



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY

June 2002

HOW TO FILE A PETITION FOR REVIEW

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I. BACKGROUND AND INTRODUCTION

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) made significant changes to the Immigration and Nationality Act (INA). Included were changes in the procedures and requirements for filing petitions for review. The most notable changes in this process included restricting the courts of appeals' jurisdiction, limiting venue to the court of appeals for the judicial circuit in which the immigration judge completed the proceedings, eliminating the automatic stay of removal that had accompanied a petition for review pre-1996, and shortening the time to file the petition from ninety to thirty days for all petitioners.

The individual should still file a petition for review in order to secure independent judicial review of a final administrative order of removal or deportation of the Board of Immigration Appeals (BIA).¹ Review of administrative decisions, such as those made by the BIA, is commenced when the petitioner files a petition for review.² The current procedures and requirements for filing this petition, as well as the events that follow the filing of a petition, are outlined below. (A form petition is attached below in Appendix A.)

The information in this document is accurate and authoritative as of June 1, 2002, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

II. PETITION REQUIREMENTS

A petition for review must be filed in a U.S. court of appeals. The petition must:

(1) have attached a copy of the final administrative order, in this case the BIA decision,³ and

¹ IIRIRA changed the term for deportation proceedings to removal proceedings. All cases started after April 1, 1997 are considered removal proceedings and governed under INA § 242 codified in 8 U.S.C. § 1252. However, most deportation cases started before April 1997 are governed by transitional rules found in § 309 of IIRIRA. These rules are attached as Appendix B. Although the statutes differ significantly, the parts of the statutes cited in this advisory do not.

² Fed. R. App. P. 15(a).

³ 8 U.S.C. § 1252(c); INA § 242(c)(2002).

(2) state whether a court has upheld the validity of the administrative order, and if so, state which court, the date of the court's ruling, and the type of proceeding.⁴

Additionally, before filing a petition for review, the petitioner should review the local rules to find out what other documents, if any, must be attached to the petition for review. (A list of website addresses for the U.S. courts of appeals is attached in Appendix C and can be found at <http://www.uscourts.gov/links.html>.)

Filing deadline: The INA requires that the petition be filed not later than thirty days after the date of the final order of removal⁵ or the final order of exclusion or deportation.⁶ Under the prior law, some circuits measured this deadline from the date the final order was entered by the BIA whereas other circuits measured this deadline from the day the order was mailed to petitioner.⁷ This issue has not been addressed to date under the new law.

But note: INS can deport the petitioner before the thirty-day filing deadlines is up.

Stay of Removal: Service of the petition on the INS officer or employee does not stay the removal of petitioner, unless the court orders otherwise.⁸ Therefore, petitioner may also want to file a request for a stay of the order of removal pending the court's decision on the petition for review. In the motion for a stay, petitioner should show that:

- (1) there is a strong likelihood that petitioner will succeed on the merits;
 - (2) irreparable harm would occur if a stay is not granted;
 - (3) potential harm to the petitioner if a stay is not granted outweighs harm to the government;
- and
- (4) the granting of a stay would serve the public interest.

In addition to the stay, the petitioner also should file a memorandum of law in support of the stay that explains the equities in the case and the issues on appeal.

III. WHERE TO FILE THE PETITION

Venue is restricted to the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.⁹ This requirement is particularly significant for individuals at remote detention centers. If deportation proceedings are conducted at the detention center because petitioners are not released on bond, the only proper venue is the circuit where the detention center is located. This change imposes a special hardship on petitioners who are in remote locations where counsel is limited or unavailable.

⁴ Id.

⁵ 8 U.S.C. § 1252(b)(1).

⁶ IIRIRA § 309.

⁷ The prior statute allowed ninety days from the *date of issuance* of the final order. In some circuits, this date was interpreted as the date the final order was mailed to the correct address rather than the date the decision was entered by the BIA. See Martinez-Serrano v. INS, 94 F.3d 1256, 1258-59 (5th Cir. 1997); Zaluski v. INS, 37 F.3d 72, 73 (2d Cir. 1994); Ouedraogo v. INS, 864 F.2d 376, 378 (5th Cir. 1989). But see Nowak v. INS, 94 F.3d 390, 391 (7th Cir. 1996)(finding that the BIA has not equated "issuance" with service and that the law must be strictly complied with). Because no court has addressed whether "the date of the final order of removal" is the date the final order was mailed rather than the date that the decision was entered by the BIA, in order to ensure that the petition for review is timely filed, it should be filed no later than thirty days after the final order is entered by the BIA.

⁸ 8 U.S.C. § 1101 (c)(4)(F); 8 U.S.C. § 1252(b)(3)(B); INA § 242(b)(3)(B).

⁹ 8 U.S.C. § 1101 (c)(4)(D); 8 U.S.C. § 1252(b)(2); INA § 242(b)(2)(B).

IV. FEES

A petition for review usually costs \$100, but petitioner should check local court rules. (A list of website addresses for the U.S. courts of appeals is attached in Appendix C and can be found at <http://www.uscourts.gov/links.html>.)

V. SERVICE

The respondent in a petition for review is John Ashcroft, Attorney General. The petition must be served on the Attorney General and on the district director for the district in which the final order of removal was entered.¹⁰ Petitioner may also want to serve a copy of the petition for review on the Office of Immigration Litigation, the local INS district counsel's office, if any, and possibly the local INS removal officers. (An address list including the address of the Attorney General and INS District Offices is attached as Appendix D.)

VII. WHAT HAPPENS AFTER A PETITION FOR REVIEW IS FILED

Serving Copies of the Petition: After filing a petition for review, the circuit court clerk must serve the respondent with a copy of the petition.¹¹ However, petitioner must also serve a copy on all other parties to the proceeding, in this case, the Attorney General and the INS District Director for the district where the final order of removal was entered, and file a list of those served with the clerk.¹²

Sending Out the Record: Within forty days after being served with the petition for review, the agency, in this case the BIA, must file the record of the administrative proceeding with the circuit court of appeals.¹³ 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 agency¹⁴ (not including evidence not admitted).

The agency must also include with the record, a list of documents, transcripts of testimony, exhibits, and other documents constituting the record.¹⁵ Parties may also stipulate in writing that no record be filed.¹⁶

Briefs: Petitioner must serve and file:

- (1) the opening brief in connection with the petition for judicial review *no later than forty days after the date on which the administrative record is available*; and
- (2) a reply brief within fourteen days after the service of the government's brief.¹⁷

This deadline cannot be extended except on a motion for good cause shown.¹⁸ Additionally, if the brief is not filed, the court shall dismiss the appeal unless a manifest injustice would result.¹⁹

¹⁰ 8 U.S.C. § 1252(b)(3)(A).

¹¹ Fed. R. App. P. 15(c).

¹² Id.

¹³ Fed. R. App. P. 17(a).

¹⁴ Fed. R. App. P. 16.

¹⁵ Fed. R. App. P. 17(b).

¹⁶ Fed. R. App. P. 17(b)(2).

¹⁷ 8 U.S.C. § 1252(b)(3)(C); INA § 242(b)(3)(C); Fed. R. App. P. 31(a)(1)(emphasis added).

¹⁸ Id.

¹⁹ 8 U.S.C. § 1252(b)(3)(C); INA § 242(b)(3)(C).

Supplemental Authorities: If after the brief has been filed, pertinent and significant authorities come to the petitioners attention, the petitioner should advise the circuit court clerk of the supplemental citations by letter, with a copy to the other parties,²⁰ in this case, the Attorney General and the INS District Director for the district where the final order of removal was entered. This document is commonly known as a “28J letter.” It is not a brief and must refer without argument to the reason for the supplemental citations referencing the relevant page of the brief.²¹

Oral Arguments: Parties can file a statement explaining why an oral argument should or should not be permitted.²² Oral arguments must be permitted unless a panel of three judges decides that:

- (1) an appeal is frivolous;
- (2) dispositive issue(s) have already been decided; and
- (3) facts and arguments are adequately presented in the briefs and records.²³

The circuit court clerk will advise parties whether oral argument will be scheduled and, if so, when.²⁴

Decision: The judgment is entered after the clerk receives the courts opinion or after a judgment is rendered without a court opinion.

NOTE: The Office of Immigration Litigation (OIL) may decide to file a motion for dismiss even before preparing a copy of the administrative record. Some of the most common grounds for dismissal include: cases of petitioners removable due to certain a criminal offenses²⁵ and some cases involving discretionary judgments.²⁶ If the petition for review is dismissed for lack of jurisdiction, a petitioner may want to file a writ of habeas corpus with the appropriate District Court.

This guide was compiled from the following resources:

Immigration & Nationality Law Handbook. Volume 1. 2000-01 edition. Editor in Chief Randy P. Auerbach. AILA. Page 713-715.

The AILA Litigation Tool Box. Essential Documents for Administrative & Federal Court Practice. Editor in chief, Charles H. Kuck. AILA. Pages 263-267.

Kurzban’s Immigration Law Sourcebook. A Comprehensive outline and reference tool. 7th edition. Ira J. Kurzban. AILF. 2000-2001. Pages 662-666.

²⁰ Fed. R. App. P. 28(j).

²¹ *Id.*

²² Fed. R. App. P. 34(a)(1).

²³ Fed. R. App. P. 34(a)(2).

²⁴ Fed. R. App. P. 34(b).

²⁵ 8 U.S.C. § 1252(a)(2)(C); INA § 242(a)(2)(C).

²⁶ 8 U.S.C. § 1252(a)(2)(B)(i-ii); INA § 242(a)(2)(B)(i-ii).

APPENDIX A: A FORM PETITION

**UNITED STATES COURT OF APPEALS
FOR THE _____ CIRCUIT**

_____)	
[name of Petitioner],)	
)	
Petitioner,)	File No. _____
)	
v.)	
)	A # _____
JOHN ASHCROFT,)	
Attorney General,)	
)	
Respondent)	
_____)	

PETITION FOR REVIEW

The above named petitioner hereby petitions for the review of a final order of [deportation] [removal] entered by the Board of Immigration Appeals on _____. [date of BIA decision]. A copy of the BIA's decision is attached. To date, no court has upheld the validity of the order.

[signature of attorney or petitioner]

Dated: _____

- [(1) COMPLETE ALL BLANK SPACES EXCEPT "FILE NO.". THE COURT CLERK'S OFFICE WILL ASSIGN A NUMBER.
- (2) ATTACH CERTIFICATE OF SERVICE AND THE BIA DECISIONS. CHECK LOCAL RULES FOR OTHER NECESSARY ATTACHMENTS.
- (3) THIS DOCUMENT SHOULD BE SERVED ON THE ATTORNEY GENERAL, JOHN ASHCROFT, AND ON THE OFFICER OR EMPLOYEE OF THE INS IN CHARGE OF THE DISTRICT IN WHICH THE FINAL ORDER OF REMOVAL WAS ENTERED, THE DISTRICT DIRECTOR. PETITIONER MAY ALSO WANT TO SERVE A COPY OF THE PETITION FOR REVIEW ON THE OFFICE OF IMMIGRATION LITIGATION, THE LOCAL INS DISTRICT COUNSEL'S OFFICE, IF ANY, AND POSSIBLY THE LOCAL INS REMOVAL OFFICERS.]

APPENDIX B: TRANSITIONAL RULES UNDER IIRIRA

Sec. 309 Effective Dates; Transition.

(a) In General.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

(b) Promulgation of Regulations.-The Attorney General shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date.

(c) Transition for Aliens in Proceedings.-

(1) General rule that new rules do not apply.-Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective Date-

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) Attorney General option to elect to apply new procedures.-

In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) Attorney General option to terminate and reinstate proceedings.-In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinstate proceedings under chapter 4 of title II the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinstated proceeding.

(4) Transitional changes in judicial review.-In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary-

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

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

First Circuit: <http://www.ca1.uscourts.gov/>
Second Circuit: <http://www.ca2.uscourts.gov/>
Third Circuit: <http://www.ca3.uscourts.gov/>
Fourth Circuit: <http://www.ca4.uscourts.gov/>
Fifth Circuit: <http://www.ca5.uscourts.gov/>
Sixth Circuit: <http://ca6.uscourts.gov/>
Seventh Circuit: <http://www.ca7.uscourts.gov/>
Eighth Circuit: <http://www.ca8.uscourts.gov/index.html>
Ninth Circuit: <http://www.ca9.uscourts.gov/>
Tenth Circuit: <http://www.ca10.uscourts.gov/>
Eleventh Circuit: <http://www.ca11.uscourts.gov/>
DC Circuit: <http://www.cadc.uscourts.gov/>
Federal Circuit: <http://www.fedcir.gov/>

APPENDIX D: ADDRESS LISTS FOR RESPONDENTS

Attorney General

John Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

INS District Offices

Alabama

Rosemary Langley Melville, District Director
INS Atlanta District
Martin Luther King Jr. Federal Building
77 Forsyth Street SW
Atlanta, GA 30303

Alaska

Robert C. Eddy, District Director
INS Anchorage District Office
620 East 10th Avenue, Suite 102
Anchorage, Alaska 99501

Arizona

Roseanne C. Sonchik, District Director
INS Phoenix District
2035 North Central Avenue
Phoenix, AZ 85004

Arkansas

Caryl Thompson, Acting District Director
U.S. Department of Justice
Immigration and Naturalization Service
701 Loyola Avenue, Room T-8011
New Orleans, LA 70113

California

Thomas J. Schiltgen, District Director
INS Los Angeles District Office
300 North Los Angeles Street, Room 1001
Los Angeles, CA 90012

Adele J. Fasano, District Director
USINS San Diego District Office
U.S. Federal Building
880 Front Street, Suite 1234
San Diego, CA 92101

Charles DeMore, District Director
INS San Francisco District Office
630 Sansome Street
San Francisco, CA 94111

Colorado

Michael M. Comfort, Acting District Director
USINS Denver District Office
4730 Paris Street
Denver, CO 80239

Connecticut

Steven J. Farquharson, District Director
USINS Boston District Office
John F. Kennedy Federal Building
Government Center
Boston, MA 02203

Delaware

Kenneth Elwood, District Director
USINS Philadelphia District Office
1600 Callowhill Street
Philadelphia, PA 19130

District of Columbia

Warren A. Lewis, District Director
USINS Washington District Office
4420 N. Fairfax Drive
Arlington, VA 22203

Florida

John M. Bulger, Acting District Director
USINS Miami District Office
7880 Biscayne Boulevard
Miami, FL 33138

Georgia

Rosemary Langley Melville, District Director
INS Atlanta District
Martin Luther King Jr. Federal Building
77 Forsyth Street SW
Atlanta, GA 30303

Guam

Donald A. Radcliffe, District Director
USINS Honolulu District Office
595 Ala Moana Boulevard
Honolulu, HI 96813

Hawaii

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595 Ala Moana Boulevard
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Idaho

Harry A. Thomas, District Director
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2800 Skyway Drive
Helena, MT 59602

Robert S. Coleman, Jr., District Director
USINS Seattle District Office
815 Airport Way South
Seattle, WA 98134

Illinois

Brian R. Perryman, District Director
USINS Chicago District Office
10 West Jackson Boulevard
Chicago, IL 60604

Indiana

Brian R. Perryman, District Director
USINS Chicago District Office
10 West Jackson Boulevard
Chicago, IL 60604

Iowa

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Kansas

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Kentucky

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Louisiana

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Maine

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176 Gannett Drive
So. Portland, ME 04106

Maryland

Louis D. Crocetti, Jr., District Director
INS Baltimore District
Fallon Federal Building
31 Hopkins Plaza
Baltimore, MD 21201

Massachusetts

Steven J. Farquharson, District Director
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Mississippi

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Andrea J. Quarantillo, District Director
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Newark, NJ 07102

New York

M. Frances Holmes, District Director
INS Buffalo District Office
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130 Delaware Avenue
Buffalo, NY 14202

Edward McElroy, District Director
INS New York City District Office
26 Federal Plaza
New York City, NY 10278

New Mexico

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1545 Hawkins Boulevard, Suite 167
El Paso, TX 79925

North Carolina

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Ohio

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A.J.C. Federal Building
1240 East Ninth Street, Room 1917
Cleveland, OH 44199

Oregon

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Portland, OR 97209

Pennsylvania

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Puerto Rico

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South Dakota

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Houston INS District Office
126 Northpoint
Houston, Texas 77060

Kenneth L. Pasquarell, District Director
USINS San Antonio District
8940 Fourwinds Drive
San Antonio, TX 78239

Utah

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Denver, CO 80239

Vermont

Jean R. Ouellette, District Director
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Virginia

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West Virginia

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Virgin Islands

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San Juan, PR 00936

Washington

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West Virginia

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