

ALI-ABA Training Materials

*from ALI-ABA's*

**BEST PRACTICES IN REPRESENTING ASYLUM-SEEKERS  
A VIDEO RESOURCE FOR *PRO BONO* ATTORNEYS**

**Asylum Appeals**

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# ASYLUM APPEALS

by Lori R.E. Ploeger<sup>1</sup>

## APPEALS TO THE BOARD OF IMMIGRATION APPEALS

### Notice of Appeal

#### A. Time for Filing.

1. The notice of appeal must be filed within **30 calendar days** after the statement of an Immigration Judge's oral decision or the mailing of an Immigration Judge's written decision (if no oral decision was rendered).
2. Filing date is determined by date of **receipt**—no “mailbox rule” applies.

#### B. Method of Filing.

Although filing can be accomplished by any method, be sure to use a method by which you can ensure a timely filing (*e.g.*, overnight mail or express courier) and file a day or two ahead of schedule to allow for problems in transit.

#### C. Contents of Notice of Appeal.

1. Use Form EOIR 26, found at <<http://www.usdoj.gov/eoir/formspage.htm>>
2. The notice must:
  - a. Identify the parties to the appeal, including “A” numbers. 8 C.F.R. § 1003.3(a) provides: “The appealing parties are only those parties who are covered by the decision of an immigration judge *and who are specifically named on the Notice of Appeal.*” (Emphasis added).
  - b. State reasons for appeal, including:
    - (1) Specifically identifying the challenged findings of facts, conclusions of law, or both.
      - (a) For questions of law, citation to legal authority is required.
      - (b) For findings of fact, the specific facts contested must be identified.

**CAUTION:** The required notice of appeal is much more detailed than that required to appeal to the federal courts of

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<sup>1</sup> Lori R.E. Ploeger is special counsel with the law firm of Cooley Godward LLP, where she devotes a portion of her pro bono hours to asylum appeals. Ms. Ploeger gratefully acknowledges the invaluable contributions of Judge Edward Becker, United States Court of Appeals for the Third Circuit, and Third Circuit Staff Attorney Christine Djalleta. She also expresses her sincere appreciation to Michael Traynor for his support and to Christopher B. Durbin and Andrea S. Bitar for their editorial assistance.

appeals from a federal district court judgment. Failure to identify and support the grounds of the appeal will result in waiver of the points on appeal.

- (2) In an appeal concerning discretionary relief, “the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged.” 8 C.F.R. § 1003.3(b).
- c. State whether a written brief will be filed.  
**CAUTION:** If the notice of appeal states that a written brief will be filed, the failure to do so can result in the appeal being summarily dismissed.
- d. State whether oral argument is requested.
- e. State whether hearing by a three-member panel of the Board is warranted and if so provide supporting reasons: “An appellant who asserts that the appeal may warrant review by a three-member panel under the standards of §1003.1(e)(6) may identify in the Notice of Appeal the specific factual or legal basis for that contention.” 8 C.F.R. § 1003.3(b).

Section 1003.1(e)(6) provides:

Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

- (i) The need to settle inconsistencies among the rulings of different immigration judges;
- (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
- (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;
- (iv) The need to resolve a case or controversy of major national import;
- (v) The need to review a clearly erroneous factual determination by an immigration judge; or
- (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

D. Mandatory Concurrent Filings.

1. Fee or Fee Waiver Request.
  - a. \$110 Filing Fee (as of June 8, 2004).
  - b. Payable to: “United States Department of Justice.”
  - c. Check must be payable from U.S. account, U.S. currency only.
  - d. Alternatively, the applicant may file a fee waiver request.
    - (1) Form EOIR-26A, found at



- L. Oral Argument takes place at the Board's offices in Falls Church, Virginia, unless another place is designated.
- M. Oral argument may be closed to the public in certain cases. The applicant can file a notice of waiver of confidentiality in those cases to permit an open courtroom.
- N. Each side generally has 30 minutes for argument.
- O. A question and answer sheet on oral argument before the Board can be found at <http://www.usdoj.gov/eoir/bia/qapracmanual/qaoral.pdf>

### **Rehearing and Reopening**

Upon receiving the Board's decision, it is important to evaluate whether there are grounds to file a motion to reopen or motion for reconsideration before the Board. While a detailed review of these procedures is beyond the scope of this paper, a complete appellate strategy requires evaluating whether there is still relief to be pursued at the Board while simultaneously initiating the appellate process with the Court of Appeals (see below). There are time and numerical bars on motions to reconsider and reopen, but these bars are subject to exceptions, including but not limited to changed circumstances and (in some circuits) equitable tolling. The BICE can waive time and numerical bars and consent to a motion to reopen or for reconsideration.

## APPEALS TO THE UNITED STATES COURTS OF APPEALS

### Petition for Review

- A. Certain Board of Immigration Appeals decisions denying asylum and withholding of removal are appealable to the United States Courts of Appeal by way of a **petition for review**. *See generally* 8 U.S.C. § 1252. An alien in custody may also have remedies by way of petition for writ of habeas corpus to the district court, but that is beyond the scope of these materials.
- B. Jurisdiction. Determine whether the federal Court of Appeals has jurisdiction to hear an appeal from the BIA's decision.
- C. When to file.
1. No later than 30 days after the date of the final order of removal. 8 U.S.C. § 1252(b)(1).
  2. This deadline is **jurisdictional** and may not be extended by the Court. Failure to file the petition by the deadline deprives the Court of Appeals of jurisdiction.
  3. The petition for review must be **received** by the Clerk's office within 30 days, not just mailed within 30 days.
  4. The pendency of a motion to reopen or motion for reconsideration does not toll the time to file the petition for review.
- D. Where to file.
1. The petition for review is filed with the Court of Appeals for the judicial circuit in which the immigration judge completed the proceedings. 8 U.S.C. § 1252(b)(2).
  2. You can locate your Court of Appeals through the following link to the federal courts' official website:  
<<http://www.uscourts.gov/images/CircuitMap.pdf>>
- E. Contents of Petition; Attachments.
1. The petition for review is a straightforward document, akin to a notice of appeal from a district court judgment. The only statutory requirements for the petition are stated in 8 U.S.C. § 1252(c):  
A petition for review or for habeas corpus of an order of removal—(1) shall attach a copy of such order, and (2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.
  2. Attach a copy of the Board's order. Although not required, the best practice is to attach the order of the immigration judge as well, particularly if the Board's order is an affirmance without opinion.

3. State whether any court has upheld the validity of the order. Typically, the answer will be no. If the answer is yes, the Court of Appeals will not have jurisdiction “unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.” 8 U.S.C. § 1252(d)(2).

**CAUTION:** An order denying a motion to reopen or reconsideration is separately appealable. Even if you have already filed a petition for review of the removal order, you must file a separate petition for review from the order denying reopening or reconsideration to preserve those issues for appellate review. The statute requires that appeals from the underlying decision and denials of reopening/reconsideration must be consolidated at the Court of Appeals. 8 U.S.C. § 1252(b)(6).

4. Filing Fee.
  - a. Check the Court of Appeals’ local rules for the amount of the filing fee.
  - b. See FRAP 24(b) for information about requesting leave to file *in forma pauperis*.

F. Service.

1. The petition must be served on the Attorney General and the BICE Field Office Director for Detention and Removal. Also consider serving the Office of Immigration Litigation, which handles most petitions for review.
2. A certificate of service should accompany the petition.

G. Motion for Stay of Removal. Filing a petition for review does not automatically stay the order of removal. The standard for granting a stay of removal varies among the circuit Courts of Appeals.

See <[http://www.aifl.org/lac/lac\\_pa\\_031803.pdf](http://www.aifl.org/lac/lac_pa_031803.pdf)> for a discussion of the various standards.

**CAUTION:** In some courts, failure to provide argument in support of the stay motion almost always guarantees that the court will deny the motion. The stay motion is particularly important for aliens whose immigration proceedings commenced before April 1, 1997, as their deportation pending court review would render their petition for review moot. 8 U.S.C. § 1105a(c) (1996) (repealed).

H. Voluntary Departure. If the alien has been granted voluntary departure, consider whether to file a motion for stay of the voluntary departure period. The AILF has a practice advisory discussing various courts’ views of what happens to an order

of voluntary departure pending a petition for review. That practice advisory can be found at <[http://www.aifl.org/lac/lac\\_pa\\_092604.pdf](http://www.aifl.org/lac/lac_pa_092604.pdf)>.

- I. The Record. The Board of Immigration Appeals must prepare a certified administrative record.

### **Appellate Briefs**

- J. Required briefs. There are typically three briefs filed on appeal: petitioner's opening brief, respondent's answering brief, and petitioner's reply brief.

- K. Time for Filing.

1. Petitioner's opening brief must be filed 40 days after the administrative record is filed. 8 U.S.C. § 1252(b)(3)(C). The reply brief is due 14 days following service of the respondent's brief.
2. Deadlines for filing appeal briefs may be extended on motion for good cause, and it is common for the parties to seek extensions. FRAP 26(b).

- L. Administrative Record.

1. The administrative record is due 40 days after the petition for review is filed, see FRAP 17(a), but the Courts of Appeals commonly grant extensions of time for filing the record.
2. Petitioner should monitor whether the record has been filed and move to extend the time for filing the opening brief if the record is not timely filed.

- M. Form of Briefs.

1. Study FRAP 32's formatting requirements carefully. Surprises for those new to appeals include, for example, a requirement that the text be in 14-point font with full one-inch margins, and a color-coding system for the cover of briefs.
2. Appeal briefs must be bound. Plastic covers may not be used because the Clerk's office file-stamps the cover of the brief. Use sturdy cardstock in the required color.

- N. Contents of Petitioner's Brief. (FRAP 28.)

1. Statement Regarding Oral Argument. Check local rules to see whether a statement regarding oral argument is required.
2. Tables
  - a. Table of Contents.
  - b. Table of Authorities (cases, statutes, other authorities):
    - (1) The list of cases should be alphabetized, and the statutes and other authorities should be organized in a user-friendly way.

- (2) Do not separate the case references by jurisdiction. It is more helpful to the Court to have a single alphabetical listing.
- c. Be sure to leave sufficient time after you have finalized the text of the brief to prepare the tables. This typically takes longer than expected. Double-check automatically generated page references in the final printed copy.
3. Jurisdictional Statement.  
This section is particularly important in immigration appeals, where the Court of Appeals' jurisdiction is carefully circumscribed by statute.
4. Statement of the Issues.
  - a. As in all appeals, choose your issues carefully. If you take a "kitchen-sink" approach, it reduces the impact of the more persuasive issues. Judges are often skeptical of briefs that raise more than three primary issues. Carefully limit the statement of issues to only the most important issues raised by the appeal.
  - b. Although appellate practitioners generally tend to avoid briefing issues that turn on witness credibility, there may be good reason to brief these issues in an immigration appeal. The Ninth Circuit, for example, has a line of cases rejecting certain factual bases for an adverse credibility determination.
5. Statement of the Case.
  - a. FRAP 28(a)(6) requires a statement of the case "briefly indicating the nature of the case, the course of proceedings, and the disposition below."
  - b. This is *not* the place for argument. It should be an objective description of the procedural history of the case to orient the judge about the type of case and how the case came to be on appeal.
6. Statement of the Facts.
  - a. Many judges consider this to be the most important section of the brief. This may be especially true in immigration cases.
  - b. It typically makes most sense to organize the facts chronologically.
  - c. Each factual recitation should be followed by one or more citations to the administrative record.
  - d. Be scrupulous in your factual representations. Nothing undermines an advocate's credibility more quickly than stretching or misstating the record.
  - e. Be cognizant of the standard of review when drafting the statement of facts.
7. Summary of the Argument.
  - a. Do not merely restate the headings from the argument section.
  - b. Preferably, this section should not exceed five pages.

- c. Cover all the arguments made in the body of the brief, but consider varying the depth of treatment based on the issue's importance.
8. Argument.
  - a. Include subject matter headings.
  - b. Generally, it is best to lead with your strongest issue. This is not the place to "save the best until last."
  - c. Acknowledge and distinguish adverse authority. The Court's clerks are thorough.
9. Conclusion.

The rule requires a "short conclusion stating the precise relief sought." FRAP 28(a)(10).
10. Certificate of Compliance.
  - a. If you use a computer to prepare the brief, you will be subject to a word-count limitation rather than a page limitation. The word-count limitation for the opening brief is 14,000; the reply brief, 7,000.
  - b. After the conclusion, but before the certificate of service, you must include a certificate of compliance with the word-count limitation.
  - c. Most word processing programs now have a word-count function. Headings, quotations, and footnotes count toward the word-count limitation. In Microsoft Word, do not simply highlight the text and then select word count; this will omit the footnotes from the word count in violation of the rules.

## **Oral Argument**

FRAP 34(a)(2) provides:

Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (b) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not significantly aided by oral argument.

Under FRAP 34(a)(2)(C), the Court has broad discretion to determine whether it thinks oral argument would be helpful.

## **Petition for Rehearing/Rehearing En Banc**

- O. Either party may move for rehearing by the panel or rehearing by the en banc Court. FRAP 35 (en banc); FRAP 40 (panel).
- P. When to file.
1. Under FRAP 35 and 40, a rehearing petition must be filed with 45 days after entry of the Court of Appeals' judgment.  
\*\*Check local rules, which may vary this due date.\*\*
  2. The petition must be *received* by the Clerk's office on or before its due date.
- Q. Panel rehearing.
1. A panel rehearing is used to address "point[s] of law or fact that the petitioner believes the court has overlooked or misapprehended." FRAP 40(a)(2). The petition must contain argument in support of the request for rehearing. *Id.*
  2. No answer permitted unless requested. FRAP 40(a)(3).
  3. No oral argument.
- R. Rehearing en banc.
1. Rehearing en banc is rarely granted. It is reserved for panel opinions that conflict with decisions of the Supreme Court or other decisions within the same circuit, or involve "questions of exceptional importance," including cases that conflict with decisions of other circuits. FRAP 35(b)(1).
  2. No response may be filed unless ordered by the Court. FRAP 35(e).

## RESOURCES

### Board of Immigration Appeals Practice Manual

Available free of charge at <<http://www.usdoj.gov/eoir/bia/qapracmanual/apptmtn4.htm>>

### Immigration Appeal Forms

Available free of charge, fillable forms at <<http://www.usdoj.gov/eoir/formspage.htm>>

### Ninth Circuit Immigration Outline

Available free of charge, a link to this excellent substantive outline is available at <<http://www.ca9.uscourts.gov>>

### American Immigration Law Foundation

Trina Realmuto and Anne Seymour, *How to File a Petition for Review*, American Immigration Law Foundation Practice Advisory, available at <[http://www.aifl.org/lac/lac\\_pa\\_050304.asp](http://www.aifl.org/lac/lac_pa_050304.asp)>

Regina Germain, *AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure* (3d ed. 2003).