meet the due diligence requirement or other prerequisites to the application of equitable tolling.[28]

- Deception, Fraud or Error

Other extraordinary circumstances that may warrant equitable tolling are instances of deception, fraud, or error. These may sometimes overlap with claims of ineffective assistance of counsel. But they may also include instances of *notario* fraud, misinformation provided by government agents, or other circumstances.[29] For example, in *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005), the Third Circuit has found equitable tolling appropriate where fraud consisted "of false representations of material fact with knowledge of their falsity and with intent to deceive" and the representation was believed and acted upon by the party deceived to his disadvantage. In *Socop-Gonzales v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (*en banc*), the Ninth Circuit found equitable tolling to be warranted where the individual had been wrongly advised by an INS officer to withdraw his asylum application in order to pursue adjustment of status. Similarly, the Seventh Circuit in *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008) held that misinformation provided by a DHS officer explained why petitioner had not filed the MTR sooner, and warranted equitable tolling.

Practitioners may consider arguing that an erroneous interpretation and application of the law should be deemed an "error" warranting equitable tolling. This may be applicable in instances in which subsequent circuit court or Supreme Court decisions clarify the correct interpretation of the law, and such correct interpretation of the law would have afforded the

[25] *See, e.g,. Hernandez-Moran*, 408 F.3d at 499 (individual failed to comply with *Lozada*, and concluding that equitable tolling was not warranted because no extraordinary circumstance had been shown); *Riley*, 310 F.3d at 1258 (BIA must consider due diligence along with compliance with *Lozada*).

[26] Some courts have refused to strictly enforce the *Lozada* requirements where the ineffective assistance of counsel is clear. *See, e.g.*, *Castillo-Perez v. I.N.S.*, 212 F.3d 518, 526 (9th Cir. 2000); *Lu v. Ashcroft*, 259 F.3d 127 (3d Cir. 2001).

[27] *Neves*, 613 F.3d 107; *Hernandez-Moran*, 408 F.3d 496.

[28] *See, e.g., Neves*, 613 F.3d at 36, 37 (finding that respondent had not exercised due diligence, and assuming, arguendo, but not deciding, that time and number limitations on MTR are subject to ET); *Punzalan v. Holder*, 575 F.3d 107, 111 (1st Cir. 2009) (finding that respondent had not adequately made out a claim for ineffective assistance of counsel based on *Lozada* factors, and reserving question of whether time and number limits on MTR are subject to equitable tolling); *Akwada*, 113 Fed. Appx. at 538 (assuming without discussion that equitable tolling applies but concluding it was not warranted because situation not sufficiently compelling).

[29] *See, e.g., Pafe v. Holder*, 615 F.3d 967, 969 (8th Cir. 2010) (fraud and deception on part of attorney); *Borges*, 402 F.3d at 401 (fraud by legal counsel); *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (deception of notario posing as attorney).

individual the opportunity to seek discretionary relief or would not have subjected the individual to removal in the first place.[30] In this situation, practitioners may argue that the error could not have been discovered until it was revealed by subsequent court decisions.

B. Due Diligence

A request for equitable tolling will generally require a showing of "due diligence" during the period one seeks to have tolled.[31] Due diligence should be understood to be "reasonable diligence,"[32] not "maximum diligence."[33] The Ninth Circuit, for example, has created a three-part test, which assesses (1) if (and when) a reasonable person in petitioner's position would have suspected fraud or error; (2) whether petitioner took reasonable steps to investigate; and (3) when tolling should end (i.e., when petitioner had definitively learned of the harm or obtained "vital information bearing on the existence of his claim").[34] Similarly, the Sixth and Seventh Circuits have held that the test for due diligence is not merely the length of delay, but whether the claimant could have reasonably been expected to file earlier.[35]

Whether an individual has exercised due diligence is a fact-intensive, case-by-case analysis that may consider multiple factors. The following examples illustrate the courts' application of the due diligence standard:

- Petitioner exercised due diligence where he was prevented from discovering mishandling of the case earlier because the government had issued work authorization in error and his attorney had misadvised him. *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005).
- Petitioners exercised due diligence where they reasonably relied on an "unscrupulous immigration consultant" who provided "faulty and ineffective representation." *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1225 (9th Cir. 2002).
- Petitioner exercised due diligence despite nine month delay in finding new counsel and filing MTR, reasoning that foreigners such as petitioner may "have more than the average difficulty in negotiating the shoals of American law" and little inconvenience or prejudice was caused by delay. *Pervaiz v. Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005).

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[30] *See, e.g., Lopez v. Gonzales*, 549 U.S. 47 (2006) (clarifying that only crimes which would be qualified as felonies under federal law should be considered drug trafficking aggravated felonies); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (clarifying that negligent DUI offenses are not crime of violence aggravated felonies).

[31] *See, e.g., Gordillo*, 640 F.3d at 705 (finding due diligence where petitioner acted promptly when first learned of counsel's ineffectiveness, but due to receiving incorrect legal advice did not file motion to reopen until years later); *but see Kuusk*, 732 F.3d at 307 (not incorporating due diligence in its equitable tolling analysis).

[32] *Neves*, 613 F.3d at 37; *Iavorski*, 232 F.3d at 134.

[33] *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011).

[34] *Id.*

[35] *See Gordillo*, 640 F.3d at 705 (finding "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… the analysis ultimately depends on all the facts of the case, not just the chronological ones."); *Pervaiz*, 405 F.3d at 490 (7th Cir. 2005); *see also*, *Riley*, 310 F.3d at 1258 ("A simple cursory comparison of the date of filing and the regulatory time line for filing motions is not enough" to determine whether tolling is appropriate).

- Petitioner exercised due diligence where he was not "on notice" of final removal order because he received a decision pertaining to an unrelated individual, took steps to ascertain the status of his claim, relied on DHS officers' erroneous assurances that the notice he received was not binding, and he filed the MTR nine months after receiving "bag and baggage" letter and four years after final decision. *Gaberov v. Mukasey*, 516 F.3d 590, 595-96 (7th Cir. 2008).

- Petitioner did not exercise due diligence after learning his case had been denied because he waited fourteen months before consulting new counsel. *Rashid v. Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008).

Furthermore, the First, Second, Third, and Sixth Circuits have expressly adopted the view that petitioner must have exercised due diligence *during the entire period* she seeks to have tolled, and not just once the circumstances leading to the claim were discovered.[36] In the context of IAC, this includes a requirement that due diligence was exercised during the periods before the ineffective assistance was or should have been discovered and continues until the MTR is filed.[37]

- **Practice Tip for the Fifth Circuit**

The Fifth Circuit has yet to hold that equitable tolling applies to MTRs. Instead, the Fifth Circuit has treated any request for equitable tolling as essentially an argument that the BIA should have exercised its discretion to *sua sponte* reopen. Because the Fifth Circuit has held that it lacks jurisdiction to review *sua sponte* decisions, it has found that it similarly lacks jurisdiction to review equitable tolling claims. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008).[38] We believe this is an incorrect interpretation of the court's authority and duty.

Furthermore, though the Fifth Circuit has not endorsed the doctrine of equitable tolling in a published immigration law decision, it has applied the equitable tolling analysis in unpublished decisions.[39]

[36] *See Neves*, 613 F.3d at 36; *Mezo*, 615 F.3d at 621; *Rashid*, 533 F.3d at 132; *Borges*, 402 F.3d at 407.
[37] *Alzaarir v. Atty. Gen.*, 639 F.3d 86, 90 (3d Cir. 2011); *Neves*, 613 F.3d at 36; *Mezo*, 615 F.3d at 621; *Rashid*, 533 F.3d at 132; *see also Avagyan*, 646 F.3d at 679 (tolling the limitations period until petitioner "definitively learns" of counsel's defectiveness or obtains "vital information bearing on the existence of his claim").
[38] In a more recent case, *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010), the court exercised jurisdiction to review a BIA decision where the BIA had concluded that "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…". However, the court denied the case on separate jurisdictional grounds, and did not review the BIA's application of equitable tolling.
[39] *E.g.*, *Torabi v. Gonzales*, 165 Fed. Appx. 326 (5th Cir. 2006) (unpublished) (finding equitable tolling warranted where individual "was unable to obtain information vital to her adjustment-of-status claim because she was *not* informed of her immediate eligibility to adjust" and filed within days of learning of her eligibility).

V. ARE NUMERICAL LIMITATIONS ALSO SUBJECT TO EQUITABLE TOLLING?

There is nothing to indicate that the numerical limitation on MTRs is meant to be a jurisdictional rule. It should therefore be treated as a claim-processing rule subject to equitable tolling like the time limitation. To date, only a handful of circuits – the Second, the Ninth, and the Fourth (in an unpublished decision) – have expressly applied principles of equitable tolling to toll the numerical limitation on MTRs in cases of ineffective assistance of counsel.[40] In so doing, they have applied the same equitable tolling test as used in the context of the time limitation on MTRs. (See Part IV above).

Other circuits that have applied equitable tolling to time limitations have also considered whether equitable tolling can cure an otherwise number barred motion but have not decided the issue.[41]

VI. HOW DOES THE BIA APPLY EQUITABLE TOLLING?

As stated above, the BIA routinely applies relevant circuit precedent allowing for equitable tolling of the motion to reopen deadlines. Therefore, practitioners should become familiar with and cite to relevant circuit court decisions.

In a 1998 published decision, the BIA rejected the argument that ineffective assistance of counsel should constitute an exception to the 180 day deadline for filing a motion to reopen an *in absentia* removal order. *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998); INA §240(b)(5)(C)(i). Though the majority's opinion rested on a reading of the plain language of the statute and its conclusion that the statutory language did not allow for the creation of an exception to the deadline on the basis of ineffective assistance of counsel, the BIA did not use the language of equitable tolling, nor did it engage in an equitable tolling analysis. The dissent called for an exercise of authority to achieve an "equitable outcome," but was not specific about whether this was to be achieved through an exercise of *sua sponte* authority or by some other means.[42] The BIA has not issued any other precedent decisions with regard to equitable tolling.[43] Several circuits, on the other hand, have specifically held that equitable tolling applies to the 180 day

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[40] *Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006); *Iturribarria*, 321 F.3d 889; *Davies v. US INS*, 10 Fed. Appx. 223 (4th Cir. 2001) (per curiam).

[41] *See, e.g., Tapia-Martinez v. Gonzales*, 482 F.3d 417 (6th Cir. 2007) (declining to decide the issue, instead concluding petitioner failed to exercise due diligence); *Luntungan v. Atty. Gen. of U.S.*, 499 F.3d 551 (3d Cir. 2006) (assuming *arguendo* that numerical limitations are subject to equitable tolling, but concluding equitable tolling not warranted); *Ruiz-Turcios v. U.S. Atty. Gen.*, 717 F.3d 847 (11th Cir. 2013) (remanding to allow the BIA to determine in the first instance whether numerical limitation is subject to equitable tolling).

[42] *Matter of A-A-*, 22 I&N Dec. 140, 148 (BIA 1998) (Rosenberg, concurring in part and dissenting in part); *see Matter of Lei*, 22 I&N Dec. 113, 131-35 (BIA 1998) (Rosenberg, concurring in part and dissenting in part) (concluding that principles of due process would allow consideration of an untimely motion in these circumstances for equitable reasons); *see, generally,* American Immigration Council Legal Action Center, "Rescinding an In Absentia Order of Removal," March 2010, available at http://www.legalactioncenter.org/sites/default/files/lac_pa_092104.pdf.

[43] The Attorney General initially endorsed equitable tolling in *Matter of Compean*, 24 I&N Dec. 710, 732 (A.G. 2009) ("*Compean* I"), but the decision was subsequently vacated, and *Compean II* makes no mention of equitable tolling principles. *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009).

deadline for filing a motion to reopen an *in absentia* order. *See, e.g., Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005). Further, no distinction exists between the 180 day deadline and the 90 day deadline (which is the focus of the discussion above) that would warrant different treatment for purposes of equitable tolling.

In light of the significant activity by reviewing courts in equitable tolling cases, it is reasonable to assume that he BIA will re-enter this field soon.

Chart of Principal Cases, by Circuit	
First Circuit	• *Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001). • *Nascimento v. Mukasey*, 549 F.3d 12 (1st Cir. 2008). • *Neves v. Holder*, 613 F.3d 30 (1st Cir. 2010). • *Bead v. Holder*, 703 F.3d 591 (1st Cir. 2013).
Second Circuit	• *Iavorski v. US INS*, 232 F.3d 124 (2d Cir. 2000). • *Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006). • *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008). • *Rashid v. Mukasey*, 533 F.3d 127 (2d Cir. 2008).
Third Circuit	• *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005). • *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005). • *Luntungan v. Atty. Gen.*, 449 F.3d 551 (3d Cir. 2006). • *Alzaarir v. Atty. Gen.*, 639 F.3d 86 (3d Cir. 2011). • *Davies v. US INS*, 10 Fed. Appx. 223 (4th Cir. 2001) (per curiam).
Fourth Circuit	• *Akwada v. Ashcroft*, 113 Fed. Appx. 532 (4th Cir. 2004). • *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013).
Fifth Circuit	• *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). • *Toora v. Holder*, 603 F.3d 282 (5th Cir. 2010).
Sixth Circuit	• *Scorteanu v. INS*, 339 F.3d 407 (6th Cir. 2003). • *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004). • *Tapia-Martinez v. Gonzales*, 482 F.3d 417 (6th Cir. 2007). • *Barry v. Mukasey*, 524 F.3d 721 (6th Cir. 2008). • *Mezo v. Holder*, 615 F.3d 616 (6th Cir. 2010). • *Gordillo v. Holder*, 640 F.3d 700 (6th Cir. 2011).
Seventh Circuit	• *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005). • *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008). • *El-Gazawy v. Holder*, 690 F.3d 852 (7th Cir. 2012).
Eighth Circuit	• *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005). • *Pafe v. Holder*, 615 F.3d 967 (8th Cir. 2010). • *Valencia v. Holder*, 657 F.3d 745 (8th Cir. 2011).

Ninth Circuit	• *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001). • *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002). • *Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002). • *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003). • *Avagyan v. Holder*, 646 F.3d 672 (9th Cir. 2011).
Tenth Circuit	• *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002). • *Galvez Piñeda v. Gonzales*, 427 F.3d 833 (10th Cir. 2005).
Eleventh Circuit	• *Avila-Santoyo v. U.S. Atty. Gen.*, 713 F.3d 1357 (11th Cir. 2013). • *Ruiz-Turcios v. U.S. Atty. Gen.*, 717 F.3d 847 (11th Cir. 2013).