

ASYLUM APPEALS FROM IMMIGRATION COURT

OVERVIEW

Upon a decision issued by the Immigration Judge (“IJ”) either granting or denying Asylum, Withholding of Removal or Convention Against Torture (“CAT”) relief, both the respondent (client) and the Department of Homeland Security Trial Attorney (“TA”) have 30 days in which to notify the Board of Immigration Appeals (“BIA”) of their intent to appeal. (NOTE: nothing is final until the 30 days have elapsed because DHS can always appeal.) The BIA is the highest administrative tribunal in the field of immigration law and constitutes part of the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice that also includes the Immigration Judges. The BIA’s mission is to execute the adjudicatory functions of the Attorney General under the Immigration and Nationality Act; in short, it is the first stop in a series of appeals.

This document provides a brief overview of the BIA appeals process but you should also consult with your Tahirih co-counsel and review the BIA’s practice manual for guidance throughout the appeal. The BIA manual is available at:
<http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap3.pdf>.

WHY WOULD YOU WANT TO APPEAL?

Aside from the obvious, that an appeal is the only way to preserve your client’s legal rights and reverse a denial of her application, the appeals process offers several other advantages. First, in most cases it automatically stays removal while the appeal is pending. Some appeals remain pending for many years. During the appeals process, your client may be able to remain in the US and continue to renew her work permit. Additionally, immigration law is constantly changing and during the pendency of the appeal, it is possible that the legal situation may improve for your client. Finally, it is important to remember that even if your client is granted some form of relief that the government is appealing, you always maintain the right to cross appeal on other issues and/or other forms of relief.

EREGISTRY REQUIREMENT

In order to practice before the Board of Immigration Appeals, all attorneys and fully accredited representatives must register with EOIR’s eRegistry. An attorney or representative who fails to provide required registration information risks being administratively suspended from practice before EOIR. If you have never registered with eRegistry you must do so before entering an appearance with the BIA, or you may risk the BIA refusing to recognize you as your client’s representative and possibly rejecting your filing. Instructions for eRegistry can be found on EOIR’s website www.justice.gov/eoir.

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FILLING OUT THE NOTICE OF APPEAL

A form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge, must be received by the BIA at its offices in Falls Church, Virginia, no later than 30 days after the date on which

the Immigration Judge issued his/her opinion. The form can be accessed at the EOIR website or by following this hyperlink: <http://www.justice.gov/eoir/eoirforms/eoir26.pdf>.

Summary Affirmance/Streamlining

Regulations issued in 2002 mandate a “screening panel” consisting of BIA members and staff attorneys to determine which cases should be summarily dismissed or affirmed or “streamlined.” These cases can be disposed of with a very brief order, because the appeal is untimely, consists of a matter over which the BIA has no jurisdiction, or the matter has already been stipulated to or is uncontested by the opposing party. If the BIA determines that your appeal satisfies the criteria for an Affirmance Without Opinion, as set forth in 8 C.F.R. § 3.1(e)(4)(i), then a single Board member will issue a three sentence decision, affirming without any further explanation the results of the decision reached below. You will therefore want to include substantive arguments regarding why your appeal should not be “streamlined” in your initial Notice of Appeal. The following are some justifications you may use to argue for a three-judge panel as opposed to a one-judge panel:

- *Inconsistencies need to be settled:* because Immigration Judges have ruled differently from each other on the issue(s) in the case.
- *Precedent must be established:* a need exists to interpret the meaning of laws, regulations, or procedures at issue in the case and, therefore, a written binding decision is appropriate.
- *Applicable precedents:* the decision by the Immigration Judge does not follow applicable precedents.
- *Major national importance:* the issue(s) in the case must be resolved because they are of major national importance.
- *Erroneous:* the Immigration Judge’s determination of the facts was clearly incorrect or erroneous.

Requesting Oral Argument

The vast majority of cases appealed to the BIA do not result in oral arguments; however, if you would like the chance to argue your case in person, you can mark the “yes” box at question 7 on the EOIR-26. Doing so *does not guarantee* an oral argument, but it does allow for the opportunity to have your case *considered* for oral argument.

Filing the Notice of Appeal with the BIA

The BIA only requires one copy of the entire appeal packet. The appeal package containing the EOIR-26 (printed on blue paper) should also contain¹ (in order):

- The appropriate filing fee [must be a money order] (if applicable, stapled to the EOIR-26);

¹ According to the BIA’s practice manual section 12.2, the BIA will accept photocopies of completed forms so long as the completed form bears an original signature and is available to the BIA upon request. Additionally, while forms are no longer required to be printed in a particular color, EOIR still welcomes the appropriate use of colored paper for certain forms, including EOIR-26, 26A, 27, 29 and 33.

- EOIR-26 (with its Certificate of Service completed)
- EOIR-26A Fee Waiver Request [tan paper] (if unable to pay the filing fee)
<http://www.justice.gov/eoir/eoirforms/eoir26a.pdf>
- An attorney's signed EOIR-27 Notice of Entry of Appearance or Representative before the BIA of Immigration Appeals [yellow paper] <http://www.justice.gov/eoir/eoirforms/eoir27.pdf>
- Supporting documentation
- Parties are encouraged to include a copy of either the memorandum order of the oral decision or the written IJ decision being appealed

Use alphabetic indexing tabs to separate the distinct portions of the appeal package and be sure to consult the BIA's practice manual for other specifics such as pagination, multi-sided copies, and binding.

Service Requirement

You must serve a copy of the filing on the Department of Homeland Security, *and* provide a proof of service form demonstrating, that a copy has been served on the Department of Homeland Security. Service may be provided by hand or by mail. It is highly recommended that you use the sample found here: <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/AppG.pdf>.

The only exception to the proof of service requirement is a motion that is agreed upon by all parties and jointly filed.

TIMELINE OF A BIA APPEAL

Once an appeal is timely filed with the BIA you can expect the following to occur:

- Approximately 2-4 weeks after filing a complete Notice of Appeal, you should receive written notice from the BIA acknowledging its receipt of the appeal.
- Next, a briefing schedule is issued in which the parties are notified of the deadlines for filing their briefs. Generally parties are given 21 days to file a brief and may request in writing an extension if "good cause" is demonstrated. Note: only one extension per case will be issued.
- Sometime after the filing of your EOIR-26, you will receive from the BIA, a copy of the written transcript of the Immigration Court proceedings.
- Once you receive the government's reply brief you will have 21 days to respond. A request to extend that period may be made subject to all other rules and numerical limitations.

It is not uncommon for several years to pass before the BIA issues a decision, particularly in cases where novel issues are at stake. For example, the BIA held appeals concerning domestic violence without issuing a decision for more than 8 years while *Matter of R-A-*, the seminal case on domestic violence, was pending. As of December 2011, the BIA has resumed the practice of holding asylum appeals for cases based on domestic violence.

FILING AN APPELLATE BRIEF

There are no limits on the number of pages in an appellate filing. However, parties are encouraged to limit the body of their briefs or motions to 25 pages, provided that such length can adequately dispose of the issues in the case. Briefs and all supporting documentation should be one-sided, paginated, and, include a cover page. A sample cover page can be found online in the EOIR practice manual or by following this hyperlink: <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/AppF.pdf>.

For additional brief-writing guidelines, see the BIA Practice Manual Chapter 4 Page 58 available online at the EOIR website or by following this hyperlink: <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap4.pdf>.

Every appellate brief should include the following sections in this order:

- 1) A short *statement of the facts* with citations to the transcript (See the BIA Practice manual for instructions on what you may and may not include as facts)
- 2) A short *statement of the procedural history* of the case
- 3) A *statement of the issue(s)* you would like the BIA to review
- 4) The *standard for review*
 - Findings of fact are reviewed under a “clearly erroneous” standard (i.e. the BIA will not overturn an IJ’s findings unless it is so clearly wrong that it *must* be overturned)
 - Legal conclusions are reviewed under a “De Novo” standard
- 5) A brief *summary of the arguments*
- 6) The *legal argument* itself constituting the majority of your brief
- 7) A short *conclusion* stating precisely what you are requesting of the BIA (i.e. reversal of the IJ’s decision, remand for further fact-finding etc.)

Your Tahirih co-counsel can provide you with sample appellate briefs upon request.

AFTER YOU FILE THE BRIEF

Changing a Client’s Address During the Appeal

In order to change your client’s address while her case is on appeal at the BIA, you should file with the BIA a form EOIR-33/BIA Change of Address (on pink paper). You can access a pdf version of the EOIR-33 online at the EOIR website or by following this hyperlink: <http://www.justice.gov/eoir/eoirforms/eoir33bia.pdf>.

Renewing Work Authorization During the Appeal

If your client’s work authorization will expire during the appeals process you should follow the instructions on the form I-765 in order to file the renewal application with all necessary documentation, appropriate fees, and with the correct service center tasked with renewing that category of employment authorization. As with all employment authorization renewals, Tahirih recommends that you submit the application at least 90 days in advance of the expiration of your client’s current employment authorization to ensure that

there are no lapses in your client's authorization to work. If your client has not previously filed for a work permit while the asylum application was pending, please consult your Tahirih mentor.

Complying With an Order of Supervision

Clients who were previously detained may, at the discretion of the DHS' Detention and Removal Office (DRO), be placed on an Order of Supervision. Each Order of Supervision will contain a list of obligations that the client must comply with in order to avoid being detained during the appeals process. Some common obligations include: reporting to the DRO on a monthly basis to be inspected by a removal officer, obtaining prior approval from the DRO for any extended travel outside the DC metro area, and refraining from criminal acts or associating with gang members.

Effect of Your Client's Departure from the United States

Tahirih strongly recommends that clients do not travel after the issuance of any decision that they intend to appeal. Departure from the United States can jeopardize your client's right to appeal, even when the departure is authorized or compelled by the DHS. Departure from the U.S. prior to filing an appeal or while an appeal is pending may be construed as a withdrawal of that appeal.

WITHDRAWING AN APPEAL

You may, at any time prior to the entry of a decision by the BIA, voluntarily withdraw your client's appeal, with or without the consent of opposing counsel, the DHS. The withdrawal must be in writing and filed with the BIA. The cover page to the withdrawal should be clearly labeled "MOTION TO WITHDRAW APPEAL" and comply with the BIA's general requirements for filing found in the practice manual. If the BIA does not receive the withdrawal BIA prior to rendering a decision, the BIA will not recognize the withdrawal, and the BIA's decision will become binding. When an appeal is withdrawn, the decision of the Immigration Judge becomes immediately final and binding, including any orders of removal.

EFFECT OF A DENIAL OF THE APPEAL

A denial at the BIA is not the end of the road. BIA decisions may be overcome through:

- A motion to reopen (received within 30 days of the decision);
- A motion to reconsider (received by the BIA within 30 days of the decision);
- An appeal to the U.S. Federal Circuit Court of Appeals with jurisdiction over your case.

Upon denial of a BIA appeal, you should consult with your Tahirih co-counsel immediately to determine the appropriate next steps and deadlines.

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