BIA and Circuit Court Appeals
Pro Bono Immigration Training
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Organization of Executive Branch and Federal Appeals Courts

- Immigration Courts
  - Power to Deport
  - Assess Liberty/Custody
  - Asylum
  - International Rights under CAT
- Board of Immigration Appeals

Judicial Review

- United States Courts of Appeals
- U.S. Supreme Court (by certiorari only)
Checks and Balances

- The BIA and Immigration Courts fall under the Executive Branch
- Federal Courts are under the Judicial Branch
- Limited avenues to judicial review exist
Preserving Judicial Review

- What you do in Immigration Court and before Board of Immigration Appeals will affect your client’s right to access federal court review

- What to Do Before the Immigration Judge
  - Make and preserve your Record
  - Memorialize off-the-record agreements, restrictions, rulings
  - Contest removability where possible
  - Preserve evidentiary objections
  - Give a solid Closing Argument
  - Take near-verbatim notes of Oral Decisions
  - Do not waive appeal unless decision fully favorable
Jurisdiction of BIA

- Appeals from most Immigration Judge decisions on the merits
- Denials of motions to reopen
- Bond appeals
- Interlocutory appeals (i.e., change of venue denied)
- Appeals from decisions on visa petitions (approx 4,000)
- Appeals from denials of INA § 212 waivers of inadmissibility for nonimmigrants
- Decisions on fines and penalties
- Decisions on BIA recognition/accreditation
- Attorney Discipline matters
Most Common Appeal Types

- Asylum, withholding, CAT
- Criminal deportability issues
- Cancellation of removal – LPR or non-LPR
- Termination of removal proceedings
- IJ denial of motions – such as motion to reopen or motion to change venue
Starting points: How do you file an appeal before the BIA?

- Timing (Received at BIA within 30 days of service of decision whether by hand or mail. No Mailbox Rule.)
- Notice of Appeal (EOIR-26)
- Remember to Request Oral Argument (can be waived later)
- Notice of Appearance (EOIR-27) – Required even if you were the attorney before the IJ
- Filing Fee ($110 payable to U.S. Dept. of Justice) or Fee Waiver (EOIR – 26A) (unless bond appeal)
- Proof of Service on all forms
- All forms available at [www.justice.gov/eoir](http://www.justice.gov/eoir)
Briefing schedules: Detained vs. non-detained

- **Detained cases**
  - Simultaneous 21-day briefing schedule
  - Response briefs accepted, up to 14 days before briefing deadline.
  - Board will not delay adjudication to wait for response brief.

- **Non-detained cases**
  - Filing party: 21 days
  - Other party: 21 days to file response brief
  - Cross appeals? Simultaneous 21-day briefing schedule (then follow rules for response briefs---not usually permitted)
  - Will accept additional response brief only if complies with rules.
  - Motion to accept reply brief
  - Premised on/asserts surprise

- **Extensions of Time – BIA Practice Manual 4.7(c)**
  - One 21 day extension readily granted
  - Additional extensions RARE. Require serious medical emergency, death or similar reason.
Getting Three Member Panel Review

- Single Judge Review permitted unless appeal qualifies for 3-member review under 8 C.F.R. §1003.1(e)(6)
- Six bases for 3 member review:
  - The need to settle inconsistencies among the rulings of different immigration judges;
  - The need to establish a precedent construing the meaning of laws, regulations, or procedures;
  - 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;
  - The need to resolve a case or controversy of major national import;
  - The need to review a clearly erroneous factual determination by an immigration judge; or
  - The need to reverse the decision of an immigration judge or the Service, other than a reversal under Section 1003.1(e)(5).
- Include near front of brief
- Remember to argue against 3 Member Review if you won In Immigration Court
Practioner’s Tips for Brief Writing

- Understand BIA Structure and Operations
  - Staff Attorneys do first level review and a draft decision
  - Cite to/Quote from key documents
  - Append any “Silver Bullet” Transcript pages or Exhibits

- Use the Practice Manual

- Raise all issues to avoid exhaustion and waiver issues in the Circuit Court

- If arguing constitutional violation, be sure to argue prejudice to your client

- Avoid Common Pitfalls
  - Choose issues wisely; relegate minor points to footnotes
  - Beware boilerplate and model briefs
  - Individualize your brief space should correspond to significance of issue
  - Be Clear About Remedy: Affirmance, Outright Reversal, or Remand

- Does Record Support Your Request?
What comes next?

- If you win, can DHS appeal? (No)
- If you lose, can you appeal? (Often)
- To Circuit Court, within 30 days of BIA decision
  - File a Petition for Review. Procedure varies depending on rules of Circuit Court.
- Note: Circuit Court does not always have jurisdiction
  - Some limitations on discretionary opinions by BIA
  - No jurisdiction over aliens removable for committing certain criminal offenses (INA § 242(a)(2)(C)), but Circuit has jurisdiction to determine its own jurisdiction.
ROUTE TO FEDERAL COURT REVIEW

- IMMIGRATION COURT
- BOARD OF IMMIGRATION APPEALS
- CIRCUIT COURT OF APPEALS
- US SUPREMES
LIMITED ARTICLE III REVIEW

Several bars exist to judicial review:
- Discretionary relief 212(h), 212(i), 240A, 240B, 245
- Discretionary relief specified to be discretionary by statute (Kucana)
- Certain convictions may bar review

Savings clause for constitutional or legal issues.
Federal Court System

- There are 89 districts in the 50 states.
- District courts also exist in Puerto Rico, the Virgin Islands, the District of Columbia, Guam, and the Northern Mariana Islands.
- In total there are 94 U.S. district courts.
- Some states, such as Alaska, are composed of a single judicial district. Others, such as California, are composed of multiple judicial districts.
- But district courts have jurisdiction of few immigration court matters following IIRIRA.
Circuit Court of Appeals

- Eleven Circuits (handle most appeals from BIA)
- D.C. Circuit
- US Court of Appeals for the Federal Circuit (subject matter specific)
Congress explicitly eliminated writ of habeas corpus in the district courts for judicial review of an order of removal.

“A petition for review (to the circuit courts) shall be the sole and exclusive means for judicial review of a removal order” (INA 242(a)(5)).

REAL ID explicitly permitted circuit courts to consider:
- CONSTITUTIONAL QUESTIONS
- LEGAL QUESTIONS (includes mixed questions of law and fact)
- Review of ASYLUM CLAIMS.
How Do We Preserve Judicial Review?

- Clients with criminal convictions can only get review if:
  - (1) legal questions raised
  - (2) constitutional issues raised
- No one may ask for review of the IJ’s discretionary decision.
- Your client must exhaust his legal claims before the IJ and BIA to present them in habeas corpus or to the circuit court.
Federal Review Eliminated for Immigrants with Criminal Bars?

If immigrants with certain criminal convictions could not (pre-REAL ID) seek review in the circuit court, and circuit courts were the exclusive means to challenge removal orders, what was left?

Could Congress suspend the right of writ of habeas corpus? If so, must it have been explicit?
WRIT OF HABEAS CORPUS

- Petition through which persons can seek redress from unlawful custody
- Threat of removal considered custody
- Protects individual freedom from arbitrary state action
- Played the supreme role in the history of human freedom
Custody Challenges

- Habeas corpus petitions may be used as a legal vehicle to challenge custody or conditions of confinement.
- Habeas corpus may still be used as a vehicle to challenge removability of United States citizens.
What is left for immigrants?

- The Bars of IIRIRA still remain (no review of certain discretionary decisions, no review of immigrants’ removal orders if the immigrants have certain criminal offenses).
- Writ of habeas corpus as an alternate vehicle to challenge removal orders eliminated. (Limited exceptions exist).
Summary

- Habeas challenges generally limited to custody challenges, claims to US citizenship, and challenges that post-date the removal process (IAC for missing PFR deadline).
- Judicial review generally limited to timely filed MTR (sua sponte open question), legal and constitutional claims, asylum claims, non-discretionary forms of relief.
Equal Access to Justice Act

Award of attorneys fees for the “prevailing party” unless the deciding body finds that the position of the US was substantially justified or that special circumstances make the award unjust.

Fee applications must be filed within 30 days of final judgment.

Available even in pro bono cases.
Resources

• EOIR Virtual Law Library: http://www.justice.gov/eoir/vll/libindex.html
• Bender’s Immigration Bulletin: http://www.bibdaily.com
• AILA: http://www.aila.org
• Department of State Country Reports: http://www.state.gov/g/drl/rls/hrrpt/2009/index.htm
• Federal Rules of Civil Procedure
• Federal Rules of Appellate Procedure