

IMMIGRATION DECISION APPEALS AND MOTIONS TO REOPEN

This memo provides a brief overview of the ways an individual may appeal an immigration decision or request to have an immigration case reopened for further consideration. For more detailed information about these topics, please review the materials included with this memo.

We strongly encourage asylum seekers who wish to file an appeal or a motion to reopen to contact a lawyer or an organization that represents asylum seekers for advice and possible legal representation. As the laws and procedures are complicated, it is important to obtain legal assistance if possible. We have included a list of non-profit organizations in your area that may be able to provide representation or assist you finding representation.

An appeal of an immigration decision may be filed with the Board of Immigration Appeals. If that appeal is not granted, the next level of appeal that may be filed is with a federal circuit court of appeals. A Motion to Reopen may be filed with an immigration judge or with the Board of Immigration Appeals. Each of these is discussed briefly below.

Appeal to the Board of Immigration Appeals (BIA)

Individuals who believe a decision by an immigration judge denying asylum or other relief or ordering them deported was made in error can appeal that decision to the BIA. The individual will need to show the immigration judge made mistakes about the law or the facts of the claim and that they were of such a serious degree that they led to the wrong conclusion.

There are two key requirements to be able to file an appeal to the BIA. **First**, if the judge issues the **decision orally during court proceedings**, an individual **must state at that time** the intent to appeal the decision. **Second**, a **Notice of Appeal must be received** by the BIA within 30 days of the day of that decision. If the decision is not issued orally, it will be sent by mail and a **Notice of Appeal must be received** by the BIA **within 30 days of the date on the decision** by the immigration judge. Sometime after the BIA receives the Notice of Appeal it will notify the applicant of the due date to submit a written presentation or “brief” discussing the reasons for the appeal.

In general, an individual who is appealing an order of removal, exclusion, or deportation cannot be deported during the 30 day period to file the *Notice of Appeal* or while the appeal is pending before the BIA.

Appeal to a Federal Circuit Court

An immigration decision can be appealed to a federal circuit court of appeals only after the BIA issues a decision. To have a decision by the BIA appealed to the federal court, the individual must file a petition for review in the court with jurisdiction over the immigration court where the decision was made. Petitions for review must be **received by the appropriate court within 30 days of the date of the BIA decision**.

Unlike an appeal to the BIA, an appeal to a federal circuit court will not automatically stop an applicant from being deported. An individual who files a Petition for Review will also need

to request a “stay of removal” which, if granted by the court, prevents deportation while the petition for review is pending at the federal circuit court. If a granted a stay of removal is not granted, the individual may be deported at any time including before the appeal is heard.

Motion to Reopen

An individual whose case has already been denied by an immigration judge or the BIA may file a Motion to Reopen if she or he believes there are new facts or evidence not available earlier that would affect the decision. In general, an individual only has **90 days** to reopen a case **after the final order of removal has been entered**. There are two important exceptions to the 90 day time limit as well as a third but much rarer exception.

First, a motion to reopen may be filed at any time to request asylum, withholding of removal or withholding under the Convention Against Torture but **only if** the motion is based on recent changed country conditions in the individual’s home country. A motion to reopen based on changed country conditions must include evidence that demonstrates the basis for the new fear of return to the country of origin and that only became available after the final decision in the case was made. **Second**, a motion to reopen may be filed at any time if the order was issued *in absentia*, that is, when the individual was not in court at a scheduled hearing, but **only if** the applicant can demonstrate that she or he did not receive proper notice of the hearing as required by law. A third exception allows for a case to be reopened after the 90 day period for any reason if Immigration and Customs Enforcement (ICE) agrees to the motion and files jointly with the applicant, but this exception is rare.

Filing a motion to reopen does not automatically prevent the individual from being deported. To prevent removal while the motion is pending, an individual must file a written request to the ICE Field Office Director with jurisdiction over the individual’s place of residence. The decision made by the Field Office Director is final and cannot be appealed. An individual can also request an order to “stay” removal from the immigration court or BIA. This can be filed with the request to reopen as one motion called “Motion to Reopen and to Stay Removal.”

Information in the Attached Packet

Based on the information provided, we have included the following materials in this packet:

1. A list of non-profit organizations in your area that may be able to help you if you do not have legal representation.
2. *What Should you Expect from your legal Representation and How to Protect Yourself from Immigration Fraud*, EOIR Legal Orientation Program
3. *ICE Community Helpline*, ICE Enforcement and Removal Options
4. *Pro Se Advisory: Appealing Removal Orders in Federal Court*, New York State Defenders Association;
5. *Seeking a Judicial Stay of Removal in the Court of Appeals*, National Immigration Project;
6. Law Firm of Van Der Hout, Brigagliano & Nightingale
 - a. *Guidelines for Letters in Support of Stay Requests*;
 - b. *Sample Stay Motion*;
 - c. *Sample Stay Declaration*;
7. *Application for a Stay of Deportation or Removal*, ICE Form I-246.

If you have internet access, you may wish to visit www.refworld.org UNHCR’s online database that includes reports on human rights conditions in countries worldwide.