

Practice, Procedure & Advocacy Skills

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Commencement of Proceedings & The Notice to Appear

- When do removal proceedings commence?
 - Immigration Court proceedings begin with filing of charging document with the Court. 8 CFR § 1239.1.
 - Service to the respondent alone does not commence proceedings.
- What is the charging document?
 - The Notice to Appear, Form I-862, INA § 239(a)

Commencement of Proceedings

- **The Main Players:**
 - DOJ, EOIR, Immigration Judges
 - DHS, ICE, Office of Chief Counsel
 - The Respondent and You
- **Where is the court? When is the hearing?**
 - <http://www.justice.gov/eoir/sibpages/ICadr.htm>
 - Immigration Court Information System: #1-800-898-7180 (Need the A#!)
 - Option 1: Next date, time, and location of hearing
 - Option 2: Case processing information (Asylum clock)
 - Option 3: Decision information (good to learn case procedure or if in absentia order issued)
- **Who represents DHS?**
 - http://www.ice.gov/about/district_offices.htm

Master Calendar Hearing

- Respondent's first appearance before IJ in removal proceedings
- Notification of Master Calendar Hearing
 - NTA or Hearing Notice with date, time, and location
- Purpose of Master Calendar Hearing:
 - Entry of Appearance
 - Advising the Respondent of rights
 - NTA: explains service, biographic info, the charges, and factual allegations
 - Pleadings
 - Identify and narrow the factual and legal issues
 - Set filing deadlines
 - Status Updates
 - Scheduling of the Individual Hearing for adjudication of contested matters and applications for relief
 - Provide certain warnings to the Respondent

The Immigration Court Practice Manual

- Filing rules and deadlines
 - Must be timely – know the **15 day rule!**
 - Must include EOIR-28, cover page, fee receipt if applicable, application, exhibits with table of contents, proposed order in triplicate (for motions), proof of service
 - Must be hole punched and bound
 - Must serve opposing party
 - Format must be proper
- Rules for conduct and procedures of hearings
- Motions before the Immigration Court
- Appeals of Immigration Judge decisions
- Rules for Detention and Bond proceedings
- Discipline of practitioners
- Appendices with samples

Pleadings in Immigration Court

- Address whether service of the NTA was proper
- Representation by counsel that he/she has discussed the nature and purpose of proceedings, as well as contents of the NTA, with Respondent
- Representation by counsel that he/she has explained the consequences of failing to appear or filing frivolous applications
- Admit or deny factual allegations and concede or deny charge(s) of removability
 - Be prepared to explain why the Respondent denies any of these

Pleadings in Immigration Court (continued)

- If relevant, notify the Court what application(s) for relief from removal the Respondent will be seeking
 - Acknowledge that they must be timely filed and biometrics must be timely completed
 - Notify the Court how much time Respondent needs to submit application(s)
 - Be ready to explain prima facie eligibility for relief sought
 - Notify the Court how much time Respondent needs to present the case in Court
 - Notify the Court if any interpreters are needed
- Designate or decline to designate a country of removal; be sure to ALWAYS decline if seeking asylum or related relief

Charging Document: the NTA

- Initial Considerations/NTA Analysis:
 - Is the individual subject to proceedings? Claim to USC?
 - Identify deficiencies in the NTA or in the service of the NTA
 - Statutory and regulatory requirements
 - Due process
 - Is he/she removable as charged in the NTA?
 - If so, is he/she eligible for relief?

Charging Document: Identifying Deficiencies

- Specific Requirements for NTAs set forth at INA § 239; 8 CFR § § 239.2, 1003.20, 1239.2.
 - **The NTA must state:**
 - The nature of the proceedings
 - The legal authority for the proceedings
 - The acts or conduct alleged to be in violation of law
 - The charges against the individual and the statutory authority for those charges
 - Notification of the right to be represented by counsel
 - Notification of the requirement that the Respondent must provide a current and updated address/phone number
 - **Service and issuance of the NTA must not be defective**
 - Must be served in person, or “if personal service is not practicable,” through mail to the Respondent or counsel of record

Service of the NTA

- DHS has the burden of proving that service of the NTA is proper upon denial of proper service.
- **Proper Service of the NTA:** Is there “clear, unequivocal, and convincing evidence” that the Service provided the written notice required under section 239(a)(1) of the Act, 8 U.S.C. § 1229(a)(1) (2000)? Section 239(a)(1) the “notice to appear” must be given “in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any).” Section 239(c) provides that “[s]ervice by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.”

Service of NTA: Minors under 14

- Service of the NTA “shall be made upon the person with whom . . . the minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend.” 8 C.F.R. § 103.5a(c)(2)(ii) (2002); see *also* 8 C.F.R. § 236.2 (2002) (providing that for respondents under the age of 14, the notice to appear shall be served in the manner prescribed in 8 C.F.R. § 239.1 upon the person or persons specified by 8 C.F.R. § 103.5a(c)).
 - In Re Rosa Mejia Andino, 23 I&N Dec. 533 (BIA 2002). Court properly terminated proceedings against the 7-year old child because the NTA was served on a person identified only as an uncle and no effort was made to serve the parents who live in the United States.

Charging Document: Identifying Deficiencies

- Due Process
 - Due process rights exist for non-citizens
 - Requires that the NTA provide the Respondent with sufficient notice of the government's theory of the case and the evidence in support of that theory
 - Proceedings comply with due process when the NTA is correctly prepared, accurately alleged and charged, and properly served

Charging Document: Challenging Deficiencies

- Review Allegations and Charges Carefully
 - Correct name?
 - Correct date/manner of entry?
 - Corrected categorization of criminal history?
 - Information contained in the allegations obtained in violation of due process?

Charging Document: Challenging Deficiencies

- Why Challenge the Notice to Appear?
 - Shift the burden of proof
 - Preserve rights on appeal
 - If you fail to review the NTA and make objections, you will likely be waiving any future challenges (*Chambers v. Mukasey*, 520 F.3d 445 (5th Cir. 2008); *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986))
 - Suppression and/or Termination of proceedings

Commencement of Proceedings: Challenging Deficiencies

- **Remedies for Due Process/Statutory and Regulatory Violations in Enforcement**
 - **Motions to Terminate**
 - *Matter of Garcia-Flores*, 17 I&N Dec. at 328-29 – When a federal regulation is “intended to serve a purpose of benefit” to a noncitizen and the government violation of that regulation “prejudiced her interests protected by the regulation and such prejudice affected the outcome of the deportation proceedings,” it is appropriate to invalidate proceedings.
 - **Motions to Suppress and Terminate Proceedings**
 - *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) – egregious violations of the 4th Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.

Termination/Dismissal

IJs Want to Decrease their Dockets!

- How to get termination?
 - Defective or “Improvidently Issued” NTAs
 - DHS may amend charges or reissue an amended NTA at any time
 - Denying the Charges & DHS not having the A file
 - Regulations (8 C.F.R)
 - Motions to Suppress

Termination/Dismissal

- Defective or “Improviently Issued” NTAs
 - Look for duplicate A#s
 - Look for allegations of valid admission to the U.S. coupled with allegations that the Respondent is an “arriving alien”
 - Look for simultaneous allegations of lack of valid admission coupled with charges of under section 212 of the INA (inadmissibility grounds)
- BUT! DHS may amend charges at any time or simply reissue an amended NTA
 - Remember concept of Res Judicata
 - DHS may also file a Motion to Reopen, but ensure their evidence is “new and previously unavailable”

Termination/Dismissal

- Denying the Charges
 - DHS is not above a fishing expedition
 - NTAs are generally not written by attorneys and frequently “overcharge” the Respondent
 - Don’t always concede everything, but know when to concede and move to the relief stage
 - Hold DHS to its burden of proof
 - DHS must show by “clear and convincing evidence” that the Respondent is removable
 - DHS must show that bars apply to any particular relief
 - DHS may reveal evidence they were saving for the Individual Hearing
 - Never concede a charge of false claim to U.S. citizenship
 - Preserve issue for appeal

Termination/Dismissal

- *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980): when a federal regulation is “intended to serve a purpose of benefit” to a noncitizen and the government violation of that regulation “prejudiced her interests protected by the regulation and such prejudice affected the outcome of the deportation proceedings,” it is appropriate to invalidate proceedings. In addition, where compliance with the regulation is mandated by the Constitution, prejudice may be presumed.

Fifth Amendment-Based Regulations

Regulations related to Children:

- 8 CFR § 236.3(h): Service of Form I-770, Notice of Rights and Disposition
- 8 CFR § 103.8(c)(2)(ii): Service of Form I-862, Notice to Appear
- 8 CFR § 1240.10(c): Admissions of Removability

Other Regulations:

- 8 CFR §§ 287.8(b) and (c)(2)(ii), and 8 CFR § 287.8(a) relate to detention, arrests, and questioning
- 8 CFR § 287.8(c)(2)(vii) prohibits the government from using coerced statements
- 8 CFR §§ 287.3(c) and 292.5(b), and 8 CFR § 1240.10(a) discuss interrogations and advisals

Suppression → Termination

- Motions to Suppress

- *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)

- Strategy: Suppressing evidence of client's alienage; no alienage evidence means ICE cannot meet its burden of proof
 - Must show that there way evidence of alienage obtained was 1. a Fourth Amendment violation and 2. that the violation was egregious in nature, OR
 - Use of evidence obtained in violation of the Fifth Amendment is fundamentally unfair and that the evidence's probative value is undermined by the violation.
 - Involuntary statements induced by coercion, duress, or improper action and, for a child, this is a lower bar

Individual Hearing

- Evidentiary hearings on contested matters, or merits hearings
 - Challenges to removability
 - Application(s) for relief
- Filings of applications, exhibits, motions, witness list, pre-hearing briefs prior to hearing
 - Immigration Court Practice Manual for filing rules and deadlines
- Pre-Hearing Conferences and Communications Between the Parties
 - Narrow issues, obtain stipulations, and simplify proceedings

Individual Hearing (continued)

- **Content of Hearings**

- Opening statements
- Objections to evidence
- Presentation of witnesses and evidence, as well as cross-examination of witnesses
- Closing statements
- Decision of the Immigration Judge (oral or written)

Individual Hearing Demeanor

- Know and follow the rules!
- Be prepared
- Contact the ICE Trial Attorney prior to the hearing
- Always keep “the record” in the back of your mind
 - Protect your client and preserve issues for appeal
 - Raise all non-frivolous arguments and challenge DHS
 - Note anything improper or unfair to your client on the record by objecting to it (i.e. improper evidence or improper questioning)
- Be zealous, but not over-zealous – remember your manners!
- Always listen carefully and be alert!

Authority of the Immigration Judge

- Set forth at INA § 240(b)(1); 8 CFR §§ 1003.10, 1240.31
- “The Immigration Judge shall administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses...issue subpoenas and sanction by civil money penalty any action or inaction in contempt of the judge’s proper exercise of authority under the Act.” INA § 240(b)(1).
- The Immigration Judge “shall...conduct exclusion, deportation, removal and asylum proceedings and such other proceedings which the Attorney General may assign them to conduct.” 8 CFR §§ 1003.10, 1240.31 (“shall exercise the discretion and Authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases”).

The Shifting Burdens of Proof

- **Burden on DHS to prove:**
 - **Alienage** – 8 CFR § 1240.8
 - If the Respondent is present without being admitted or paroled, the burden is on DHS initially to establish alienage. **Admitting the allegations and conceding the charge(s) of removability establishes alienage for DHS thereby doing their job.**
 - **Removability as charged** – INA § 240(c)(3)(A); 8 CFR § 1240.8(a)
 - If the Respondent was lawfully admitted but is now deportable, the burden is on DHS to prove that the Respondent is removable as charged by “clear and convincing evidence.”
 - **If there is any possible way to challenge alienage or removability, force DHS to meet their burden!**

The Shifting Burdens of Proof

- **Burden on Respondent to prove:**

- **Lawfully present or not inadmissible as charged** – 8 CFR § 1240.8(c)
 - If the Respondent is present without being admitted or paroled and DHS established alienage, the burden shifts to the Respondent to prove that he/she is lawfully present (“clear and convincing”) or not inadmissible as charged (“clearly and beyond doubt”).
- **Eligibility for relief from removal**
 - If DHS has established alienage and removability, the burden shifts to the Respondent to prove that he/she is eligible for relief from removal
 - Meets all applicable eligibility requirements
 - Merits a favorable exercise of discretion (for discretionary relief)

The Abridged Rules of Evidence in Immigration Court

- Rules of Evidence come from Regulations and Practice Manual
 - Use your instincts
 - Make objections to maintain the issues for appeal
- Rules that apply – aimed at reliability and trustworthiness
 - Authentication
 - Best Evidence
 - Administrative Notice
 - Stipulations
- Rules that do not apply, but you should consider
 - Hearsay
 - Privileges
- When in doubt, it's about Fundamental Fairness!

Submission of Evidence, Authentication, and Meeting Your Burden

- **Burden – INA § 240(c)(4)(A)**
 - Must satisfy basic statutory/regulatory eligibility requirements
 - Meet each element
 - Address any bars to relief / inadmissibility issues
 - Criminal, misrepresentation/fraud, statutory bars
 - Must show that a favorable exercise of discretion is warranted
 - Address any adverse criminal factors, fraud, etc.
 - Submit waivers
 - Show rehabilitation and remorse
 - Highlight positive factors: U.S. citizen family members, hardship to U.S. citizens, contributions to community, long period of time in the U.S., lack of criminal record, immigration history, paying taxes and other civic duties, etc.

Evidence

- IJs usually deal with evidentiary issues prior to any testimony
- TA may object to evidence. Common objections:
 - Authentication
 - Relevance
 - Undue repetitiveness
 - Hearsay
- Argue objections go to weight not admissibility

Corroborating Evidence Post REAL ID Act

- IJ can grant based on testimony alone but only if testimony is credible, persuasive, and refers to specific facts sufficient
- **IJ can require evidence to corroborate otherwise credible testimony “unless the applicant does not have the evidence and cannot reasonably obtain the evidence”**

Common Types of Corroborating Evidence

- Police reports, arrest records
- Medical records
- Photos
- Letters from friends/family/organizations/therapists etc.
- Death certificates
- Newspaper articles

Translation of Documents

- All foreign docs must be translated into English!
- **Attach a certificate of translation:**
e.g. “I, Rita Garcia, hereby certify that I translated the attached document from Spanish into English and that to the best of my ability it is a true and correct translation. I further certify that I am competent in both Spanish and English to render and certify such translation.”

Using Exhibits During Testimony

- (1) “I’m showing you what is marked as Tab A, pages 115-120.”

- (1) Do you recognize it?

- (1) What is it?

Preparation of Witnesses

- IJ will weigh credible testimony along with other evidence of record
 - Credible testimony of applicant AND WITNESSES
 - Corroborating documentation
- REAL ID Act of 2005
 - Demeanor, candor, responsiveness
 - Internal consistency
 - Consistency with other evidence of record
 - Any false statements
- IJ's credibility finding ordinarily given deference; must be supported by specific, cogent reasons

Why are Witnesses Important?

- How can you prove each legal element? How do you corroborate each fact?
 - EVIDENCE!
- What can witnesses corroborate?
 - Specific facts of your client's story
 - Statutory elements when there is no documentary evidence
 - Pattern and practice of persecution / similarly situated individuals
 - Country conditions in the country of nationality
 - Entry to the U.S., immigration history, and timing of application for relief
 - Discretionary factors (positive and negative) → humanize your client!
- What if a witness is unavailable?
 - Reasonable explanation of why
 - Documentation of efforts to reach him/her

Witnesses Preparation: Ensuring Credible Witnesses

- Proper preparation is key
 - Careful review of all documentation/facts
 - Know what to expect
 - Mock Q&A session with the applicant
 - Anticipate IJ/ICE questions
- Document it!
 - Corroboration is your best tool for demonstrating credibility
- Discrepancies and omissions can be detrimental to any case
 - Make sure witnesses' testimony is consistent with client's
 - If it is not, figure out why not and address it

Witnesses Preparation: Ensuring Credible Witnesses

- Preparation of Witnesses
 - Ensure the witness knows the purpose of the proceedings and the purpose of his/her testimony
 - Familiarize the witness with the procedures and what to expect
 - Prepare witnesses for questions that are likely to come up on cross-examination and explain the purpose of those questions
 - Sworn affidavits are your friend! Use them! Especially when a Witness is better on paper

Witnesses Preparation: Ensuring Credible Witnesses

- Discrepancies between client and witness testimony are avoidable!
 - Know your client's full story
 - Note any discrepancies, omissions, or vague testimony between your client and your witnesses' stories
 - Discuss them with your client and witnesses
 - Address how they can be explained
 - Ensure all documents you prepare are consistent with your client's story and the other documents on record, including your application forms!
 - Witness affidavits

Witness Affidavits

- **Same format as your client's affidavit**
 - Numbered paragraphs
 - Times New Roman, 12 point font
 - 1" margins
 - 10-15 pages
- **Organization depends on witness and purpose of your affidavit is**
 - Should have a set and organized structure
 - Should be readable – logical and easy-to-follow
- **Tone/Voice**
 - Capture the witness's voice – Would the witness say this? How would he/she say it?
 - Avoid legal jargon and technical terms
 - First person from the witness's perspective

Witness Examination

- **Direct Examination**
 - Have a plan, but be flexible (listen to your client's answers; pay attention to the Immigration Judge)
 - Ask direct, simple questions focused on the personal knowledge of the witness
 - No leading questions allowed
 - Qualify your expert and/or witnesses to give opinions
 - Defer to the Immigration Judge as the fact-finder
- **Cross Examination**
 - Listen!
 - Be prepared to object and make your objections for the record
- **Re-direct Examination**
 - Don't repeat what has already been covered
 - Purpose of re-direct is to respond to issues brought up on cross or to help clarify the Respondents answers given on cross

Opening Statements

- Some IJs allow, some do not
- Most IJs start with preliminary matters, such as identifying the exhibits, asking if there are any objections to evidence, admitting the evidence into the record, etc.
- After preliminary matters, some IJs will ask you for your theory of the case (This is your opportunity to tell the Judge what the case is all about! First impressions are lasting impressions!)
- **Purpose of an Opening Statement**
 - Establish the theory of your case (legal requirements with facts woven in)
 - Establish your theme – reduce a large amount of information to easily-remembered words and phrases
 - Anticipate weaknesses and refute the other side
 - Request an outcome – tell the IJ what you want!

Closing Statements

- Most IJs allow closing statements
- Keep it short and sweet (no more than 5 minutes tops)!
- This is your opportunity to tie it all together for the Immigration Judge...not simply a summation!
 - Remind the IJ of your theme and why he/she should find in your client's favor – logic and emotion!
 - Incorporate good quotes from the Respondent offered while testifying
 - Take the law, theory of your case, supporting evidence, and testimony presented, and mold them into a persuasive whole
 - Deal candidly with weaknesses and dismiss them, point out weaknesses in the other side's case

Practical Tips for Appearing before the Immigration Judge

- Be on time; being on time is being late
- Be familiar with and comply with the statute and regulations, the Immigration Court Practice Manual, and the basic rules of evidence
- Be prepared – know key facts or have a sheet of important facts, like age and school, for reference
- Be organized – know your client and the documentation on record with the Court (tab your NTA!)
- Be civil

Advice on Effective Motions

1. Know the time and number limitations.
2. Ensure the correct “A number” is on the motion.
3. Follow the instructions and formats in the Immigration Court Practice Manual
4. Remember that the mere filing of a motion to continue or change venue does not relieve Respondent and counsel of their obligation to appear as scheduled.
5. Check your facts carefully.

Appeals to the BIA and Beyond

- Procedure
 - Never waive appeal
 - Appeal must be filed with the Board of Immigration Appeals within 30 days of the Immigration Judge's decision – 8 CFR § 1003.38
 - Form EOIR-26, Form EOIR-27
 - Transcript produced, briefing schedule set
- See BIA Practice Manual, also available online
- Litigate with Appeals in Mind; this makes for better litigators!
 - Board of Immigration Appeals
 - Administrative exhaustion
 - Standards of review
 - Federal Circuit Courts
 - Seek to advance the law
 - Interpretations change

Best Resources for the Immigration Practitioner

- INA and CFR (and other sources of law)
- Immigration Court Practice Manual
 - http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm
- USCIS and EOIR websites – www.uscis.gov ; www.justice.gov/eoir
 - INA and CFR
 - Policy memoranda
 - Forms and the Instructions
- Immigration Judge Benchbook
<http://www.justice.gov/eoir/vll/benchbook/>
- EOIR Virtual Law Library <http://www.justice.gov/eoir/vll/libindex.html>
- Kurzban's Immigration Law Sourcebook
- American Immigration Council Practice Advisories
www.americanimmigrationcouncil.org

Trying a Case in Immigration Court

GOOD LUCK!!!

Questions? Contact us (but be patient):

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