

# IMMIGRATION JUSTICE CAMPAIGN



## OVERVIEW OF BIA APPEALS

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 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 that represented the government in the immigration court proceedings. If there is a paper record in your client’s case, 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](#). If there is an electronic record, you can submit all filings through ECAS, the immigration court online submission system, and there is no need to separately serve OCC.

### 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. A non-citizen who timely files an appeal with the BIA therefore should not be removed from the U.S. while the appeal is pending.

## Notice of Appeal

To perfect one's right to appeal an immigration judge's order of removal, the Board must *receive* the following documents within 30 calendar days after the IJ issues her or his 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. \$1010 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).

Check ECAS to determine whether or not your case has an electronic record. 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.

### **Step One: Enter Your Appearance (and Notice of appeal and fee or waiver if they have not already been filed)**

As soon as you take on a BIA appeal case, you should enter your appearance in the case by filing an EOIR-27 (and the E-26 and E-26A if they have not already been submitted).

**In many cases**, the person or organization who referred the case to IJC has already filed a Notice of Appeal and Fee or Fee Waiver (E-26 and E-26A). If they have, you will only need to file an E-27. If they have not, you'll need to submit the E-27, E-26 and E-26A all at the same time.

**Processing can take multiple days.** Check with your mentor if you're worried!

## **Step Two: Obtain Record of Proceedings and Audio Recording of Hearing**

Once the BIA accepts your EOIR-27, you will have access to the record in ECAS if there is an electronic record in the case. The entire record of proceedings should be available in ECAS. If it is not, you can request a copy of the record of proceedings. In either case, you can also request a DAR, or Digital Audio Recording, of the hearing itself.

In most cases, you can now request the DAR and download the eROP directly from eCAS once your E-27 has been approved.

You can also request both the ROP and the DAR by filing an [EOIR-59](#), carefully following the [instructions on this page](#). Make sure to request both the ROP and DAR/audio if you need both, or only the DAR if you already have the electronic record.

## **Transcripts and Briefing Schedule**

Transcripts of the previous hearings will be created and uploaded into eCAS once a briefing schedule has been issued. The timing of the issuance of the briefing schedule varies widely. Once a briefing schedule is issued, the deadline for the brief is often very soon (giving less than 3 weeks' notice is very likely—see step 3 below for how to address this).

*The transcripts will appear in eCAS and the briefing schedule notice will just show up in eCAS—you don't always get electronic notice of them being issued, so it's important to regularly check eCAS or the EOIR case Information portal to see if a briefing deadline has been issued.*

## **Step Three: (Optional but Generally A Good Idea) Prepare a Motion to Extend the Briefing Schedule**

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. You may want to draft the motion before you receive the briefing schedule, so that you have it ready to go as soon as the briefing schedule issues. The motion can be short (a page or two), but needs to articulate good cause for the extension.

#### **Step Four: Familiarize Yourself with the BIA Practice Manual**

The BIA has precise rules for the length, contents, and formatting of appeal briefs. You will find those rules in the [BIA Practice Manual](#). It is imperative to familiarize yourself with the manual, in particular the [section on appeal briefs](#). The BIA may reject briefs that do not comport with its requirements, so it is essential to be aware of those requirements.

#### **Step Five: Draft the Brief**

The brief should contain a statement of the relevant facts and the issues presented, and an argument that addresses the essential elements of the claim for relief, and 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 **30-page limit** unless otherwise directed by the Board.

#### **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 BIA precedent decisions. Although the vast majority of the Board's opinions are unpublished (and 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.

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 30-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.