



BIA Appeals: Dos and Don'ts

Ben Winograd

Immigrant & Refugee Appellate Center, LLC

Dr. Alicia Triche

Triche Immigration Appeals

Interactive Webinar *organized by* Young Lawyers
Division, Immigration Law Section, FBA

March 25, 2019

A world map in shades of blue and grey, overlaid with a complex network of white and blue nodes and connecting lines, representing global connectivity or technology.

Part I: Winograd

- Filing the Appeal: Essential Rules and Procedures

A world map in shades of blue and grey, overlaid with a complex network of white and blue lines and circles, representing global connectivity or a digital network.

Overview

- Members are appointed by and serve at the pleasure of the Attorney General
- The Board currently has 15 members, though by regulation it “shall” have 21 members. 8 C.F.R. 1003.1(a)(1)
- Director of EOIR can appoint Temporary Board Members for 6-month terms that are non-renewable

A world map in shades of blue and grey, overlaid with a complex network of white and blue lines and circles, representing global connectivity or data flow.

Overview (cont.)

- The Board issues approximately 30,000 decisions per year
- More than 99.9% of decisions are unpublished (*i.e.* nonprecedential)
- Decisions can be only published by majority vote of permanent Board members
- Most decisions issued by single member

A world map in the background with a network of blue and white nodes and lines overlaid on it, representing global connectivity.

Jurisdiction

- Board can hear appeals of virtually all IJ decisions.
Exceptions:
 - No jurisdiction over the length of voluntary departure period. 8 C.F.R. 1003.1(b)(2)
 - No jurisdiction over adverse credible and reasonable fear determinations. 8 C.F.R. 1003.42(f), 1208.31(g)(1)
- Motions to reopen/reconsider if Board issued most recent decision on the merits
 - If appeal was dismissed as untimely or withdrawn, MTR must be filed with IJ
- Appeals of various USCIS denials, including Form I-130 and NIV waivers

When The Notice of Appeal is Due

- Notice of Appeal (Form EOIR-26) must be received within 30 days of:
 - Issuance of an oral decision
 - Mailing of a written decision
- If decision was mailed, check the date on the cover page and the postage stamp on the envelope
- The Board regards the deadline is mandatory and jurisdictional. Failure of a courier to deliver is no exception
- Use same-day filing service if needed

When A Filing Fee Is Required

- A filing fee of \$110 is required with a Notice of Appeal subject to only two exceptions:
 - Fee waiver (Form EOIR-26A)
 - Bond appeals
- The Board has become less lenient about granting fee waivers in non-detained cases
- There is no exception for appeals of asylum claims
- A filing fee of \$110 is required with a motion to reopen/reconsider subject to only two exceptions:
 - Fee waiver (Form EOIR-26A)
 - Motion based on Form I-589

A world map in shades of blue and grey, overlaid with a complex network of white and blue lines and circles, representing a global digital or communication network.

Signatures

- The Board requires hand-written but not “wet” signatures on all filings
- Scans/copies of hand-signed documents are permissible
- Signature stamps, “s/Name,” etc. are not permitted
- Some attorneys use computer-generated cursive signatures, but doing so is risky



FOIA Request

- Even if you represented the respondent before the IJ, file a FOIA request with EOIR after submitting the Notice of Appeal. Why?
 1. Ensures record is complete
 2. Enables you to easily search record
 3. Allows you to share record with other attorneys if necessary
- Note: don't cite the Bates stamp numbers in the FOIA response

Issuance of Transcript/Briefing Schedule

- After receiving EOIR-26, Board will create transcript and issue briefing schedule
 - Note: Board does not create transcripts for bond appeals or appeals of denied MTRs, but one can be requested
- Board is taking 2-3 months to issue transcripts in detained cases, 9+ months in non-detained cases
- Read transcript upon receipt to identify inaccuracies
- Briefing deadline is 21 days after issuance of schedule, subject to one 21-day extension
- First extension will be granted so long as request is received on or before original deadline



Standard of Review

- All issues subject to one of two standards of review. 8 C.F.R. 1003.1(d)(3)
- Factual findings & adverse credibility determinations subject to “clear error” review
- Questions of law, discretion, judgment, and all other issues subject to “*de novo*” review
- Note: the BIA never uses “abuse of discretion”

Standard of Review (cont.)

- Clear error review:
 - Very unfavorable to the appealing party
 - “[T]he reviewing Board member or panel is left with the definite and firm conviction that a mistake has been committed.” *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003)
- *De novo* review:
 - Best standard for appealing party
 - Latin for “anew”
 - No deference given to the immigration judge

Standard of Review (cont.)

- Factual determinations
 - “An issue capable of being answered by way of demonstration, as opposed to a question of unverifiable opinion.” BLACK’S LAW DICTIONARY 1366 (9th ed. 2009)
- What happened
 - Ex: when did an asylum applicant arrive in the United States?
- What is happening
 - Ex: what is an asylum applicant’s religion or political opinion?
- What will happen (predictive findings)
 - Ex: would an asylum applicant be incarcerated upon return?
 - Note: prior to *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015), the BIA did not regard predictive findings as “facts”

Standard of Review (cont.)

- Pure question of law
 - Whether a grant of asylum constitutes an “admission” to the United States. *Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013)
 - Whether the “one central reason” requirement applies to withholding of removal. *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010)
- Mixed question of law and fact (of “judgment”)
 - Whether an asylum applicant has a “well-founded” fear of persecution. *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015)
 - Whether qualifying relative would face “exceptional and extremely unusual hardship.” *Matter of A-S-B-*, 24 I&N Dec. 493, 497 (BIA 2008)

Standard of Review (cont.)

- Mixed questions subject to a hybrid standard
 - Underlying factual findings subject to clear error review
 - Whether facts satisfy the statutory standard subject to *de novo* review
- Examples
 - *Turkson v. Holder*, 667 F. 3d 523 (4th Cir. 2012) (whether pain/suffering qualifies as “torture”)
 - *Upatcha v. Sessions*, 849 F.3d 181 (4th Cir. 2017) (whether marriage was entered in “good faith”)
 - *Cruz-Quintanilla v. Whitaker*, __ F.3d __ (4th Cir. 2019) (whether government response equals “acquiescence”)

Standard of Review (cont.)

- Discretionary determinations
 - “Exercise of judgment by a judge or court based on what is fair under the circumstances.” BLACK’S LAW DICTIONARY 534 (9th ed. 2009)
- Examples:
 - Whether to grant a motion to continue or change venue
 - Whether to grant LPR cancellation to an applicant who is statutorily eligible
- Subject to *de novo* review, not “abuse of discretion”
- But underlying factual determinations still subject to clear error review. *Matter of Pinzon*, 26 I&N Dec. 189, 190 (BIA 2013)

Standard of Review (cont.)

- What should you do if it is unclear which standard of review to apply?
- If the IJ ruled against you, frame the findings as legal or discretionary and subject to *de novo* review
- If the IJ ruled in your favor, frame the findings as factual and subject to clear error review



BIA Fact-Finding

- The Board cannot find facts for the first time on appeal
- However, the Board may take administrative notice of “commonly known facts such as current events or the contents of official documents.” 8 CFR 1003.1(d)(3).
 - State Department reports
 - Certified conviction records
 - Widely reported news

BIA Fact-Finding (cont.)

- Other than facts subject to administrative notice, any evidence submitted on appeal will be construed as a motion to remand
- Motions to remand are subject to the same requirements as motions to reopen—*e.g.*, must submit copy of application for relief



Motion to Reconsider

- Must be received within 30 days
- \$110 filing fee required unless underlying claim based on Form I-589
- Must identify factual or legal error in prior decision
- *See generally Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006)



Motion to Reconsider (cont.)

- Cannot introduce new evidence with a motion to reconsider
- Cannot file motion to reconsider based solely on failure to refer appeal to three-member panel
- Cannot file a motion to reconsider the denial of a motion to reconsider



Motion to Reopen

- Must be received within 90 days (unless no deadline applies—*e.g.* changed country conditions)
- \$110 filing fee required unless underlying claim based on Form I-589
- Should be accompanied by new EOIR-27

Motion to Reopen (cont.)

- Must be based on material, previously unavailable evidence
- If seeking new form of relief, must be accompanied by underlying application
 - Note: application does not need to be “feed in.”
Fee is paid to DHS only if motion is granted
- Ultimate decision to reopen is discretionary

Motion to Reopen (cont.)

- *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992)
 - Party seeking reopening bears a “heavy burden” and must submit evidence that “would likely change the result in the case”
- *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996)
 - When a respondent “has not had an opportunity to present her application before the Immigration Judge, the Board will look to whether there is sufficient evidence proffered to indicate a reasonable likelihood of success on the merits, so as to make it worthwhile to develop the issues further at a full evidentiary hearing.”



Sua Sponte Motions

- Regulations authorize the BIA to grant motions to reconsider/reopen prior decisions “*sua sponte*”
- By definition, *sua sponte* motions are not subject to the 30/90-day deadlines
- Limited to “exceptional situations”
- Examples:
 - Respondent no longer removable (*e.g.* change in law, vacatur of conviction)
 - Respondent acquires lawful status (*e.g.* derivative asylee, U visa)
 - Compelling humanitarian reasons

A world map in shades of blue and grey, overlaid with a complex network of white and blue lines and circles of various sizes, representing a global network or data flow.

Part II: Triche

- Composing the Brief: Writing Mindfully, Strategically and Persuasively

Analyze the IJ Decision

“(1) what is/are the main agency/court holding/s?”

(2) on what reasons did the agency/court rely to reach this conclusion?”

--Trina Realmuto, *10 Tips for Writing Better Immigration Briefs* (Oct. 2013)

https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2013_30Oct_10-tips-briefs.pdf

Construct a Theory of Appeal

- Remember the central question is always: why should the BIA overturn the Immigration Judge's decision? Your brief must answer why the Immigration Judge got it wrong
- Effectively answer every explicitly stated reason in the IJ's decision: HOW and/or WHY did the IJ get it wrong? AND
- Demonstrate why the answer you propose is correct, instead

Address Each Required Element of Relief

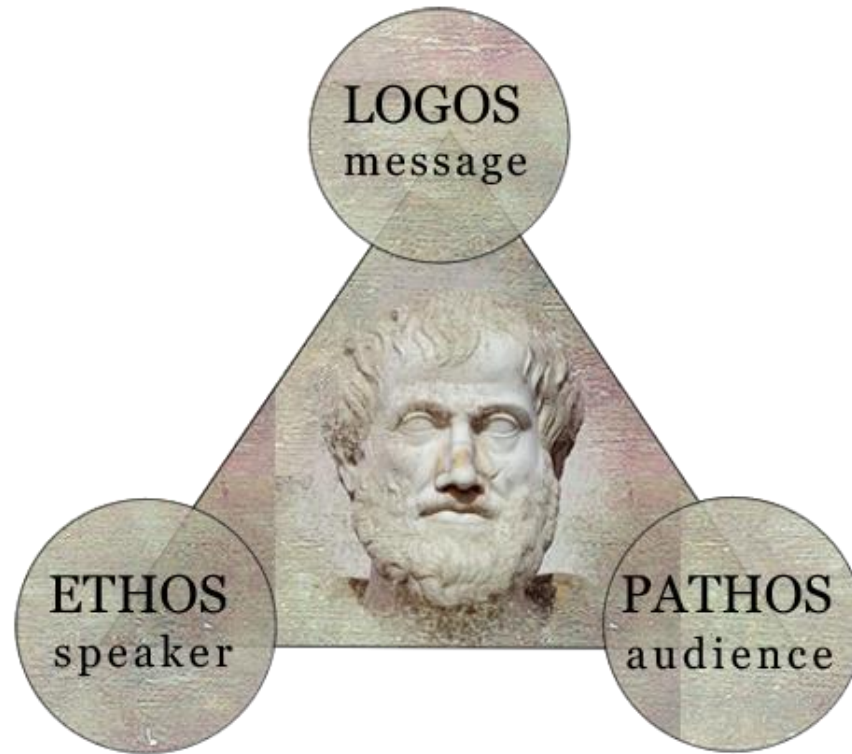
- Every element of relief must be considered and ruled upon; If IJ has not considered it yet, argue it but ask for a remand in the alternative
- Example: IJ finds no particular social group, but fails to rule on any other issue: **BRIEF EVERY ELEMENT** of asylum, ask for a grant, ask for remand in the alternative

Elements of Appeal Theory

- **Factual theory of the case**
 - How does the record prove each main fact
 - How does the story unfold, clearly and persuasively?
- **Legal theory of the case**
 - Offense: How do the facts, as established compel relief under existing precedent
 - Defense: how did the IJ get it wrong

Further Reading: David F. Chavkin, *Clinical Legal Education: A Textbook for Law School Clinical Programs*

Make a STRATEGY to advance the Theory on Appeal



Stacey Caplow, *Putting the “I” in Wr*t*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 J. LEGAL WRITING INST. 249 (2008)



Appeal Strategy

- Make the reader WANT to grant the appeal
 - A *persuasive*, accessible, sympathetic account of the facts (pathos)
 - A straightforward, lucid account of the law, heavy on the “A” part of IRAC and rooted firmly in the IJ’s decision
 - Acknowledge (apparently) damning precedent and address it
- Make the reader believe that a negative decision will be overturned in the Court of Appeals
 - A pristine presentation with no typos, correct grammar, on-point precedent (ethos)
 - A logical account of why binding precedent requires the result argued (logos)
 - Put the Board on notice that the writer is familiar with controlling Court of Appeals precedent and is prepared to use it (logos/ethos)



Essential Contents

From *BIA Practice Manual*, Chapter 4 p.58:

- a concise statement of facts and procedural history of the case
- a statement of issues presented for review
- the standard of review
- a summary of the argument
- the argument
- a short conclusion stating the precise relief or remedy sought

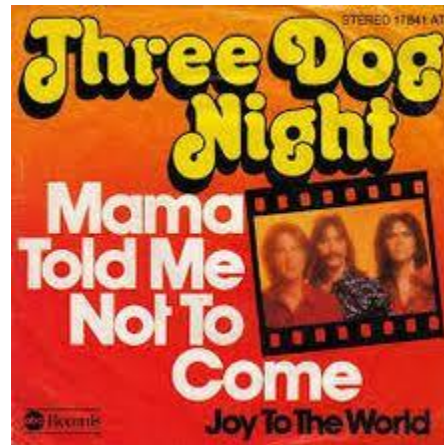
Presenting the Facts Persuasively

- Be aware of your client as a person, and get their narrative into the brief. If you adopt the IJ's version of the facts, still present your theme in the Introduction and Factual Sections
- If there are pictures in the record, integrate them throughout the brief (Don't go outside of the record)
- Remember any reader, including a BIA clerk/member, is moved by a story arc: who is the person, what happened to them, how does the story get resolved? Further research:
<https://futureofstorytelling.org/video/paul-zak-empathy-neurochemistry-and-the-dramatic-arc>

Make the Story and Argument Interesting and Accessible

Think outside the box: link story points or arguments to a context outside the brief

Mama told me not to Come....



Logos: Constructing Argument Headers in Shorter Briefs

- One approach: Make your arguments in detailed sub-headers, and then make a Table of Contents
 - Example: “RESPONDENT’S FIXED ADDRESS, USC SPONSOR AND PRIMA FACIE ASYLUM CLAIM RENDER HIM ELIGIBLE FOR BOND, AND FAILURE TO GRANT BOND IS AN INEXPLICABLE DEPARTURE FROM PREVIOUS, SUBSTANTIALLY SIMILAR BIA DECISIONS”
 - This is best for shorter, straightforward briefs such as bond briefs or briefs

Logos: Constructing Argument Headers in Longer Briefs

- Still make your arguments in headers and sub-headers, but in less detail; still make a Table of Contents, and be sure to make a clear point towards the first sentence of each paragraph
 - Example: I. This Case Must be Dismissed for Lack of Subject Matter Jurisdiction
 - A. Pereira v. Sessions Negates Jurisdiction
 - B. Matter of Bermudez-Cota is Distinguishable

Ethos: Physically Presentable Brief with Reliable Research

Seventh Circuit Court of Appeals,
*Requirements for Typography in Briefs and
Other Papers,*

<http://www.ca7.uscourts.gov/forms/type.pdf>

A. Triche, *Legal Research for Asylum Cases:
A Learning to Fish Guide for Solid Results*

<https://tricheimmigrationappeals.com/wp-content/uploads/2017/12/Mag-PDF.pdf>

Start your BIA Appeal on Day 1

- Determine every element of your claim, and to the fullest extent humanly possible, put DIRECT evidence in the record for each element
 - Example: did your expert testify specifically to the reasons s/he believes your client was targeted? Does the record speak specifically to the issue of unwilling/unable, as opposed to just general crime or “corruption”?
 - Example: if you claim US citizen children cannot, for an affordable price, go to school in English in Mexico, do you have a document in the record specifically saying this? If not, do you have an expert who can say this?
 - Be aware of new BIA precedent holding that the PSG must be stated initially before the IJ *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018)
 - Research and stay up to date on relevant case law in your own Circuit!

Using Unpublished BIA Decisions

- Unpublished BIA decisions can sometimes be used to assert that denying appeal would be arbitrary
- Sources: IRAC index (non-asylum), CGRS, Westlaw, your friends, your own (saved, redacted) cases
- *Diaz-Resendiz v. INS*, 960 F.2d 493, 497 (5th Cir. 1992) (“Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious.”)
- If your facts are close to “all fours” with previous decisions, submit them as Exhibits along with your brief, and cite according to the Practice Manual (Appendix J)
Jane Smith, A012 345 678 (BIA July 1, 2014)

Setting up Issues for Court of Appeals Review

- Be aware as you draft the brief that OIL's standard playbook includes asserting that issues raised on Circuit Court Appeal were not "exhausted" at the Board
- A good exhaustion case distinguishing between the actual argument v/s legal theories in support of an argument: *Lopez-Ventura v. Sessions*, 907 F.3d 306 (5th Cir. 2018)
- Even though the BIA will not rule on some constitutional issues, state they are explicitly reserved for appeal; and make procedural due process/prejudice arguments explicitly
- Be very aware of potential jurisdictional limits in case law in your circuits, examples: no sua sponte/MTR review; court's definition of "discretionary decisions" such as hardship determination in cancellation or overall asylum decision (INA Sec. 242(a)(2))



Ben's Tips for Briefs

- Use the same language as the Board
 - “Respondent,” not “appellant”
 - “Immigration Judge,” not “IJ”
 - Appeals are “sustained” or “dismissed”
 - Motions are “granted” or “denied”
- A-Number must be on cover page and in bottom-right corner of all other pages
- Factual assertions should be supported by citations to the record/transcript
- Omit uncontested/unnecessary facts
- Table of contents not required but a good idea

A world map in the background with a network of blue and white nodes and lines overlaid, representing global connectivity and technology.

Trends at the Board

- Bond proceedings
 - Holding that one DUI conviction not does make respondents a “danger to the community,” especially if incident did not cause injury or property damage
 - Vacating requirement that respondents present original passport as condition of release
- Asylum/withholding
 - Remands where IJ denied claim without letting respondent testify
 - Remands to consider whether “women/females” is a cognizable PSG
- U visa
 - Remands following denial of continuance because IJ failed to discuss factors in *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012))
- Motions to reopen
 - Grants sua sponte MTR for long time TPS holders eligible to adjust status
 - Finds changed country conditions in Iraq

A world map in shades of blue and grey, overlaid with a network of white and blue nodes and connecting lines, representing global connectivity.

Questions

Ben Winograd, Esq.

Immigrant & Refugee Appellate Center, LLC

bwinograd@irac.net

Dr. Alicia Triche

Triche Immigration Appeals

drtriche@tricheimmigrationappeals.com