

Appendix III

Memorandum



HQCOU90/16.11-P

<p><b>Subject</b></p> <p>Motions to Reopen Policy REVISED</p>	<p><b>Date</b></p> <p>December 23, 1997</p>
<p><b>To</b></p> <p>Regional Counsel District Counsel</p>	<p><b>From</b></p> <p>Office of the General Counsel</p>

This memorandum supersedes the memorandum on motions to reopen dated July 11, 1997. The following instructions, effective immediately, contain guidance under which the Service may consent to the joint filing of a motion to reopen immigration court and BIA proceedings.

**Motions to Reopen**

**Background**

Section 240(c)(6) of the Immigration and Nationality Act (INA), as amended, permits an alien to file one motion to reopen removal proceedings. Section 240(c)(6) also restricts the period for filing such motions to within 90 days of the date of entry of a final administrative order of removal. While the INA provides an exception to the 90 day time limit for aliens applying for relief under sections 208 or 241(b)(3), section 240(c)(6) is silent on time limits where the parties agree that a motion to reopen is appropriate.

Current Executive Office for Immigration Review (EOIR) regulations provide that an alien must file a motion to reopen within 90 days after the date that the administrative decision became final or on or before September 30, 1996, whichever is later. 8 C.F.R. §§ 3.2(c)(2), 3.23(b)(1). An exception to this restriction is a case in which all of the parties agree to the motion and such a motion is jointly filed with EOIR. 8 C.F.R. § 3.2(c)(3)(iii).

To seek the Service's consent to file a motion to reopen with an Immigration Court or the Board of Immigration Appeals under the third exception, 8 C.F.R. § 3.2(c)(3)(iii), an alien must contact the District Counsel's office that represented the Service during the alien's immigration proceedings. Such a request must be supported by affidavits or other evidentiary material, including a complete copy of the appropriate application for relief, if applicable. The request should also include the proposed joint motion in a format that includes a signature block for the INS attorney. Any joint motion to reopen to which the Service consents shall be signed only by the District Counsel or a designated Deputy District Counsel. Where appropriate, the District Counsel's office may request that revisions to the joint motion be made as a precondition for giving its consent. Even

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when it agrees to such a joint motion, the Service may still contest the merits of the alien's case in a reopened proceeding. *Id.*

**Guidance for Motions to Reopen**

Service consent to file a motion to reopen that would otherwise be barred as untimely under EOIR regulations should be given only under exceptional and compelling circumstances. Factors to be considered in determining whether a favorable exercise of discretion is warranted should include: (1) whether the alien has presented new evidence that is material and was not available and could not reasonably have been discovered or presented at the former hearing; (2) whether the alien is statutorily eligible for the relief sought; (3) whether the alien merits a favorable exercise of discretion; (4) the hardship to the alien and/or his USC or LPR family members if the alien were required to procure a visa through consular processing (including the potential applicability of section 212(a)(9) should the alien depart the United States); (5) the alien's criminal history, if any; (6) the number and severity of the alien's immigration violations; (7) whether the alien has cooperated with, or his continued presence in the United States is desired for, a criminal or civil investigation or prosecution conducted by a federal, state or local law enforcement agency; and whether the alien's removal is consistent with INS objectives. When novel or otherwise sensitive issues are presented, consult with the Regional Counsel.

**Guidance for Motions to Reopen filed by Aliens Covered by the Nicaraguan Adjustment and Central American Relief Act (NACARA).****Nicaraguan and Cuban Nationals:**

The Service should not consent to motions to reopen filed by Nicaraguan and Cuban nationals seeking to apply for adjustment pursuant to section 202 of the NACARA. The NACARA provides that a motion to reopen is not a prerequisite for filing such an adjustment application and eligible aliens should be so advised in any communication denying the request for consent to file the motion. Motions to reopen filed by Nicaraguan and Cuban nationals seeking to adjust status pursuant to section 245 of the INA (i.e. the requisite petition or certification has been approved and an immigrant visa is immediately available) should be treated like any other motion to reopen as provided in the previous paragraph.

**Certain Nationals of El Salvador, Guatemala, and Former Soviet Bloc Countries:**

Section 203(c) of the NACARA allows an alien who becomes eligible for suspension or cancellation of deportation as a result of amendments made by that legislation to file one motion to reopen to apply for cancellation of removal/suspension of deportation regardless of any other statutory limitations. The Attorney General is required to designate a time period in which all such motions are to be filed. As these aliens must file their motion to reopen during a statutorily

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prescribed time period, the Service should not consent to motions to reopen for cancellation of removal/suspension of deportation filed by aliens eligible to pursue relief under section 203 of the NACARA.

**Motions and Requests Do Not Stay Deportation**

Neither a request for Service consent to file a joint motion to reopen nor actual Service consent thereto shall stay the execution of any final order of deportation in that case. The burden is on the alien to apply for and obtain a stay of deportation from the appropriate authority. The District Counsel shall consent to a stay in cases in which the Service has agreed to a joint motion to reopen. However, absent the specific grant of a stay of deportation by the Board of Immigration Appeals, an Immigration Judge, or an authorized INS officer, execution of a deportation order may proceed notwithstanding the fact that the Service may not have acted upon an alien's request to file a joint motion to reopen. See 8 C.F.R. § 3.2(f).

Nothing in this memorandum shall be construed to create a cause of action against the Service with respect to any action or non-action taken on a particular request for consent.

*for Louis Scialabba*  
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General Counsel