WINNING AT THE BIA

National Immigration Litigation Alliance
in collaboration with Children’s Immigration Law Academy
June 2021
CILA-NILA Partnership

Provide trainings, resources and technical assistance (Texas) related to appellate and litigation practice

Some emphasis on matters originating within Fifth Circuit

Posted trainings include:
- Ready to Win—Moving Beyond Trying Cases at the IJ Level
- Introduction to Federal Court Practice Parts I and II
- Advanced Immigration Legal Research
- Legal Writing
- Litigating SIJS Delay Cases: Mandamus and APA
- Attorneys Fees Under the Equal Access to Justice Act

Upcoming trainings include:
- Habeas Petitions 101
- Administrative Procedures Act (APA) Actions after SIJS Denials
- Petitions for Review and Judicial Stays of Removal (5th Circuit)
Agenda

• Preparing and filing a notice of appeal.

• The mechanics of a persuasive BIA appeal brief.

• Strategies for identifying errors in the IJ decision and framing them for appeal.
Preparing and Filing the Notice of Appeal
Resources to Consult for Every Appeal

• Regulations governing BIA appeals: 8 C.F.R. §§ 1003.1–1003.8.


• Remember: the law of the relevant circuit and the Supreme Court are binding on the BIA.
The Mechanics

• **What to File**
  - Cover letter outlining documents in appeal packet.
  - Notice of Appeal form (Form EOIR-26) – carefully follow all instructions!
  - Check of $110 payable to U.S. Department of Justice *OR* Fee Waiver Request (Form EOIR-26A).
  - Notice of Entry of Appearance as Attorney or Representative Before the BIA (Form EOIR-27).
  - Copy of the IJ’s order that you are appealing.

• **Note:**
  - Everything must be in English.
  - Name and A-Number must appear on all documents.
The Mechanics

• **When to File**
  - No later than 30 calendar days after the IJ renders an oral or written decision. R. 4.5(a); 8 C.F.R. § 1003.38(b).
  - Note: the appeal must *be received* by the BIA (not just mailed) within 30 days. This applies to detained individuals.
  - *No* extensions. (R. 4.5(b))

• **Where to File**
  - Must be filed with the BIA: Board of Immigration Appeals Clerk’s Office 5107 Leesburg Pike, Suite 2000 Falls Church, VA 22041
  - Mail a copy of the appeal packet to the opposing party (i.e., Assistant Chief Counsel of ICE).
Preserving Issues

• Better to over-include rather than under-include—appeal is generally limited to the issues listed in the Notice of Appeal.

• Consider including an attachment if issues do not fit in the box.

• Provide sufficient explanation to make the issue clear, but it need not be as detailed as what you will write in the brief.

• Examples of issue statements:
  • “The IJ erred by not considering the evidence Ms. X submitted in determining that Ms. X did not present corroborating evidence.”
  • “The IJ erroneously determined that Ms. X was not a member of a particular social group in contravention of longstanding BIA precedent.”

6. State in detail the reason(s) for this appeal. Please refer to the General Instructions at item F for further guidance. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and “A” number(s) on every sheet.

See Attachment A.
The Mechanics of a Persuasive BIA Appeal Brief
What to Include

• Briefing notice stapled or attached on the top of the filing (R 4.6(a)).
• Cover page (R 3.3(c)(vi); see Appendix F for sample cover page).
• Brief (R 4.6(c)(iv)):
  • Introduction
  • Concise statement of facts and procedural history of the case
  • Statement of issues presented for review
  • Standard of review
  • Summary of the argument
  • Argument
  • Short conclusion stating the precise relief or remedy sought
  • Proof of Service or Certificate of Service (R. 3.2(d))
Ms. X is married and has three U.S. citizen children. Ms. X and her husband have been married for twenty years and have three young U.S. citizen children—Ana, who is ten years old; Ben, who is five years old; and Julian, who is two years old.

Gang members shot at Ms. X’s house. Gang members executed a drive-by shooting in an attempt to murder Ms. X, leaving ten bullet-holes in the side of her home.
Statement of Issues

• Include a separate, bulleted issue statement for each argument you want the BIA to decide.

• Issues should be listed in the order they appear in the argument.

• Frame the issue statements in a way that helps your case.

<table>
<thead>
<tr>
<th>Version 1</th>
<th>Version 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whether the IJ erred in denying Ms. X’s motion to reopen.</td>
<td>Whether the IJ incorrectly applied the standard under 8 C.F.R. X in denying Ms. X’s timely motion to reopen.</td>
</tr>
<tr>
<td>Whether the IJ erred in denying Ms. X’s application for asylum.</td>
<td>Whether the IJ erred in denying Ms. X’s application for asylum where the IJ failed to consider evidence that corroborated her testimony.</td>
</tr>
<tr>
<td>Whether the IJ erred in determining that Ms. X was convicted of an aggravated felony.</td>
<td>Whether the IJ erred in concluding that assault in North Carolina is an aggravated felony where the statute is overbroad and indivisible.</td>
</tr>
</tbody>
</table>
## Standard of Review: Issues

### Questions of law
- Whether immigration court has jurisdiction over a claim.
- The meaning of a statutory or regulatory provision.
- Whether a statute or regulation applies retroactively. *See* Faudoa-Gonzalez *v.* Barr, 836 F. App’x 242, 246–47 (5th Cir. 2020).
- Whether an offense constitutes a crime involving moral turpitude or an aggravated felony. *See* Alejos-Perez *v.* Garland, 991 F.3d 642 (5th Cir. 2021)

### Questions of fact
- Credibility determinations.
- Dates, places, manner of entry.
- Biographical information (e.g., birth date, existence of a marriage or divorce).
- Predictions of future events. *See, e.g.*, Cabrera *v.* Barr, 939 F.3d 379, 382-83 (1st Cir. 2019).

### Mixed questions of law and fact
- Government acquiescence under 8 U.S.C. § 1208.16(c)(2) for CAT protection. *See* Cruz-Quintanilla *v.* Whitaker, 914 F.3d 884, 890 (4th Cir. 2019).
- Whether possible future treatment amounts to torture under the CAT. Turkson *v.* Holder, 667 F.3d 523, 528-30 (4th Cir. 2012).
- Good faith marriage determinations for waiving joint filing requirement to remove conditions for permanent residency. *See* Alom *v.* Whitaker, 910 F.3d 708, 712 (2d Cir. 2018); Upatcha *v.* Sessions, 849 F.3d 181, 185, 187 (4th Cir. 2017).

### Standards of review
- **De novo**
- **Clear error**
- **Factual findings reviewed for clear error; application of law to facts reviewed de novo**
Standard of Review: The Standards

• 8 C.F.R. § 1003.1(d)(3)

| Clear error | • “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” United States v. Gypsum Co., 333 U.S. 364, 395 (1948). |
| De novo | • The BIA must “make[] an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for [a party].” Bose Corp. v. Consumers Union, 466 U.S. 485, 514 n.31 (1984).  
• De novo review requires that the BIA “make an independent determination of the issues.” United States v. First City Nat’l Bank, 386 U.S. 361, 368 (1967) |

• Thus, where possible, frame issues on appeal as questions of law or mixed questions requiring de novo review.
The BIA’s Review of Facts

8 C.F.R. § 1003.1(d)(iv):
• The BIA will not engage in factfinding.
• But, the BIA may take administrative notice of facts that are not reasonably subject to dispute, including:
  • Current events
  • Contents of official documents outside the record
  • Facts that can be accurately and readily determined from official government sources and whose accuracy is not disputed, or
  • Undisputed facts contained in the record
• Note: if the BIA does take administrative notice of facts, it must provide notice to the parties and allow 14 days for the parties to respond.
Argument

• Strongest arguments first
• Use headings and subheadings
• Include roadmaps to help guide the reader
  • E.g.: “In this case, the IJ denies Mr. X’s motion to reopen on procedural grounds under 8 C.F.R. 1003.23(b)(3) and on the merits. Because the IJ’s reasoning as to both is erroneous, the Board should vacate the IJ’s order.”
• CREAC – conclusion, rule, explanation, application, conclusion
Conclusion

• Clearly state the relief sought.
• Keep it short, e.g.:

  “For the reasons set forth above, the Board should vacate the IJ’s denial of Ms. X’s motion to reopen.”
Appendix

• Where relevant, include an appendix.

• Follow all formatting requirements in BIA Practice Manual.

• Label exhibits in the order they appear in the brief.
Identifying Common Errors in IJ Decisions
General Strategies

• Develop a process:
  • Read the decision once for the outcome
  • Read the decision again several times carefully to spot potential issues
  • Research those potential issues and keep coming back to the decision as you do more research

• Read each case that the IJ decision cites
  • Does it in fact stand for that proposition?
  • Is the case distinguishable?

• Diagram the decision – visually helpful to ensure you do not miss any issues
Is application required to be attached where no changes are made to the application and the application is clearly already in the record? Distinguish Keisler.

The respondent failed to include an application for relief. See also Palma-Mazariegos v. Keisler, 504 F.3d 144, 147 (1st Cir. 2007) (holding that the denial of the petitioner’s motion to reopen was independently and sufficiently justified on the grounds that the motion was not accompanied by the appropriate application for relief and supporting documentation); 8 C.F.R. § 1003.23(b)(3) (requiring that a motion to reopen filed for the purpose of applying for a form of relief be accompanied by the appropriate application for relief and all supporting documents). Nor has respondent established eligibility for any relief. See Matter of L-O-G-, 21 I&N Dec. 413, 418-19 (BIA 1996).

The respondent failed to produce evidence that was not available at the previous proceedings. 8 C.F.R. § 1003.23(b)(4). Attached to the Respondent’s motion to reopen is her affidavit, a summary of her medical conditions, and general country conditions documentation. See Mot. to Reopen at 16-39. The Respondent’s motion to reopen and supporting documents fail to establish changed circumstances or country conditions since the decision of the Court denying deferral of removal and ordering her removed. Id. The supporting documentation and provided country condition reports are insufficient to support the Respondent’s claim of changed circumstances or country conditions or provide a prima facie showing of eligibility. See id. at 16-39.

Finally, the Court declines to reopen the Respondent’s proceedings sua sponte. The Court’s sua sponte powers are reserved for exceptional circumstances and are “not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.” Matter of J-J-, 21 I&N Dec. at 984.

Accordingly, the Respondent’s motion to reopen is denied and the following order shall be entered:
Common issues

• The IJ’s interpretation of a statutory or regulatory provision is incorrect.

• The IJ ignored binding BIA or circuit/Supreme Court caselaw.
  • Note: even if there is a binding BIA or A.G. decision, still address the issue (briefly) to preserve challenging that decision in a PFR before the circuit court.

• The IJ erred in determining that a conviction is a CIMT or aggravated felony under the categorical approach.

• The IJ failed to follow binding regulations (e.g., failed to adjudicate an RFI appeal within the 10-day regulatory deadline under 8 C.F.R. §§ 208.31(g), 1208.31(g)).
Common issues

• The IJ’s determination as to ___________ and/or the IJ ignored evidence relevant to ___________ was erroneous:
  • Asylum: persecution, particular social group
  • CAT: government acquiescence, torture
  • Cancellation of removal: hardship, good moral character
• The IJ’s adverse credibility determination is erroneous.
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Please complete the **Feedback survey**. Fill out the **CLE Credit survey** for Texas CLE credit or a letter of attendance.

Upcoming recorded trainings: Habeas Petitions 101 & APA Actions After SIJ Petition Denials.

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