Chapter 3: The Immigration Court System

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

What is the immigration court system?

The Immigration Court system is located within the U.S. Department of Justice's Executive Office for Immigration Review (EOIR). EOIR exercises its functions and duties under the power of the Attorney General. Decisions of the Attorney General "with respect to all questions of law" are controlling unless overturned by a federal court.[1]

EOIR is comprised of 58 administrative immigration courts located throughout the United States and the Board of Immigration Appeals (BIA), an administrative appellate body. Immigration judges conduct removal hearings and decide whether or not a noncitizen can remain in the United States. Immigration judges advise noncitizens of their legal rights, hear testimony, make credibility findings and rulings on the admissibility of evidence, entertain legal arguments, adjudicate waivers and applications for relief, make factual findings and legal rulings, and issue final orders of removal. Immigration judges are administrative law judges, but they are not appointed pursuant to the Administrative Procedures Act.

What are the rules of procedure that govern immigration court?

There are several manuals/memoranda that you should review before appearing in immigration court.

Perhaps one of the most important tools when preparing to appear in immigration court is the EOIR Immigration Court Practice Manual[2] , which provides a comprehensive overview of the court's policies and procedures and is relevant for all immigration courts in the United States. Attorneys appearing in immigration court must follow the practice manual instructions, or else risk great detriment to their client's case.

In 2007, EOIR released the Interim Operating Policies and Procedures Memorandum (OPPM) 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children. This memorandum gives guidance to immigration judges on various issues impacting children in the courtroom including appropriate procedures and courtroom modifications to make the court more child friendly.

What should I expect when appearing in immigration court?

There are two types of hearings you will appear in while representing your client in removal proceedings. The first is a master calendar hearing and the second is an individual calendar hearing, also referred to as the "merits hearing."

What is the role of the clerk of the court?

Each immigration court has a clerk of the court who may be useful in answering questions regarding filing requirements, deadlines, and other miscellaneous questions that arise. This clerk does not work for an individual judge, but rather for the court itself.

Also, many immigration judges have their own individual law clerk. If you have a specific question regarding the child's case, you may call the court and ask to speak to the immigration judge's law clerk. This is the most efficient way of clarifying any problems that arise and the best way to ensure adherence to the immigration judge's specific requirements.

You should make sure to note the person you spoke with, as well as the day and time, in case there is a discrepancy that later arises regarding information that the individual law clerk or clerk of the court provided.

How do I notify the court and the government attorney that I am representing my client?

At or before your first appearance on behalf of a client in immigration court, you must file with the court, and serve upon ICE, Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative (called an E-28).[4]

How I can access the government files on my client?

Once retained, at the earliest opportunity, you should submit requests to the relevant government agencies to review the files they posses on your client. The principal file is the EOIR Immigration Court file. If your client is detained, there will also be an Office of Refugee Resettlement (ORR) file. Requests may be made under the Freedom of Information Act (FOIA) for information about your client in USCIS, ICE, and CBP files. These files may contain documents that clarify case history or are relevant to the client's claim. Although you can ask for expedited processing, requests should be made well in advance as the agencies may require four to six months to process your requests.

Requesting the ORR file. You may send a written request for a copy of a client's ORR file to the director of the Division of Children's Services (DCS).[5] This requires a fully executed copy of Form G-28 and a signed release from the client before releasing medical or psychological records. The request may take four weeks to process.

FOIA request. You may submit a FOIA request to the National Records Center seeking any and all immigration information on a client that the government has in its records. The request may be made using Form G-639. The form must be signed by the client and notarized, and a Form G-28 should be attached. If you are requesting an expedited process you must provide proof that your client is in removal proceedings. An expedited response may take about six weeks or more.

Reviewing the court file. You may review the client's immigration court file by arrangement with the immigration judge's clerk. You will also need to submit Form E-28 with the immigration court to access your client's file. When reviewing the file you should be given the opportunity to listen to taped transcripts of any of the appearances your client has made before the immigration judge. You should also be allowed to request copies of any of the documents contained in the file.

What is a Notice to Appear?

The Notice to Appear (NTA), Form I-862, is the charging document initiated by DHS that places your client in removal proceedings. The NTA states the exact charges DHS is alleging against the child

and the section(s) of the law allegedly violated. It is important to review the facts alleged and legal charges with your client. The client will be asked to plead to them at the master calendar hearing.[6]

Your client will either be charged as being deportable pursuant to INA § 237(a) or being inadmissible pursuant to INA § 212(a). How the child came to the United States will determine if the child is deportable or inadmissible. If your client was admitted to the United States prior to the issuance of the NTA, the child will be charged with being deportable. "Admission" is defined in INA § 101(a)(13)(A) as the "lawful entry of an alien into the United States after inspection and authorization by an immigration officer." In contrast, if the child entered the United States without inspection or was otherwise never legally admitted, the child will be charged as being inadmissible. In either case, the child will be facing removal from the United States.

What can I expect at a master calendar hearing?

A master calendar hearing is a short procedural hearing which may only last a few minutes. The main purpose of this hearing is for the child to admit or deny factual allegations contained in the Notice to Appear (NTA) and concede or deny removability. The NTA will also inform your client of the date and time of the initial master calendar hearing. Once a person is placed in removal proceedings they are referred to as "the Respondent."

The court usually holds master calendar hearings on the same day each week. The courtroom will be crowded with many people waiting to be called before the judge for their master calendar hearing. When the child's name (or A number) is called, you and the child will sit before the judge and discuss the case with the judge and the ICE trial attorney. Depending on the circumstances, there may be more than one master calendar hearing scheduled over a span of many months before the child will have her individual merits hearing.

Practice Pointer:
If you are appearing with a client for the first time at a master calendar hearing and are not prepared to plead, you may request a continuance for "attorney preparation." The immigration judges typically grant such requests for pro bono counsel and will schedule another master calendar hearing at which pleadings will be taken.

During a master calendar hearing, an immigration judge is prohibited from accepting an admission of removability from an individual under 18 years old who is not accompanied by an attorney or legal representative, near relative, guardian, or other adult representative. In the case of a minor under 14 years of age, DHS must personally serve the NTA on the person with whom the minor resides.[7]

The immigration judge will first rule on whether or not the child is removable as charged. This determination must be made before the child can seek any relief. DHS has the burden to establish that it has the legal right to remove your client before the immigration judge will entertain any potential avenues of relief from removal. If DHS cannot prove at the master calendar that your client is removable, the immigration judge will schedule a hearing to determine removability.

Once removability is established, the immigration judge will ask your client if there is any relief from removal that the child is requesting. It is imperative that you identify for the court each and every form of relief that your child client may apply for, even if such relief will not be applied for simultaneously. For example, if the child is eligible for both special immigrant juvenile status (SIJS) and asylum, you should inform the court that the child is seeking SIJS and in the alternative, asylum; the same is true if the child will seek voluntary departure in the event that other forms of relief are denied.

In addition, the court will ask if the child wishes to designate a country of removal should the child be ordered removed. In the case of an asylum claim, since the child is claiming a fear of returning to her country, the best practice, generally, is to decline to designate a country of removal, in which case the government will designate the child's country of nationality.

The master calendar is also the appropriate time to set a trial date and request an interpreter for future hearings if necessary.

What happens when my client is released from custody?

While a child is initially in ORR custody, ORR may determine that the child should be released to the care and custody of a "sponsor." A sponsor is a responsible adult, usually a relative of the child. If the NTA was already filed with an immigration court and the sponsor's home is in another jurisdiction, the child will need to request a change of venue from the immigration judge.

A motion to change venue must be properly served on the government and filed in the jurisdiction where the removal proceedings were originally brought, which is usually where the NTA was filed. Once the motion is granted, the child will be scheduled to appear before an immigration judge in the

new venue. If the motion is the attorney's first appearance in the case, the attorney will have to file a Notice of Entry of Appearance, Form E-28.

What is an individual calendar/merits hearing?

The individual calendar hearing, or the merits hearing, is where the applicant is given the opportunity to present evidence not only to establish eligibility for immigration relief but also to show that she merits a favorable exercise of discretion by the immigration judge. This hearing will be audio recorded (except for off-the-record discussions) by the judge and then subsequently transcribed if the case is appealed.

A merits hearing takes place in an immigration courtroom in front of a single immigration judge. Those participating in the hearing will include the child, the child's attorney, the judge, an interpreter if necessary, and the government trial attorney. Any witnesses that you intend to call will be required to wait outside the courtroom until it is their turn to testify.

Generally, removal hearings are open to the public. However, the immigration judge has the authority to order the hearing closed if there are sensitive issues or concerns about confidentiality. Often immigration judges are sympathetic to the sensitive issues surrounding a child testifying, particularly an unaccompanied minor child. If you think that your child client would benefit from a closed hearing, you should file a "Motion to Request a Closed Hearing" with the immigration judge prior to the date of the actual hearing. You should be prepared to articulate why your client would benefit from a closed hearing.

What should I expect at the individual calendar hearing?

While the immigration judge decides how each hearing is conducted, parties should be prepared to:

- Make an opening statement.
- Raise any objections to the other party's evidence.
- Present witnesses and evidence on all issues.
- Cross-examine opposing witnesses.

- Make a closing statement.[8]

The judge's role is to listen as well as to actively ask questions for clarification. It is not uncommon for the judge to interrupt testimony or the proceedings if she or he has an issue to clarify or follow up on.

The child presents her case first. Usually, the hearing starts with the child as the witness in support of the application. The immigration judge swears in the child and then you proceed with the direct examination of the witness.

After the conclusion of direct examination, the ICE trial attorney will proceed with cross-examination of the witness. The trial attorney's objective is to test the veracity of the witness's testimony and raise doubts about her credibility. The trial attorney may ask about specific dates or details or jump back and forth among various topics - testing whether the witness is easily confused or contradicts herself. After cross-examination, you may ask to be allowed to re-direct as a way of clarifying any questions that the trial attorney raised. Usually, the judge will allow some form of re-direct. The judge may also ask witnesses questions during direct or cross-examination. This process will then repeat itself for additional witnesses. The government typically will not present any witnesses.

At the end of the hearing, the judge may issue an oral decision immediately on the record, schedule a future hearing date for you and the child to return to receive an oral decision, or decide to provide a written decision - in which case either the decision will be mailed to the child or a continuance will be scheduled for her to return at a later time to receive the judge's decision.

How are motions, evidence, and objections dealt with in immigration court?

During direct testimony and cross-examination, oral objections to questioning by either side are permitted. You should refer to the EOIR Immigration Court Practice Manual for general guidelines on motions and courtroom procedure.

Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence formally apply in immigration proceedings (although they may be referred to for guidance). Overall, the admission of evidence in immigration court is extremely broad. The immigration judge "may receive in evidence any oral or written statement made by the respondent or any other person" if the statement is "material and relevant to any issue in the case."[9] Further, hearsay is generally admissible in

immigration court unless it is "fundamentally unfair."[10]

Most judges will deal with evidentiary issues prior to any testimony. You will offer documents into evidence (without having to lay a foundation through testimony). The trial attorney may make objections to the evidence, most often based on authentication, relevance, undue repetitiveness or hearsay. You should always argue that based on the relaxed evidentiary standards applicable in immigration court, any objection by the trial attorney should go to the weight of the evidence, not its admissibility. In response to an objection that a document is unduly repetitive (most often arising with respect to country conditions information), it is helpful to be able to pick out one particular issue from each report that is not necessarily covered by others. You can also argue that while the information contained within several reports is similar, they each come from distinct sources, which proves that it is more likely that the information is accurate and/or widely accepted.

Should I consider calling an expert witness?

Yes. The testimony of an expert witness may be a crucial part of the child's case. Many experts will agree to act as an expert for a reduced fee or waive it entirely. Expert testimony is often provided on the following subjects: (a) country conditions, especially when the U.S. Department of State Country Report on Human Rights Practices for the particular country does not sufficiently address the persecution at issue in the case or is incorrect in some respects; (b) medical doctors who can examine bullet wounds, scars, and x-rays to confirm that a particular condition likely resulted from the torture or abuse described by the child; and (c) psychologists or psychiatrists who can examine the child to confirm post-traumatic stress disorder or some other condition that resulted from the applicant's persecution or torture.

In preparing the expert, it may be helpful for you to give the expert a copy of the child's application and, if applicable, written affidavits and any other relevant pieces of evidence, so she can become familiar with the child's case. You should always obtain the child's permission before disclosing her statement to any third party, including an expert. It is helpful if the expert can prepare an affidavit and also be available to testify in person, or if the court will allow it, via telephone.

On cross-examination, the trial attorney may want to know exactly how much time the expert has spent evaluating the child (thus establishing the expert's ability to accurately assess the child's case) and to ensure that the expert is not giving generic but rather individualized testimony. You may consider speaking with the trial attorney prior to the individual hearing to see if the trial attorney will consent to the expert witness being deemed an "expert." This will preclude the need to spend time

questioning the witness on the stand regarding her or his expertise.

Finally, expert witnesses are often obtained from a non-local area and sometimes, outside of the United States. It may be expensive to have the witness appear at the hearing in person. An alternative is to have the expert witness testify by telephone. If so, the Immigration Court Practice Manual requires that a written motion to present telephonic testimony be filed with the immigration court.[11] Again, the immigration judge must approve the motion before proceeding with telephonic testimony. Some judges are greatly opposed to witnesses testifying telephonically.

NOTE: You should consult your KIND pro bono coordinator for guidance on a particular judge's preferences with respect to telephonic witness testimony.

Practice Pointer:
You are required to present a witness list to the court at least 15 days before the hearing. The witness list should include the name of the witness, the alien registration number if applicable, a written summary of the testimony, the estimated length of the testimony, the language in which the witness will testify, and a CV or resume for any expert witness.[12]

If you plan to present a witness at the individual hearing, some judges also require a written affidavit from each witness. You should clarify with the judge ahead of time to confirm if an affidavit is required.

Is it necessary for my client to testify in immigration court?

No. It is not always necessary for a child applicant to testify in immigration court. If the child is very young, traumatized, or has difficulty recalling substantive information, you may choose to have other adults testify who can substantiate the child's claim in lieu of testimony from the child. It is also possible to use experts including psychologists and therapists to testify to the events in support of the child's claim.

What if my client's testimony is inconsistent?

If you think that your client will have difficulty testifying or if you are concerned that your client's oral testimony will conflict with the written application, it is very important that you are able to provide persuasive evidence to explain these inconsistencies so that they do not undermine your client's overall credibility.

There are several plausible explanations for why your client's testimony may be inconsistent with submitted written documents. First, many seemingly inconsistent statements can be a result of interpretation or cultural particularities. Second, children suffering from traumatic events may have memory lapses and/or flashbacks, which may explain their failure to remember specific facts or details. Third, the hearing itself may be an intimidating environment for the child. The courtroom is full of unfamiliar adults and an ICE attorney conducting adversarial cross-examinations of your client and other witnesses. These circumstances may cause a great amount of anxiety in a child. This anxiety can contribute to memory loss or the inability to answer questions in the same detailed manner as in her written application.

It is your job to explain these factors to the judge if your client's testimony is inconsistent. You may also want to argue that any inconsistencies are in fact minor and not material to the child's claim. If you are making these types of arguments you should provide concrete evidence to the court to support your reasoning. Such evidence could include reports/statements/expert witnesses submitted in the form of exhibits.

What are the consequences of failing to appear for master or individual hearings?

If your client fails to appear for a scheduled calendar hearing, the immigration judge has the authority to order your client removed in absentia. This order can only be overcome by filing a motion to reopen the case. There is no guarantee that a motion to reopen will be granted and your client could be removed from the United States with an in absentia order of removal. It is essential that you warn your client (and sponsor, if applicable) about the drastic and often irreversible consequences of failing to appear for a hearing or any other type of government appointment. If the child is in removal proceedings, it is imperative that she attends all hearings.

How do I work with the ICE trial attorney?

In many cases, the ICE trial attorney may be amenable to working out issues before the hearing occurs. A trial attorney's enormous workload makes her or him likely to consider requests for continuances (within reason) and the stipulation of various issues. If you have a question or would like to know the trial attorney's view on an aspect of the case, you should call the trial attorney and discuss the case.

Practice Pointer:
Trial attorneys are often difficult to reach; it may take several attempts before finally reaching him or her. Also note that trial attorneys are not assigned to individual cases until a few weeks before the hearing. As the hearing nears, you may call the ICE Chief Counsel's office and ask which trial attorney has been assigned to the judge presiding over the child's case. If you have a question before the trial attorney has been assigned, you should contact the ICE Office of Chief Counsel and request to speak to the "duty attorney."

Will an interpreter automatically be provided for my client?

No. Interpreters are not automatically provided at individual hearings. If a child needs an interpreter, a request must be made either orally at a master calendar hearing or by filing a Motion to Request an Interpreter. You should also confirm with the court's law clerk a few days before the hearing that the court has arranged an interpreter in your client's language for the individual hearing.

Practice Pointer:
While the court provides its own court interpreter, it is advisable to bring your own interpreter if the child does not speak English well. This will enable you and your client to consult as necessary and will serve as a check on the accuracy of the court interpreter.

How do I prepare my child client for the hearing?

Testifying in court can be a difficult and emotional experience, even for adults. This adversarial setting can be even more difficult, trying, scary, and possibly traumatic for a child witness, particularly when the child has suffered in some way. The courtroom environment alone can be intimidating, not to mention that the child is forced to sit through repeated questioning and delays. A child's anxiety of being in a courtroom can be compounded by unfamiliar adult faces, a language they do not understand, and the novelty and strangeness of the courtroom's ceremonial procedures.

Because of the stress children may feel, they may be more likely to make mistakes in their testimony. The more comfortable you can make a child with the courtroom and the process of telling her story, the less likely it is that mishaps will occur. It is important to tell a child who will testify that it is okay to cry, ask for a break, ask for a question to be repeated, or say, "I don't understand." Have the child practice saying these things beforehand.

You should begin by familiarizing your client with what to expect at the hearing. One way to do this is to take the child on a tour of the courtroom before the hearing so she knows what the room will look like. You should also explain to the child the different roles of each individual (e.g., the judge, the trial attorney, the judge's clerk, etc.) and what the child can expect to see and hear at the hearing. It is important not to leave a child guessing the roles of the adults present in the courtroom or what will happen during the proceeding.

You should also attend a hearing, preferably with the same judge that your client has been assigned to, in order to become familiar with the procedures and courtroom environment.

NOTE: Please ask your KIND pro bono coordinator for helpful information regarding specific local immigration judges and trial attorneys.

Who's who in the courtroom? Help your client visualize the hearing.

The courtroom
It is likely that the child has never set foot in a courtroom before so it's best to start here. The child, depending on her age and exposure to American media, may also hold preconceived notions of the courtroom as a place for criminals. As mentioned above, it is important to familiarize the child with the seating arrangements and equipment used (e.g., immigration judges use voice recording devices to create a contemporaneous record of all immigration hearings in the event of an appeal) and to arrange to take the child into a courtroom beforehand, if possible. When visiting the court is not an option, showing the client photographs of the courtroom, engaging in role-playing activities, and watching the video "What Happens When I Go to Immigration Court?"[13] will help the child feel more comfortable with the process.

In addition, although courtrooms are set in their design and furniture, you may take minor steps to create a more child-friendly environment. For example, the childmay be encouraged to sit with a

trusted adult at the witness table or stand. Or the child may be allowed to bring a personal item for comfort (e.g., a favorite toy, blanket, book, or good luck possession).

Immigration judge
The immigration judge is usually the first person who comes to mind when thinking of the courtroom; the judge will most likely be the person who will stand out immediately for the child upon entering the courtroom. According to the Executive Office for Immigration Review's Operation Policies and Procedures Memorandum, judges are expected to be mindful of unaccompanied children in their courtrooms and to employ child sensitive procedures whenever a child respondent is present. Explain that the judge may be wearing a black robe and is usually seated behind a bench or platform or in a place of authority. Explain to the child that the judge may directly question her throughout the hearing.

Opposing counsel
The government lawyer in immigration proceedings, referred to as Assistant Chief Counsel (ACC) or trial attorney, is another potentially intimidating adult who the child will encounter in the courtroom. Explain the role that the government's lawyer will play in the proceedings, including that this person is not on the child's side and will be asking a lot of questions to find reasons why the child should not be allowed to stay in the United States. Explain that the child may encounter new ACCs or trial attorneys throughout the immigration court proceedings due to rotations within the Office of Chief Counsel's office. The appearance of a new face at the opposing counsel's table at each immigration court appearance may be confusing to the child.

Court interpreter
The role of the court interpreter should also be explained to the child. Upon request, the immigration court will provide an interpreter for the child's hearing. You should explain to your client that the interpreter will speak in the child's language throughout out the hearing. Similarly to the ACCs or trial attorneys, the child should not be surprised if there is a different interpreter at each court appearance. Explain the independent but important role of the interpreter, as well as the importance of clear communication and understanding between the child and the interpreter. The child should feel comfortable voicing any problems in understanding the interpreter and practice asking for clarification. Because the child's testimony is so crucial, try to have the interpreter spend a few minutes with the child before testimony is given to establish a rapport and ease the child's anxiety.

Child client
You should explain to the child the role that she will play in the removal hearing. Discuss the physical and verbal responses that may be expected from her the day of the individual hearing as a matter of procedure. For example, the judge may ask the child if she wants to be represented by you and if she

is ready to proceed with the hearing. The judge may also ask the child to state her true name and to stand up, raise her right hand, and swear to tell the truth. Practicing these procedural questions will make the child more at ease so that when the substantive questions are asked, the child feels comfortable in her ability to answer them confidently.

How do I teach my client how to answer questions in court?

Once you have made efforts to reduce the child's anxiety about testifying in the courtroom, you can focus on preparing the child for her own role. The child should be introduced to the basics of testifying.

The sworn oath
Explain to the child that she will be answering questions under oath and that an oath means that she must tell the full and complete truth. The judge may ask the child to state the difference between a lie and the truth to qualify the child as a competent witness. Although seemingly obvious, the child should be advised to always tell the truth, especially given the possibility of suggestibility.

Prepare your client for questioning
Remind the child that you, the trial attorney, and the immigration judge will take turns asking her a lot of questions. Remind the child to answer only the questions that she understands and to feel comfortable saying "I don't understand." Your client should not be afraid to ask for the question to be repeated as many times as needed or for the question to be asked in a different way.

Take note if you hear something that is a different response to a known fact by raising a concern to the court, such as whether the child understood the question or whether there was an interpretation error. Due to the possibility of such confusion and a child's deference to authority figures, your attentive ear must always complement a child's testimony.

Explain to the child the need to provide her answers in short sections in order to give the interpreter a chance to understand the answer and to translate it.

As mentioned above, you should tell the child that it is okay to cry, ask for a break, ask for a question to be repeated, or say, "I don't understand." Have the child practice saying these things beforehand. You should also watch for signs of fatigue or discomfort and request a break for a child.

Objections
The child should be made familiar with the practice of objections that both you and the government

lawyer may raise during the child's testimony. Further, explain to the child that she should wait for the judge to make a ruling on the objection before answering the question or being instructed not to answer the question.

Use child sensitive questions
You should use child-sensitive questions during direct testimony. The goal is to elicit a complete, accurate, and truthful version of the child's experiences. Language, voice tone, and phrasing of questions are important. For example, in questioning children, use short, clear, age-appropriate sentences and easy, one- or two- syllable words. As discussed earlier, children are more prone to suggestibility than adults, so avoid leading questions. These same principles also apply to trial attorneys and judges.[14]

In addition, immigration judges should be mindful that children are usually not able to provide the precision to which judges are accustomed with adult respondents. Judges may need to be reminded, where appropriate, that inconsistencies are not evidence of lying or dishonesty, but can be a product of the child's age, use of language, educational level, trauma, or anxiety.[15]

Keeping your client's voice
The child's story in her own voice should buttress the claim for relief. The child should not memorize her affidavit or declaration. The key to presenting a child's testimony is to enable the child to tell her story in her own words and in her manner of speaking. Let the child be heard. You should be so well versed in the child's story that you can guide her in presenting the necessary facts in her own terms. Allowing the child to tell the story in her voice and from her perspective validates the child's experience and helps to mitigate the effects of being forced to recount her tale of suffering to unfamiliar adults in a strange setting. While retelling a story can be difficult, some children find it is an opportunity to overcome or take control of a painful experience.

How does the immigration judge issue a decision?

Immigration judge decisions are usually rendered orally in the courtroom at the conclusion of the hearing. If it is not favorable, a decision about whether or not to pursue an appeal will have to be made without the advantage of a written decision or transcript. Because the Notice of Appeal must state the errors of law and/or fact to be reviewed, it is a good idea to have a colleague in the courtroom to take contemporaneous notes of the judge's decision. You may appeal a case before the Board of Immigration Appeals (BIA) or ask the immigration judge to reconsider. You should explain to the child that the appeals process can take many months and, if the child is in the care of the Office of

Refugee Resettlement (ORR), she may remain in government custody unless an ORR sponsor takes custody of the child.

What happens after the decision?

Once you complete the child's legal case, explain to the child what will happen next. For example, if a child is granted voluntary departure, advise the child to make travel arrangements and explain how the child is to confirm her departure from the United States with the U.S. government after arriving in her country of origin. If legal status is granted, warn the child about ways in which she could lose the immigration benefit recently granted. Do this both verbally and in a written letter in the child's language. Also, provide the child with guidance as to how to get a social security card and other documents. Finally, send a reminder letter to the child about completing any follow up phases of the case. For example, about 10 months after a child is granted asylum, send a letter advising the child that in two months time, she will be eligible to apply for adjustment of status. A follow up phone call to the child is also advisable.

How do I appeal if the immigration judge denies relief?

Immigration judge
Prior to filing an appeal with the Board of Immigration Appeals, the losing party can file a motion with the immigration judge to reconsider the decision. This must be done within 30 days of the decision and before filing a motion with the BIA because once a Notice of Appeal has been filed with the BIA, the immigration judge loses jurisdiction over the case. These motions are usually filed when you request that the judge reexamine or reconsider his or her own decision based on either new evidence or new case law.[16] Again, any motion to reopen or reconsider must be filed with the correct fee within 30 days of the decision and before filing a Notice of Appeal (Form E-26). See 8 C.F.R. § 1003.23.

The Board of Immigration Appeals
The Board of Immigration Appeals, which is part of the U.S Department of Justice's Executive Office for Immigration Review (EOIR), is the appellate administrative body for interpreting and applying immigration laws. The BIA is comprised of 15 Board Members, who are aided by staff lawyers. A Chairman and Vice Chairman share responsibility for BIA management.

Decisions rendered by immigration courts nationwide may be directly appealed to the Board of Immigration Appeals (BIA), headquartered in Falls Church, VA. The government (DHS) and the child may both file appeals with the BIA. Details about the requirements for an appeal before the BIA are

found in the BIA's Practice Manual available on the EOIR website.[17]

The BIA has jurisdiction to hear appeals from removal orders and other decisions rendered by any immigration judge. The BIA also hears some appeals from DHS proceedings involving a noncitizen, a citizen, or a business and the U.S. government. BIA decisions are binding unless modified or overruled by the Attorney General or a federal court. Most BIA decisions are reviewable by federal courts.

The majority of appeals reaching the BIA involve orders of removal and applications for relief from removal.

The BIA designates some decisions as precedential. These decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court. The precedential decisions are also published in bound volumes entitled Administrative Decisions Under Immigration and Nationality Laws of the United States.[18] Volume 24[19] contains a searchable subject matter index to decisions in Volumes 16 - 24.

Volume 15[20] contains a cumulative index to Volumes 1 though 15.

The BIA reviews findings of fact by the immigration judge under a "clearly erroneous" standard and applies a de novo standard to issues of law. Most appeals are decided after the submission of written briefs and are issued as written decisions. Oral arguments are allowed only on rare occasions.[21]

To file an appeal with the BIA, the appealing party must reserve the right to appeal at the time the immigration judge renders a decision in the case. If the losing party waives her right to appeal, the immigration judge's decision will become final.

NOTE: The "waiver" of the right to appeal violates due process if it is not "considered and intelligent."[22]

After the immigration judge issues the decision, the appealing party has 30 days to file the Notice of Appeal with the BIA. The Notice of Appeal must be filed along with an Entry of Appearance (Form E-27), and the appropriate fees or an Appeal Fee Waiver Request (Form E-26A)[23]. The BIA is strict about deadlines, even in cases in which there are special circumstances, thus it is highly recommended that all documents and forms, including the Notice of Appeal, be filed well in advance of the filing deadline to avoid dismissal of the appeal due to untimely filing.

Once the Notice of Appeal is received, the BIA will order a written transcript of the proceedings and

send the attorney a copy of the transcript together with a briefing schedule. This may take two or three months for a detained case and longer for a non-detained case. For this reason, it is a good idea for you to begin preparing the brief even before the transcript arrives. The BIA typically grants at least one three-week extension upon attorney request. However, any such requests need to be filed as soon as possible after receipt of the briefing schedule and before the deadline set in the schedule.

In the Notice of Appeal and brief, you may request that a three-judge panel review the decision of the immigration judge. Otherwise, a single judge will decide the appeal. Requests for a three-judge panel are evaluated based on certain factors.[24]

The filing of a direct appeal of a decision by the immigration judge in a timely manner, within the 30-day period, results in an automatic stay of execution of that order.[25] Unless the child waives the appeal, she will not be removed from the United States pending her BIA appeal.

Federal court review

Once the BIA decision is issued, the losing party (now referred to as the "petitioner") may be entitled to judicial review of the decision in the federal circuit courts of appeal. However, not all issues are entitled to judicial review by the federal circuit courts.

Although asylum is a discretionary form of relief, the court retains jurisdiction to review most aspects of the asylum determination pursuant to INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). However, INA § 208(a)(3), 8 USC § 1158(a)(3) limits review of several determinations related to asylum, such as whether an individual established changed circumstances or extraordinary circumstances regarding a delay in filing for asylum. Again, the prohibition does not apply to cases that raise a constitutional claim or a question of law. Not all courts agree on what constitutes a "question of law." The ninth and second circuits have held that questions of law include the application of statutes or regulations to undisputed facts, or mixed questions of facts and law. Therefore, in the ninth and second circuits, a decision on "changed circumstances" or "extraordinary circumstances" is a mixed question of law and fact over which the court has jurisdiction.[26]

A petitioner has 30 days to file a petition for review with the federal circuit court from the date the BIA renders its decision. The circuit court is determined by the location of the immigration court where the immigration judge completed proceedings. For example, if the underlying immigration judge decision took place at the Arlington, VA immigration court, the petition would be filed in the U.S. Court of Appeals for the Fourth Circuit.

There is no automatic stay of removal when filing for a Petition for Review. A separate request for stay of removal must be filed with the federal circuit court. If the petitioner is detained or is in danger

of being imminently removed, you should entitle it "emergency request for stay of removal."[27]

The federal courts give considerable deference to agency decisions, but they do not hesitate to reverse the BIA when error is clear, such as when the BIA fails to follow the legal reasoning of its own precedential decisions. INA § 242(a)(2)(D) provides federal courts have jurisdiction to review "questions of law," which include the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.

The federal district courts may review custody decisions by habeas corpus[28] and address systemic practice issues involving the application of statutory and constitutional law, such as detention conditions and practices. Habeas corpus also provides review of deportation orders for permanent residents (and perhaps others) who cannot obtain review through direct petition.[29]

Practice Pointer:
The law in this area is extremely complicated and varies dramatically by circuit. For additional reference, please ask your KIND pro bono coordinator. Further, the AILA Practice Advisory, "Applying For a Stay Of Removal During Federal Court Proceedings," is an extremely helpful resource.

Citations

[1]INA § 103(a)(1)

[2]http://www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressedPDF.pdf

[3]http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf[4]When you represent a client before EOIR and ICE, you must enter your appearance on Form E-28. A different form is used to enter your appearance before USCIS, Form G-28. You may need to complete Form G-28 several times during the proceedings, because it is necessary to specify on the G-28 form the purpose for which it is being submitted (e.g., for purpose of making a Freedom of Information Act (FOIA) request or filing Form I-360, etc.) Unlike the E-28, both the attorney and client must sign Form G-28.

[5]The office was known as the Division of Unaccompanied Children's Services until it was renamed in November 2011. Federal Register Vol. 76, No. 218

[6]See the immigration judges' master calendar checklist at http://www.justice.gov/eoir/vll/benchbook/tools/Script%20MC%20Checklist.htm

[7]See 8 C.F.R. § 103.5a(c)(2)(ii), 236.2 (2002).

[8]An example of a closing argument is provided by Regina Germain in AILA's Asylum Primer (5th Ed.); (American Immigration Lawyers Association 2005).

[9]8 CFR § 240.46(c)

> [10]*Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999).

[11]ICP Manual § 4.15(o)(iii).

[12]ICP Manual § 3.3(g).

[13]"What Happens When I Go to Immigration Court?" was created by the Women's Refugee Commission for attorneys to use with their clients. The DVD is available in several languages, including Spanish. Ask your KIND coordinator for a copy of this video if you are interested in viewing

it.

[14]For more examples of suggestions in questioning children, David L. Neal, Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Minors, US Department of Justice, Executive Office for Immigration Review, at Exhibit A (March 22, 2007), http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf

[15]DOJ, www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf (advising judges to "[n]ot assume that inconsistencies are proof of dishonesty, and recognize that a child's testimony may be limited not only by his ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults.")

[16]See 8 C.F.R. § 1003.23.

[17]http://www.justice.gov/eoir/.

[18]http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html

[19]http://www.justice.gov/eoir/vll/intdec/Vol%2024_pdf/Volume%2024%20Index.pdf

[20]http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html

[21]8 C.F.R. § 1003.1(d)(3)(i).

[22]See *U.S. v. Zarate-Martinez*, 133 F.3d 1194, 1097-98 (9th Cir. 1998).

[23]Forms and fee schedules are available at: http://www.usdoj.gov/eoir/formslist.htm

[24]8 C.F.R. § 1003.1(e)(6).

[25]8 CFR 1003.6(a).

[26]American Immigration Council Legal Action Center, *How to File a Petition for Review*, Feb. 28, 2011, http://www.ailf.org/lac/pa/lac_pa_041706.pdf. (citing *Taslimi v. Holder*, 590 F.3d 981, 985 (9th Cir. 2010); *Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007); *Chen v. United States* DOJ, 471 F.3d 315, 322 (2d Cir. 2006)).

[27]For more specific guidance on stays of removal, refer to "How to file a Petition for Review," Id.

[28]*Zadvydas v. Davis*, 533 U.S. 678 (2001) - The court held that habeas corpus may be used to bring statutory and constitutional challenges to post-removal order detention. This case addressed whether the government could detain a removable person indefinitely beyond the removal period. *Demore v. Kim*, 538 U.S. 510 (2003) - The court held that habeas corpus may be used to bring a constitutional challenge to pre-removal order detention. The court considered the constitutionality of the mandatory detention provision, INA § 236(c). *Clark v. Martinez*, 543 U.S. 371 (2005) - The court held that its decision in *Zadvydas v. Davis* also applied to government detention of persons found to be inadmissible.

[29]In *INS v. St. Cyr*, the Supreme Court clarified that the courts retain habeas corpus review of deportation orders, at least for permanent residents who cannot obtain review through direct petition at 325.