



Removal Defense

Online Course

American Immigration Lawyers Association

Module 6: Appeals: Preparing the Record and Presenting the Case for the BIA and Circuit Court Review

Hypotheticals

Faculty Response

Hypothetical A

Jorge Lopez applied for cancellation of removal for non-LPRs with the Immigration Court in Cleveland, Ohio. His application was denied by an Immigration Judge and he now wants to appeal to the Board of Immigration Appeals. The IJ found that Mr. Lopez's 2002 theft conviction was a crime involving moral turpitude based on a BIA precedent decision that was issued three weeks prior to the final hearing that addressed the exact statute Mr. Lopez was convicted under and found that someone convicted under that statute is ineligible for cancellation of removal. There is a case from another circuit court that concluded that the theft conviction would not be a crime involving moral turpitude. As a result of the IJ's finding on the criminal issue, Mr. Lopez was found to be ineligible for cancellation of removal for having a disqualifying criminal offense pursuant to INA § 240A(b)(1)(C). The IJ found that Mr. Lopez met each of the other requirements for cancellation of removal.

What sort of discussion should you have with your client regarding an appeal to the BIA in light of the Board's precedent decision finding that the theft statute under which Mr. Lopez was convicted is a crime involving moral turpitude and bars cancellation of removal?

Faculty Response

You should have a frank discussion with Mr. Lopez that an appeal to the Board of Immigration Appeals will be unsuccessful unless the Sixth Circuit issues a contrary decision. He should be advised that the appeal would be unlikely to be successful in the absence of a change in the law. However, you should explain that you can ultimately appeal the Board's decision to the Sixth Circuit by filing a petition for review. It may be possible to argue that the BIA's recent interpretation of the law is impermissibly retroactive. In order to do so, you must preserve the issue by first appealing to the Board of Immigration Appeals. Your client should understand the process and the certainty of a denial in the absence of intervening case law. However, he should also be aware that this will allow him to challenge the decision at the Sixth Circuit.



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Hypothetical B

Jayesh Patel is in removal proceedings in Atlanta, Georgia. He was in Atlanta visiting his friend when ICE picked him up. However, he lives in New York, NY. You were hired to represent him in his case since your office is near where he lives and you previously handled a family member's case. The Immigration Judge in Atlanta granted bond. Mr. Patel filed a motion to change venue along with written pleadings, and an I-589. However, the Immigration Judge denied the change of venue request without giving any reason despite DHS not opposing the request. Mr. Patel now must proceed with his case in Atlanta, GA when his witnesses and attorney are in New York. As his attorney, what should you do after the change of venue is denied?

Faculty Response

This would be a situation where an interlocutory appeal should be considered. The Board has granted interlocutory appeals in situations where a change of venue is denied. Your client would suffer significant prejudice by having the case heard in Atlanta because the witnesses are in New York. You are also located in New York, which would cause a significant expense to the client to have you travel to Atlanta for Court. You must file the interlocutory appeal within 30 days of the denial of the change of venue motion. You should also file the brief at the time of the appeal or very soon thereafter.