

# IMMIGRATION JUSTICE CAMPAIGN

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## The Board of Immigration Appeals Direct Appeals of Removal Orders (Merits Proceedings)

The Board of Immigration Appeals (“BIA” or “the Board”) is the administrative appellate body within the Executive Office for Immigration Review (“EOIR”) which reviews Immigration Judge (“IJ”) decisions in removal and custody redetermination (bond) proceedings. Located at 5201 Leesburg Pike, Suite 2000 in Falls Church, Virginia 22041, the Board adjudicates appeals from all of the immigration courts nationwide.

### **Scope of review**

The scope of the Board’s review is limited to the administrative record; in general, it does not take new evidence and the proceedings are conducted exclusively on the papers, with each party having the opportunity to present a brief in support of its position. There are, however, limited circumstances under which the Board will remand proceedings to the Immigration Court for consideration of newly submitted evidence which was unavailable at the time of trial and is material to the claim.

### **Opposing counsel**

The Department of Homeland Security Immigration and Customs Enforcement Office of Chief Counsel (OCC) represents the federal government in removal proceedings before the nation’s immigration courts and before the Board of Immigration Appeals. The OCC office with responsibility for your client’s case will be the one which represented the government in the immigration court proceedings. You must serve OCC with a complete copy of anything you file with the Board, along with a certificate of service. A listing of the various OCC offices is found [here](#).

### **Effect of an Appeal**

The filing of an appeal from an Immigration Judge’s order of removal divests the Immigration Court of jurisdiction over the case, and prevents the removal order from becoming final. As such, one who timely appeals cannot be removed from the U.S. while the appeal is pending.

## Procedures

To perfect one's right to appeal an immigration judge's order of removal, the Board must *receive* the following documents within 30 days after the IJ issues her decision:

1. Form [EOIR-27](#) (Notice of Entry of Appearance), if the respondent is represented by counsel.
2. Form [EOIR-26](#) (Notice of Appeal).
3. \$110 filing fee (check made payable to the Department of Justice or paid online via the [EOIR payment portal](#)) or form [EOIR-26A](#) (Fee Waiver Request).
4. Copy of the Immigration Judge's decision

***There is no mailbox rule! The appeal must be received before the deadline; if it is even a day late the Board will reject the filing and the client will lose her right to appeal.***

When the Board receives the Notice of Appeal, it issues a receipt, and mails it to the respondent if she filed *pro se*, or to counsel if one has entered an appearance. It then requests the respondent's EOIR file from the immigration court and prepares a transcript of the proceedings. When the transcript is prepared, the Board issues a briefing schedule and mails the transcript and briefing schedule to the respondent or her counsel, and to the DHS Office of Chief Counsel in the jurisdiction where the immigration court proceedings took place. The Board considers all documents which were entered into evidence before the Immigration Judge in the course of its adjudication, but it does not provide copies of those documents to the parties as a matter of course.

Briefing schedules in detained cases are concurrent (that is, both parties' briefs are due on the same date) and are fixed at 21 days. The Board is generally receptive to granting a single 21-day extension of the briefing schedule but will almost never grant more than one. And, again, there is no mailbox rule; in extremely rare circumstances the Board will entertain a motion to accept a late-filed brief but in general, briefs received after the due date are rejected and the appeals summarily dismissed.

In early 2022, EOIR implemented electronic record-keeping and, with it, an online filing system. Documents in cases which have an electronic record of proceedings are filed online through the agency's [Electronic Courts and Appeals System \(ECAS\)](#). Online filing is not available for cases which do not yet have an electronic record (cases which began in the immigration courts prior to 2022, and for which the court has not converted the paper record to an electronic one); in those cases, documents must be filed in hard copy and either mailed or hand-delivered to the Board. Check ECAS to determine whether or not your case has an electronic record.

## Reviewing the record and preparing the brief

The Board does not routinely prepare a comprehensive record of proceedings for the parties. The EOIR file is physically transported to the BIA, and the Board members who review it base their decision on the evidence presented to the immigration court. The only documents which

the BIA provides to appellants and their counsel as a matter of course are the transcript of the immigration court proceedings and the immigration judge's decision.

Representatives may, however, request a copy of the record of proceedings by emailing [EOIR.BIA.ROP.Requests@usdoj.gov](mailto:EOIR.BIA.ROP.Requests@usdoj.gov). Include the client's name and A number in the request and reference [BIA Practice Manual §13.2](#). If the case already has an electronic record, there is no need to request a copy via email; the entire record should be available for viewing and download in ECAS.

Alternatively, it is sometimes possible to make an appointment in the immigration court where the proceedings were conducted or at the Board of Immigration Appeals' clerks office in Virginia to review the physical file. Note that if you do review the physical file, you will not necessarily be able to make copies. To inquire into reviewing a physical file, contact the [BIA](#) or the relevant [immigration court clerk's office](#).

***The briefing schedule issues with the transcript and immigration judge decision.*** As such, it is imperative to familiarize yourself with the record, and begin formulating arguments before the briefing schedule issues.

### **Motions practice**

If you decide to file a motion for an extension of time in which to file your brief, it is good practice to file the motion as soon as possible after the briefing schedule issues. The motion can be short (a page or two), but needs to articulate good cause for the extension. Attach a copy of the briefing schedule, as well as a certificate of service.

### **Drafting the brief**

The brief should contain a statement of the relevant facts and an argument which addresses the essential elements of the claim for relief, and which identifies errors in the Immigration Judge's reasoning.

Rules relating to the form and contents of briefs, as well as general information and filing instructions, are found in the [BIA Practice Manual](#). A few highlights:

- 1. All filings must contain a caption with the respondent's name and alien registration number ("A number" or "file number.")*

A copy of each filing must be served on the DHS/ICE Office of Chief Counsel, and each filing must be accompanied by a certificate of service. If you paper-filed, serve DHS by mail and indicate the local office's address in your certificate of service. If you filed online, DHS will be automatically served via ECAS. There is no need to serve the agency separately; simply note in your certificate of service that "this document was electronically filed through ECAS and both parties are participating in ECAS. Therefore, no separate service was completed."

2. *Briefs are subject to a general 50-page limit unless otherwise directed by the Board, and motions do not have a specified page limit. However, brevity is encouraged.*

### **Authority and citations**

The Board generally follows the law of the circuit in which the immigration court proceedings took place. It is also bound by published agency opinions. Although the vast majority of the Board's opinions are unpublished (and, as such, not binding in unrelated cases), both the BIA and the Attorney General have the authority to issue precedent decisions. Published BIA and AG decisions are binding on other Board panels and on all immigration judges except (for the most part) to the extent that they conflict with the law of the circuit in which the case arises.

As such, the brief should cite not only to relevant federal law (statute, regulations, and federal court opinions), but to published BIA and AG opinions as well.

When citing to the record, cite to the relevant page numbers in the transcript or IJ decision, and identify other portions of the record by name (for example, "Respondent's Declaration at P 4" or "U.S. Department of State *Country Report on Human Rights Practices, Cameroon 2018* at P17"). You may (but are not required to) also refer to documents by their exhibit number.

Remember that the Board has a general 50-page limit on briefs (though brevity is encouraged), and will reject a brief which does not contain a caption and certificate of service.

### **Filing the brief**

***If your case is not eligible for online filing, you must arrange for your paper brief to arrive at the Board on or before the due date. As with the notice of appeal, there is no mailbox rule. If the brief is even a single day late the Board will summarily dismiss the appeal.***

### **Submitting new evidence**

In general, the scope of the Board's review is limited to the record of proceedings (that is, the transcript, IJ decision and any documents submitted to the Immigration Court during the course of the removal proceedings). It does not accept new evidence.

In very limited circumstances, however, the Board will entertain a motion to remand if new, previously unavailable evidence which is relevant to the client's eligibility for relief becomes available after the Immigration Court proceedings conclude. If such evidence becomes available, the proper procedure would be to file it with a motion to remand. ***Do not file a motion to remand instead of a brief;*** if you believe you have a strong case for a remand, file both a motion remand with the new evidence and a brief in support of the appeal.

### **Rulings and federal court appeals**

In detained cases, the Board generally issues a decision 2-3 months after the briefing is complete. In non-detained cases, adjudication times are significantly longer (generally 1-3 years).

In general, if the Board grants an appeal, it will remand to the Immigration Court for further proceedings in keeping with its order. If it dismisses the appeal, it will enter a final order of removal.

Final orders of removal are reviewable via petitions for review to the federal Circuit Court of Appeals in the jurisdiction where the immigration court proceedings were conducted. The Circuits, however, are constrained by statutory bars to review which divest them of authority to review certain issues and claims. And a petition for review of a final order of removal does not carry an automatic stay of removal. The Courts have the authority to stay a petitioner's removal, but also retain jurisdiction over a petition for review even after the petitioner is removed.