The Record on Appeal

by Andres Benach, Kerry E. Doyle, and Devin T. Theriot-Orr

Andres Benach is a founding partner of Benach Ragland. For over a decade, Andres has navigated clients through the maze of immigration law. Andres has concentrated his practice on representing clients in removal proceedings and in litigation matters before the federal courts. Andres also has extensive experience advising clients on the immigration consequences of criminal convictions and complex citizenship and residence questions. Andres was identified as being a "go-to attorney when it comes to representing individuals in complex government cases" and at the "forefront of an emerging generation of litigators" in the immigration field by Chambers International.

Kerry E. Doyle is a partner with the Boston firm of Graves & Doyle, Attorneys at Law. Prior to forming Graves & Doyle, Ms. Doyle worked in the nonprofit sector representing immigrants, asylum seekers, and refugees in Boston, Miami and Hong Kong. She currently co-teaches Immigration Law at Suffolk University School of Law. She was lead counsel for the successful challenge of mandatory detention in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009). Her other successful Circuit challenges include *Smith v. Holder*, 627 F.3d 427 (1st Cir. 2010) reopening and remanding an asylum case and *Bolieiro v. Holder*, 663 F.3d 868 (1st Cir. 2013), a case of first impression allowing post-departure motions to reopen.

Devin T. Theriot-Orr hails from Seattle, where his practice focuses on complex immigration litigation before the agencies as well as the federal judiciary. Devin's published cases include *Siddiqui v. Holder*, 670 F.3d 736 (7th Cir. 2012) (reversing AAO denial of legalization application), *Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014) (granting petition and ordering termination of proceedings for failure to meet the burden of proof) and *Abdur-Rahman v. Napolitano*, 814 F. Supp. 2d 1098 (W.D. Wash. 2011) (reversing I-140 revocation and H1B denial under the Administrative Procedure Act). Devin is an active member of AILA who regularly presents at local and national CLEs. He also teaches Immigration Law at Seattle University School of Law.

****

DEVELOPING A GAME PLAN, AND WHY YOU NEED ONE

We all do our best to get our cases approved before the agency, but sometimes appeals are inevitable. Any appellate review, either by the agency appellate body (Administrative Appeals Office (AAO) or Board of Immigration Appeals (BIA)), or in the federal courts, is confined to the administrative record. It is thus crucial to ensure that you are looking at your cases with an eye for a possible future appeal from day one.

In most cases, our clients may already have some sort of "record" at the agency. So, when you start your case, the very first thing that you should do is a FOIA[1] request for all records pertaining to your client. This may include:

- **U.S Citizenship and Immigration Services (USCIS)/U.S. Immigration and Customs Enforcement (ICE)** – Form G-639. If your client is in removal proceedings, expedited FOIA is available. You must include evidence that an NTA has been issued and filed and that you have a hearing date scheduled. If you are looking for a specific document, you should so indicate without limiting your request (e.g. "We are requesting the complete A file. Please be sure to produce the asylum interview notes.").
- **U.S. Customs and Border Protection (CBP)** – May be filed online at https://foiaonline.regulations.gov/foia/

[1] Freedom of Information Act, 5 USC §552, as amended by Pub. L. No. 104-231, 110 Stat. 3048.

- **Executive Office for Immigration Review (EOIR)** – You may request both the paper record, as well as any audio recordings. Note that audio recordings of old hearings may be on four-track cassette tape. Newer audio recordings are on CD. Requests may be sent by email to EOIR.FOIARequests@usdoj.gov. No specific form is required, but must have a signed release from your client confirming under penalty of perjury their name, identity and A number (if you have it). If you don't have the A number, you may need to describe the possible responsive records (*e.g.*, "I may have a removal order issued by the Oklahoma City Immigration Court on or about March 1, 2001.").
- If any materials are redacted or withheld, you should file a timely administrative appeal. Follow the instructions on the FOIA cover letter sent to you by the agency.
- If the agency does not respond within the statutory deadline of 20 working days,[2] you may deem the failure to respond as a denial and appeal the denial or sue in federal court. But note "it is commonly accepted that no federal agency can meet the impossibly rigorous timetable set forth in the statute."[3]

This is particularly important—in fact, absolutely critical—if you are coming into a case late in the game. Once you receive the FOIA responses, review them carefully! Play devil's advocate with the materials and attempt to locate inconsistencies or adverse discretionary information in the materials so that you and your client may be prepared to respond.

Regardless of the type of case you are preparing, you should always remember that any appeals will be decided on a paper record. Board members at the BIA and judges on the federal bench will not be able to hear your client's tearful testimony, or observe your client interacting with her kids. It is your job to ensure that the "cold" paper record paints as complete a picture of your client as possible.

Practice Pointers

- Use FOIA requests to gather the complete record.
- Raw data that requires expertise to interpret is usually less compelling than an expert's statement summarizing their conclusions. So, a simple 1-2 paragraph letter from the treating physician stating the diagnosis, treatment, and prognosis of your client's relative's medical condition is often preferable to 250 pages of chart notes and medical bills. Similarly, in an asylum case, a sworn statement from a subject matter expert can be more compelling than hundreds of pages of news reports.
- Quality is better than quantity. For example, a single, sworn, heart-felt letter from a family or friend discussing your client in detail is often better than 100 boilerplate letters repeating the same claims.

Preserving Evidentiary and Legal Arguments

One of the most difficult lessons for an attorney to learn is to know when to be quiet. On the other hand, protecting your client's rights in immigration court also requires the attorney to speak up at

[2] 5 USC §552(a)(6)(A)(i).
[3] *Natural Res. Def. Council v. Dep't of Energy*, 191 F. Supp. 2d 41 (D.D.C. 2002).

very critical moments. It is incumbent upon an attorney to be absolutely sure that magical word "objection" or something very close to it is in the record of the hearing. You can sometimes reach the same goal by arguing against the issue at hand–whether it be a piece of evidence or a question posed by the government attorney–but the surest way to preserve your issues is to say simply "objection."

If you miss an issue or you are not sure if your objections or arguments made in on the recording of the case, you may always submit something in writing that outlines the question of law you wish to preserve after the hearing. In that way, you will ensure that your objection or other issue is preserved for further appeal. For example, you could file a motion in limine in advance of the hearing date with your arguments explaining why the Department's evidence should be excluded if you know about the potential evidence ahead of time. At the hearing, you can simply make a brief objection stating that you object to the evidence or the line of questioning and refer to your written motion.

Of course, stating an objection is often a spur of the moment decision, but you should not be unprepared. It is important that you have made very clear decisions on the legal theory of your case ahead of your merits hearing and submitted documentation and evidence as necessary to support your theory. Having everything in writing and well documented ensures a good record and makes it easier for a judge to grant your case or your motion without having to worry about an appeal.

Get to know your judge and your trial attorney. In Boston, the trial attorney schedule is posted for the month late in the prior month. Try to call ahead to find out who the trial attorney is likely to be. In this way, you can prepare your client better for what to expect from that attorney and have at least a loose plan of what to be prepared for and what approach the attorney may take. Have an "objections" cheat-sheet for just those moments of surprise (copy attached in the materials). Even though the federal rules of evidence are applied only loosely, if at all, in the immigration court, one must still make objections and cite the evidentiary or legal basis for the objection. If you are a new practitioner or have a judge you haven't practiced before, talk to your AILA colleagues. They will help you and give you pointers about the judge and trial attorney so you can be prepared in order to get your case on the record.

Also, be aware of any special legal requirements or guidance that exists that may protect your client. Is your client a minor? Or have mental health or developmental delays that may render him or her incompetent?[4] Survivor of domestic violence?[5]

The belligerent judge can sometimes be handled easier than the kindly judge. You aren't really going to antagonize the former by objecting to all kinds of things, but, the kindly judge creates a harder judgment call. In Boston, there is a judge who will more often than not grant relief. This judge, however, likes to rush you along in the presentation of your case. The judge will pressure you not to call your witnesses and to cut your direct examinations short in order to finish the case more quickly. It is very tempting to go along with the judge's entreaties, because you often believe and it's often born out, that relief will be granted, but what if it is not? Stand by your case and if

[4] *See Matter of M–A–M*, 25 I&N Dec. 474 (BIA 2011).
[5] *Matter of A–R–C–G–*, 26 I. & N. Dec. 388 (BIA 2014).

anything, err on the side of calling all your witnesses and completing your full direct exam, even in the face of an impatient judge. Do this even if you have to bear the brunt of the judge's impatience. Like learning to speak at the proper moment, getting yelled at is just sometimes our job.

While it can be possible to develop an argument fuller in a subsequent filing or even a Motion to Reconsider or Motion to Reopen, a well-developed plan walking into court is your best defense and your client's best protection should you have to pursue an appeal.

Be sure to object to your interpreter if you need to. It can be hard, especially in asylum cases, because your client is so eager to present his or her case and having another delay in order to obtain a competent interpreter can be devastating. And yet, you must object to interpreters who are not doing their job. Sometimes you can infer that there are problems with the interpretation even if you do not speak the language. If you have prepared your client well and they are answering simple questions differently than you would expect, it may well be an interpretation problem. Subtle differences in language can make a huge difference. For example, testimony that your client was taken to a "building" is very different than testimony that she was taken to a "barracks" in an asylum claim based on fear of the military. An improper and incompetent interpreter is a fundamental issue and you have to be ready to object on the record.

Practice Pointers

- Have a clear legal theory and a clear game-plan going into your hearing.
- Stand strongly behind your strategy, don't be pushed out of calling the witnesses you want and need for your case.
- Know your judge and your trial attorney so you can anticipate some of their tendencies and tactics.
- Be sure to say "objection" clearly and when the recording system is on.
- Follow-up with written objections or arguments if you need to preserve your arguments that you missed during the hearing.
- Know the basis of your objection–bring a cheat-sheet if you have to.
- Object to the interpreter on the record, while the recording device is ON.
- Get to know your judge and your trial attorney before the hearing. Talk to practitioners as necessary. They all have their favorite tricks and tendencies. If you know them ahead of time, you can be better prepared to respond.

Admit or Concede vs. Deny: Factors to Consider

You must review the client's options initially. It is vital that you discuss the Notice to Appear (NTA) and the specific allegations with your client before the hearing to develop a strategy. Whether to admit and concede charges in an NTA will depend on the individual's eligibility for relief and your client's goal. Is your client seeking lasting relief or simply trying to avoid removal? As a general rule, if the charges are relatively benign, an overstay or entry without inspection, and the client's claims for relief are relatively strong, conceding the charges and moving on to relief can be a reasonable option.

On the other hand, a criminal ground of inadmissibility or removability should usually be challenged. It is important to put the government to its proof. The government may not be able to produce the required documents and the case can be terminated with little work on your part. Also, there are often a plethora of arguments against the finding of removability in criminal removal cases that should always be explored. Additionally, the law changes. Even if you believe your client's conviction may be a removable offense under presently-governing law, you can and should deny the charge of removal to preserve your client's arguments in case the law changes. If challenged on this point, you may simply acknowledge the adverse law and state that you are preserving the issue for appellate review.

Motions to suppress can also be an important tool for challenging improperly collected documentation or to gain important time in a client's case. For a motion to suppress, all charges must be denied on the NTA, but note that there should be egregious facts in your case that are directly connected to the client's arrest, detention or immigration questioning before suppression should be considered.

Of course, once a fact charged on the NTA is conceded by the individual, this fact cannot be challenged on appeal,[6] absent a complaint of ineffective assistance of counsel[7] or a motion to withdraw the concession.[8]

Practice Pointers

- Weigh the strength of the client's relief versus the charges on a charging document.
- Challenge what you can in the NTA, when you need to do so. Be judicious but protect your client's interests.
- If your client has any suppression claim, you must deny everything, including the allegation of alienage, or you will waive the suppression claim.

What Relief is Available? Raise It or Waive It

When you start work on a case, it goes without saying that you should screen your client for all forms of relief, including those that are not available before the immigration judge (e.g. any type of visa petition). If your client may be eligible for relief that requires action from USCIS, you should promptly file the application with the agency and file a courtesy copy with the immigration judge, including the receipt notice. If your client will ultimately seek relief from the immigration court, such as adjustment of status, you should also consider establishing that your client would be eligible for such relief once the visa petition is approved (i.e., proof of entry or other basis for eligibility[9]). Generally, motions to continue the case to await visa approval should be granted, but such motions can be denied if DHS can establish either that your client is not ultimately eligible for the relief, or that your client has been dilatory in seeking the relief.[10]

---

[6] 8 CFR §1003.1(d)(2)(i)(B).
[7] *See Matter of Lozada*, 19 I&N. Dec. 637 (BIA 1988).
[8] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
[9] *E.g.* INA §245(i).
[10] *See Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

Sometimes, a client will be eligible for multiple forms of relief, and in some cases, the immigration court or DHS trial counsel will urge you to withdraw other types of relief applications before proceeding to adjudicate the principal application that you are proceeding under. A common scenario would be an individual who has a fear of returning to their home country, but is also eligible for, say, cancellation of removal or adjustment of status. Be wary of withdrawing any fear-based claim, especially if the claim was originally timely-filed! If you withdraw the asylum relief application, a subsequent application may be considered untimely.

Generally speaking, a failure to submit a relief application will be deemed to be an abandonment of the application, even if your client may be eligible for the relief.[11] If your client *becomes eligible* for relief after the merits hearing, or if your client was unaware of her eligibility for relief, consider filing either a motion to reopen or a motion to remand and include all necessary evidence to establish that your client is prima facie eligible for the relief.[12]

ARRIVING AFTER THE PARTY: HOW TO SUPPLEMENT THE RECORD AFTER THE MERITS HEARING

If you join the case after it has already begun, you must FOIA for a complete copy of every agency's file (see above). You should assume that whatever files your client has are incomplete. If you do not have time to wait for the FOIA response and the file is still at the local immigration court, consider asking the court if you could come and review the court's file. Once you have the record, you should dispassionately examine the administrative record and ask yourself whether you have documentary evidence in the record to support the claims that you want to assert in the proceeding. In many cases, critical evidence or arguments will be missing.

If you are still before the agency, you have several options:

- A legal argument has not yet been presented to the agency, but the record contains the factual information for the claim: Consider filing a motion to reconsider. A motion to reconsider uses the existing factual record to make a new legal argument that was overlooked either by the agency or prior counsel or both. If you fail to raise your legal argument, even if it is a slam dunk, you will likely be precluded from raising it in any federal court proceeding.
- If factual information is missing from the record: You must file a motion to reopen or, if an appeal is pending, a motion to remand. Be sure to follow all the prerequisites for such motions—*i.e.*, include any relevant relief application and establish prima facie eligibility for the relief.

There are limited opportunities to supplement the record after the Immigration Judge enters a decision. Often, such efforts must be made very shortly after the decision is entered.

[11] 8 CFR §1003.31(c). *See Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005).
[12] *See infra* for more information.

The principal way to supplement the record is through a motion to reopen. Deciding to file a motion to reopen is a significant tactical decision that requires an attorney to consider a number of factors. Although a motion to reopen may be filed with the immigration court within 90 days of the entry of the judge's decision, an appeal to the Board must be filed within thirty days. The filing of an appeal divests an immigration judge of jurisdiction over a motion to reopen. These calendar realities have a significant impact on your decision-making. In addition, many times, if you are new counsel, you will not get the case until several days or weeks have passed since the judge's decision, further constraining your room to maneuver.

A motion to reopen must state new facts that were unknown or unavailable at the time of the last hearing and that are material to the outcome in the case. A motion must be supported by affidavits, evidence or any new application that an individual wishes to present and must contain an explanation as to why this information could not have been presented prior to the decision.

Upon notice of an unfavorable decision, an attorney needs to consider several factors in deciding whether to file a motion to reopen or to file an appeal. These factors include:

- Timing. Has the appeal window shut already since it has been 30 days since the Judge's decision? How quickly could you get the evidence you need and file a motion to reopen?
- The Judge. Is this a judge who is likely to rule quickly? Is this a judge whose opinion suggests that she would reopen with certain evidence? Conversely, is this a judge who tends to delay deciding motions? Does the judge's opinion convey a significant lack of sympathy to your client? Do you have time and a judge that you could conceivably file a motion and get a decision before your appeal is due?
- ICE. Can you get DHS on board with a motion?
- Nature of the decision. Is this an issue better addressed on appeal, such as a legal issue? Or is this something better addressed by going back before the Judge, such as ineffective assistance of counsel or the late arrival of a key document?

The introduction of new and additional evidence is, traditionally, the purpose of a motion to reopen and that would be the first choice of many advocates. However, where there is evidence which needs to be created or gathered, such as compliance with the requirements of *Lozada*[13] to demonstrate ineffective assistance of counsel or the production of affidavits and records from faraway countries with unreliable infrastructure, there may not be enough time to file a motion to reopen. In such circumstances, the filing of an appeal of the immigration judge's decision can preserve your ability to present this evidence once it is ready. By filing an appeal, you lose the possibility of seeking a motion to reopen before the judge, but you do not necessarily lose the chance to bring new evidence to the proceedings.

As a general matter, the BIA will not consider new evidence on appeal. However, new and previously unavailable evidence may be presented to the BIA in the form of a motion to remand. A motion to remand is appropriate when, during the pendency of an appeal to the BIA, there is new and material evidence that provides an opportunity for relief. A motion to remand may be filed

[13] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

with the BIA, not for the purpose of having the BIA consider the new evidence in the first instance, but, rather, to remand the case to the immigration judge for the judge's consideration of the evidence. This is not to say that the BIA will not review the new evidence. The BIA will consider whether the evidence is new and could not have reasonably been obtained in the proceedings below, whether the evidence is material, and whether the evidence has the possibility of changing the outcome below. The Board has discretion to grant or deny a motion to remand.

AVOIDING SUMMARY DISMISSAL OF AN APPEAL

Before the Board

The BIA has instituted procedures to allow for summary dismissal of certain appeals.[14] The possibility of summary dismissal means that care must be taken in the preparing the form EOIR-26, Notice of Appeal. As discussed above, an appeal to the BIA must be filed within thirty days of the decision of the immigration judge. An appeal must state the reasons for seeking an appeal and must avoid vagueness. Often, the appeal will be filed in a case where the judge dictated an oral decision and the only documentation that exists is a summary order stating whether an application was granted or denied. The substance of the denial will be preserved only digitally and may not be available to counsel. A failure by the appellant to specify the reasons for seeking appeal can result in summary dismissal. Thus, it is essential that counsel do her best to secure details of the judge's decision and the basis for seeking an appeal. The more detail that can be put into the Notice of Appeal, the less likely the case will be subject to summary dismissal. At the same time, if there is unknown information and potential issues that may need to be raised, counsel can note on the Notice of Appeal that additional grounds for appeal may be forthcoming once the transcript is available for review. However, if the Notice of Appeal does not contain sufficient information to pass summary dismissal, the BIA does not produce a transcript or a briefing order and the case is dismissed solely upon the Notice of Appeal. A case to the BIA may also be summarily dismissed if the appellant indicated that she would file a brief but fails to do so. Although a brief does not need to be filed in an appeal, where counsel has indicated that a brief would be filed but fails to do so, summary dismissal will occur.

In addition to summary dismissal, the BIA allows for single member disposition of an appeal. Cases that avoid summary dismissal under 8 CFR §1003.1(d)(2)(i) are forwarded to a single Board Member. That board member must decide whether the case is appropriate for three member panel review. The single Board Member may proceed to affirm without opinion or may "issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel." Affirmance without opinion is appropriate where:

> the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

[14] 8 CFR §1003.1(d)(2).

> (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.[15]

To get past summary dismissal, single member review and affirmance without opinion, an appeal and any supporting materials must make a case for three member panel review. Three member panels are appropriate where:

> Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:
> (i) The need to settle inconsistencies among the rulings of different immigration judges;
> (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
> (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;
> (iv) The need to resolve a case or controversy of major national import;
> (v) The need to review a clearly erroneous factual determination by an immigration judge; or
> (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under §1003.1(e)(5).[16]

A good practice is to state your case as to why three member panel review is appropriate in the Notice of Appeal. This need not be a long explanation, but it should set the stage at every phase of the proceeding as to why this case merits additional consideration.

A Notice of Appeal should be treated as an important filing and not something submitted just to get the appeal lodged. Details, attention, thoroughness and diligence are the keys to avoiding summary dismissal of an appeal.

Before the Courts of Appeal

Federal court review of agency decisions is full of jurisdictional carve outs and pitfalls.[17] It's vital to ensure that you cover your bases before the agency appellate body to give your client the best chance of success on appeal. While there is not an exhaustive list of reasons why your appeal could be summarily dismissed, some common ones are listed below:

- Incomplete factual record: This can be absolutely fatal. If you are trying to raise an argument that is based on facts not present in the administrative record, you are going to

[15] 8 CFR §1003.1(e)(4)(i).
[16] 8 CFR §1003.1(e)(6).
[17] *See generally* INA §242.

lose. Consider preparing a motion to reopen to get the new evidence before the agency. Please see further discussion on supplementing the record supra.

- Failure to exhaust administrative remedies: One common trap for the unwary is failure to exhaust. Exhaustion is not merely filing a timely appeal to the BIA from the immigration court's decision. You must also preserve your legal arguments by briefing all your issues or else a federal court may deny any subsequent challenge based on the legal claim that was not preserved.[18] How fully each issue must be explored is a matter of some variability.[19] If there is a cutting-edge issue present in your case, be sure to search our practice advisories and sample briefs from the American Immigration Council (AIC), American Immigration Lawyers Association Amicus Committee, American Civil Liberties Union, Southwest Immigrants' Rights Project, National Immigrant Justice Center and others who pursue federal litigation and who file amicus briefs frequently. You want to be sure to raise all the necessary issues in your agency appellate brief so as to avoid the unwelcome conclusion that a particularly important issue has not been raised below and is therefore waived.
- Failure to comply with procedural matters: For example, failing to file a brief on time or comply with other court orders.

Practice Pointers

- Raise all necessary issues with the agency appellate body and discuss them with some completeness to avoid having them found waived by the circuit court of appeals.
- Research issues in your court of appeals and nationally before submitting your BIA brief (if you haven't already done it before you presented your case to the immigration judge) to ensure you haven't missed any important topics or legal arguments.
- Seek out briefs on related or identical issues from AIC, ACLU, etc.
- Consider a motion to reopen in order to submit new evidence if you discover an important issue that was missed or neglected during the case before the immigration judge.

[18] INA §242(d)(1). This provision applies only to review of a "final order of removal." As to claims under the Administrative Procedure Act, exhaustion is only required where expressly "prescribed by statute or agency rule . . . ." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

[19] *See, e.g., Zhong v. Gonzales*, 480 F.3d 104 (2d Cir. 2007).