



# LEGAL ACTION CENTER

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AMERICAN IMMIGRATION COUNCIL

## PRACTICE ADVISORY

### HOW TO FILE A PETITION FOR REVIEW

Legal Action Center

Updated by Debbie Smith February 28, 2011<sup>1</sup>

#### I. HIGHLIGHTS OF THIS ADVISORY

This Practice Advisory addresses petition for review procedures and requirements:

- Petitions for review must be filed **and received** by the court no later than 30 days after the date of the decision of the Board of Immigration Appeals (BIA) or the U.S. Immigration and Customs Enforcement (ICE). This deadline is jurisdictional.
- The 30-day deadline for filing a petition for review is not extended either by filing a motion to reopen or reconsider or by the grant or extension of voluntary departure.
- Separate petitions for review must be filed for each BIA decision, including issues arising from the denial of a motion to reopen or reconsider.
- Filing a petition for review does *not* stay the individual's removal from the country.
- A separate request for a stay must be filed with the court.
- Filing a petition for review terminates the voluntary departure order, with one exception.
- ICE can deport an individual *before* the 30-day deadline to file a petition for review.
- If in doubt about whether the court of appeals has jurisdiction, it may be prudent to timely file the petition for review to preserve the individual's right to seek review.
- Electronic filing is the norm in most circuit courts of appeal. It is recommended that attorneys register as soon as possible to create an account in the circuit court of appeals.
- Attorneys must be admitted to the bar of the circuit court.
- Unrepresented individuals may move the circuit court to appoint pro bono counsel.
- Indigent individuals may move the circuit court to grant *in forma pauperis* status and file the petition without the filing fee.
- It may be appropriate to request a conference with the Mediation Unit of the court.
- When in doubt about circuit court procedures, call the court clerk with your question.
- A petition for review may be litigated even if the individual has been removed.

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<sup>1</sup> Copyright (c) 2009, 2010, 2011 American Immigration Council. Debbie Smith is an attorney at Catholic Legal Immigration Network, Inc. (CLINIC). Thanks to Trina Realmuto and Christopher Rickerd for their helpful comments. [Click here](#) for information on reprinting this Practice Advisory. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

Sample petitions for review are attached as Appendices A and B. A list of websites for the courts of appeals is attached as Appendix C. A list of national addresses for service of the petition is attached as Appendix D.

## II. INTRODUCTION

A petition for review is the document filed by, or on behalf of, an individual seeking review of an agency decision in a circuit court of appeals. In the immigration context, a petition for review is filed to obtain review of a decision of removal (and the former deportation and exclusion) issued by the BIA. In addition, a petition for review may be filed to obtain review of a removal order issued by ICE under a few very limited specific provisions of the Immigration and Nationality Act (INA).

Section 242 of the INA, 8 U.S.C. § 1252, as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)<sup>2</sup> and amended by the REAL ID Act,<sup>3</sup> contains the jurisdictional basis for petitions for review and sets out rules and procedures governing petitions for review.<sup>4</sup> In addition, the Federal Rules of Appellate Procedure (FRAP) and local circuit court rules provide petitioners with additional court procedures and requirements. The circuit courts post the FRAP and local rules on their websites. See a list of the court websites in Appendix C. In addition, many of the circuit court websites contain valuable resources to assist practitioners. For example, the website of the 9th Circuit Court of Appeals posts a detailed outline of procedural and substantive immigration law in the 9th Circuit, a list of Frequently Asked Questions, and an explanation of practice issues entitled “After Opening a Case – Counselor Immigration Cases.” Similarly, the 3rd Circuit Court of Appeals website includes a detailed explanation of the court’s mediation program. See Appendix C.

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<sup>2</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

<sup>3</sup> REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

<sup>4</sup> Prior to the enactment of the REAL ID Act, judicial review of final deportation or exclusion orders (i.e., where proceedings commenced before April 1, 1997), was governed by transitional rules set forth in IIRAIRA §309. Subsequently, the REAL ID Act said that petitions for review of orders of deportation or exclusion filed under the transitional rules “shall” be treated as if filed as a petition for review under new INA §242 (as amended by REAL ID Act §106(d)). Thus, regardless whether the person has a removal order, deportation order, or exclusion order, the same rules should apply.

### III. COURT OF APPEALS JURISDICTION OVER PETITIONS FOR REVIEW

The courts of appeals have **exclusive** jurisdiction to review “a final order of removal,” except an expedited removal order entered under INA § 235(b)(1).<sup>5</sup> INA § 242(a)(1), 8 U.S.C. § 1252(a)(1). The following are examples of the types of decisions that may be reviewed through a petition for review:

#### **A BIA decision to:**

- issue a final removal order (including the finding of removability and the denial of any applications for relief);
- deny a motion to reconsider or a motion to reopen; or
- deny asylum in asylum only proceedings.

#### **An order of removal issued by ICE under:**

- INA §241(a)(5); or
- INA §238(b).

A challenge to a BIA or ICE decision may involve legal, constitutional, factual, and/or discretionary claims. In general, (1) legal claims assert that BIA/ICE erroneously applied or interpreted the law (*e.g.*, the INA or the regulations); (2) constitutional challenges assert that BIA/ICE violated a constitutional right (*e.g.*, due process or equal protection); (3) factual claims assert that certain findings of fact made by BIA/ICE were erroneous; and (4) discretionary claims assert BIA/ICE abused its discretion by the manner in which it reached its conclusion.

#### **Jurisdictional Bars**

The restrictions on judicial review imposed by INA §242, 8 U.S.C. § 1252 require practitioners to analyze each case to determine whether a particular claim is reviewable in the court of appeals. In order to decide if review is permitted, practitioners must first consider whether the INA contains a bar to review that is related to the decision, nature of the claim, or the person bringing the challenge. To do this, practitioners must be familiar with evolving case law within their circuit interpreting the relevant bar to review. Second, if there is a bar to review, practitioners must evaluate whether the petition raises a constitutional claim or a question of law that supersedes the bar.

#### **Discretionary Decisions**

INA §242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) contains two sub-provisions which generally prohibit review of discretionary decisions including waivers of removal under §§ 212(h) and

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<sup>5</sup> Whether a decision is “final” for purposes of judicial review sometimes is not clear. Yet, if an order is not final at the time the petitioner filed the petition for review, most courts of appeals will dismiss the petition as prematurely filed. However, if the individual foregoes the opportunity to file a petition for review when one should have been filed, later review in the court of appeals may be precluded. Read an in-depth discussion of the finality requirement in the LAC’s Practice Advisory, “Finality of Removal Orders for Judicial Review Purposes” (Aug. 5, 2008) at [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_finrem.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_finrem.pdf).

212(i), 8 U.S.C. §§ 1182(h) and (i), cancellation of removal, voluntary departure, and adjustment of status, and other decisions or action the authority for which is specified in Title II of the INA to be discretionary. With respect to this last category, discretionary decisions in Title II, the Supreme Court held in *Kucana v. Holder* that the proscription against review of discretionary determinations applies only to Attorney General determinations made discretionary by statute, not to determinations declared discretionary by the Attorney General through regulation.<sup>6</sup> Prior to the enactment of REAL ID's provisions authorizing review of constitutional claims or questions of law,<sup>7</sup> several circuits found jurisdiction to review non-discretionary determinations that were within the context of a discretionary benefit.<sup>8</sup> Following the REAL ID amendments to the statute, review is not precluded in cases that raise a constitutional claim or a question of law. For example, a court has jurisdiction to consider questions of statutory interpretation in cancellation of removal cases, and thus courts have decided whether the hardship standard is consistent with international law<sup>9</sup>, whether the individual has met the continuous presence requirement<sup>10</sup> or whether a qualifying relative meets the definition of "child."<sup>11</sup> Similarly, the utter failure to consider evidence in the context of a cancellation case may be a reviewable question of law.<sup>12</sup>

### Criminal Offenses

INA §242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) prohibits review of cases involving criminal offenses under INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) or specific subsections of INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). Nonetheless, the court retains jurisdiction to review whether the individual to be removed 1) is a non-citizen, 2) who is removable, 3) based on a disqualifying offense.<sup>13</sup> Thus, the individual must actually be removable on a basis specified in the relevant section of the statute. For example, if the individual is not charged and found removable on grounds that might implicate the bar, **such as the aggravated felony bar**, the bar does not apply. In addition, the right to review is also restored pursuant to INA §242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), for cases involving criminal offenses that raise a constitutional claim or a question of law. For example, the court retains jurisdiction to determine whether an individual

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<sup>6</sup> *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010).

<sup>7</sup> See INA § 242(a)(2)(D), 8 U.S.C. §1252(a)(2)(D).

<sup>8</sup> See *Santana-Albarran v. Ashcroft*, 393 F.3d 699,703 (6th Cir. 2005); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (holding that there is jurisdiction to consider the continuous presence requirement for cancellation of removal); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2001) (holding there is jurisdiction to review the definition of child).

<sup>9</sup> See *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005).

<sup>10</sup> See *Augustin v. AG of the United States*, 520 F.3d 264, 267 (3d Cir. 2008).

<sup>11</sup> See *Partap v. Holder*, 603 F.3d 1173, 1174 (9th Cir. 2010); *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1176-78 (9th Cir. 2007) (court reviewed whether unborn child or grandchild met the definition of "child" under the statute).

<sup>12</sup> See *Champion v. Holder*, 626 F.3d 952, 956 (7th Cir. 2010).

<sup>13</sup> See *Moore v. Ashcroft*, 251 F.3d 919, 923 (11th Cir. 2001).

subject to the aggravated felony grounds of removal is eligible for 212(c) relief if there is no statutory counterpart in the grounds of inadmissibility.<sup>14</sup>

### **Asylum**

Although asylum is a discretionary form of relief, the court retains jurisdiction to review most aspects of the asylum determination pursuant to INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). However, INA §208(a)(3), 8 USC §1158(a)(3), limits review of several determinations related to asylum such as whether an individual established changed circumstances or extraordinary circumstances regarding a delay in filing for asylum.<sup>15</sup> Again, the prohibition does not apply to cases that raise a constitutional claim or a question of law. Not all courts agree on what constitutes a “question of law.” The Ninth and Second Circuit have held that questions of law include the application of statutes or regulations to undisputed facts, or mixed questions of facts and law.<sup>16</sup> Therefore, in the Ninth and Second Circuits, a decision on “changed circumstances” or “extraordinary circumstances” is a mixed question of law and fact over which the court has jurisdiction.<sup>17</sup>

In conclusion, the limitations on jurisdiction affecting discretionary decisions, cases involving criminal offenses, and specific asylum determinations are mitigated by the court’s authority to review constitutional claims and questions of law. In addition, courts retain jurisdiction to determine whether they have jurisdiction over the petition for review. As discussed below, following the REAL ID Act amendments, few, if any, issues outside of challenges to detention remain reviewable via habeas corpus. Thus, it is advisable to *timely* file a petition for review to preserve the individual’s right to seek review.<sup>18</sup>

## **IV. PETITION REQUIREMENTS**

### **Filing Deadline**

A petition for review “*must be filed not later than thirty days after the date of the final order*” of removal or the final order of exclusion or deportation. *See* INA §242(b)(1), 8 USC §1252(b)(1) (removal orders).

The 30-day deadline for filing a petition for review of the underlying decision is *not* extended by the filing of a motion to reopen or reconsider, nor is it extended by the grant or extension of

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<sup>14</sup> *See De La Rosa v. U.S. Atty. Gen.*, 579 F.3d 1327, 1328 (11th Cir. 2009) cert. denied *De La Rosa v. Holder*, 130 S. Ct. 3272 (2010).

<sup>15</sup> INA § 208(b)(2)(A), 8 USC § 1158(b)(2)(A).

<sup>16</sup> Other circuit courts have not found jurisdiction where there is a mixed question of law and fact.

<sup>17</sup> *See Taslimi v. Holder*, 590 F.3d 981, 985 (9th Cir. 2010); *Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007); *Chen v. United States DOJ*, 471 F.3d 315, 322 (2d Cir. 2006).

<sup>18</sup> Courts have held that review of detention issues including the length and conditions of detention, still is available in habeas corpus proceedings. *See* the LAC’s practice advisory titled “Introduction to Habeas Corpus” (April 2006), at [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_0406.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_0406.pdf).

voluntary departure. To obtain review of issues arising from a BIA decision and issues arising from the denial of a motion to reopen or reconsider, separate petitions for review of each BIA decision must be filed. If separate petitions are not filed, the court's review may be limited to the issues arising from the BIA decision for which review is sought. For example, if a petition for review of the BIA's decision denying a motion to reopen or reconsider has been filed, but a petition for review of the BIA decision underlying the motion has *not* been filed, the court may not review issues arising from the underlying BIA decision.

The deadline for filing a petition for review is "mandatory and jurisdictional" and is "not subject to equitable tolling." *Stone v. INS*, 514 U.S. 386, 405 (1995). Because the 30-day deadline is jurisdictional, circuit courts lack authority to consider late-filed petitions for review.<sup>19</sup>

The 30-day time period begins running from the date of the BIA's decision. If the BIA denied a motion to reopen or reconsider, the 30-day time period begins running from the date of the BIA decision denying the motion. In reinstatement cases under INA §241(a)(5), or administrative deportation cases under INA §238(b), the 30-day deadline begins running from the date of the final ICE order.<sup>20</sup> In computing the 30 day period to file the petition for review, if the last day to file the petition for review is a Saturday, Sunday, or legal holiday,<sup>21</sup> the filing period continues to run until the day after the Saturday, Sunday, or legal holiday.<sup>22</sup> The petition for review must be **received** by the clerk's office on or before the thirtieth day and not merely mailed by that date. The date the petition is postmarked is **not** relevant.

Where the 30-day deadline has expired due to ineffective assistance of counsel, new counsel may consider filing a motion to reopen to the BIA (provided the motion is filed within the 90-day statutory time period for filing motions to reopen). See *Matter of Compean*, 25 I. &N. Dec. 1, 3 (AG 2009) (finding that BIA may consider claims of ineffective assistance based on conduct that occurred after the entry of a removal order). Counsel also may consider filing a motion requesting that the BIA rescind and re-issue its decision to allow petitioner to seek judicial

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<sup>19</sup> There are very few situations in which a court might excuse a late-filed petition for review: (1) where the court or the BIA provided misleading information as to the deadline for filing a petition for review; and (2) where the BIA failed to comply with the applicable regulations regarding mailing the decision to petitioner or petitioner's counsel. For further information on these situations and potential remedies, see the LAC's Practice Advisory, "Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court" (April 20, 2005) at [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_042005.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_042005.pdf).

<sup>20</sup> At least one circuit has held, however, that the thirty day deadline does not commence until *service* of the final ICE order where government misconduct delayed service beyond the thirty day period. See *Villegas de la Paz v. Holder*, \_\_\_ F.3d \_\_\_, 2010 U.S. App. LEXIS 23182 (6th Cir. Nov. 8, 2010), *reh'g en banc denied*, *Villegas de la Paz v. Holder*, 2010 U.S. App. LEXIS 26935 (6th Cir. Dec. 28, 2010)

<sup>21</sup> Absent further instruction from a circuit court, legal holidays are limited to New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

<sup>22</sup> FRAP 26(a).

review.<sup>23</sup>

### **Attachments and Contents**

Under INA §242(c), 8 USC §1252(c), a petition for review must and need only: (1) include a copy of the final administrative order; and (2) state whether any court has upheld the validity of the order, and if so, state which court, the date of the court's ruling, and the type of proceeding.

However, the circuit court rules may mandate additional requirements for the filing of the petition for review beyond those specified in the statute. These additional requirements affect only those cases filed in that circuit. For example the Ninth Circuit rule governing the contents of a petition for review requires the petition to state whether the petitioner is detained in the custody of the Department of Homeland Security or at liberty and whether the petitioner has filed a motion to reopen before the Board of Immigration Appeals or applied to the district director for an adjustment of status.<sup>24</sup> Therefore, it is crucial that practitioners familiarize themselves with the circuit rules for the circuit in which the petition will be filed prior to filing the petition for review.

The petition should state the name of each individual petitioning for review and should not use "et al." to reference more than one petitioner. FRAP 15(a)(2)(A). For example, where a family is in immigration proceedings, but the BIA decision only references the lead respondent, the petition for review should name each family member whose case was decided by that order and include their A number, even if all family members were not specifically listed in the BIA decision. Individual petitions for review need not be filed for each family member.

A sample petition for review is attached as Appendix A. Although it is not necessary at this stage to discuss the jurisdictional basis or merits of the petition, a more detailed sample petition for review, containing the basis for jurisdiction and venue, also is provided as a reference and is attached as Appendix B. An affirmative explanation of jurisdiction may be desirable in cases where an opposition to jurisdiction is anticipated.

## **V. STAY OF REMOVAL AND TERMINATION OF VOLUNTARY DEPARTURE**

### **Stay of Removal**

The filing of a petition for review does *not* provide an automatic stay of removal. Immigration and Customs Enforcement (ICE) may deport an individual as soon as the BIA issues its order;

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<sup>23</sup>For further information regarding motions to rescind and re-issue, see the LAC's Practice Advisory, "Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court" (April 20, 2005) at [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_042005.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_042005.pdf). In addition, the Ninth Circuit has said that there is habeas jurisdiction to consider a claim of ineffective assistance relating to counsel's failure to file the petition for review. *See Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007)

<sup>24</sup>Ninth Circuit Rule 15-4. Counsel should update the court regarding any pertinent changes subsequent to the filing of the petition for review.

ICE need not wait until the 30-day period for filing a petition for review has run. Likewise, in reinstatement cases under INA §241(a)(5), and administrative removal cases under INA §238(b), deportation may occur as soon as ICE issues its removal order. In the post-AEDPA<sup>25</sup> and IIRAIRA era, serving the petition for review does *not* stay deportation, “unless the court orders otherwise.” Thus, petitioner also may want to file for a stay of the removal order pending the petition for review. Obtaining a judicial stay is necessary to prevent petitioner’s removal from the country. If the court orders the stay of removal, the stay remains in place until the court’s mandate issues.

In *Nken v. Holder*,<sup>26</sup> the Supreme Court held that a court of appeals should apply the traditional criteria governing stays when adjudicating a stay of removal. In doing so, the Court rejected the government’s argument that the stringent standard in INA § 242(f)(2), 8 U.S.C. § 1252(f)(2) (“clear and convincing evidence” that the removal order “is prohibited as a matter of law”) applies. The Court’s decision reversed the Fourth and Eleventh Circuits, which had held that INA § 242(f)(2) applies to stays of removal pending petitions for review.

Under the traditional standard for stays, the court shall consider (1) whether the stay applicant has made a strong showing that he/she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The *Nken* Court noted that the first two factors are most critical. The last two factors merge because the government is the respondent. In addition, the Court advised “that the burden of removal alone cannot constitute the requisite irreparable injury” and that courts should not assume that “ordinarily, the balance of hardships will weigh heavily in the applicant’s favor.”

Unlike the filing of the petition for review, the filing of a motion for a stay requires a detailed analysis of the facts of petitioner’s case, the legal issues raised in the case, the BIA’s errors of law, and the hardships that would ensue if the petitioner were forced to return to his or her native country pending review of the petition. In most cases practitioners will be preparing and filing the stay request without the benefit of the administrative record, which, pursuant to the FRAP must be filed within 40 days of service of the petition for review. The absence of the administrative record increases the burden on practitioners who did not represent the petitioner before the BIA. Practitioners in this situation must examine the BIA decision, all information available from previous counsel, and the facts of the case as recounted by the petitioner. Stay motions should not be cursory; they require significant care and analysis. The government may or may not oppose a stay motion. If an opposition is filed the petitioner has an opportunity to reply. See FRAP 27(a)(4).

### **Voluntary Departure**

Under regulations that took effect on January 20, 2009, an order of voluntary departure will terminate automatically upon the filing of a petition for review or other judicial challenge and the

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<sup>25</sup> Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

<sup>26</sup> *Nken v. Holder*, 129 S. Ct. 1749, 1754 (2009).



alternate order of removal will take effect.<sup>27</sup> 8 C.F.R. § 1240.26(i). However, if a person then departs within 30 days of filing the petition for review and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. *Id.* See 73 Fed. Reg. 76927, 76933 (Dec. 18, 2008) for a discussion of what proof and evidence may be sufficient.

## **VI. WHERE TO FILE THE PETITION FOR REVIEW**

Venue is restricted to the court of appeals for the judicial circuit in which the IJ completed the proceedings. INA §242(b)(2), 8 USC §1252(b)(2). If a case is conducted by video hearing, the immigration judge must state on the record the location of the hearing, which may be different from where the IJ and the parties are located. *See* OPPM 04-06, Creppy, Chief IJ, EOIR (August 18, 2004) available at <http://www.usdoj.gov/eoir/eoia/ocij/oppm04/04-06.pdf>.

## **VII. FILING FEE AND MOTION FOR PRO BONO COUNSEL**

The filing fee for a petition for review is currently \$450. Petitioner may request leave to proceed *in forma pauperis* by filing a motion and supporting affidavit with the court.<sup>28</sup> The request to proceed *in forma pauperis* is governed by 28 U.S.C. § 1915. In the affidavit and motion, petitioner must demonstrate that he/she is incapable of paying the filing fee because of indigence. Local circuit court rules may require the submission of a form demonstrating petitioner's income. If petitioner is represented by counsel, the affidavit and motion may explain whether such representation is pro bono.

Indigent petitioners without counsel may also move the court to appoint counsel to pursue the petition for review. The motion for pro bono counsel should contain information about the legal merits of the case and the petitioner's indigency. The court appoints counsel in a limited number of civil cases and the motion must present compelling legal and humanitarian reasons for the appointment.

## **VIII. SERVICE ON RESPONDENT**

### **Whom to Sue**

The INA states that "[t]he respondent is the Attorney General." INA §242(b)(3)(A), 8 USC §1252(b)(3)(A).

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<sup>27</sup> This rule applies prospectively only, and therefore does not apply to cases where the voluntary departure was ordered prior to January 20, 2009. *See* 73 Fed. Reg. at 76936.

<sup>28</sup> *See* FRAP 24(b) and corresponding local circuit court rules.

### **Whom to Serve**

The petition must be served “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 240 was entered.” INA §242(b)(3)(A), 8 USC §1252(b)(3)(A).<sup>29</sup>

Serve the Attorney General by sending a complete copy of the petition for review to the address set forth in Appendix D. Attorneys from the Office of Immigration Litigation (OIL), a division within the Civil Division of the Department of Justice, litigate on behalf of the Attorney General. Thus, it is advisable to also serve a copy of the petition on OIL at the address listed in Appendix D. After receiving a copy of the petition, the OIL attorneys assigned to the case will enter their appearance before the court and should inform petitioner’s counsel.

To serve the officer in charge of the district, counsel should serve the ICE Field Office Director for Enforcement and Removal Operations (formerly Detention and Removal) with jurisdiction over the district where the final administrative order was issued. Counsel may need to make inquiries to learn the name of the officer in charge of detention and removal in their area. Counsel also will need to ascertain the proper mailing address for the ICE Field Office Director in order to serve this official.

At the same time, petitioner must file a certificate of service listing the names and addresses of those served and the manner of service. FRAP 15(c). Addresses for the Attorney General and the Office of Immigration Litigation are attached as Appendix D. Counsel may contact the local ICE office to get the correct address of that office. FRAP 15(c) further requires that petitioner must give “the clerk enough copies of the petition . . . to serve each respondent.” Presumably, an original plus one copy of the petition must be filed where the Attorney General is the only named respondent. However, counsel should verify the number of copies required by checking local procedures or contacting the clerk’s office. *See also* FRAP 25 (Filing and Service) and corresponding local court rules.

### **Service of Future Pleadings**

After opposing counsel has entered his or her appearance, future pleadings’ service “must be made on the party’s counsel” by a prescribed method. FRAP 25(b) and (c). Such pleadings must be filed with either: (1) an acknowledgement of service by the person served; or (2) a statement by the person effectuating service attesting to the date and manner of service, the names of those served, and the appropriate mail, e-mail or delivery address or facsimile number, depending on the manner of service. The proof of service may appear on or be affixed to the pleading. *See* FRAP 25(d)(3). The local rules set out acceptable methods of service.

### **Electronic Filing**

Many courts of appeals now require electronic filing as permitted under FRAP 25(a)(2)(D). The local rules specify which documents are exempt from electronic filing and practitioners must consult local rules. Currently the filing of a petition for review is exempt from electronic filing

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<sup>29</sup> If the order of removal was entered under another section of law, for example, INA §§238(b) or 241(a)(5), counsel presumably is bound by the service requirements of INA §242(b)(3)(A), 8 USC §1252(b)(3)(A).

requirements and paper filing is required. While the filing of the petition for review is exempt from the electronic filing requirements, subsequent filings, including motions and briefs, must be filed electronically in some circuit courts if the petitioner is represented by counsel. In order to be prepared for future filings in the circuit court, it is important that attorneys register as electronic filers in advance. This registration will create an account in the circuit court of appeals. See the Legal Action Center's (LAC) Practice Advisory, "Electronic Filing and Access to Electronic Federal Court Documents" (April 13, 2009) at [http://www.legalactioncenter.org/sites/default/files/pa-ElectronicFiling\\_20090413.pdf](http://www.legalactioncenter.org/sites/default/files/pa-ElectronicFiling_20090413.pdf).

## **IX. LITIGATING THE PETITION IN THE COURT OF APPEALS**

### **Admission and Entry of Appearance**

Attorneys must be admitted to practice before the court of appeals in which the petition for review is filed or, in some courts, must file an application for admission either simultaneously or within a prescribed time period. Some courts of appeals allow an attorney who is not admitted to appear *pro hac vice*.

The courts of appeals require counsel to enter an appearance in each case. Entry of Appearance forms are available on the court's website and from the clerk's office.

For further information regarding admission and appearance requirements, counsel may consult FRAP 46 and corresponding local circuit rules. Information also is available on court websites. *See* Appendix C, listing websites for the courts of appeals.

### **Federal Rules of Appellate Procedure**

The rules and procedure for litigation in the courts of appeals are governed by the Federal Rules of Appellate Procedure in conjunction with each circuit's local rules. This advisory provides a brief overview of appellate procedure related to petition for review litigation; however, it does not address all of the Federal Rules of Appellate Procedure nor does it address local circuit rules.

### **Mediation Program**

FRAP 33 establishes the availability of appeal conferences to aid the court in the disposition of cases and the possibility of settlement. All civil cases, including immigration petitions for review, may be considered for acceptance in circuit court mediation programs. However, not all circuits permit mediation in immigration cases. For example, the 4<sup>th</sup> Circuit Court of Appeals does not offer mediation in immigration cases. Counsel must determine if mediation is available and request a mediation conference.

Mediation is generally requested pre-briefing before each side has invested significant resources in the case. An example of an instance where mediation may resolve the case is a petition for review raising an asylum issue where an adjustment of status possibility becomes available.

### **Certified Record of Proceedings and Briefing Schedule**

Once a petition for review is filed, the court generally issues an order/schedule for the parties to file: (1) the Certified Record of Proceedings (also known as the "Administrative Record"); (2) Petitioner's Opening Brief (and possibly Excerpts of Record); (3) Respondent's Answering Brief; and (4) Petitioner's Reply Brief (optional).

The agency is obligated to file the Certified Record of Proceeding within 40 days of service of the petition for review. FRAP 17(a). The record must include: (1) the order involved; (2) any findings or report on which it is based; and (3) pleadings, evidence, and other parts of the proceeding before the agency, including the transcripts of hearings. FRAP 16(a). Where the petition seeks review of a BIA order, the record is prepared by the Executive Office for Immigration Review and filed by OIL.

INA §242(b)(3)(C), 8 USC §1252(b)(3)(C), states that petitioner must serve and file the opening brief no later than 40 days after the date on which the administrative record is available, and further states that petitioner may serve and file a reply brief within 14 days *after service* of the government’s brief. *See also* FRAP 31(a)(1) (“The appellant must serve and file a brief within 40 days after the record is filed.”). The statute and rule say these deadlines may only be extended by motion upon a showing of good cause. INA §242(b)(3)(C); FRAP 31(a)(1). Also, if the brief is not filed, INA §242(b)(3)(C) instructs courts to dismiss the appeal unless a manifest injustice would result. In circuits that require electronic filing of briefs, the circuit rules state the manner of electronically filing and whether paper copies are also required. *See* FRAP 31 and local rules. In circuits that do not require electronic filing of briefs, local rules may also modify the number of paper briefs required for filing FRAP 31.

Importantly, most courts do not rely on the time frame in the statute or rule; instead, they issue a schedule setting out due dates for the filing of both the administrative record and the briefs. Further, it is common for counsel on either side or both sides to move to extend the briefing schedule or move to hold briefing in abeyance.

When filing briefs in the circuit courts, counsel should consult FRAP 28 (Briefs), 30 (Appendix to the Briefs), 31 (Serving and Filing), and 32 (Form of Briefs, Appendices, and Other Papers), as well as all corresponding local rules. A list of websites for the courts of appeals is attached as Appendix C.

### **Motions**

Written motions are governed by FRAP 27 and corresponding local rules. Some courts also allow telephonic motions for an extension of time to file a brief. In addition, the briefing schedule may be delayed or vacated if the government files a motion to dismiss for lack of subject matter jurisdiction claiming that petitioner is barred from review in the court of appeals.

Generally, motions are supported by an affidavit or declaration.<sup>30</sup> When the motion requests relief by a date certain, the request must be included in the caption.<sup>31</sup> Frequently local rules require that the motion include the position of the opposing party to the request, and the 9th Circuit Court of Appeals requests a statement of the petitioner’s detention status.<sup>32</sup> Deadlines for responses and replies to motions are set forth in FRAP 27. Local rules may provide special procedures for the filing of an emergency motion. If the petitioner is detained and wishes to get a decision on his or her case as quickly as possible, counsel should discuss whether to file a motion to expedite consideration of the petition for review with the court.

Practitioners must be prepared to respond to motions to dismiss and motions for summary disposition. Motions to dismiss for lack of jurisdiction may allege that the petition raises a discretionary decision, criminal offense, or asylum case that is barred under INA §242, 8 U.S.C. § 1252. Practitioners must be ready to address the court’s jurisdiction affirmatively and address

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<sup>30</sup> 28 U.S.C. § 1746.

<sup>31</sup> FRAP 27(a)(3)(B).

<sup>32</sup> Ninth Circuit Rule 27-8.2

whether the petition raises constitutional claims or questions of law or whether the petitioner is removable. Similarly a motion for summary disposition may allege that the questions raised on review are insubstantial. In that case, practitioners must provide information about the petition's significant legal issues.

### **Supplemental Authorities—28(j) Letters**

If pertinent and significant authorities come to petitioner's attention after briefing is completed or after oral argument, but before the court issues a decision, counsel should advise the court of the supplemental citations pursuant to FRAP 28(j). The advisal is made by letter and copied to opposing counsel. "The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited." FRAP 28(j).

### **Oral Argument**

Pursuant to FRAP 34, any party may file, or a court may require by local rule, a statement explaining why an oral argument should, or need not, be permitted. Oral arguments must be permitted unless a panel of three judges decides that:

- the appeal is frivolous;
- the dispositive issue(s) have already been decided; or
- the facts and arguments are adequately presented in the briefs and records.

The court clerk will notify the parties of the date, time, place, and amount of time allotted for argument if the court determines oral argument is necessary.

### **Judgment and Post-Judgment Review**

The judgment (or decision) is entered on the docket by the clerk after he or she receives the court's opinion or upon the court's instruction (where judgment is rendered without opinion). FRAP 36 (Entry of Judgment). A petition for rehearing and/or petition for rehearing en banc may be filed within 45 days after entry of judgment, unless otherwise specified by the court or local rule. FRAP 35 (En Banc Determination) and FRAP 40 (Petition for Panel Rehearing). Unless the court directs otherwise, the mandate will automatically issue seven calendar days after the time to file a petition for rehearing expires, or seven calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. FRAP 41. For additional information regarding petitions for panel and en banc rehearing, see the LAC's July 31, 2008 Practice Advisory, "How To File A Petition For Rehearing, Rehearing En Banc And Hearing En Banc In An Immigration Case" at [http://www.legalactioncenter.org/sites/default/files/lac\\_pa\\_082704.pdf](http://www.legalactioncenter.org/sites/default/files/lac_pa_082704.pdf).

**APPENDIX A: SAMPLE PETITION FOR REVIEW**

Notes:

1. Complete ALL underlined spaces (except “Case File No.”) as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk’s Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n.4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, rules regarding admission and entry of appearance as counsel, and electronic filing requirements.
5. **If the local circuit court rules require it**, add information about whether the petitioner is detained and whether the petitioner has filed a motion to reopen to the BIA or applied for adjustment of status.

**UNITED STATES COURT OF APPEALS FOR THE \_\_\_\_\_ CIRCUIT**

<p><b>[Name of Petitioner],</b></p> <p><b>Petitioner,</b></p> <p><b>v.</b></p> <p><b>Eric H. HOLDER,</b> <b>Attorney General,</b></p> <p><b>Respondent .</b></p> <p>_____</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Case File No.</b> _____</p> <p><b>Immigration File No.: A</b> _____</p> <p align="center"><b>PETITION FOR REVIEW</b></p>
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The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court’s ruling, and the kind of proceeding).

Dated: \_\_\_\_\_

Respectfully submitted,

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Attorney/s Name  
Firm / Organization  
Address  
Telephone:  
Facsimile:  
Attorney/s for Petitioner



**APPENDIX B: SAMPLE PETITION FOR REVIEW (MORE DETAILED)**

Notes:

1. Complete ALL underlined spaces (except “Case File No.”) as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk’s Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n. 4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, rules regarding admission and entry of appearance as counsel, and electronic filing requirements.
5. **If the local circuit court rules require it**, add information about whether the petitioner is detained and whether the petitioner has filed a motion to reopen to the BIA or applied for adjustment of status.

**UNITED STATES COURT OF APPEALS FOR THE \_\_\_\_\_ CIRCUIT**

<p><b>[Name of Petitioner],</b></p> <p><b>Petitioner,</b></p> <p><b>v.</b></p> <p><b>Eric H. HOLDER,</b> <b>Attorney General,</b></p> <p><b>Respondent .</b></p> <p>_____</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>Case File No.</b>_____</p> <p><b>Immigration File No.: A</b>_____</p> <p><b>PETITION FOR REVIEW</b></p>
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The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court’s ruling, and the kind of proceeding).

Jurisdiction is asserted pursuant to 8 U.S.C. § 1252(a)(1) (removal cases) / § 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as amended by § 106 of the REAL ID Act of 2005 (deportation and exclusion cases.)

Venue is asserted pursuant to 8 U.S.C. § 1252(b)(2) (removal cases) / IIRIRA § 309(c)(4)(D) (deportation/exclusion cases) because the immigration judge / ICE (in cases under INA §§ 241(a)(5) or 238(b)) completed proceedings in City, State, within the jurisdiction of this judicial circuit.

This petition is timely filed pursuant to 8 U.S.C. § 1252(b)(1) (removal) / IIRIRA § 309(c)(4)(C) (deportation / exclusion) as it is filed within 30 days of the final order of removal / deportation / exclusion.

Dated: \_\_\_\_\_

Respectfully submitted,

\_\_\_\_\_  
Attorney/s Name  
Firm / Organization  
Address  
Telephone:  
Facsimile:

Attorney/s for Petitioner

## APPENDIX C: WEBSITES FOR U.S. COURTS OF APPEALS

*First Circuit:* [www.ca1.uscourts.gov](http://www.ca1.uscourts.gov)

First Circuit Checklist for Briefs:  
[http://www.ca1.uscourts.gov/files/faq/checklist\\_for\\_briefs.pdf](http://www.ca1.uscourts.gov/files/faq/checklist_for_briefs.pdf)

*Second Circuit:* [www.ca2.uscourts.gov](http://www.ca2.uscourts.gov)

How to Appeal an Agency Case to the Second Circuit :  
[http://www.ca2.uscourts.gov/clerk/Forms\\_and\\_instructions/pdf/How\\_to\\_Appeal\\_Your\\_Agency\\_Case\\_12-09.pdf](http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/How_to_Appeal_Your_Agency_Case_12-09.pdf)

*Third Circuit:* [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov)

Third Circuit Mediation Program :  
<http://www.ca3.uscourts.gov/medhome.htm>

*Fourth Circuit:* [www.ca4.uscourts.gov](http://www.ca4.uscourts.gov)

Fourth Circuit Motions Procedures:  
<http://www.ca4.uscourts.gov/pdf/motproc.pdf>

*Fifth Circuit:* [www.ca5.uscourts.gov](http://www.ca5.uscourts.gov)

Fifth Circuit Form and Instruction for Appearance of Counsel  
<http://www.ca5.uscourts.gov/documents/dkt-5a.pdf>

*Sixth Circuit:* [www.ca6.uscourts.gov](http://www.ca6.uscourts.gov)

Sixth Circuit Checklist for Briefs  
[http://www.ca6.uscourts.gov/internet/forms/documents/Amended\\_Brief\\_Checklist.pdf](http://www.ca6.uscourts.gov/internet/forms/documents/Amended_Brief_Checklist.pdf)

*Seventh Circuit:* [www.ca7.uscourts.gov](http://www.ca7.uscourts.gov)

Seventh Circuit Practitioner's Handbook  
[http://www.ca7.uscourts.gov/wiki/index.php?title=Practitioner%27s\\_Handbook](http://www.ca7.uscourts.gov/wiki/index.php?title=Practitioner%27s_Handbook)

*Eighth Circuit:* [www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)

Eighth Circuit Contact List  
<http://www.ca8.uscourts.gov/newcoa/contact.htm>

*Ninth Circuit:* [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov)

Instructions for counseled immigration cases:  
[http://www.ca9.uscourts.gov/datastore/uploads/file\\_an\\_appeal/case\\_opening\\_csl\\_imm.htm](http://www.ca9.uscourts.gov/datastore/uploads/file_an_appeal/case_opening_csl_imm.htm)

Ninth Circuit Immigration Outline:  
[http://www.ca9.uscourts.gov/guides/immigration\\_outline.php](http://www.ca9.uscourts.gov/guides/immigration_outline.php)

*Tenth Circuit:* [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov)

Tenth Circuit Practitioner's Guide  
[http://www.ca10.uscourts.gov/downloads/pracguide\\_web.pdf](http://www.ca10.uscourts.gov/downloads/pracguide_web.pdf)

*Eleventh Circuit:* [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

Eleventh Circuit Mediation Information

<http://www.ca11.uscourts.gov/documents/pdfs/KMC-MEDIATION-PROGRAMS.pdf>

*DC Circuit:* [www.cadc.uscourts.gov](http://www.cadc.uscourts.gov)

## **APPENDIX D: LIST OF ADDRESSES FOR SERVICE OF A PETITION FOR REVIEW**

### **Attorney General**

Eric H. Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

### **Office of Immigration Litigation**

Thomas W. Hussey, Director  
Office of Immigration Litigation  
U.S. Department of Justice / Civil Division  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

### **ICE District Offices**

Service must also be made on the Field Office Director or, where none exists, the most senior officer in the Detention & Removal Unit. Counsel will need to contact the local ICE office to obtain the name and position title of the appropriate local officer and to obtain the mailing address for service on this individual.