

Appealing Your Case To The Board Of Immigration Appeals



This guide was prepared and updated by the staff of the Florence Immigrant & Refugee Rights Project and was written for immigrant detainees in Arizona who are representing themselves pro se in their removal proceedings. This guide is not intended to provide legal advice or serve as a substitute for legal counsel. The Florence Project is a nonprofit legal services organization and does not charge for its services to immigrant detainees in Arizona. This guide is copyright protected but can be shared and distributed widely to assist indigent immigrants around the country. All of our guides are available to download on our website: www.firrp.org. We kindly ask that you give credit to the Florence Project if you are adapting the information in this guide into your own publication.

Important Words to Know

Immigration Law has a lot of technical words. Here's a list of some of the words you'll see a lot in this guide and an short explanation of what they mean.

- **Immigration Judge (“Judge”):** this is the person who will make a decision about your case. He or she holds hearings in the courtroom and wears a black robe. This person doesn't work for ICE. It's her job to look at the facts of your case and apply the law fairly.
- **Immigration and Customs Enforcement (“ICE”):** this is the agency that has put you in deportation proceedings and is in charge of detaining you. ICE is part of the Department of Homeland Security, or “DHS.”
- **Government Attorney:** this is the lawyer who represents ICE when you go to your court hearings. He or she sits at the table next to you and also talks to the Judge. It's usually this attorney's job to ask the Judge to order you deported.
- **Deportation:** ICE has put you in deportation proceedings, which are also called “removal proceedings.” If the Judge orders you deported or “removed” from the United States, you will be sent back to the country where you are a citizen and will not be able to return legally to the U.S. for at least ten years.
- **The Florence Project:** this is a group of lawyers and legal assistants who provide free legal help to people without lawyers. The Florence Project wrote this guide to help you understand your case.

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Overview

If you disagree with the Immigration Judge's decision in your case or on your bond, you have the right to appeal his decision to a higher court. This court is called the Board of Immigration Appeals, or "BIA", and it is actually located in Falls Church, Virginia. The BIA decides all appeals from immigration courts around the country. The BIA usually can't look at new letters or other documents, which means that they will normally only look at the evidence given to the immigration judge.

Just like you have the right to appeal a decision, Immigration & Customs Enforcement (ICE) also has the right to appeal to the BIA if the judge grants you relief or a good bond. So you will need to be prepared to understand appeals if you win or if you lose your case.

This guide explains how the appeal process works and gives step-by-step instructions for how to appeal your case. The first part of this guide is focused on appealing decisions in your **removal (deportation) proceedings** only. The second part explains appeals in **bond proceedings** since they work a little differently.

If your case is already at the BIA and you are looking for information about appealing to the 9th Circuit, please refer to the Florence Project's guide on Petitions for Review at the 9th Circuit.

How to Reserve Your Right to Appeal

At the end of your immigration court hearing the judge will make a final decision about your case. For example, he may say "Sir, I am ordering you deported to Mexico and I am denying your application for cancellation of removal." After the judge has made his decision he will ask you "**do you want to appeal my decision?**" If you think you will



want to file an appeal, it is very important to say **YES!** to this question and **RESERVE** your right to appeal. When you reserve your right to appeal you are automatically given **30 days** to file your Notice

of Appeal paperwork and actually start the appeal process. **See Appendix A for a sample conversation with the Judge about reserving appeal.**

There are many things to think about when deciding whether you want to appeal the judge's decision. You will probably face several more months in detention if you are appealing a negative decision and cannot pay your bond or don't have a bond. You may also want to consider how strong you think your case is and whether you think the facts and law are in your favor. You should also think about whether anything unfair or extreme happened in your hearing that hurt your ability to present your case. For example, if you had an interpreter and you didn't understand him, or if the judge cut you off or didn't let you testify fully, or if the ICE attorney was overly aggressive or harassing in his questions. Other examples may include if one of your witnesses wasn't allowed to testify, if you submitted written evidence that was excluded, or if you have a mental or medical issue that impaired your ability to understand what was happening in your hearing.



When possible, it is best to think through these things *before* your final hearing so you feel prepared to make a decision that day. But the nice thing about **RESERVING** appeal is that you don't have to appeal, you are just giving yourself time to think about it and make a decision. During these 30 days you may want to review this guide, talk to a lawyer or the Florence Project about your chances on appeal, and think about your decision. If you decide not to appeal in the 30 days, the judge's decision will become the final order and if you were denied relief you will be deported.

If you don't want to appeal your case and you are *absolutely sure* of this at the time of your immigration hearing, when the judge asks if you want to appeal his decision you should tell him **NO**, which means you are **WAIVING** your right to appeal. If you are from Mexico and

detained near the border, then this means you will probably be deported that same day and you have given up your opportunity file an appeal to the BIA and you accept the judge's decision as final.

If the judge makes a final decision that is good for you, for example, if she grants you cancellation of removal, you will not want to appeal the decision and it is safe to waive your right to appeal. The government attorney may appeal but if you have been granted relief you don't want the BIA to reverse the judge's decision in your favor.

Filing Your Notice of Appeal

When you tell the judge you want to appeal, the court officer will give you some important paperwork called the **Notice of Appeal**, also called an "NOA" or **Form EOIR-26**. You have **30 days** from the date of your decision to file this paperwork with the BIA to actually start the appeal process. This means the BIA in Virginia has to *receive* the Notice of Appeal by the 30th day, so give yourself plenty of time to mail it to the BIA. It is best to mail your NOA at least 10 days *before* the 30th day to make sure it gets there in time. If the BIA receives your Notice of Appeal after the deadline it will not consider your appeal and the Immigration Judge's decision will become final. The judge will probably tell you the exact date your Notice of Appeal is due and, if she doesn't, feel free to ask the judge when you reserve appeal what date your Notice of Appeal is due to the BIA so you are sure you have the right date.



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The Notice of Appeal paperwork has a few forms. Be sure to read and follow all of the directions. If you can't read English, then ask someone to assist you with the paperwork.

(1) EOIR 26 – Appeal form. This is the actual appeal form and it is usually printed on blue paper. Follow the instructions carefully and answer everything required.

- Check “no” where it asks if you want to give an oral argument.
- **Question 8** asks about whether you will file a **written brief** explaining the mistakes you believe the judge made. You will be asked to submit this brief in a few weeks, after you have received the transcript from your hearing. If you plan to write a brief, check “yes” where it says that you will write a brief. If you check “yes” here and you do NOT file a brief your appeal will probably be dismissed. If you want to check “no” be sure to write out all of the reasons for your appeal on a separate piece of paper and send it in with this form.
- Where it asks your reasons for appeal, write a short paragraph about why you want to appeal. Then if you are filing a brief add this line: “Respondent reserves the right to raise additional arguments upon receipt of transcript.”

(2) EOIR 26A – Fee Waiver form. Generally, if you are appealing a removal order, there is a fee of \$110.00. The Board may waive this fee if it is clear that you cannot afford this expense. Complete the information about your finances and sign the form. Fee waivers are usually granted for people in detention.

(3) EOIR 33 – Change of Address form. If you are released on bond from immigration detention or if you move while your appeal is pending, you must notify the BIA of this change within 5 working days. This form notifies the BIA of any change in address and it is usually printed on pink paper. If you do not have a bond and are not going to be released from detention you don't need to complete this form.

(4) EOIR 27 – Attorney form. This form is for your attorney, if you have one or if you hire one later. It is usually printed on yellow paper. If you are representing yourself you don't need to complete this form. Be sure to sign all forms where it asks you to sign! When they are complete, you will mail the originals to the BIA at this address:

Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

You also need to mail a copy to ICE and keep a copy for your own records. If you are detained in a Florence facility mail a copy to:

ICE Litigation
3250 N. Pinal Parkway
Florence, Arizona, 85132

If you are detained in Eloy mail a copy to:

ICE Litigation
1705 E. Hanna Road
Eloy, AZ 85131

About one month after receiving your Notice of Appeal, the BIA will mail you an orange paper called the **Filing Receipt** that says they have received your appeal. Save this for your records. If you haven't received this receipt within a week or two of your Notice of Appeal being sent call 1-800-898-7180 to check on whether there is a record of your appeal being filed.

Filing Your Appeal Brief

Usually a few weeks after you receive your filing receipt, the BIA will mail you a larger package, also with orange documents. This package will include a copy of the transcript of your immigration hearing, the Immigration Judge's decision if it was an oral decision, and a **Briefing Schedule** (on orange paper). The Briefing Schedule gives

your deadline for sending the BIA your written brief. If the Florence Project is assisting you with your appeal, call us *immediately* when you receive this packet in the mail.

The deadline for your brief is usually three weeks from the date you receive it. Remember you should mail your brief 10 days *before* the due date to make sure it gets to the BIA on time. If this is not enough time for you to prepare your brief, you may file a **Motion for Extension of Time to File the Respondent's Brief**. This **MUST** be filed *before* your brief due date. In this document, it is a good idea to include some reasons why you need more time, for example, explaining that you are detained, that you don't have a lawyer, or that you have limited access to the law library. Mailing a request for an extension does **NOT** automatically extend the filing deadline. While the BIA *usually* grants one 21 day extension request do not assume it will be granted until you get a notice in the mail giving you a new deadline.

If you are detained, ICE will also prepare a brief that is due the same day and will send you a copy. If the judge denied you relief, ICE often files a **Motion for Summary Affirmance** which means they are asking to BIA to agree with the judge's decision denying you relief. You can respond to specific arguments in ICE's brief in your own brief but you are not required to.



You may be wondering *how* to write a brief and what it needs to include. Your brief is just a written argument explaining in detail why you think the judge made the wrong decision in your case. The most important thing is to raise and discuss *all* of the important issues presented in your case. **See Appendix B to this guide for a helpful outline of what should go into your brief.** It's preferable to type your brief but you can also write it by hand clearly.

When your brief is finished, attach the orange **Briefing Schedule or Briefing Extension** documents in front and be sure to include a written **Certificate of Service** at the end of your brief that says you are

mailing a copy to ICE. There is a sample certificate of service at the end of this document in Appendix C. You must sign your brief and your certificate of service. Make one copy of your final brief for ICE and one for your own records. Mail the original (with the orange Briefing Schedule or Briefing Extension) to the BIA at the address on page # and one copy to ICE at the address on page #.

The BIA will review the briefs, and will make a decision in a few months. You will receive the BIA's written decision in the mail. If the Florence Project is assisting you with your case, call us when you receive your written decision.

Checking the Status of Your Appeal

To check for a decision from the BIA you can call **1-800-898-7180**. The BIA may take longer in some cases to make decisions than in others, so it is hard to give you an estimated time you will have to wait for a decision. However, the BIA is *supposed to* make a decision within six months if you are detained.



If you filed an appeal and you have decided that you want to give up and be deported because, for example, you don't want to be in detention anymore, you may file a **Motion to Withdraw Appeal** by mailing a letter explaining you want to withdraw your appeal to the BIA at the address on page #. If you withdraw your appeal, the Immigration Judge's decision becomes final and it is extremely difficult to reopen your appeal so think very carefully before you do this.

Losing and Winning Appeals

Often the BIA's decision can be complicated and in reading it you may not understand if you have won or lost. The BIA may reverse the judge's decision, may affirm (or agree with) the judge's decision, or may remand the case (send it back to the judge) for another hearing. If you are confused by the decision you can send a copy of the decision to the Florence Project with a letter so we can review it for you.

If you lose your appeal on the issue of removability OR if the government wins its appeal of the judge's decision in your favor, then you have the right to appeal that decision to an even higher court. You have 30 calendar days to file a **Petition for Review** (appeal) to the U.S. Court of Appeals for the Ninth Circuit. During the 30 days that you have to file a Petition for Review with the Ninth Circuit, ICE may try to deport you, especially if you are from Mexico. If you are from Mexico and you are detained in Arizona or along the border, this could happen the day that the BIA orders you deported. If you do plan to appeal your case to the Ninth Circuit, it is important to have the Petition for Review ready to go right away. Please see the Florence Project's guide on Petitions for Review to the Ninth Circuit if you want more information.

When The Government Appeals

If the Immigration Judge grants your case, you will probably waive your right to appeal but ICE may still appeal the decision. They will have 30 days to file their Notice of Appeal and they too may decide not to ultimately appeal your case. If they don't appeal, you will probably be released within 30 to 35 days of the judge's decision. If they do file their Notice of Appeal, you will probably remain detained during the appeal because the judge's decision in your favor does not become final until the BIA rules on ICE's appeal. However, you may request the a new bond hearing in front of the Immigration Judge in light of his or her decision in your favor or if you are experiencing prolonged detention. Please see the Florence Project's bond guide for more information on requesting a bond.

Please note that if you represented yourself before the Immigration Judge and WON your case you may have the opportunity to have a pro bono attorney assigned to defend your case at the BIA when ICE appeals. If you **win** your case before the judge and you are pro se, the **BIA Pro Bono Project** may select your case for assistance by a pro bono attorney.

Appealing a Bond Decision

Removal and bond proceedings are two separate proceedings that will result in two separate orders by the judge. In a bond hearing, the Immigration Judge may choose to grant you a bond for a certain amount of money. If the judge chooses NOT to grant you bond, he will probably say one of the following three things, which will signal to you that you can appeal his decision:

(1) “I’m not going to give you a bond because I do not have jurisdiction because some of your crimes disqualify you from having a bond” or “I’m not going to give you a bond because I have no power to give you a bond because of certain crimes in your criminal record.”

(2) “I’m not going to give you a bond because I think that you are a danger to society.” (This means that the judge thinks that once you are released you will have more problems with the law.)

(3) “I’m not going to give you a bond because I think that you are a flight risk.” (This means that the judge thinks that if you are free you will disappear and not keep coming to your immigration hearings.)



The judge will give you a piece of paper containing the final bond decision. If the judge sets a bond amount, that amount will be listed. Otherwise, the judge will probably have checked the box marked “no jurisdiction” or the box marked “Other.” The judge ask you “**Do you want to appeal my decision?**”. If you want to **RESERVE** appeal you should answer **YES!** to this question and take the Notice of Appeal paperwork. Just like in your deportation case, you will have 30 days to send this paperwork in.

With bond appeals, the BIA will send you a **Memorandum Decision from the Immigration Judge**, explaining why she made the

decisions that she did about your bond. This is an important document to review and keep because you will want to reference it in your brief.

Usually several weeks later the BIA will send you a letter containing an orange document with the **Briefing Deadline**. Since bond hearings are not usually recorded you will not receive a transcript or oral decision from your bond hearing. You then must submit a written brief before the deadline explaining in detail why you think the judge made the wrong decision in your bond hearing.

If you lose the bond appeal, then you may subsequently file a petition challenging your detention with the local Federal District Court at any time (there is no deadline). If you are facing prolonged detention and were denied bond and want to explore this you can write to the Florence Project to see if we can help.

Conclusion

Appealing to the BIA can be complicated and overwhelming, especially if you don't have assistance from counsel. We hope this guide is helpful to you in this process and wish you good luck with your case!

Appendix A: Conversation with Judge When Reserving Appeal

JUDGE: Ma'am, I am ordering you deported to Fiji and I am denying your application for cancellation of removal. Would you like to appeal my decision?

MS. DEO: Yes your honor. I do not agree with this court's decision and I would like to appeal my case to the Board of Immigration Appeals.

JUDGE: Ok, ma'am. I am going to give you some forms for your appeal. You have 30 days to appeal my decision and you will need to fill out and mail these forms to Virginia before the deadline passes. The address is on the front page of instructions.

MS. DEO: Your honor, what date is my appeal due then?

JUDGE: Ma'am, today is December 1st. So your appeal will be due on December 31st. Do you understand?

MS. DEO: Yes. Thank you your honor. So, do I have to come back to court on December 31st?

JUDGE: No Ma'am. You just have to fill out and mail those forms that I just gave you to the BIA in Virginia at the address that is highlighted on the front cover and make sure that it arrives in Virginia before the 31st. Ok?

MS. DEO: Yes. Thank you.

Appendix B: Suggested Outline For A Written Brief to the BIA

I. Facts and Procedural History

- a. Describe the important facts in your case.
- b. Describe the decision that the Immigration Judge made
- c. Describe any previous appeals, motions to reopen, motions to reconsider filed in your case and their outcomes.

II. Issues Presented

- a. Identify the specific legal issues or factual problems in your case in the form of a question.
 - In many cases, the two main issues will be (1) whether the evidence shows that you are in fact deportable AND (2) whether you should be granted relief from deportation. However, every case is different!

III. Standard of Review

- a. The Board reviews findings of fact by an Immigration Judge under the “clearly erroneous” standard of review, but reviews “de novo” questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges.*
 - Because the law is always changing, the standard of review may also change. Always make sure to double check whether this is the most current law.

IV. Argument

- a. Specifically identify each mistake that you think the Immigration Judge made in reaching his or her decision.
 - For each mistake, specifically identify any information (law, facts, policy, or otherwise) in the record that support your assertion that there was an error.

V. Conclusion

- a. Indicate what you think the proper relief or remedy is.
 - Example: “The Immigration Judge erred in finding me removable and by denying my application for cancellation of removal. I ask that this Board terminate these proceedings or, in the alternative, grant my application for cancellation of removal in its discretion.”

Appendix C: *Certificate of Service*

I, _____, swear that I did serve the Department of Homeland Security at _____ (address) with an identical copy of this document by mail or hand delivery on the date indicated below.

Signature

Date