

Final administrative order  
of removal entered.  
R files a MTR.

**Chart 2**  
Continue here for  
general  
requirements of  
an MTR

Time and Numerical Limitations<sup>1</sup>:  
• R must have filed the MTR w/in 90 days  
of entry of the administrative order of  
removal; and  
• Must have filed only one MTR.

2 Exceptions:

The MTR must include<sup>2</sup>:  
• The new facts that will be proven;  
• Affidavits and other evidentiary material.

**I. Equitable Tolling, See Chart 4.**  
If applicable, proceed along this  
chart as if time and numerical  
limitations not an issue.<sup>10</sup>

If the MTR is for the purpose  
of applying for relief:

**I.** The appropriate application  
and supporting documents  
must be submitted.<sup>3</sup>

**II.** The MTR shall not be  
granted unless:  
• The IJ is satisfied that the  
evidence offered is material,  
was not previously  
available, and could not  
have been discovered or  
presented during the course  
of the prior proceeding.<sup>4</sup>  
• The R establishes prima  
facie eligibility for the form  
of relief sought.<sup>5</sup>

**III.** The MTR shall not be  
granted if the R's right to  
apply for such relief was fully  
explained to her by the IJ and  
an opportunity to apply for  
such relief was provided.<sup>6</sup>

If R's MTR is based on an  
allegation of ineffective  
assistance of counsel  
("IAC"), R must comply  
with *Lozada* and show  
that she was prejudiced.<sup>8</sup>

*Note:* Rs are not required to  
show prejudice in the  
context of a MTR an *in  
absentia* order based on  
IAC as an exceptional  
circumstance—prejudice  
there is assumed.<sup>9</sup>

The MTR shall not be  
granted unless the IJ is  
willing to grant the MTR  
as an exercise of  
discretion.<sup>7</sup>

**II.** The time and numerical  
limitations do not apply if the alien  
is applying for Asylum, WOR, or  
CAT on the basis of changed  
country conditions in the R's  
country of nationality or the  
designated country of removal.  
For this exception to apply, R must  
fulfill two criteria:

**A.** Evidence of the change in  
the country conditions must be  
material;

**B.** The evidence must not have  
been available or discoverable  
and presentable during the  
course of the prior  
proceedings.<sup>11</sup>

*Note:* where the R moves to reopen  
proceedings in order to apply for  
asylum, she must reasonably  
explain her failure to apply for  
asylum before the completion of  
her prior removal proceeding.<sup>12</sup>

If R entitled to  
MTR for new  
relief, or proves  
IAC, grant the  
MTR!

If R is unable to prove she is  
entitled to MTR for new relief,  
or has not shown IAC, determine  
whether R entitled to *sua sponte*  
reopening.<sup>13</sup>

- FN 1** A party may file only one motion to reopen an order of removal and must file that motion within ninety days of the date of the entry of a final administrative order of removal. 8 C.F.R. § 1003.23(b)(1).
- FN 2** A motion to reopen shall state the new facts that shall be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3).
- FN 3** “Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.” *Id.*
- FN 4** “A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing.” *Id.*
- FN 5** In addition to submitting evidence that is material, that was not available at her former hearing, and that is supported by affidavits or other evidentiary material, “a motion to reopen will not be granted unless the respondent establishes a prima facie case of eligibility for the underlying relief sought.” *See Matter of S-V-*, 22 I & N Dec. 1306, 1307 (BIA 2000); *See also Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003). *Prima facie* eligibility for relief is shown “where the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied.” *Ordonez*, 345 F.3d at 782. A conclusive showing that eligibility for relief has been established is not required. *Id.*
- FN 6** “A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien’s right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing . . . .” 8 C.F.R. § 1003.23(b)(3).
- FN 7** “The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.” *Id.*
- FN 8** When an alien files a motion to reopen based on ineffective assistance of counsel, the alien must demonstrate that she was prejudiced by her counsel’s ineffective assistance. *See Matter of Assaad*, 23 I& N Dec. 553 (BIA 2003). This is so because an alien’s right to counsel in removal proceedings is based on the Fifth Amendment’s guarantee of due process. *See Lozada*, 19 I&N Dec. at 638 (citations omitted). Ineffective assistance of counsel “is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Id.* (citing *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986)). Prejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings. *Ortiz*

*v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (citing *Barraza Rivera v. INS*, 913 F.2d 1443, 1448 (9th Cir. 1990)).

**FN 9** See Chart 4 at note 9.

**FN 10** See Chart 4 at notes 9-11.

**FN 11** “The time and numerical limitations . . . shall not apply if the basis of the motion [to reopen] is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding.” 8 C.F.R. § 1003.23(b)(4)(i); INA § 240(c)(7)(C)(ii).

*He v. Gonzales*, 501 F.3d 1128 (9th Cir. 2007) (holding that the birth of children outside the country of origin is merely a change in personal circumstances that is not sufficient to establish changed circumstances in the country of origin within the regulatory exception to late-filed or successive motions to reopen, explaining that “[a] self-induced change in personal circumstances cannot suffice”).

*Matter of J-J-*, 21 I&N Dec. 976, 980-81 (BIA 1997) (finding no material change in circumstances where the evidence submitted indicated that the situation in Liberia had been volatile since before the alien’s last hearing).

*Usmanov v. Mukasey*, 2008 WL 2180143 (9th Cir. 2008) (unreported) (holding that the BIA did not abuse its discretion in determining that the alien failed to provide sufficient evidence of changed circumstances in Tajikistan).

**FN 12** However, where the alien moves to reopen her proceedings in order to apply for asylum, she must reasonably explain her failure to apply for asylum before the completion of her prior removal proceeding. 8 C.F.R. § 1208.4(b)(3)(ii); *Lainez-Ortiz v. INS*, 96 F.3d 393, 395-96 (9th Cir. 1996).

**FN 13** See Chart 1 at note 7.