





Improve Your Appeal to the Board of Immigration Appeals



September 28, 2022

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IMMIGRATION ADVOCATES NETWORK





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Presenters

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- Anne Greer, Appellate Immigration Judge, BIA
- Karen Grisez, Special Counsel / Litigation, Fried Frank



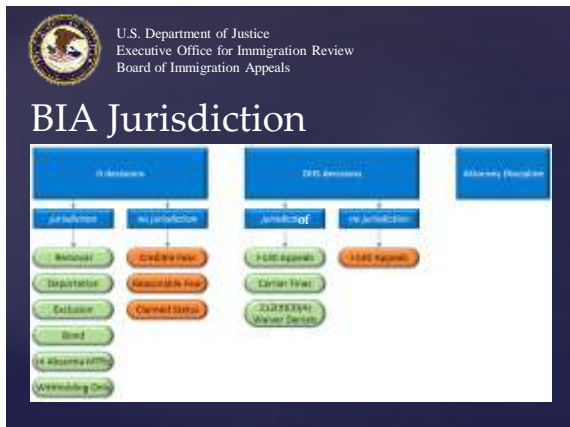
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Overview

- Board of Immigration Appeals (BIA) Jurisdiction and Standard of Review
- Preparing for an Appeal
- BIA Pointers for Appeals
- BIA Top 10 Tips for Practice Before the BIA
- Practitioner Tips: Notice of Appeal & Brief



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BIA Standard of Review
8 C.F.R. § 1003.1(d)

(3). *Scope of review.*

(i). The Board will **not engage in de novo review of findings of fact** determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine **whether the findings of the immigration judge are clearly erroneous.**

(ii). The Board may **review questions of law, discretion, and judgment** and all other issues in appeals from decisions of immigration judges *de novo*.

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BIA Standard of Review 8 C.F.R. § 1003.1(d)

(3). *Scope of review.*

(iv). Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will **not engage in factfinding** in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. **If further factfinding is needed in a particular case**, the Board may **remand** the proceeding to the immigration judge or, as appropriate, to the Service.

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Preparing for a BIA Appeal

Appeal Preparation begins in Immigration Court

- Consciously shape the Record of Proceedings
- Memorialize off-the-record conversations and rulings
- Make and preserve objections
 - Exhibits
 - Witnesses
 - Lines of Questioning

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Focus on Immigration Judge's Decision

- Take nearly verbatim notes on IJ's Oral Decision
- Transcript comes AFTER your appeal is filed; you won't have it for NOA prep
- Note IJ's exact language on adverse factual findings (including credibility) or statements of law and consider incorporating them
- Be sure to preserve appeal if not favorable to your client; don't "waive" or accept "final" decision inadvertently

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Pointers for Appeals to the BIA

Presented by AIJ Anne Greer

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KISS

"KISS"
Keep It Simple
S_____

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Notice of Appeal (NOA)

Form EOIR-26

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The Immigration Judge violated the respondent's due process rights by denying his application for relief

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The Immigration Judge erroneously denied the applications for asylum. He also erred by denying the respondent the opportunity to apply for Cancellation of Removal. Finally, he abused his discretion by denying the respondent's application for asylum, withholding of removal and CAT

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BRIEF

- Format
- Structure
- Content




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Top 10 Tips for Practice Before the BIA

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Get Familiar with the
Practice Manual and
Virtual Law Library

Tip 10

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Practice Manual:

- Tells you what the Board prefers to see
- Read cover to cover – don't miss Chapter 3 on filing
- Read appendices

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Virtual Law Library:


- Published BIA and Attorney General precedents
- Federal Register tables
- Country conditions information from U.S. Government and other sources
- State Department Visa Bulletin

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Identify Issues Up Front

Tip 9

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- Explain what went wrong below
- Cite statutes/regulations/case law supporting your arguments
- Make your case on the Notice of Appeal

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Present Arguments, Not Just Citations

Tip 8

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- Recitation of facts and basic law okay, but ...
- Use headings and format to focus the Board
- Make arguments specific – apply the law to the facts of your case

Tip 8

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Use Logic, Not Rhetoric

Tip 7

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- Passion vs. persuasion
- Logic chain (A then B then C)
- What's broken? How do we fix it?

Tip 7

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Don't Ignore a Judge's Adverse Credibility Finding

Tip 6

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- Credibility = finding of fact
- Findings of fact must be "clearly erroneous"
- Gateway to other issues on appeal

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Pay Attention to Circuit Court Law

Tip 5

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- Board defers to law of the circuit where case arises
- Differences arise: asylum and criminal conviction issues
- Learn your circuit's law and cite to it

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Read the Asylum / Withholding /
CAT Regulations at 8 CFR 1208.1 –
1208.24

Tip 4

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- Blueprint for analysis of asylum cases
- Codified much of asylum case law -- but added some twists

Tip 4

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Be Candid, Not Cagey

Tip 3

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- Acknowledge and confront weaknesses in your case
- If case law is not on your side, argue how to distinguish it

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Write Professionally

Tip 2

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- Professional = persuasive
- Decorum in presentation – organization, headings, cover page
- Decorum in Argument – clear arguments, analysis, conclusion

Tip 2

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Be Judicious with New Evidence on Appeal

Tip 1

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- Board rarely takes evidence on appeal
- Got new evidence? Why now?
- Make remand request clear and specific

Tip 1

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Resources

BIA Web Page:
<http://www.justice.gov/eoir/biainfo.htm>

BIA Practice Manual:
[BIA Practice Manual | EOIR | Department of Justice](#)

EOIR Virtual Law Library:
[Virtual Law Library \(justice.gov\)](#)

Resources

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Practitioner's Tips:

The Notice of Appeal & the Brief

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Preparing the NOA

- Concisely state all issues and identify the type of error the IJ made (law, fact, discretion)
- Include a sentence reserving right to raise additional issues upon review of the transcript
- Include statement in support of 3 member panel review – 8 C.F.R. §1003.1(e)(6)
- Request Oral Argument
- Don't forget to pay the filing fee or include Fee Waiver request
- Remember EOIR-27 even if entered before Immigration Court

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Briefing Your Appeal

Set Yourself up for Success

- Review Briefing Notice and Transcript Promptly
- Address Any Transcript Issues
 - Call to Clerk's Office or by Motion
- Consider Motion for Extension of Time per Practice Manual
 - 21 days possible but must give reasons; Not for delay
- Not Granted Until It's Granted – Prepare to File Timely

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Know Your Practice Manual

- Most of Your Questions Will be Addressed Here
- Some Key Points:
 - Format – Required Sections and Preferred Order
 - Citation Formats
 - 50 page limit for body of briefs – but know how to count them!
- Excellent Samples
 - Cover Page
 - Proof of Service

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Strategy for Brief Writing

Which side are you on?

- Your brief is an advocacy piece in more ways than one.
- Think not just of what you say but how you present it.
- Presentation should be different depending on whether you are seeking to uphold or reverse an IJ decision.

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Strategy in Structure

Follow the Practice Manual, BUT

- Briefs should not be Cookie-Cutter.
- Use the parts of your brief and the allocation of space you give to each to your advantage.

Statement of Facts

- What you do with this can range from adopting Statement of Facts from IJ Decision if fully favorable to storytelling that builds in many facts and emphasizes equities to personalize your client

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Strategy in Structure cont'd.

- Emphasize Standard of Review when it helps you.
 - You want clearly erroneous if you won below;
 - Mixed question of law and fact if you need de novo.
- Argument
 - Put your pages where your strengths are
 - Don't waste space on boiler plate; use case law where it is at issue
 - Use quotes from exhibits, testimony, dialogue with IJ or from decision

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About the Conclusion

Conclusion is part of your brief!

- Know what you are asking for and be sure ROP supports it.
- Does the evidence support your desired conclusion?
- Are you asking for:
 - ◆ Sustain the appeal? Reverse the IJ decision
 - ◆ Dismiss the appeal? Affirm the IJ decision
 - ◆ Remand as only remedy or in the alternative?

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QUESTIONS?

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Thank you!



We share, create, and innovate resources to support advocates and immigrants. Join us at www.immigrationadvocates.org



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