



FIFTH CIRCUIT PETITIONS FOR REVIEW OF IMMIGRATION DECISIONS

National Immigration Litigation Alliance

in collaboration with Children's Immigration Law Academy

October 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*
- *Winning at the BIA*
- *Niz-Chavez, Pereira, and Notices to Appear*
- *Nuts and Bolts of Habeas Corpus Petitions Challenging Immigration Detention*
- *Administrative Procedures Act (APA) Actions after SIJS Denials*

CILA NILA Partnership



**Trainings –
Live and Recorded**

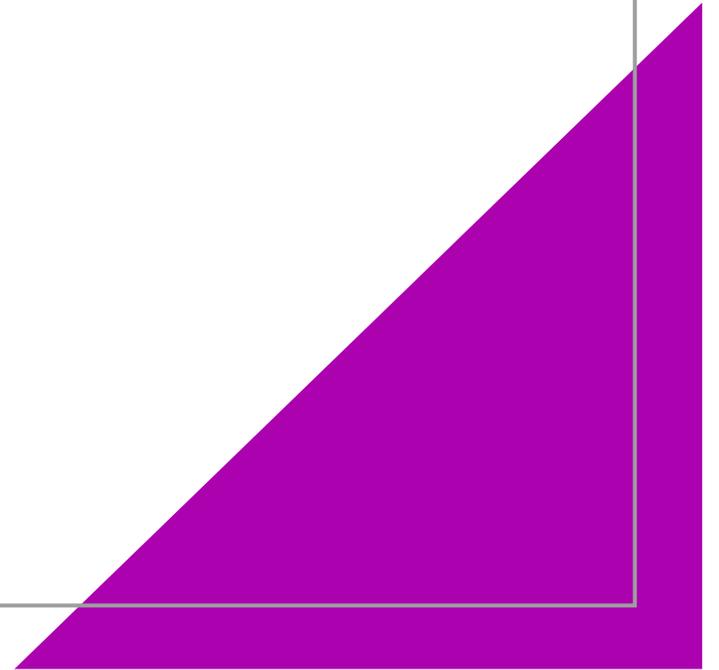


**Resources –
Practice
Advisories &
Templates**



**Texas –
Technical Assistance,
Legal Writing
Technical Assistance**

Polls



What is a petition for review (PFR)?

A request for review of certain immigration decisions:

- BIA decisions denying and/or dismissing an appeal of an IJ decision ordering removal or an IJ decision denying a motion to reopen or reconsider
- BIA decisions denying a motion to reopen or reconsider filed directly with the BIA
- Reinstatement orders under 8 U.S.C. § 1231(a)(5) and administrative removal orders under 8 U.S.C. § 1228(b),
 - IJ decisions affirming negative reasonable fear determinations and BIA decisions denying claims in withholding-only proceedings
- Removal orders issued under 8 U.S.C. § 1187, the Visa Waiver Program

What is a petition for review (PFR)?

- Petitions for review should be no more than 1 - 2 pages.
- They require a \$500 filing fee.
 - The fee is waived if court grants a [motion to appear in forma pauperis](#).
 - Note different filing options for filing with fee and filing with IFP motion.
 - Utilities > File Case Originating Documents with Fee > Petition for Review with Fee
 - Utilities > File Case Originating Documents w/o Fee > Petition for Review without Fee
- They must name the Attorney General as the Respondent. *See* 8 U.S.C. § 1252(b)(3)(A).
- A copy of the underlying order must be attached. *See* 8 U.S.C. § 1252(c)(1), 5th Cir. R. 15.1.

When to File a PFR

- Within 30 days of issuance of order, *see* 8 U.S.C. § 1252(b)(1)
 - Deadline is mandatory and jurisdictional, *see Stone v. INS*, 514 U.S. 386 (1995)
 - For DHS-issued orders with fear-based claims, 5th Circuit held that 30 days is measured from conclusion of reasonable fear/withholding-only proceedings, *see Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-06 (5th Cir. 2016)

How to File a PFR

- File PFR + Decision + Certificate of Service electronically
 - Current system is CM/ECF; some circuits now use ACMS
 - Review Local Rule 25.2; 5th Cir. ECF Filing Standards; 5th Cir Guide: How to File Originating Documents
 - File *either* fee (via PACER) or IFP motion (accompanied by PFR)
- For pro se filers only: By mail to court clerk – MUST be received within 30 days of the order
 - Pro se filers can subsequently request electronic filing privileges
- Complete service “on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered,” 8 U.S.C. § 1252(b)(3)(A)
 - Generally: mail to AG; OIL; ICE FOD

Where to File a PFR

- With the judicial circuit “in which the immigration judge completed proceedings,” 8 U.S.C. § 1252(b)(2)
 - If DHS-issued the reinstatement order (under 8 U.S.C. § 1231(a)(5)) or administrative removal order (under 8 U.S.C. § 1228(b)), *generally* file in the circuit where the issuing office is located
 - Question regarding where to file if DHS-issued the order in one circuit but reasonable fear/withholding only proceedings are completed in another circuit

Administrative Record (AR)

- Court “shall decide the petition only on the administrative record on which the removal order is based,” 8 U.S.C. § 1252(b)(4)(A)
- DOJ obligated to file AR within 40 days of service of PFR absent court order otherwise, Fed. R. App. P. 17(a)
- Contents governed by Fed. R. App. P. 16(a); can move to strike or supplement the AR, Fed. R. App. P. 16(b)
- Fifth Circuit adjudicates the PFR using only the AR, i.e., without requiring petitioner to file an Appendix, *see* 5th Cir. R. 30.2
- Format: ROA.5 or ROA.123-24 or ROA.123, 145, 156 or ROA.12, 21-22

Motions to Stay Removal

- Filing a PFR alone does NOT stay removal. 8 U.S.C. § 1252(b)(3)(B).
- If petitioner is not detained, generally no need to file stay motion.
- Specific rules/policies, including certain automatic stays, in 1st, 2d, 3d, 4th, 9th Circuits but *NOT* the 5th Circuit.
 - For non-emergency stays, follow motions rule, *see* Fed. R. App. P. 27; 5th Cir. R. 27
 - For emergency stays, follow 5th Cir. R. 27.3.1 and CA5 website/Guides/Guid to Filing Emergency Motions (note: court will only consider if person has a removal date and is in custody)
- Deportation can proceed unless and until 5th Circuit orders a stay.
- Standard for stay of removal governed by 4-part test set forth in *Nken v. Holder*, 556 U.S. 418 (2009).
- If stay is denied, 5th Circuit still has jurisdiction over the PFR.

Dispositive Motions

- Respondent may file dispositive motions before or after filing of OB
- Dispositive motions can be procedural (motion to dismiss for lack of final order or failure to prosecute, etc.) or substantive
- Most common substantive motions:
 - Motions to dismiss (no jurisdiction)
 - Motions for summary disposition (no substantial question as to outcome of case)
 - Motions for remand
- Timing governed by Fed. R. App. P. 27,
 - Petitioner has 10 days to file a response and *should* do so! If not, the court may deem the issues waived
 - Respondent has 7 days to reply to Petitioner's response

Other Common Motions

- Motions to proceed under a pseudonym, Fed. R. App. P. 27
- Motion to consolidate PFR of order with PFR of denial of motion to reopen/reconsider order, Fed. R. App. P. 27, 8 U.S.C. § 1252(b)(6)
- Motion to hold PFR in abeyance pending event, *e.g.*, court decision, decision on a pending motion to reopen/reconsider before the agency, Fed. R. App. P. 27
- Motion to supplement administrative record, Fed. R. App. P. 16; 5th Cir. R. 27.1
- Motion to lift stay of removal, Fed. R. App. P. 27
- Motion to voluntarily dismiss PFR, Fed. R. App. P. 42; 5th Cir. R. 42.1

Motions to Extend Time

- Read Fed. R. App. P. 26 and 27; 5th Cir. R. 26.2, 27.1, 27.4, and 31.4; 5th Circuit I.O.P. General Standards for Ruling on Motions
- Rules require contacting or attempting to contact DOJ counsel and indicating if opposition will be filed, 5th Cir. R. 27.4
- Court may grant extensions due to other litigation deadlines (must provide case details), complexity of issues, extreme hardship
- 5th Circuit grants extensions “for the very least amount of time necessary” and will not exceed 40 days “except in the most unusually compelling circumstances,” 5th Cir. I.O.P. General Standards for Ruling on Motions
- File in advance of the deadline to ensure that court has time to adjudicate the motion before the deadline
 - 5th Circuit filing at least 7 days before due date absent detailed proof that basis for request did not exist/could not have been known earlier, 5th Cir. R. 31.4.1

Fifth Circuit Mediation Program

- Information at:
 - CA5 website/Attorney Information/Circuit Mediation Program
 - General Order (Oct. 13, 2016)
- Only counseled cases are eligible.
- Case may be selected by mediation program, referred by the court, BUT if case may benefit from mediation, call the Mediation Program and inquire about inclusion. Tel.: (504) 310-7799.
- All communications in mediation are confidential and separate from PFR merits briefing. Violations have consequences.

Opening Brief

- Read Fed. R. App. P. 28, 31, 32 **and** 5th Cir. R. 28, 31, and 32 *before* writing.
- For Brief Guidance, Sample Briefs, and Checklist Used By the Clerk in Examining Briefs go to CA5 website/Guide
- 13,000 words, *see* Fed. R. App. P. 32(a)(7)(B)(i)
- Contents, order of contents, etc. governed by Fed. R. App. P. 28(a) and 5th Cir. R. 28.2
 - Advisable: include an introduction; request oral argument.
- Court will deem arguments/issues that are not raised in an Opening Brief waived. *See Legate v. Livingston*, 822 F.3d 207, 211-12 (5th Cir. 2016)
- Court will request 7 paper copies after brief is accepted, 5th Cir. R. 31.1

Opening Brief - Jurisdiction

- Per Fed. R. App. P 28(a)(4), jurisdiction section must include:
 - Basis for agency jurisdiction w/citations
 - Basis for circuit jurisdiction w/citations
 - Filing dates establishing timeliness; and
 - Final order assertion.
- Limitation on review of discretionary decisions & claims filed by noncitizens w/certain criminal convictions, 8 U.S.C. § 1252(a)(2)(B), (C).
- BUT 8 U.S.C. § 1252(a)(2)(D) restores jurisdiction over legal and constitutional claims.

Opening Brief - Jurisdiction

- Section 1252(a)(2)(D) covers mixed questions of law and fact, *see Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020)
- Other areas where jurisdiction is limited:
 - Particularly serious crime determinations
 - One-year bar for asylum
 - MTRs where the underlying relief is discretionary
 - Sua sponte MTRs
 - Prior order in reinstatement cases
- Supreme Court will decide whether § 1252(a)(2)(D) strips jurisdiction over nondiscretionary, statutory eligibility issues, *Patel v. Garland*, No. 20-979 (arg. Dec. 6, 2021)

Opening Brief – Standard of Review

- Substantial evidence
 - Factual findings
- De novo
 - Questions of law
 - Mixed questions of law/fact
 - Constitutional claims
- Abuse of discretion
 - Motions reopen, reconsider, or remand (but not questions of law or mixed questions)

Opening Brief - Exhaustion

Generally, 2 kinds of exhaustion in PFR cases:

- Statutory exhaustion of “administrative remedies available to the [noncitizen] as of right,” 8 U.S.C. § 1252(d), i.e. must appeal IJ decision to the BIA
- Issue exhaustion of claims/arguments/violations that the agency *could have corrected or rule on* if raised below
 - Limited exceptions, e.g., futility, pre-determined agency position, agency addressed the issue anyway, which vary by Circuit
 - Where BIA reaches issue on merits, claim is exhausted even if petitioner didn’t properly raise to the BIA, *see Lopez-Dubon v. Holder*, 609 F.3d 642 (5th Cir. 2010)
 - Must address in brief, not just raise in NOA, to exhaust issue, *see Claudio v. Holder*, 601 F.3d 316 (5th Cir. 2010)

Opening Brief - Exhaustion

However, 5th Circuit is an outlier on exhaustion: *Omari v. Holder*, 562 F.3d 314 (5th Cir. 2009)

- Treats 8 U.S.C. § 1252(d) as jurisdictional AND as requiring petitioners to raise each issue before the BIA
 - Finds *issue* exhaustion required by statute where “(1) the petitioner could have argued the claim before the BIA, and (2) the BIA has adequate mechanisms to address and remedy such a claim”
- Where new argument arises based on error in BIA decision, must raise to BIA in motion to reconsider

But:

- Supreme Court, other circuits recognize exhaustion not required where procedure is non-mandatory
- *Dale v. Holder*, 610 F.3d 294 (5th Cir. 2010): *Omari* applies where petitioner raises entirely new issue that arose after BIA decision due to an error; no need to seek reconsideration simply because there is an error in BIA’s decision

Answering Brief

- What to expect:
 - Will highlight convictions and other bad facts
 - Will ignore positive facts and arguments
 - May flip the order of arguments
 - Will be skillfully worded to sound persuasive, even if the bones of arguments are weak
 - Generally, will claim more deferential standard of review applies
 - May argue that the court should affirm on a basis not invoked by the agency
 - May contain incorrect facts
 - May assume that an issue is unexhausted or waived when it is not
- Same requirements apply as in opening brief

Reply Briefs

- ALWAYS file a reply brief. NEVER give DOJ the last word.
- Due within 21 days of service of answering brief, Fed. R. App. P. 31(a)(1)
- Fifth Circuit disfavors motions to extend time to file a reply brief
- Word limit is 6,500, half that of the opening brief, Fed. R. App. P. 32(a)(7)(B)(ii)
- Must include TOC and TOA, Fed. R. App. P. 28(c)
- Court will request 7 paper copies after brief is accepted, 5th Cir. R. 31.1
- **TIP:** The circuit may only affirm agency's decision on a basis invoked by the agency. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Oral Argument

- Helps the panel understand the issues.
- Precedent decisions generally are not issued without oral argument.
- Not advisable to decline oral argument.
- New authorities can be submitted before and after oral argument via a letter. Fed. R. App. P. 28(j).
- Outlines, moots, and practice. Be prepared to deviate.
- It's ok to be nervous. Most attorneys are.

Post-Decision

- Published v. Unpublished
- Binding unless and until rehearing granted, unless the court specifically orders otherwise.
- Stay continues through issuance of the mandate, i.e., throughout rehearing period and resolution of any petition, absent a court order otherwise
- Petitions for En Banc and/or Panel Rehearing, Fed. R. App. P. 35, 40, 5th Cir. R. 35, 40
- Mandate issues 7 days after the time to file a rehearing petition expires, or 7 days after order denying rehearing petition or motion for stay of mandate, whichever is later. Fed. R. App. P. 41.
- Consider seeking fees and costs under Equal Access to Justice Act
- Consult with Supreme Court Working Group before filing (or after approached about filing) a petition for writ of certiorari





CILA's Pro Bono Platform

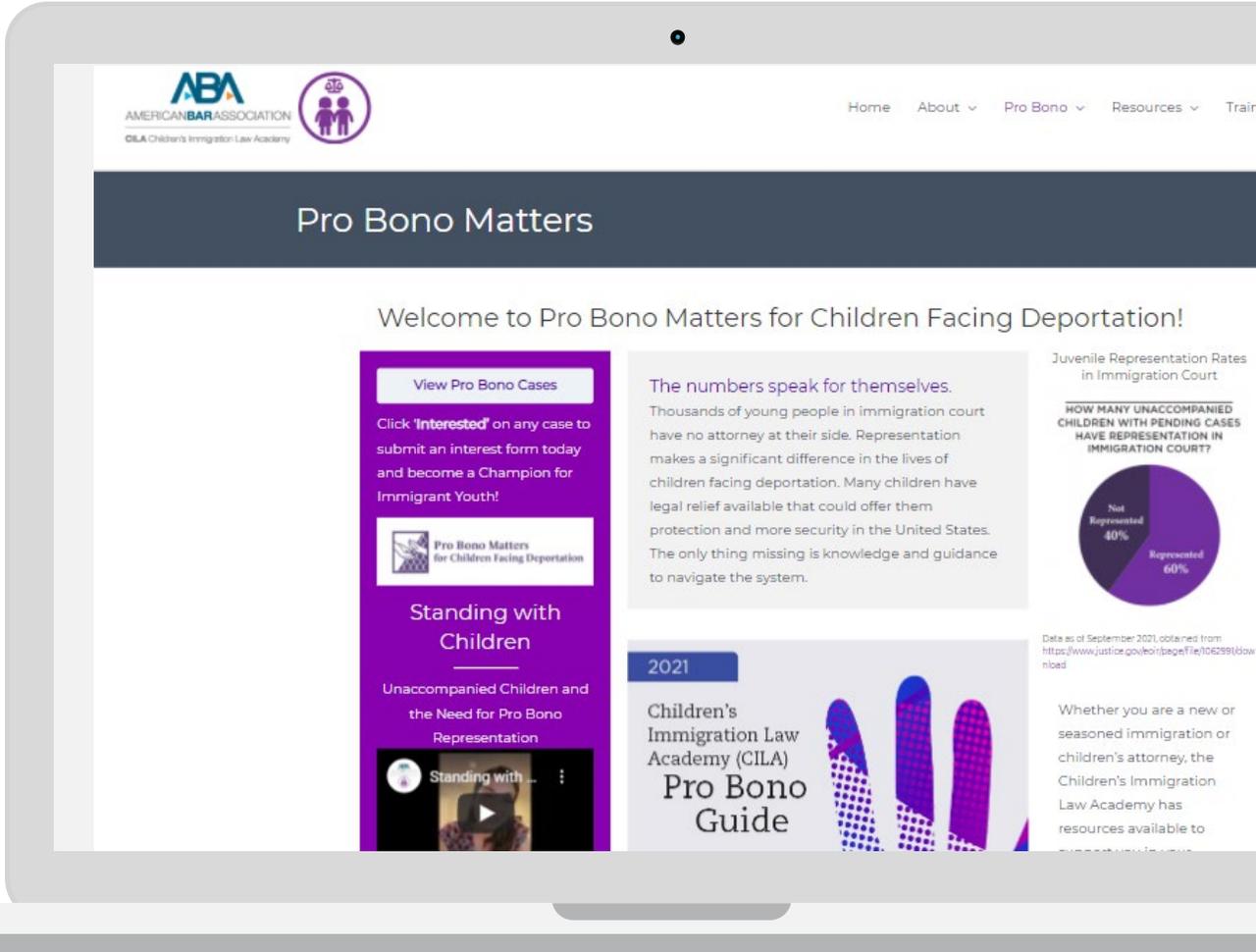


Pro Bono Matters for Children Facing Deportation



Help more children have representation!

Visit CILA's Platform



Thank You for Joining Us!

Please complete the **Feedback [survey](#)**. Fill out the **CLE Credit [survey](#)** for Texas CLE credit or a letter of attendance.

Texas Folks – Reach out to CILA for CILA/NILA technical assistance.

Upcoming resource: PFR Practice Advisory!

[CILA - NILA Trainings Available Here](#)