Navigating the Ninth Circuit

A Pro Se Guide for Immigrants in Removal Proceedings

PUBLIC LAW CENTER
PROVIDING ACCESS TO JUSTICE FOR ORANGE COUNTY'S LOW INCOME RESIDENTS

Berkeley Law

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Dedicated to Chen-Yuan Cheng

Colleague, Teammate, and Friend

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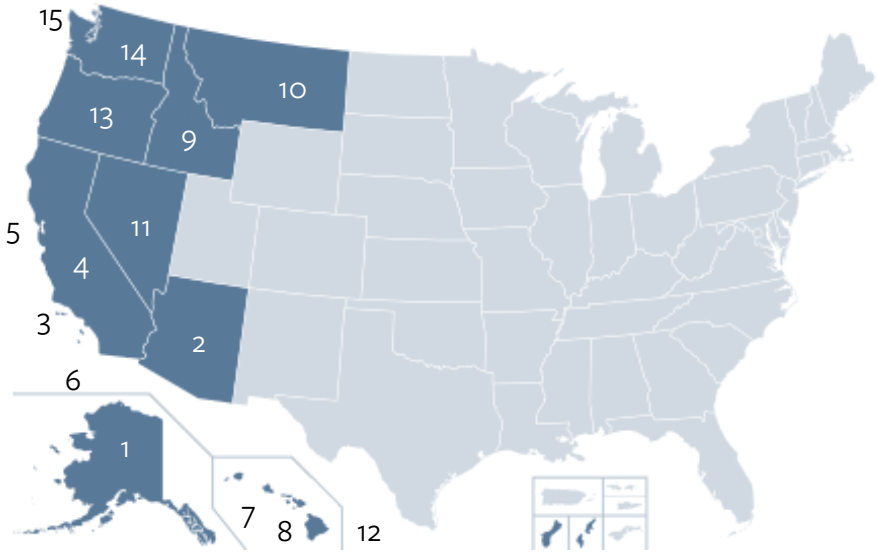
SECTION 1

GENERAL INTRODUCTION TO THE COURT

You are appealing your case to the Ninth Circuit…what does that mean?

The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) is responsible for appeals from courts in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the Northern Mariana Islands. It also has jurisdiction over Board of Immigration Appeals (BIA) decisions from those states. Previously, your case has been heard in immigration court, first by an immigration judge and then by the BIA. Now, you are moving to the general U.S. court system, where all appeals from all cases in the region are heard. This means you will encounter different rules and procedures than in the previous steps of your case. This guide will familiarize you with the differences.



Ninth Circuit Districts

1-Alaska
2-Arizona
3-Central District of California
4-Eastern District of California
6-Southern District of California
7-Guam
8-Hawaii
9-Idaho
10-Montana
11-Nevada
12-Northern Mariana Islands
13-Oregon
14-Eatern District of Washington
15-Western District of Washington

The court's physical headquarters are located at:
95 Seventh Street,
San Francisco, California 94103

The court's mailing address is:
P.O. Box 193939, San Francisco, California 94119-3939

Image retrieved from (https://www.ca9.uscourts.gov/judicial-council/what-is-the-ninth-circuit/)

HELPFUL TIP

It is essential that you keep copies of every document you send to the court and to opposing counsel (the government) as well as every document you receive. Keep them in a safe place! Also, please note that you will be filing all documents in paper form. Electronic forms are only for parties represented by an attorney.

Where will your case be heard?

1. **The Northern Unit:** Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington. (Oral arguments usually heard in Seattle or Portland)
2. **The Middle Unit:** Arizona, Nevada, Hawaii, Guam, Northern and Eastern California, and the Northern Mariana Islands. (Oral arguments usually heard in San Francisco)
3. **The Southern Unit:** Central and Southern California. (Oral arguments usually heard in Pasadena)

Who are the important people at the Ninth Circuit?

Judges:

There are 29 judges within the Ninth Circuit. These judges are appointed by the President of the United States. Cases are heard in a variety of ways to keep the system efficient. Your case will either:

1 **BE HEARD BY A THREE-JUDGE PANEL**

- After briefing (submitting your written legal argument) and oral argument.

2 **BE HEARD BY A THREE-JUDGE PANEL**

- After briefing and scheduling but *without* oral argument.

3 **BE PRESENTED BY STAFF ATTORNEYS**

- An oral or written screening panel is briefed and staff attorneys working for the judges present the panel with the case.
- Screening cases must:
- Be eligible for submission without oral argument under Federal Rules of Appellate Procedure (FRAP) Rule 34(a) (FRAP is defined and discussed on the next page) *and*
- Have a clear result based on applicable law established in the Ninth Circuit based on previously decided Ninth Circuit or Supreme Court cases (called precedent)

- If your case is denied by a screening panel, you can file for a petition for rehearing and/or rehearing en banc. (En banc traditionally means your case will be heard by all the judges in the court. However, because of the large size of the Ninth Circuit, it typically means a panel of eleven judges. It is very rare that requests for hearings en banc are granted.)

4 BE DECIDED THROUGH MOTIONS

- Common motions are described in Section 2 of this guide. In general, a motion is a formal request made to the court. It asks for a specific ruling or decision outside of the traditional pleadings and litigation.
  - *Pleadings* refers to the formal documents that you must file for court. In this case, you are filing a petition for review, which is described in length below.
  - *Litigation* refers to the entire process of getting a decision made by the court.

Judges are randomly assigned by a computer in the Clerk's office to panels. Sometimes, the court calls upon district judges and judges from other circuits to sit on panels when there are not enough Ninth Circuit judges available.

Clerk's Office:

The Court Clerk is vital to the court's functioning and will be your main point of contact at the court. The Clerk's office is responsible for certain procedural motions and for dismissing cases for failure to prosecute. The Clerk's Office handles all administrative functioning, so any inquiries about rules, procedure, or special handling should be directed here.

The Clerk's Office may be reached at:
(415) 355-8000
Clerk office hours are M-F 8:30-5pm

The Clerk sets the time and place of court calendars. The Clerk does not know which judge panel your case will be assigned to. The time and place of the Court calendars are set at least six months in advance. This calendar can be found at *https://www.ca9.uscourts.gov/calendar/court-sessions/* and in the Appendix at A.

Staff Attorneys:

Ninth Circuit staff attorneys work to review cases and assign a numerical weight to each case. They do not represent you, but work to rank your case based on type, issue, and complexity. This way, cases with similar legal issues can be grouped together for efficiency in hearing them. Staff attorneys also process all non-procedural motions filed before a panel is assigned to the case.

Federal Rules of Appellate Procedure (FRAP):

This is the set of rules that outlines the procedural requirements within the Court of Appeals. The Ninth Circuit also has its own local rules that augment the FRAP available at *https://www.ca9.uscourts.gov/rules/.*

What are the steps of an appeal to the Ninth Circuit?

The following graphic from the United States Court of Appeals for the Ninth Circuit, Office of the Clerk, provides a good outline of the steps you will need to follow to complete your appeals process.

Handling your own case: Three stages

This section will help you understand and manage the different parts of your case. You'll learn about the documents you must file with the court and the timing of each step.

To begin, review the chart below. It introduces the three stages of a case.

1 OPENING

- You file a petition for review.
- The court sends you a case schedule. You pay filing fees or get a waiver.
- You and opposing counsel may file motions.
- You respond to any court orders or motions from opposing counsel.

2 BRIEFING

- You submit an opening brief.
- Opposing counsel submits an answering brief.
- You may submit a reply to opposing counsel's brief.

3 DECISION

- The court decides your case.
- If you don't like the result, you decide whether to take further action.

PETITION FOR REVIEW

What is a Petition for Review?

Since you are reading this guide, you are probably challenging a removal decision made by the BIA. The first step to appealing this decision is filing a petition for review (PFR) with the Ninth Circuit.

Q: What is a PFR?
A: A PFR is the special name for the document that you will file with the Court to trigger a review of your immigration decision.

A PFR is filed by you (the petitioner) against the Attorney General of the United States (the respondent). Because you are going through this process without counsel (there is no lawyer representing you), you are considered a "pro se appellant." There are different rules and procedures for pro se appellants to follow, and this guide is meant to help you navigate them.

The PFR must be received by the Ninth Circuit no more than 30 days from the final administrative decision (final order of removal) from the BIA. The court has no authority to extend this deadline. The countdown begins from the day the BIA issues its decision, NOT from the day you receive the decision in the mail. This means that the date listed at the top of the BIA decision paperwork you receive in the mail is “day 1” in the count. The 30 day period is measured in calendar days, meaning it includes weekends and holidays. However, if the 30th day falls on a weekend or holiday, the PFR is due on the next business day.

If you have not received the BIA’s decision within these 30 days, you can file a motion asking the BIA to rescind and reissue its decision. This restarts the calendar for the 30 day period for filing the PFR. If you have to file this motion, it must be supported by some evidence demonstrating that the BIA’s decision was not received on time. An example of useful evidence would be a decision letter postmarked to you after the 30-day deadline.

A pre-made form version of a PFR can be found in the Appendix at B and in the Ninth Circuit Form 3 at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form03.pdf*, and examples can be found in the American Immigration Council’s practice advisory “How to File a Petition for Review” in the Appendix at C and at *https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf.*

PFRs are filed with the Ninth Circuit, not the BIA. Requirements for the PFR come from a combination of Section 242 of the Immigration and Nationality Act (8 U.S.C. section 1252), Rule 15 of FRAP, Ninth Circuit rules, and Ninth Circuit general order 6.4. They are summarized here.

A PFR must include:

- The name of each party seeking review (So in most cases, your name) either in the caption or the body of the petition
- Include your A-number in the caption
- The case number of your decision from the BIA to specify the BIA order to be reviewed
- The name of the Attorney General as the respondent
  - Look up who the current attorney general is here https://www.justice.gov/ag
- A statement of whether any court has upheld the validity of the order and, if so, the date of the court's ruling and the type of proceeding
  - In your case, you are appealing the BIA's denial of your stay of removal. The court has not upheld the validity of the order, so answer this question with "No."
- Include a copy of the BIA's decision (keep the original BIA decision provided to you and create a copy to enclose with your PFR)
- State whether or not you are currently in ICE detention
- State whether you have moved the BIA to reopen your case
  - Motions to Reopen are explained in detail in Section 5
- IMPORTANT NOTES:
  - Use letter-sized paper (8 1/2 inches x 11 inches)
  - English language only
  - Type in black ink or handwrite (neatly) using blue or black ink
  - Include page numbers
  - Use only one paper clip or staple
  - **Must** include a certificate of service, available in the Appendix at D and here *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form25.pdf*. This certificate must be attached to all documents you send to the Court and to the government.

        - This certificate should be included at the end of the petition for review, but it can reference all of the motions filed with the petition for review. STILL, each motion must be submitted individually as **separate documents** (including any motion to stay removal).
    - **Must** send all documents to the government at the office of the Attorney General, to the Department of Justice's Office of Immigration Litigation, AND to the ICE officer in charge of the district where the final removal order was entered. These addresses are as follows.

Attorney General:
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Department of Justice Office of Immigration Litigation:
U.S. Department of Justice
Civil Division
Office of Immigration Litigation - Appellate Section
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

ICE District Officer:
To find ICE officer name and address for the district your final order was filed in, visit: *https://www.ice.gov/contact/field-offices*.

TIP: It is a good idea to call the office to confirm the name of the District Director and the address. You may record the name and address here for future use:

_____

- If it makes sense for your case to be joined to another (for example, your immediate family is also filing PFRs), two or more people can join the petition for review
    - Must list each petitioner's name and A-number.

FILING FEES

It costs $500 to file a PFR. This fee is paid directly to the Ninth Circuit. If you cannot afford this fee, you can file a motion to proceed in forma pauperis, which waives the filing fee. This motion must be filed alongside a supporting affidavit. There is a fillable affidavit available from the Ninth Circuit as Form 4 available in the Appendix at E and at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form04.pdf*. This motion is described in further detail later on in this guide.

Q: What is an affidavit?
A: It is a signed document that formalizes a statement made to a court. By signing an affidavit, you are signaling to the court that what you are saying is accurate and truthful and thus can be used as official evidence.

INITIAL MOTION FOR STAY OF REMOVAL

What happens while you wait for a decision?

Unfortunately, an appeal to the Ninth Circuit does not mean that you are safe from being deported. To be able to stay in the U.S. while you wait for your decision, you can file a motion for a "stay of removal." This type of motion asks that you NOT be removed while your case is in progress. Once you file this motion, you are automatically granted a **temporary** stay. This means that you cannot be removed while this motion is being decided.

Because it is very important to submit your motion for stay of removal as quickly as possible (preferably alongside your PFR), it is common for appellants in your position to submit a simple initial motion using the form provided by the Ninth Circuit (Form 27). Once you submit this initial motion as a placeholder, the Ninth Circuit allows fourteen days of extra time in which you can supplement the motion with additional details and facts.

The form for a stay of removal is available in the Appendix at F and as Form 27 at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form27.pdf.* Given Form 27 is a general form, you can also find instructions for Form 27 in the Appendix at F and at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form27instructions.pdf*.

It's important to remember that stays of removal are held to a high standard by the court and are evaluated for very specific criteria:

- Whether the stay applicant has made a strong showing that your case is likely to succeed on the merits. That is, that you have strong arguments for why the Ninth Circuit should overrule the BIA and decide in your favor.
- Whether the applicant would be irreparably injured absent a stay. For example, whether you would be able to fight your case from abroad if you were deported, whether you would be placed in physical harm if you were deported, and whether you would be able to legally return to the U.S. if you were deported.
- Whether issuance of the stay will substantially injure the other parties interested in the proceedings. In your case, "other parties" is the government. The government will never be substantially injured if you are granted a stay, however, you will be. Make sure to reiterate this point: the government will not be prejudiced in any way in the event of a stay, but you will be severely prejudiced if a stay is not granted for the reasons above.
- Where the public interest lies. In cases like yours where the government is the respondent, factor 3 and this factor merge. Plainly state that this is the case by saying that "factors three and four merge." The court will understand what you are saying.

As such, it is important that your motion for a stay of removal includes details and facts about your particular situation. This includes the merits of the legal issues you are raising in your case, but also the hardships you would face if removed. An example of a motion for a stay of removal is available in the Appendix at G.

How to file motions is explained in more detail in Section 2 of this guide. Remember that this motion should be made at the same time as the PFR but as a separate motion in a separate document. And of course, make sure to include a certificate of service available in the Appendix at D and at:
https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form25.pdf.

After you file a motion for a stay of removal, the government has 12 weeks to file a response to your motion. Then, once their response is given, you have seven days to respond back.

MOTION FOR APPOINTMENT OF PRO BONO COUNSEL

The court only provides free lawyers as it deems necessary. Unfortunately, it is rare to receive an appointment of Pro Bono Counsel (free legal representation) as a pro se appellant unless unusual circumstances apply. To ask for pro bono counsel, you can use Form 24 available in the Appendix at H and here: *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form24.pdf.*

Include in this motion why you think your case was wrongly decided and how a pro bono lawyer would help you win your appeal (language difficulties, complicated legal issues, etc.).

SECTION 2

COMMON MOTIONS

A motion is a legal document that asks the court to do or decide something in your favor. They are your way of communicating with the court throughout your case and asking them to grant a request or decide a part of the case in your favor. The Ninth Circuit has provided forms for pro se petitioners to use as a guide when writing a motion. You should use the correct motion form as required, clearly state what you want the court to do, give legal reasons why the court should do what you are asking, and tell the court when you would like it done. You can find all these forms in the Appendix.

GENERAL REQUIREMENTS

How do I file motions?

Because you are representing yourself, you will file all of your motions in hard copy, mailed to the court and to the government. When filing a motion you should:

1. **Make three copies**: You should make three copies of any and all documents you file with the court. You will send one to the court, one to the government, and keep one for yourself. It is very important that you keep a copy of everything you send to the court and all papers that are sent to you. Put everything in a folder and keep it in a safe place.
2. **Attach a certificate of service**: You must attach a signed "certificate of service" to every document you send to the court and to the government. Find a blank "certificate of service" in the Appendix at D, which you can copy and fill out as needed.
3. **Send to the correct address**: Before you put anything in the mail, it is important that you make sure you have the correct and current address. You should send the government's counsel a copy of every document you send to the court.
    - The court's mailing address is: P.O. Box 193939, San Francisco, California 94119-3939
    - You can find the government's address in the "notice of appearance" that was sent to you after you filed your PFR. The notice states the name and address of the attorney. You can copy the address here for easy reference:

      _____

What is the required format for motions?

You will present your motions to the court in writing, unless the court orders otherwise. All motions must be in black ink on white, standard sized paper (8.5 by 11 inch), and must be printed on a single side of each page. All pages must be bound together by either one paperclip or a staple. Text should be double spaced and in a professional, 14-point font (e.g. Times New Roman). You can also submit handwritten motions.

On either a cover page or the first page of your motion, you must include:

- Your case number/docket number, which can be found at the top of the letter the court sent recognizing your petition for review. This number must be included on everything you send to the court. You can write your case number here for reference: _____
- The name of the court (Ninth Circuit)
- The name of your case
- A brief descriptive title of the document (eg "motion for stay or removal," "motion for extended time to file")
- Your name

How long can my motions be?

A motion and a response may not exceed 20 pages or 5,200 words unless the court permits or directs otherwise. A reply to a motion by the government may not be more than 10 pages or 2,600 words unless the court permits or directs otherwise.

Drafting a motion

A motion should state what you want the court to do (the "relief sought"), the legal basis for that request ("grounds for the motion"), and any facts or legal arguments necessary to support your argument.

When drafting your motion, you should reach out to the government and ask their position by writing a letter to the address for opposing counsel in your "notice to appear" (you may have copied it onto the previous page). While you do not need to share your position with the government before serving them with the motion when you submit it to the court, it can be helpful to ask what they plan to do in response. They may disagree and plan to argue against your motion, they may be neutral, or they may even agree with you and want to support your motion. Whatever their stance, you should include their position in your motion if possible and, if needed, argue against it. However, it is likely that you will not receive a response from the government. If you could not contact them, acknowledge that you reached out and did not hear back. Make sure you meet any deadline for filing your motion. **Waiting to hear back from the government is not an acceptable excuse for missing a deadline.**

In addition, your motion should include the name of the merit panel your case is assigned to, if you know who they are. If you need a response from the court by a certain date to avoid irreparable harm, you must specify **that date in bold on the caption page of your motion.**

Finally, you must include any required accompanying documents. Most motions have required documents you will need to attach and file with the motion. These include any declaration or other paper necessary to support the motion. A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate document attached to the motion packet.

Your motion does not need to include:

- A separate brief or document with additional arguments supporting your motion or responding to the other side.
- A notice of motion.
- A proposed order.
- Other irrelevant or unnecessary documents.

Responding to the other side's motions

When the government files a motion, you are allowed to file a response within 10 days unless the court shortens or extends the time. This response should include your best argument against the motion if you disagree with it, including facts that you feel the other side has described inaccurately or in a way that implies something that is not true.

If you file a motion and the government files a response, you may file a reply to their response within 7 days. A reply is not required, and you should only submit a reply if you feel that you have something to add or a specific point to make in response to something they said.

If your response or reply requests that the court take an action to grant you some kind of relief (e.g. granting an extension of time or a stay of removal), the document's title must say so.

MOTION FOR A STAY OF REMOVAL

What is motion for a stay of removal?

As discussed in Section 1, a motion for a stay of removal asks the court to stop immigration officers from removing you from the U.S. while your case is in progress. Filing your petition for review with the Ninth Circuit does not automatically prevent immigration officers from deporting you. You should submit a motion for stay of removal as soon as possible, preferable with your PFR when you file for appeal with the Ninth Circuit.

When and how do you submit a stay of removal?

To make sure you are not removed from the country you should file your first motion for stay of removal at the same time as your PFR or as soon as possible after. This is very important, particularly if you are at risk of being deported to a country with a strong deportation pipeline (e.g. Mexico, Hati, Guatemala, Honduras). In some cases, failing to submit a motion for stay of removal can lead to deportation within 24 hours. You should submit the motion in the same mailed packet as the PFR but as a separate document (e.g. staples or paper clipped separately).

You most likely will not have the time or all of the information you need to write a compelling motion right away. The most important thing is that you submit a short motion (you can use Form 27 as a guide, which you can find in the Appendix at F) as soon as possible. Once you have submitted your motion for stay of removal, you temporarily cannot be removed from the U.S. until the court rules on your motion. You should contact the ICE district officer you filed your PFR with (discussed in the Petition for Review section, above) to notify them that you have filed the motion and so you cannot be removed.

Once you have submitted your initial motion, you have 14 days to file a supplemental motion with all of the information supporting your case or to file a motion for extended time. You will almost certainly file a motion for extended time (described below). Make sure you file this motion within the 14-day window. Otherwise, the government will be able to file a motion opposing your temporary stay, and they may be able to cancel your temporary stay.

To write a compelling motion for stay of removal you will need access to the Certified Administrative Record (CAR), which is the document containing all of the information about your immigration court trial and your appeal to the BIA. The court system is slow moving and will likely take a month or more to make the CAR available, so it will not be available within the 14-day window. As such, the court is very likely to grant your motion for extended time so you can use the CAR in writing your motion for a stay of removal.

When deciding on a new deadline to ask for in your motion for extended time, check in your case opening packet (the first packet of documents the court sent you) for the "Initial Scheduling Order." The Initial Scheduling Order should include a due date for the CAR. In your motion for extended time, you should request a new deadline of 21 days after the CAR is due to the court.

Motion for Stay of Removal Timeline & Checklist:

- The day you file your PFR, file an initial motion for stay of removal. This can be simple and straightforward, using Form 27.
- Within 14 days of filing the initial motion for stay, file your motion for extended time. Ask for a deadline of 21 days after the CAR due date listed in your Initial Scheduling Order. Proceed like the court has granted this order.
- On or before the new deadline 21 days after the CAR is submitted to the court, file your supplemental motion for stay or removal (see details below).

What should you contain in your supplemental motion to stay removal?

To win your stay of removal, you must show the court four things: 1. That you have a strong case and your appeal is likely to succeed, 2. That not granting the stay will cause you irreparable harm, 3. That there is no risk of harm to the opposing party (in your case, the government), and 4. That it is in the public interest to grant your stay. In your case, the first two elements are the most important, while numbers 3 and 4 merge together into one prong since the government interest *is* the public interest.

Where do these rules come from?

America has a "common law" legal system, meaning that laws come from both the statutes passed by Congress and also previous court decisions on the subject. In writing your motion for stay of removal and your opening brief, you will read cases from the U.S. Supreme Court and the Ninth Circuit that deal with issues similar to the ones you are arguing in your case. Quoting rules and examples from these cases in your brief can help strengthen your argument to the court.

While this can seem intimidating, a well written supplemental motion is worth the effort. If you argue these three points clearly, the court is likely to grant your motion for a stay of removal. See the Sample Motion in the Appendix at G for a sense of how to format and argue your motion.

The rules for winning a motion for stay of removal were established in a Supreme Court case called *Nken v. Holder,* 556 U.S. 418 (2009). This and other cases that might be helpful in your research are available to you in the Ninth Circuit Immigration Outline at: *www.ca9.uscourts.gov/guides/immigration-outline*

1) Showing you have a strong case: You will hear this referred to as showing that you are likely to "succeed on the merits." This just means showing that you have a strong case and are likely to win.

This is the most important part of your motion and is where you argue the key details of your appeal. What did the BIA decide that was incorrect? What evidence do you have to show that they were wrong? You do not have to include every argument you will make in your appeal, but make your strongest arguments here.

2) Irreparable harm if not granted: This is the second most important part of your motion. You should describe how you will be harmed if the stay is not granted and you are removed. Key arguments include:

- Any fear of physical harm or persecution you will face in your home country
- The logistical difficulties in continuing your case from abroad (mailing documents to the court, appearing for oral argument, collecting evidence and talking to witnesses who are in the U.S.)
- That there is no process for DHS to return you to the U.S. if you win after being deported. If you succeed in your case, there is no process for the U.S. government to repair the harm done to you by deporting you.

3) Harm to the government and the public interest: Here, you will address any concerns the government has over granting your stay of removal. While this varies from case to case, key themes include that you are not a flight risk or a risk to society (if you do not have a criminal record, point that out. If you do, find ways to demonstrate that you are not a danger).

What happens after you submit?

After you file a motion for stay removal, the government has 12 weeks to file a response with the court. If the government responds, you may file a reply within 7 days (which starts on the day the government serves you the reply) telling the court why the government's reply is incorrect.

You get a temporary stay until the court can rule on the motion. It may take several months for the court to decide if they should grant your stay. If the court grants your motion, immigration officials may not legally remove you from the country while your case is being decided by the Ninth Circuit. If the court does not grant your motion, your immigration case will continue but immigration officials are legally allowed to remove you from the U.S.. If removed, you will continue your case from abroad.

Emergency Proceedings

You will only submit an emergency motion if you have reason to believe that you are at a high risk of being deported before the court can process your motion. Generally, you do not need to file an initial motion for stay of removal on an emergency basis. However, if your motion for stay has previously been denied, you may find yourself in a situation where your removal is imminent and remaining in the country requires that you submit your motion for stay or reconsideration as emergency motions.
Your motion should be labeled "EMERGENCY MOTION UNDER CIRCUIT RULE 27-3" on the cover page, along with the date you need a ruling by, and should be accompanied by a Circuit Rule 27-3 Certificate for Emergency Motion (Form 16). You can find the form in the Appendix at I and at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form16.pdf.*

After filing an emergency motion to stay removal, you should contact the motions unit by phone at 415-355-8020 (may be subject to change, confirm online) or email at emergency@ca9.uscourts.gov. Note that the filing or pendency of any motion for stay of removal does not stay or vacate the briefing schedule.

MOTION TO PROCEED IN FORMA PAUPERIS

What is a motion to proceed in forma pauperis?

Motion to proceed in forma pauperis asks the court to waive your $500.00 filing fee. You should submit a motion to proceed in forma pauperis with your PFR but bound separately, with only the motion and supporting affidavit.

What should you include in a motion to proceed in forma pauperis?

- Reasons why you cannot pay the filing fees.
- Information about your financial statement.
- A sworn statement that you do not have money to pay.

The Ninth Circuit provides a form (Form 4) that you can fill out instead of drafting the motion from scratch. (Appendix E)

MOTIONS TO EXTEND TIIME OR EXCEED LENGTH LIMITS

In general, briefs and motions should follow the page limits dictated by the court and should be filed on the schedule provided by the court. In situations where you need additional time to file your motion or your motion might exceed the page limit, you can try to move for an exception, though there can be a high bar to get an exception for length requirements.

Moving for Extended Time

Briefs:
If you need more time to finish your brief, you can file one time per brief for an extension of up to 30 days by filing a Streamlined Request for Extension of Time to File a Brief (Form 13), you can find the form in the Appendix at J and at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form13.pdf*, and mailing it to the Clerk. Form 13 can be used once per brief. This form is easy to use. You only need to include your case number, case name, your name, original due date of the motion, and your requested due date. You must file Form 13 on or before your original due date. If you miss the deadline and submit the form after, the court can dismiss your case.

If you have already filed for an extension for this brief or you need more than 30 days you will need to submit a Motion for Extension of Time by filling out Form 14. You can find the form in the Appendix at K and at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form14.pdf)*

Unlike Form 13, which is due on your original due date, the motion for extended time must be filed at least 7 days before your existing deadline. If you fail to submit Form 14 at least 7 days before a brief is due, the court can dismiss your case.

On the first page of Form 14 you will provide your identifying information, indicate what document you are requesting an extension for, and explain why you need more time. You cannot submit the form without explaining why you need additional time, but you can honestly say why you need the extension. On the second page, you will indicate if you have previously submitted Form 13 or Form 14 for this specific document, as well as your detention status.

On the third page, you will explain in more detail why you need additional time for the brief. Because a 30-day extension is available through Form 13 for briefs, the bar for Form 14 extensions for briefs is higher. You must show that you have done your best to meet the deadline and that the delay is unavoidable.

You should also reach out to the government to find out if they intend to oppose your motion or if they are okay with extending the deadline. It is possible they will not respond. If so, simply include in your motion that you reached out to find out their position.

If you have submitted a request for extended time and the court does not respond by your original due date, act as though the court has granted your request and take the time you asked for.

Motions:
The process for moving for extended time on motions is simpler. Form 13 only applies to briefs. You will file for extended time on a motion with Form 14. You do not need to fill out page 3 of Form 14 for a motion. Instead, you only have to fill out all of the sections on page 1, including an explanation of why you need extended time, and page 2. This is the Form you will fill out to move for extended time for your supplemental motion for stay or removal, with the reason for extended time being that you need time with the CAR to write a complete motion.

Moving to Exceed Length Limits

Opening and answering briefs may be 50 pages, or up to 14,000 words, while reply briefs can be up to 25 pages or 7,000 words. The court is strict about length limits, and is unlikely to grant a motion to exceed length limits unless there are unusual circumstances and a strong need. If at all possible it is better to edit your brief down to the allowed size.

If you submit a brief that exceeds the permitted length without a motion for an extended length the court will automatically reject it. If the court denies your motion for an extension you will have 7 days from the time the court makes its decision to submit a new, revised brief that complies with the page limit.

To move for an extended page limit, **on or before your brief's deadline** you must submit:

- Your full and completed brief at its full length
- A motion explaining why the extra pages are necessary. The motion should provide details explaining the unusual circumstances of your case and why it requires additional length.
- A completed Certificate of Compliance for Briefs (Form 8) (you can find the form in the Appendix at L and at:

https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form08.pdf
certifying the word count and checking the box that the brief, while longer than the word count, is accompanied by a motion explaining the length.

If you submit a brief that exceeds the permitted length **without** a motion for an extended length the court will automatically reject it. If the court denies your motion for an extension you will have 7 days from the time the court makes its decision to submit a new, revised brief that complies with the page limit.

MOTION TO SEAL OR PROCEED UNDER INITIALS

In most appeals, all files are available to the public. Sometimes it is unsafe for an appellant to have their name or details of their case available to the public. In these situations, you can move to "seal" all or part of the case record, meaning that the sealed documents become unavailable to the public, or move to proceed under initials, in which case the record remains public but you are only referred to by initials and not by name. You can file either one or both of these motions.

Generally, courts need a good reason to consider one of these motions. There is a strong preference for keeping information public. However, if you feel there are risks to you if your case details become public you can overcome that preference by demonstrating a serious risk of irreparable harm in your motion. You will usually need to include evidence of the risk or danger to you with a motion to proceed under initials.

What is the difference between a motion to seal and a motion to proceed under initials?

Motion to Seal:

There are two kinds of motions to seal. First, you can move to seal a document. This means that only the court can read that particular document and it will not be available to the public. This kind of seal only affects the specific documents sealed. The other option is to seal the entire case. This way, the entire case record is kept from public view, and you do not have to keep filing new motions to seal sensitive documents. Sealing the case provides maximum privacy but it also requires a more convincing argument to the court.

Even if you win the motion to seal the case, the court's final decision on the case will likely still be public. Although all the other case documents will be private, the final decision is almost always available for public viewing.

To ensure complete privacy, you may wish to also file a motion to proceed under initials, so that your name is not included in the public final decision. An example of a motion to seal the case is available in the Appendix at M and here *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form19.pdf*.

Should you move to proceed under initials?

You should consider a motion to proceed under initials if you fear someone will harm you or attempt to harm you if they see your name in the case record. The court can grant a motion to proceed under initials to protect you from harassment, injury, ridicule, or personal embarrassment.

To build a case to have your motion to proceed under initials granted, you must show 3 things:

1. That the potential harm of your name being made public is severe,
2. That your fears are well-founded and reasonable,
3. That the person or people you fear are currently able to harm you or will be able to in the future, and that you are vulnerable to their retaliation.

The court will weigh the risks of publishing your name against any challenges proceeding anonymously will create for the government. Contact the government to find out if they plan to oppose your motion. It is possible that the government will not object to proceeding anonymously. Even if the government does not object, you have to write a convincing brief that will show the court the risks of publishing your name to overcome the court's preference for publishing information.

Should you move to seal?

You should consider a motion to seal if there is information in the case record that you believe puts you or your loved ones at risk. While sealing the entire case record may be preferable because it provides complete privacy and security, it is also more difficult to convince the court to seal the entire record. You should consider if you can accomplish your goal by sealing specific documents or by asking the court to redact certain information before making the record public. Information you may want redacted includes the names of your family or loved ones, locations, people who have harmed you, or other personally identifying information.

When drafting your motion to seal, you should specifically state what you are asking the court to do. Explain which documents and information you are asking them to seal.

Keep in mind that there is a strong norm of making records public, and focus on explaining why every piece of information you want to seal is necessary to accomplish your goal. Where possible, provide concrete examples of how publishing the record will cause harm. To grant your motion, the court will need to find that there is a "compelling reason" to keep the documents private that has a "factual basis" and does not rely on "hypothesis or conjecture." This means that, where possible, it is helpful to include specific examples of what you are worried will happen if the documents are published and why your concerns are well founded.

How do you move to seal or proceed under initials?

To move to seal or proceed under initials, you will write a motion that is no more than 20 pages. In the motion, you will explain **what you are asking the court to do** and **why the court should grant your motion**. Open with a clear statement of what action you want the court to take. You can ask for the court to seal the record and to proceed under initials in the same motion. Then, explain what harm could happen if your name or case record are published, and why those concerns are well founded. Be as specific as you can, focusing on specific facts and examples from your life.

When you first file, both the motion and the documents you are asking to be sealed will be temporarily sealed until the court makes a final decision. If you are moving to seal only specific documents, you must put the words UNDER SEAL on the cover or first page of all of the documents you want to seal.

MOTION TO HOLD IN ABEYANCE

A motion to hold in abeyance means asking the court to put your case on "pause" while other legal matters resolve. Given the patchwork of immigration proceedings, it is possible that you have other means of relief that are slowly making their way through the courts. If the Ninth Circuit has granted a stay of removal pending your appeal, putting your appeal on pause can help you remain in the country while those other options get resolved.

Should I consider moving for abeyance?

The decision to move for abeyance is a complicated one that, if possible, should be discussed with a lawyer. Generally, people move for abeyance if they are close to getting an alternate form of relief.

If you are eligible to stay in the U.S. through another program (e.g. Deferred Action for Childhood Arrivals), have a path to a visa (e.g. the U visa program or a family member becoming eligible to apply for a relative visa), or are being removed because of a criminal conviction you are having overturned, it may be worth considering moving for abeyance. Alternatively, if there is another case pending that might change the law in a way that positively impacts your case, you can move for abeyance.

How do I move for abeyance?

To move for abeyance you should submit a motion of under 20 pages to the court explaining what alternate form of relief you are anticipating and how it will impact the case in front of the Ninth Circuit. It is important to emphasize how it will change the situation in your case and how continuing before the decision is made in your other case would not be a good use of the court's time and resources. Instead of drafting the motion from scratch you can fill out Form 27 or use it as a guide (you can find Form 27 in the Appendix at F and at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form27.pdf.*

When moving for abeyance, it is important to contact the government's counsel. In some cases the government may agree that the case should be paused and may support your motion. In other cases they may oppose your motion for abeyance. In this case it may be worth asking if the government would consider supporting a request for a long extension on your next brief instead to buy time for your other court decisions. You can ask the court for abeyance and offer an extension on your brief as an alternative in the same motion.

MOTIONS FOLLOWING BIA RULING ON REOPENING/RECONSIDERATION

Having filed an appeal with the Ninth Circuit, you have already encountered court decisions you disagree with, and you may encounter more, both during your case or after the final decision.

Motion to Reopen:

While appealing your case to the Ninth Circuit, it is possible that you also filed a motion with the BIA to reopen your case.

Such motions are made if there is new evidence available that you believe might change the BIA's decision in your case, like if the conditions in your home country have changed in a way that puts you at higher risk, if you have newly overturned convictions, if the law has changed in a way that makes you more eligible for relief, or if your personal circumstances have changed in a way that impacts your case. If the BIA denies your motion to reopen, you can move to have the Ninth Circuit review that decision on top of their review of the BIA's initial decision against you. You can read more about motions to reopen in Section 5 of this guide.

What if the BIA granted my motion to reopen?

If the BIA grants your motion to reopen, the Ninth Circuit no longer has anything to review since the BIA's decision against you is no longer final. You should contact the government and jointly bring the reopening to the court's attention. The Ninth Circuit will then dismiss your case, and you will proceed with the BIA rehearing. If the rehearing ends with a decision against you, you can then file another PFR with the Ninth Circuit.

Why move for Ninth Circuit review?

With the BIA denying your motion and the Ninth Circuit already reviewing your underlying case, it can seem strange to move for review of the denial to reopen. Simply put, filing for Ninth Circuit review of this second BIA decision gives you more bites at the apple. It provides a fuller record for the Ninth Circuit to review, letting them examine all of the evidence and the lower court's decisions. Because the Ninth Circuit can only review the record you have appealed, appealing the motion to reopen allows you to introduce new evidence and arguments that were not in the initial record.

How do I petition the court to review the BIA's decision not to reopen?

Luckily, once filed, the PFR for the decision not to reopen will be consolidated with your ongoing appeal and go forward as one case, so there will not be additional paperwork after the initial PFR. To file the PFR, you will mail the court a packet containing:

1. Either a Petition for Review of Order of a Federal Agency, Board, Commission, or Officer (You can find the form in Appendix at B) or a document containing the required information.

You can choose to either fill out the standard form or create your own document. The process to submit this PFR is the same as your initial PFR. If you create your own statement, it must include:

- Your name
- Your assigned A-number
- Naming the Attorney General as the respondent
- A clear statement of what you are asking the court to review
- If you've appealed the order to any other court
- A statement that you already have a case before the Ninth Circuit and your current case's case number
- Whether you are detained by DHS or at home and, if you are detained, if you have applied for a change in status

2. The BIA order denying your motion to reopen

3. A Certificate of Service

We recommend using Form 3 to streamline the process, mailing in that Form with a copy of the BIA order attached. Upon receipt, the court will automatically consolidate the petition with your ongoing case as long as you have provided the case number.

Motion for reconsideration:

There are two types of motion for reconsideration. One happens while your case is ongoing, while the other challenges the final decision.

Why would I file a motion for reconsideration during my case?

The court makes a lot of decisions throughout your case that shape what you can argue and how you present your case, which in turn shapes their final decision. From denying a motion to proceed in forma pauperis and thereby requiring you to pay unfair fees to requiring documents be released to the public record, these decisions can have a significant impact and can be challenged if you think the court has made the wrong decision.

How do I move for reconsideration during my case?

A motion for reconsideration is due within 14 days of the date stamped on the court order. Your motion can be no more than 15 pages, and should clearly state which court decision you are disputing.

It is important that your reconsideration motion isn't simply a recital of your original motion that was denied. Instead, you should focus on what you think the court got wrong. Did they misunderstand a key fact? Did they mistake the law? Have important circumstances changed in a way that you think will alter their decision? These are the things to highlight in a motion for reconsideration.

Important: If you are filing for **reconsideration of a denial for a motion for stay**, the motion for reconsideration does **not** prevent you from being deported. While you cannot be deported when the court is initially considering your original motion for stay of removal, the same is not true when you file a motion for reconsideration. If there is a risk that you will be immediately removed within 21 days you must submit the motion for reconsideration on an emergency basis. This means you should contact the court and the government as soon as possible to let them know about the emergency and submit your motion as quickly as you can. Your motion should be labeled "EMERGENCY MOTION UNDER CIRCUIT RULE 27-3" on the cover page, along with the date you need a ruling by, and should be accompanied by a Circuit Rule 27-3 Certificate for Emergency Motion (Form 16). You can find an example of Form 16 in the Appendix at I.

How do I move for rehearing after the final decision?

If the Ninth Circuit decides against you, you can move to have your case considered one more time. Your case can be decided in one of two methods. Either the court will simply state its decision in a few paragraphs, called an "order." In that case, you will file a motion for reconsideration. If, instead, the court issues a multipage decision called a "memorandum disposition" or "opinion," you will instead file a petition for rehearing. There is no significant difference between the two petitions/motions, but you may hear them called different things.

In either case, you will have 45 days from the date the order is issued to respond with a motion of no more than 15 pages. Like the motions for reconsideration, this motion should not simply restate your case or express your disagreement with the outcome. Instead, focus on specific places you believe the court made errors. Compelling arguments include:

- They misunderstood or overlooked key facts that support your case.
- They have misstated or misapplied specific points of law.
- There have been other cases or legislation since your case that impact the law and how it applies to your case.

Your final packet that you submit to the court must include:

- Your motion of no more than 15 pages
- A copy of the Ninth Circuit's final order or opinion
- A Certificate of Compliance for Petitions for Rehearing/Responses (Form 11) (You can find the form in the Appendix at N and also at here: https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form11.pdf)

Your motion for rehearing will likely be heard by the same three judges who heard your case. In exceptional circumstances, you can also move to have your case reheard by eleven judges of the Ninth Circuit (referred to as en banc). These petitions require exceptional and unique legal questions.

If the court grants your motion for rehearing they can rule on the case without a hearing or can schedule a new hearing.

SECTION 3

MERITS OF AN APPEAL

RECORD ON APPEAL

Certified Administrative Record

Federal Rules of Appellate Procedure require that the lower court provide a Certified Administrative Record of an agency. That record must include:

1. the order involved;
2. any findings or report on which it is based; and
3. the pleadings, evidence, and other parts of the proceedings before the agency.

In your case, the BIA will provide a record to the Ninth Circuit that includes their final decision in your case and all of the pleadings, evidence, testimony, and records from your case before the BIA.

Should there be documents which are distorted and difficult to read, a clearer copy of the document is recommended to be submitted. This is important because the Ninth Circuit will base its decision on the facts and evidence contained in the record.

New evidence is generally not allowed to be presented for the first time on appeal. However, in certain circumstances and as may be allowed by the court, a request may be made for the court to take judicial notice of a fact not previously placed in the record. This is a high standard, however, and your case will likely be primarily decided on the basis of the record coming out of the BIA (unless you later file a PFR for a denial of a motion to reopen and the record of that denial is combined with your original record). In a case decided by the Supreme Court, out-of-record evidence may be considered in any of the following instances:

1. the BIA considers the evidence; or
2. the BIA abuses its discretion by failing to consider such evidence upon the motion of the applicant.

Filing the Record

The record must be filed with the Circuit Clerk within 35 days of service of the PFR. Please note that it is the BIA and not you who is responsible for filing the record. By filing your PFR, you have triggered the BIA's responsibility to file the record. The Clerk must notify all parties of the date when the record is filed and you will receive a copy by mail.

The agency must file either of the following:

- the original or a certified copy of the entire record or parts designated by the parties; or

- a certified list adequately describing all documents, transcripts of testimony, exhibits, and other materials constituting the record, or describing those parts designated by the parties.

If no record or certified list is filed, the parties must stipulate the same with the Circuit Clerk and the date when the stipulation was made shall be treated as the date when the record is filed. The agency must retain those portions of the record (if any) not filed with the Circuit Clerk and submit them to the court, if the court or a party so requests.

Briefs

In your opening brief (appellant's brief), you should clearly state the facts, issues, and arguments that you wish to present. As you will be representing yourself, the court will not be as strict with the technicalities that should be presented in regular briefs. Nevertheless, be mindful of the important information that should be included in your brief. This information includes:

1. Disclosure statement (if required);
2. Table of contents;
3. Jurisdictional statement;
4. Statement of the issues presented for review;
5. Statement of the facts relevant to the issues, relevant procedural history, and rulings;
6. Summary of the arguments made in the body of the brief;
7. The argument, which must contain the appellant's contentions and reasons for them; and for each issue, statement of the applicable standard of review;
8. Short conclusion stating the relief sought; and
9. Certificate of compliance (if required).

To guide your drafting of your opening brief, the Ninth Circuit provides a "Petitioner's Informal Opening Brief (Immigration)" Form. This is available in the Appendix at O or at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/Informal-Opening-Brief-Form-Immigration.pdf*. (NB: there is an alternate version of this form for non-immigraiton cases. Make sure you are using the immigration version). You can either fill out this Form or use it as a guide in drafting your opening brief.

In drafting your opening brief, keep in mind that you need to be specific in presenting your arguments. The more details there are, the better. Also, remember that you are trying to convince the court to overturn the BIA's decision against you. Aside from narrating your facts, you will also have to demonstrate that the BIA made a mistake in its decision. Present in detail what you believe the BIA decided incorrectly, misunderstood, or got wrong about your case.

When drafting your opening brief, expect that the government will try to undermine your arguments. Do not be disheartened by their counterarguments and be firm in your case. Your credibility will be tested as you present your arguments; it is important to point to every page of evidence that supports your truth and mention and refer to the exhibits that you have filed in court before. Remember to use the CAR to help you with this. It will contain a record of all the documents you filed, as well as a transcript from every hearing you attended.

When drafting your briefs, reference to "appellant" and "appellee" should be minimized. Instead, use the parties' actual names or the designations previously used in the BIA proceeding, or other descriptive terms (e.g. "the employee," "the injured person," etc.).

Appellee's Brief / Answering Brief

The government may file an Appellee's Brief to respond to your arguments. Remember that the opposing party in your case is the U.S. government. In the Appellee's Brief, expect for the government to attack your arguments. They may deny outright the information you stated in your brief, or they may admit to the facts you described but attempt to persuade the court that, even if these facts are true, that they do not support changing the outcome of your case.

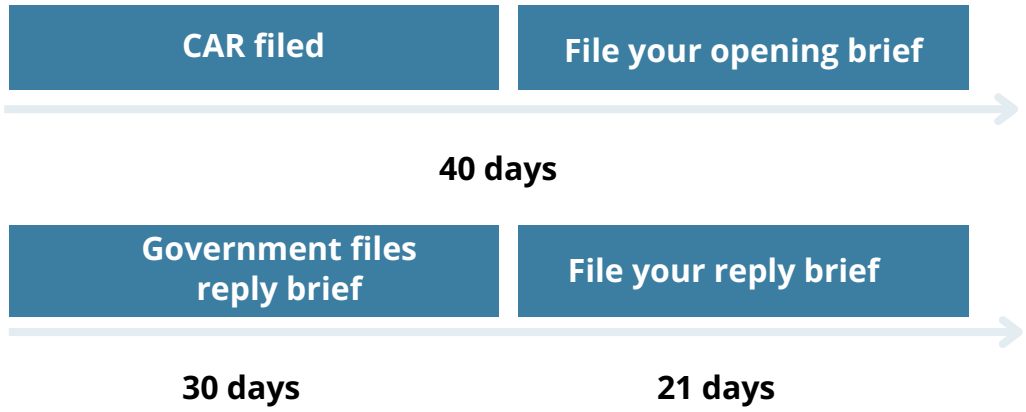
For example, imagine that in your opening brief, you stated the fact that you were tortured by a private citizen. However, you do not show that your home country government participated in or was connected to the torture. The U.S. government may say that it is a harmless error or that even if it were true that you were tortured, it was not your home county's government's doing. They may argue that, although you were tortured, because the government did not do it, you are still not entitled to relief. This is an example of the type of argument the U.S. government may make.

Reply Brief

After the Appellee's Brief is filed, you have the chance to counter the government's arguments by filing a reply brief. In fact, it is strongly recommended that you do so. Your reply should not be a restatement of all the arguments made in your opening brief. Instead, you should focus specifically on the arguments made in the Appellee's Brief.

For instance, in the torture scenario above, if the torture indeed happened and it happened at the hands of your home government, explain your side by providing more detailed information on the government's involvement to convince the court that you are telling the truth.

Timeline



It is very important to remember the timeline for briefs and ensure all briefs are filed on time. Failure to do so will allow the government to move to dismiss your case.

Your opening brief must be served and filed within 40 days of the record (CAR) being filed.

The government will file their Appellee's Brief and serve it to you within 30 days after you file and serve them with your opening brief.

Should you wish to file a reply brief, your reply is due within 21 days after receiving the government's Appellee's Brief. However, your reply must also be filed at least 7 days before your argument is scheduled unless the court, for good cause, allows later filing. If you receive the Appellee's Brief less than 28 days before argument, file it 7 days before argument or move the court for extended time.

Additional Requirements

In addition to the requirements provided above, the briefs must also comply with the Ninth Circuit Local Rules on the Statement of Jurisdiction, Bail/Detention Status, Reviewability and Standard of Review, Statement of Related Cases, and Addendum to Briefs. While these rules should be followed, you will be given a lot of leeway by the court on these technicalities since you are representing yourself. Again, you are not necessarily required nor expected to be able to present the same type of work as a lawyer will do, but you are encouraged to follow these rules as closely as possible.

1. Statement of Jurisdiction

Before your statement describing your case in your initial brief, you should include a statement demonstrating that the BIA court that heard and denied your appeal falls under the jurisdiction of the Ninth Circuit. State, in the following order, that:
The statutory basis for the BIA's subject matter jurisdiction over your original case;
The BIA decision you are appealing is final and appealable, and the statutory basis of jurisdiction of the Ninth Circuit; and
The date listed on the top of your decision from the BIA.

2. Bail/ Detention Status

Your opening brief must contain the following statements:

1. Whether you are detained in ICE custody or at liberty and/or
2. Whether you have moved the BIA to reopen your case or applied to the ICE District Director for an adjustment of status.

3. Reviewability and Standard of Review

For every issue stated, you should indicate where in the record on appeal the issue was raised and ruled on, and you should also, where possible, identify the applicable standard of review. If a ruling complained of on appeal is one which a party must have objected at a trial to preserve a right of review, you should point to where in the record on appeal you made the objection.

4. Statement of Related Cases

If you have any other related case pending in the Ninth Circuit, you should identify them in a statement on the last page of your opening brief. Otherwise, no statement is required.

The most common time you would need to include this information is if you had also filed an appeal of the BIA's decision on a motion to reopen. See Sections 2 and 5 for discussions on motions to reopen.

5. Addendum to Briefs

An addendum must be submitted with the opening brief. The addendum must be separated from the body of the brief by a distinctively colored page if the addendum is bound with a brief.

For orders challenged in immigration cases, all opening briefs filed in counseled petitions for review of immigration cases must include an addendum.

This addendum must include the orders being challenged, as well as orders of the immigration court and BIA, if any. The addendum shall be bound with the brief. You are not expected to provide the detailed citations or formatting that you may see in an addendum produced by a lawyer. As an unrepresented party proceeding in forma pauperis, you must file 4 legible copies with the Clerk, and only one copy must be served on the government.

Brief Format

1. Cover

The front cover must contain:
The case number centered at the top;
The name of the court (Ninth Circuit);
The title of the case;
The nature of the proceeding and the name of the BIA;
The title of the brief, identifying your name

2. Paper Size, Spacing and Font

The brief must be written on a standard 8 ½ by 11 inch letter sized paper. The body must be double-spaced. It is recommended to use Times New Roman font, size 14. You may also hand-write your brief.

3. Length

The opening brief may not exceed 50 pages or 14,000 words. The reply brief may not exceed 25 pages or 7,000 words.

ORAL ARGUMENT OR SUBMISSION

Appellate cases are decided by three-judge panels. Once the briefs are submitted, the court will consider whether to set the case for oral argument.

Not every case will be set for oral argument; most of them are not. If a case is not set for oral argument, it will be decided on the briefs, also known as being decided "on submission." This is not a negative comment on the case. It may mean that the briefs of the case were competently prepared and were enough for the judges to reach a decision.

Most pro se cases will be decided without oral argument. If the court decides that your case does not need an oral argument, you can request one by filing a motion explaining why oral argument should be permitted.

Similarly, if you do not want an oral argument, you can request to submit the case without oral arguments by filing a motion to submit the case on briefs, in which you should explain why oral argument should not be permitted.

In the unusual case that your case is scheduled for oral argument, you will be assigned a pro bono attorney by the court at no cost to you. A pro bono attorney is a licensed attorney who has volunteered to work your case free of charge. This attorney will argue your case before the three-judge panel and will work with you to review the work you have done so far on your briefs.

Notice of Oral Argument

If your case is scheduled for oral argument, there will be two kinds of notices that you need to pay attention to.

The first is the pre-calendaring notice, which will identify the month when the case is being considered for arguments. If you have conflicts with the dates, discuss the issue with your pro bono attorney. They will respond to the court within 3 business days by using Form 32 (accessible in the Appendix at P) or at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form32.pdf*).

Another notice is the hearing notice. This notice will schedule the date and time of oral arguments and will be distributed approximately 10 weeks before the hearing date. However, the 3 judges assigned to the case (the list of which will be posted on the court's website on the Monday of the week before the scheduled argument), have the last word on whether it is necessary to have oral argument for the case. If all of the judges agree that it is not necessary, then the case will be submitted without arguments. Make sure to stay in touch with your pro bono attorney and check the court's website the Monday of your scheduled argument for any last minute changes.

Timing of Oral Argument

The timing of oral arguments depends on several factors, including the type of case and whether there are related cases before the court. You can expect that your oral argument will be scheduled approximately 6 months after all the briefs in the case have been filed.

Location

The court sits in different places every month. Typically, cases are heard in the administrative units in which they arise.

But if you want an earlier argument date, you can notify the Court Clerk that you are willing to travel and can have your case placed on any available argument calendar, regardless of location.

The court may decide to conduct oral argument remotely. If so, all of the judges and parties will appear by video or telephone. If oral argument is held by video, court staff will contact you at least 2 weeks before the scheduled argument to: 1) determine the method of connecting to the video conference, 2) obtain the telephone number and email address at which you may be reached on the day of the argument, and 3) send you a link, which can be used to test the connection with the court.

PRO SE ASSISTANCE

It is admirable that you are undertaking the process of an appeal alone. However, due to the complexity of the immigration law, it is recommended that you should seek out qualified professional representation if possible.

A. To find yourself a lawyer

If you need legal advice but cannot afford a lawyer, you may wish to consider the following options.

Court-appointed lawyers:
You can ask the court to appoint a volunteer lawyer to represent you free of charge. While these appointments are rare, you can be provided with an attorney if the judge thinks there are unique or complex legal issues that require a lawyer or if there are other unusual circumstances. To request a lawyer, you must file a motion for appointment of counsel using Form 24, available in the Appendix at H or at *https://cdn.ca9.uscourts.gov/datastore/uploads/forms/form24.pdf*. There is more information on how to request a lawyer in Section 2 of this guide.

Low-cost legal services:
Another option is to seek free or low-cost help from a legal aid organization in your area. There are attorneys, bar associations, and non-profit organizations willing to provide legal services to people in your position at little or no cost. You can find the lists of free legal service providers nationwide at *https://www.justice.gov/eoir/list-pro-bono-legal-service-providers.*

B. To understand the procedures and rules

Additionally, the Court can provide some support if you have difficulties understanding the procedures. Even though court employees cannot give you legal advice, the Clerk's Office may answer your questions about court procedures or rules. Do not hesitate to ask for clarification on any court procedures or rules that you find unclear or challenging.

C. If you need English language assistance

All papers you file with the Ninth Circuit must be in English. At this time, the court is not able to accept, translate, or process paperwork in other languages. Therefore, if you need help understanding and completing your court papers in English, you should seek legal aid as described above or find someone with strong English language skills who is available and willing to support you during your case.

D. Other resources and instructions

1. Basic information about the Ninth Circuit:
https://www.ca9.uscourts.gov/information/

2. Forms and instructions you may need in the proceeding:
https://www.ca9.uscourts.gov/forms/pro-se-litigants/

3. Federal rules of appellate procedure, Ninth Circuit Rules, and Circuit Advisory Committee Notes: *https://cdn.ca9.uscourts.gov/datastore/uploads/rules/frap.pdf*

4. Guides provided by the Ninth Circuit:
https://cdn.ca9.uscourts.gov/datastore/general/2018/12/06/Pro%20Se%20Immigration%20Case%20Opening.pdf

SECTION 4

MOTION TO REMAND

The parties to an immigration proceeding (i.e. both you and the government) may request to move the case back to the BIA before the Ninth Circuit has issued a decision. This request is made through a motion to remand. If the Ninth Circuit grants a parties' motion, the case will return to the BIA without the Ninth Circuit weighing in on the merits of the case.

You may approach the government's counsel to request moving together to remand the case when there has been some new development in the case. The way to request this would be to write a letter to the government outlining the exact reasons why you think you are entitled to remand. It could be because of a change in government policy, a significant change in the law, or a change in your applications for alternative forms of relief (e.g., a U visa application).

Furthermore, another reason that you could use for your request for remand could be based on discretion. ICE has issued memoranda on who they deem "enforcement priorities." In other words, who they think the government should be prioritizing for deportation. If, upon looking at this criteria, you decide that you don't meet the definition of enforcement priority as established in an ICE memo, you could reach out to the government and request judicial closure and/or a motion to remand on the basis of discretion.

The address for the government's attorneys is:

U.S. Department of Justice
Office of Immigration Litigation
Civil Division/Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

If the government agrees with the reasons, it could agree to file the motion to remand, or it could agree to file a motion for judicial closure. This type of motion takes the case off of the court's active docket, and allows the government the time to review the facts and law and determine whether a remand is warranted.

The government may be more willing to join a motion to remand in certain cases depending upon the current government policies. For example, during the transition from the Trump to Biden administrations, the government's stated intent to re-evaluate its immigration policy could have acted as a good driving force for the government to join a motion to remand.

1-https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf

In some cases, the government may initiate discussion on the possibility of a joint motion to remand to the BIA. Most commonly, this would occur after your opening brief is filed, i.e., the very early stage of Ninth Circuit court proceedings. Motions to remand that are filed later in the process may be perceived as wasteful of judicial resources, particularly as the date of argument or submission draws near.

If the government indicates openness to remand, you may decide to join the government in filing the motion, take no position, or oppose the government's motion to remand. There are several factors that the you should consider while deciding your next step including:

• ***Your best interests*:** This might include an interest in speedy resolution of the case (or extending the case) and the possibility of the BIA denying your appeal again if the case is returned to the BIA without the Ninth Circuit correcting their errors. **Important**: The stay of removal that applied during your Ninth Circuit case may end when the case is remanded to the BIA.

• ***Strength of the case under current law*:** You may consider the current state of the law by following the latest news and trends in the immigration laws and the likelihood of positive change, as well as any hope for further development of the factual record.

• ***Possible outcome before the Ninth Circuit*:** For many cases, the best possible outcome will be remand to the BIA, as outright decisions from the Ninth Circuit are rare. In that case, a joint motion to remand may get you the best outcome without the risk of a denial from the Ninth Circuit.

• ***Opportunities for leverage*:** You may be able to use the government's desire to remand to ensure the motion includes language favorable to you. For example, language setting out the scope of remand in helpful terms, or statements confirming that your removal will continue to be stayed upon remand, or asking the government to make a joint request with you for mediation.

MEDIATION

Mediation is a procedure in which the parties discuss their disputes with the assistance of a trained impartial third person(s) who assists them in reaching a settlement. It may be an informal meeting among the parties or a scheduled settlement conference. Parties to a mediation proceeding are expected to make good faith efforts to negotiate and come to a settlement agreement.

However, there are no legal penalties if they fail to do so. The case moves back to the court if the mediation fails. In many types of cases, such as family disputes, mediation is a mandatory step before a case can be heard in a court, but this is not true for immigration cases. However, it can be a speedy and less-costly path for reaching agreement about a case or issue.

Although, generally, mediation is not available for pro se litigants, a mediation can take place if both parties agree to it. The government may suggest mediation if they believe it would be helpful in deciding on whether to file a motion for remand or for judicial closure. Mediation may be warranted when your circumstances have changed and/or you have become eligible for alternate forms of relief (there is a change in the government's policies, U visa application, etc.).

Mediation may occur at any point during your case and may allow the government to consider a broader range of factors or finalize negotiations prior to a joint motion to remand.

The Ninth Circuit offers a mediation program at no cost. The purpose of mediation is to resolve disputes without long litigation.

SUMMARY DISPOSITION OR DENIAL

In some cases, the government may file a motion for summary disposition or summary denial. Summary disposition is when the case is decided on its merits (essential facts and issues involved in a case) without waiting for the case to be fully briefed and argued, and summary denial is when the court denies a petition without considering the merits of the case. The Ninth Circuit grants summary disposition only when there is a clear error in the BIA decision or intervening legal authorities require granting or denying the PFR; or when it is obvious that the questions presented for review "are so insubstantial as to not justify further proceedings."

These motions may be filed at any point in the process, though are usually filed prior to the government's submission of its answering brief. You will have the opportunity to respond to the government's motion, arguing that the merits of your case warrant full presentation rather than a summary disposition or denial. If the court grants the motion, it may dismiss or deny your case prior to the conclusion of briefing.

GRANT OF PETITION

The best outcome in the Ninth Circuit is a grant of your PFR. The court may grant the PFR in whole or in part. Granting the PFR in part would mean that the court only agrees with you on some of the issues raised.

The court will grant the PFR either in a published opinion or in an unpublished decision. Published opinions set a standard for future cases, while unpublished decisions decide only your particular case. Whether published or unpublished, the decision is final for your case. As with all other filings, you will be notified via mail from the court when the court has posted a decision to the docket. Both published and unpublished decisions are also generally made available for public review on the court's website.

In most cases, granting the PFR will result in the Ninth Circuit remanding the case to the BIA for further proceedings according to the Ninth Circuit's opinion. If the Ninth Circuit gave a final decision upon certain aspects of your claim, the BIA may not be able to revisit those issues at the time of remand and will simply have to adhere to Ninth Circuit's decision. Depending on the phase of your case and the nature of the court's decision, you may wish to file a motion to remand to the Immigration Judge (IJ) once the case has returned to the BIA.

DENIAL OF THE PETITION

If the court denies the PFR, there are two options for further review.

First, you may file for rehearing of the petition, either by the same 3-judge panel or by all active Ninth Circuit judges sitting en banc (a panel of 11 judges). In PFRs of BIA decisions, you must file for either or both types of rehearing within 45 days from the date of the decision of denial, though extensions are permitted.

A petition for panel rehearing is appropriate when the panel has overlooked a relevant point of law or fact in deciding your case. The petition should clearly point out the panel's mistake.

Rehearing en banc may be warranted when the court's decision conflicts with controlling precedent (earlier decisions by the U.S. Supreme Court which the Ninth Circuit is bound to follow, or previous decisions by the Ninth Circuit itself), or involves a question of exceptional importance.

Rehearing en banc is an exceptional remedy and requires a majority of the active judges of the Ninth Circuit to vote in favor of rehearing the case. You may request both forms of rehearing in a single filing or may submit separate requests.
Filing a petition for rehearing automatically stays the issuance of the mandate (discussed in the next section).

In the Ninth Circuit, petitions for rehearing are limited to 15 pages or 4,200 words and must include a certificate of compliance.

Second, you may file a petition for a writ of certiorari (where the higher court reviews the decision of the lower court) with the U.S. Supreme Court. Parties must file their petition with the U.S. Supreme Court within 90 days of the date of judgment of the Ninth Circuit. If a petition for rehearing has also been filed with the Ninth Circuit, the 90-day certiorari filing deadline runs from the date of denial of rehearing or entry of judgment on rehearing. Parties may file a request to extend the deadline with the Justice (Judge) assigned to cover the Ninth Circuit.

Petitions for writs of certiorari are rarely granted, but the Supreme Court may be inclined to hear cases in which the Ninth Circuit's decision creates or deepens a circuit split (two different circuit courts giving contrasting opinions on the same type of issue) or where there are other compelling reasons for the court to weigh in. There are several factors for you to weigh when considering a petition for certiorari, including the cost and likelihood of a positive outcome.

MANDATE

The court's opinion or order explains the court's reasoning and the disposition of the case. However, the opinion is not considered final until the mandate is issued. The mandate is the mechanism by which the Ninth Circuit deprives itself of jurisdiction over the case (the ball is no longer in the Ninth Circuit's court) and, if the PFR has been granted, returns the case to the BIA for further proceedings. The mandate itself is usually a stamped or certified version of the court's decision in the case, rather than a separate, formal document.

The Clerk's office will issue the mandate 7 days after the time to file for rehearing expires (45 days) or 7 days after a timely petition for rehearing is denied. This means that in PFRs of a BIA decision, the mandate will be issued 52 days (45+7) after the Ninth Circuit's decision if neither party moves for rehearing. Any stay of removal granted by the Ninth Circuit will remain in effect until the issuance of the mandate.

Filing a petition for a writ of certiorari does not automatically stay the issuance of the mandate. However, if a party plans to file with the U.S. Supreme Court, they may request the Ninth Circuit to stay the issuance of the mandate for up to 90 days, with the possibility of extension. Such stays are generally only granted if the court believes the case presents a substantial question for the U.S. Supreme Court and that there is good cause to stay the mandate.

SECTION 5

COLLATERAL RELIEF WHILE APPEAL IS PENDING

While your appeal of the BIA's holding in your case is pending before the Ninth Circuit, there are two steps you might be able to take to help your case. First, if you received inadequate legal advice from an attorney at earlier stages of your immigration proceeding, you may be able to raise a claim of ineffective assistance of counsel. Second, if you are at risk of being deported because of a criminal conviction in California, you may be able to try to get the conviction vacated under a California state law provision.

INEFFECTIVE ASSISTANCE OF COUNSEL

If you feel that you have received ineffective assistance from your immigration attorney before the immigration judge, you can file a claim.

What is the Fifth Amendment? Why does it matter?

The Fifth Amendment of the Constitution says "No person shall … be deprived of life, liberty, or property without due process of law." This Due Process Clause applies to you during the deportation proceedings. It requires the courts and the BIA to give you a meaningful opportunity to be heard.

The right to counsel is an important component of "a meaningful opportunity to be heard." For this reason, ineffective assistance of counsel in your deportation proceedings can deny your rights to due process, if it meets the following standards. Ineffective assistance of counsel essentially means that your lawyer failed to provide you with effective representation in your hearings before the immigration judge. It does not mean that they did something small with which you disagreed, but rather that they either did something or failed to do something that had a major impact on your case. And that had they represented you differently, you likely would not have been ordered removed by the immigration judge.

A successful petition of ineffective assistance of counsel can result in the reversal and remand of the removal decision, giving you another opportunity to fight your case again with better assistance.

Where should I file my claim?

We will from now on refer to ineffective assistance of counsel as IAC. You will file your IAC claim with the BIA, usually in the form of a motion to reopen.

Legal standards you need to satisfy for your IAC claim

The BIA will evaluate your IAC claim based on the following legal standards.

Threshold Requirements

Your IAC claim needs to meet the following threshold requirements to be able to succeed.

First, your IAC claim must derive from the legal assistance of someone who is authorized to practice law. That is to say, if you voluntarily waived your rights to a lawyer, and instead knowingly relied on the assistance from individuals not authorized to practice law, you do not have an IAC claim.

Second, the legal services in question must be related directly to your removal case. For example, suppose your attorney failed to properly file a visa application. If this visa application and your attorney's deficiency did not relate to the substance of your ongoing proceeding, there is no IAC claim.

Counsel's Competence

After your IAC claim met the threshold requirements, you must show that your attorney failed to perform with "sufficient competence."

What does "sufficient competence" mean legally speaking? Here is a quote from the Ninth Circuit to help you understand:

"We do not require that the petitioner's representation be brilliant, but it cannot serve to make the immigration hearing so fundamentally unfair that the petitioner was prevented from reasonably presenting his case."

For example, where the attorney failed to investigate and present the factual and legal basis of the client's claim, failed to meet with the client and discuss their case, failed to advocate on the client's behalf, such conduct is a failure to "perform with sufficient competence."

Affecting the client's authority to decide whether and on what terms to concede the claim could also constitute a failure to "perform with sufficient competence." For example, where an attorney pressured his client to accept voluntary departure by threatening to withdraw from the client's case hours before the hearing, the attorney's conduct constitutes a failure to "perform with sufficient competence."

Prejudice

You must also show that you were "prejudiced" by your attorney's IAC. This means that you need to demonstrate that your attorney's error was so significant that it may have affected the outcome of your case.

To show prejudice, you only need to show that you have plausible grounds for relief, not that your attorney's behavior certainly changed the outcome. The BIA/court will consider the merits of your case and come to a conclusion as to whether your claim, if properly represented by your attorney, will be viable.

There are certain types of IAC that give you a presumption of prejudice. This means that prejudice is assumed in these circumstances and you do not have to show that it may have happened. There are three specific circumstances where prejudice is presumed.

- First, during a critical stage of your proceeding, your attorney was totally absent and did not assist you at all. This includes when you are prevented from filing an appeal due to your attorney's error and the court issued an order of removal because you did not show up for your immigration hearing.
- Second, your attorney completely failed to argue for your case. For example, your attorney conceded guilt to the only factual issues that are in dispute.
- Third, the circumstances of your situation made it so unlikely for any lawyer to provide effective assistance to you (e.g., your lawyer was prevented from visiting you in detention).

When do I need to file my IAC claim?

When presenting your IAC claim through a motion to reopen your case to the BIA, you need to file within 90 days of receiving your final removal order. There are exceptions to this. If you were ordered deported because you did not show up to your immigration court hearing, you have 180 days to file a motion to reopen, based on exceptional circumstances. These deadlines are subject to "equitable tolling," meaning that the court can grant an extension if you were unable to file your motion within the deadline "because of deception, fraud, or error," as long as you were diligent in discovering this deception, fraud, or error. Equitable tolling is available for motions to

reopen based on IAC. An example of this would be if you never received a notice that you were supposed to appear in immigration court, but as soon as you discovered the issue, you attempted to show up.

What materials do I need to submit?

Any motion to reopen that you submit to the BIA must be in writing and include your signature. Your motion should have a clear title, such as "[Your Name]'s Motion to Reopen." Include your name and A-number. If you are currently in detention, when filing your motion your motion's cover page should say "Detained," in the upper right corner and highlighted. Your motion should clearly state that you are filing a motion to reopen your case, before the BIA, based on previous IAC. You also will need to submit proof that you paid the required $110 fee for filing a motion to reconsider. You will usually pay this at the local USCIS office. You should also include a copy of the previous BIA ruling in your case.

A. The Lozada Requirements

In a case called *Matter of Lozada*, the BIA set out the required materials that individuals filing motions to reopen based on IAC need to submit. Thus, we refer to these as "the Lozada requirements." The three requirements are as follows:

1. You must "submit an affidavit explaining [your] agreement with former counsel regarding [your] legal representation."

2. You must "present evidence that prior counsel had been informed of the allegations against [them] and given an opportunity to respond."

3. You must "either show that a complaint against counsel was filed with proper disciplinary authorities or explain why no such complaint was filed." This would generally be the state bar association – for example, the State Bar of California (if you received this legal representation in California). This is an important point. If you think your attorney did not meet the standards necessary to present your case competently, you should file a complaint with the State Bar of California (or whichever state bar licensed your attorney).

In California, you can find information on filing a bar complaint here: *https://www.calbar.ca.gov/Public/Complaints-Claims/How-to-File-a-Complaint*. You can also call this number: 800-843-9053.

B. Exceptions to the Lozada Requirements

The Ninth Circuit has created some exceptions to these three Lozada requirements. Even if you do not comply with the Lozada requirements, the court can still rule in favor of your IAC claim if your previous lawyer's ineffectiveness is "plain on its face." In accordance with prior Ninth Circuit rulings, the BIA/District Court may excuse non-compliance with the Lozada requirements if you show that you made "diligent efforts" to comply, but these efforts "were unsuccessful due to factors beyond [your] control." For example, if you were unable to file a Bar Complaint because you do not know where your attorney is licensed. If possible, to increase the chances of your IAC claim being successful you should try to comply fully with all of the Lozada requirements.

What happens after I file my IAC claim?

A. Is my deportation stayed?

Submitting a motion to reopen before the BIA, based on IAC, will not stay your removal order. However, if your removal order was issued because you did not know about your hearing, then filing a motion to reopen your case will stay your deportation order. This means that it is temporarily no longer in effect while the motion is pending and that the government cannot remove you. However, if you wish, you can also request a stay of removal while your IAC motion is pending before the BIA for which you do not receive an automatic stay. This motion is similar to the motion for stay discussed in Section 2.

B. Can I present my arguments orally?

As with any motion to reopen that you might file with the BIA, you can include in your motion a request for oral argument. The BIA will then decide whether or not to grant your request. The BIA will have discretion over whether to grant or deny your request for oral argument, meaning that the BIA can refuse to grant your request and make its decision based solely on the written submissions. It is unlikely that the BIA will grant your motion for oral argument. However, do not worry. Most motions are decided without oral argument, and you do not have to request it.

What can I do if the BIA finds that there was no IAC?

If the BIA refuses to grant your motion to reopen based on IAC, you can appeal that denial to the Ninth Circuit. However, the appeals process looks very different for the two scenarios.

If you are appealing the BIA's denial of a motion to reopen on IAC grounds, the Ninth Circuit will have jurisdiction over your case. The Ninth Circuit will review the BIA's findings of fact, about your lawyer's performance under the "substantial evidence" standard, meaning they will ask whether the BIA findings were based on substantial evidence. In reviewing the BIA's denial of a motion to reopen, including a motion to reopen based on IAC, the Ninth Circuit will ask whether the BIA abused its discretion when it refused to grant the motion. When examining the underlying constitutional question of whether there was a due process violation due to IAC the Ninth Circuit will review the way the BIA came to their decision and the law they applied with fresh eyes.

What happens if the BIA finds that there was IAC?

If the BIA has granted your motion to reopen your immigration case based on IAC, then your final deportation order is vacated, and your case will be reopened. The BIA may return the case to the Immigration Court for further proceedings.

With regards to your appeal pending before the Ninth Circuit, if the BIA grants a motion to reopen, this means that there is no longer a final decision for the Ninth Circuit to review. Thus, you should contact the government and you can jointly inform the court that the BIA has granted your motion. Then, the Ninth Circuit will dismiss your case, and you can proceed with the BIA rehearing.

POST-CONVICTION RELIEF UNDER CALIFORNIA PENAL CODE § 1473.7

If you are at risk of deportation because of a criminal conviction or sentence in California, you may be able to file a motion, known as a 1473.7 motion, to vacate that conviction. If this motion is successful, and your conviction is vacated, this may decrease your chances of being deported.

The U.S. Supreme Court has held, in *Padilla v. Kentucky*, that the Sixth Amendment to the Constitution (which guarantees the right to an attorney for criminal defendants), includes the right to legal advice about the immigration-related consequences of a plea. Before you plead guilty to an offense that carried the possibility of deportation, your lawyer should have told you of this before your deportation. If you did not receive this advice and your guilty plea made you eligible for deportation, California law provides a path for you to vacate that conviction.

What is a 1473.7 motion?

Section 1473.7 of the California Penal Code says that, in certain circumstances, "[a] person who is no longer in criminal custody may file a motion to vacate a conviction or sentence." By filing this motion, you are asking the court in California that convicted you of a crime to vacate your conviction, meaning it will no longer appear on your criminal record. If the court grants your motion, that means your conviction no longer exists, legally speaking, which can help protect you from deportation.

Should I file a 1473.7 motion?

A. Am I eligible?

You can file a 1473.7 motion if you meet the following three criteria:

1: You were convicted of a crime in California, following a guilty or nolo contendere ("no contest") plea.

2: When you plead guilty or nolo contendere, you were unaware that this conviction would jeopardize your immigration status and affect your ability to legally remain in the U.S.

3: You are no longer in criminal custody. This means you are no longer in California state prison, on probation, or on parole as a result of that conviction.

If you meet these criteria, you should consider trying to get your conviction or sentence vacated through a 1473.7 motion. The argument is based on you not having received proper legal advice about the fact that this conviction would carry the possibility of deportation after you served your prison sentence.

B. Do I need to meet the requirements for ineffective assistance of counsel?

The California Penal Code says that someone who is filing a motion to vacate a conviction under 1473.7 can, but is not required to, argue ineffective assistance of counsel. This means that you do not necessarily have to meet the requirements for an ineffective assistance of counsel finding, as discussed above, for a court to grant your 1473.7 motion.

How long do I have to file a 1473.7 motion?

If someone is not in deportation proceedings, has not received a notice to appear in immigration court, and has not had a final removal order issued against them, they can file a 1473.7 motion "at any time in which the individual filing the motion is no longer in criminal custody."

However, in the immigration context, you need to file a 1473.7 motion "with reasonable diligence after" whichever of the following two events happens last:

- You get a notice to appear in immigration court "or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization."

- A final removal order is issued against you, "based on the existence of the conviction or sentence that the moving party seeks to vacate."

Therefore, if you get a notice to appear in immigration court or a final removal order based on the conviction in California that you hope to vacate, you will need to file your 1473.7 motion as soon as possible. Otherwise, a judge may find that the motion is "untimely" and refuse to consider it.

How can I get help filing a 1473.7 motion?

You can get legal help filing a 1473.7 motion through your local public defender's office. If you meet the income qualifications, your local public defender's office can assist you with filing a 1473.7 motion at no cost to you.

The websites for all county public defender offices in California are available at: *http://www.cpda.org/County/CountyPDWebSites.html*. Alternatively, in Appendix R of this guide, there is a list of the appropriate phone numbers for each county to get in touch with a public defender. Alternatively, if you wish, you can hire a private attorney to represent you in this process.

Can I file a 1473.7 motion pro se?

Yes, you can file a 1473.7 motion pro se, meaning that you are representing yourself. This means you are filing the motion without representation by an attorney, such as a public defender.

A. What form do I use?

To file your motion pro se, you can use the Judicial Council of California's pro se form, available in the Appendix at S or at *https://www.courts.ca.gov/documents/cr187.pdf*.

B. How do I fill out the form?

At the top of this form, you will check the box indicating that you are filing a motion to vacate your conviction or sentence under Pen. Code, §§ 1473.7(a)(1). In section (1), you will list the offense of which you were convicted. You will then fill out section (3), since you are seeking relief under 1473.7(a)(1). You can leave sections (2) and (4) blank. Fill out section (5) only if you would like the court to hold a hearing on the motion without you physically present.

What will happen after I file a 1437.7 motion?

After you file the motion, you are entitled to have a hearing on it.

A. Do I have to attend the hearing?

You can request that the court hold the hearing without you physically present, if you can persuade the court that there is good cause for your absence.

B. Can a judge ever grant a 1473.7 motion without a hearing?

If the prosecution – meaning the local District Attorney's office – has no objection to your motion, the court can grant the motion and vacate the conviction or sentence without a hearing.

Q: How will the court decide whether or not to grant my 1473.7 motion?
A: A judge will decide whether or not to grant your 1473.7 motion.

C. What standard will the judge use?

The judge will decide whether "a preponderance of the evidence" supports your argument – meaning, it is more likely than not that you qualify for relief under the statute.

D. What do I need to show?

You will need to "establish that the conviction or sentence being challenged is currently causing or has the potential to cause removal or the denial of an application for an immigration benefit, lawful status, or naturalization." If your current removal order on appeal before the Ninth Circuit is the result of the criminal conviction you are trying to vacate, then this satisfies the requirement.

A judge will need to analyze whether the inadequate legal advice you received about the immigration-related consequences of your plea or conviction was prejudicial. Under the California Supreme Court's 2021 decision in *People v. Vivar*, this means that a judge will ask what a defendant in your position who received adequate legal advice would have done. The judge will look at all of the circumstances to determine how likely it is that you would not have plead guilty to the charges had you understood the immigration-related consequences.

In some situations, there may be "a presumption of legal invalidity" with respect to your conviction or sentence. This means it is more likely that the court will grant your motion. Under California law, there will be such a presumption if:

1: You had originally "pleaded guilty or *nolo contendere* pursuant to a statute that provided that, upon completion of specific requirements, the arrest and conviction shall be deemed never to have occurred";

2: You complied with the statute's requirements; **and**

3: "the disposition under the statute has been, or potentially could be, used as a basis for adverse immigration consequences."

If the court denies my motion, can I appeal the ruling?

Yes, if the court denies your motion, you can appeal to the California Court of Appeals. Similarly, if the court grants your motion, the prosecution can also appeal the ruling.

If the court grants my motion, what happens?

A: What happens to my immigration case?

If the court grants your 1473.7 motion, this means that your conviction will no longer appear on your record. Once this happens, you can file a motion to reopen your case with the BIA, and ask the BIA to overturn its previous deportation order. The BIA will only consider your motion to reopen once you can show that a court has actually vacated your conviction.

B. How do I file a motion to reopen?

Any motion to reopen that you submit to the BIA must be in writing and signed by you or your attorney. It should have a clear title, such as "[Your Name]'s Motion to Reopen." Include your name and A-number. If you are currently in detention when filing your motion, your motion's cover page should say "Detained," in the upper right corner and highlighted. Your motion should clearly state that you are filing a motion to reopen your case before the BIA based on the fact that a court vacated your conviction. You also will need to submit proof that you paid the required $110 fee for filing a motion to reconsider. You will usually pay this at the local USCIS office. You should also include a copy of the previous BIA ruling in your case.

In your motion, you can include a request for oral argument, which the BIA has discretion to grant or deny.

If the BIA grants your motion to reopen your case, then your final deportation order is vacated, and your case will be reopened. The BIA may return the case to the Immigration Court for further proceedings. With regards to your appeal pending before the Ninth Circuit, if the BIA grants a motion to reopen, this means that there is no longer a final decision for the Ninth Circuit to review. Thus, you should contact the government and you can jointly inform the court that the BIA has granted your motion. Then, the Ninth Circuit will dismiss your case, and you can proceed with the BIA rehearing.

C. What happens to the earlier criminal charges against me?

Even though your conviction is vacated if the court grants your 1473.7 motion, this does not mean that the original criminal charges against you are automatically dismissed. The case is open, so the prosecutor can decide to bring charges again. You and your attorney, if you have one, can try to negotiate with the prosecutor's office to ensure that this does not happen. The court will allow you to withdraw your original guilty or nolo contendere plea.

Berkeley Law

Appendix A: Court calendars

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2023 COURT SESSIONS

MONTH	DATE*	CITY*	DATE*	CITY*
JANUARY	9 - 13	PASADENA SAN FRANCISCO		
FEBRUARY	6 - 10	PASADENA PORTLAND SAN FRANCISCO PHOENIX	13 - 17	SAN FRANCISCO PASADENA HONOLULU SEATTLE
MARCH	6 - 10	PASADENA LAS VEGAS SAN FRANCISCO	13 - 17 27 - 31	PASADENA SAN FRANCISCO SEATTLE
APRIL	10 - 14	SAN FRANCISCO PASADENA SEATTLE	17 - 21	SAN FRANCISCO PASADENA PORTLAND PHOENIX
MAY	8 - 12	SAN FRANCISCO PASADENA SEATTLE	15 - 19	PHOENIX
JUNE	5 - 9	SAN FRANCISCO PASADENA SEATTLE HONOLULU	12 – 16 26 - 30	PASADENA PORTLAND PASADENA
JULY	10 - 14	SAN FRANCISCO PASADENA SEATTLE	17 - 21	SAN FRANCISCO PASADENA
AUGUST	14 - 18	SAN FRANCISCO PASADENA ANCHORAGE	21 - 25	SAN FRANCISCO PASADENA PORTLAND SEATTLE
SEPTEMBER	11 - 15	SAN FRANCISCO PASADENA SEATTLE PHOENIX		
OCTOBER	2 - 6	SAN FRANCISCO PASADENA HONOLULU SEATTLE LAS VEGAS	16 - 20	SAN FRANCISCO PASADENA PORTLAND PHOENIX
NOVEMBER	6 - 9	PASADENA PHOENIX	13 - 17	SAN FRANCISCO PASADENA SAN JOSE SEATTLE
DECEMBER	4 - 8	SAN FRANCISCO PASADENA PORTLAND SEATTLE	11 - 14	SAN FRANCISCO PASADENA

As of 1/03/23

Appendix B:
Form 3. Petition for Review of Order of a Federal Agency, Board, Commission, or Officer

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 3. Petition for Review of Order of a Federal Agency, Board, Commission, or Officer

Name of Federal Agency, Board, Commission, or Officer:

Date of judgment or order you are challenging:

Fee paid for petition? ○ Yes ○ No

List all Petitioners *(List **each** party filing the petition. Do not use "et al." or other abbreviations.)*

For immigration cases:

Alien Number(s):

Is petitioner(s) detained? ○ Yes ○ No

Has petitioner(s) moved the BIA to reopen? ○ Yes ○ No

Has petitioner(s) applied to the district director for an adjustment of status? ○ Yes ○ No

Have you filed a previous petition for review from this agency? ○ Yes ○ No

If Yes, what is the prior 9th Circuit case number?

Your mailing address:

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature **Date**

Complete and file with the attached representation statement and the order being challenged. See, e.g., Circuit Rule 15-4.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Representation Statement for Petition for Review

Petitioner(s) *(List **each** party filing the petition, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ○ Yes ○ No

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Respondent(s) *(List only the names of parties and counsel (if known) who will oppose you in the petition. List separately represented parties separately.)*

Name(s) of party/parties:

Name(s) of counsel (if any known):

Address:

Telephone number(s):

Email(s):

To list additional parties and/or counsel, attach additional pages as necessary.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix C:
How to File a Petition for Review

PRACTICE ADVISORY

HOW TO FILE A PETITION FOR REVIEW
Updated November 2015[1]

I. HIGHLIGHTS OF THIS ADVISORY

This practice advisory addresses petition for review procedures and requirements:

- Petitions for review must be filed **and received** by the court no later than 30 days after the date of the decision of the Board of Immigration Appeals (BIA) or the U.S. Immigration and Customs Enforcement (ICE). This deadline is jurisdictional.
- The 30-day deadline for filing a petition for review is not extended either by filing a motion to reopen or reconsider or by the grant or extension of voluntary departure.
- Separate petitions for review must be filed for each BIA decision, including issues arising from the denial of a motion to reopen or reconsider.
- ICE can deport an individual *before* the 30-day deadline to file a petition for review
- Filing a petition for review does *not* stay the individual's removal from the country; instead, a separate request for a stay must be filed with the court.
- Filing a petition for review terminates the voluntary departure order, with one exception.
- A petition for review may be litigated even if the individual has been removed.

Sample petitions for review are attached as Appendices A and B. A list of websites for the courts of appeals is attached as Appendix C. A list of national addresses for service of the petition is attached as Appendix D.

II. INTRODUCTION

A petition for review is the document filed by, or on behalf of, an individual seeking review of an agency decision in a circuit court of appeals. In the immigration context, a petition for review is filed to obtain federal court review of a removal, deportation or exclusion decision issued by the BIA. In addition, a petition for review may be filed to obtain review of a removal order issued by ICE under a few very limited specific provisions of the Immigration and Nationality Act (INA).

Section 242 of the INA, as enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)[2] and amended by the REAL ID Act,[3] contains the

[1] Click here for information on reprinting this Practice Advisory. The Council thanks Debbie Smith for an earlier update to this advisory, and Trina Realmuto and Christopher Rickerd for their helpful comments on an earlier version. This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

jurisdictional basis for petitions for review and sets out rules and procedures governing petitions for review.[4] In addition, the Federal Rules of Appellate Procedure (FRAP) and local circuit court rules provide petitioners with additional court procedures and requirements. The circuit courts post the FRAP and local rules on their websites. See a list of the court websites in Appendix C. In addition, many of the circuit court websites contain valuable resources to assist practitioners. For example, the website of the 9th Circuit Court of Appeals posts a detailed outline of procedural and substantive immigration law in the 9th Circuit, a list of Frequently Asked Questions, and an explanation of practice issues entitled "After Opening a Case – Counseled Immigration Cases." Similarly, the 3rd Circuit Court of Appeals website includes a detailed explanation of the court's mediation program. See Appendix C. Finally, when in doubt about circuit court procedures, call the court clerk with your question.

III. COURT OF APPEALS JURISDICTION OVER PETITIONS FOR REVIEW

The courts of appeals have **exclusive** jurisdiction to review "a final order of removal," except an expedited removal order entered under INA § 235(b)(1).[5] INA § 242(a)(1). The following are examples of the types of decisions that may be reviewed through a petition for review:

- **A BIA decision to:**
  - issue a final removal order (including the finding of removability and the denial of any applications for relief);
  - deny a motion to reconsider or a motion to reopen; or
  - deny asylum in asylum only proceedings.

- **An order of removal issued by ICE under:**
  - INA §241(a)(5); or

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[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[3] REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

[4] Prior to the enactment of the REAL ID Act, judicial review of final deportation or exclusion orders (i.e., where proceedings commenced before April 1, 1997), was governed by transitional rules set forth in IIRAIRA §309. Subsequently, the REAL ID Act said that petitions for review of orders of deportation or exclusion filed under the transitional rules "shall" be treated as if filed as a petition for review under new INA §242 (as amended by REAL ID Act §106(d)). Thus, regardless whether the person has a removal order, deportation order, or exclusion order, the same rules should apply.

[5] Whether a decision is "final" for purposes of judicial review sometimes is not clear. If an order is not final at the time the petitioner filed the petition for review, most courts of appeals will dismiss the petition as prematurely filed. However, if the individual foregoes the opportunity to file a petition for review when one should have been filed, later review in the court of appeals may be precluded. For that reason, when there is any doubt as to whether a Petition for Review should be filed, the safer practice is to file. Read an in-depth discussion of the finality requirement in the Immigration Council's Practice Advisory, Finality of Removal Orders for Judicial Review Purposes (Aug. 5. 2008).

- INA §238(b).

A challenge to a BIA or ICE decision may involve legal, constitutional, factual, and/or discretionary claims. In general, (1) legal claims assert that BIA/ICE erroneously applied or interpreted the law (*e.g.*, the INA or the regulations); (2) constitutional challenges assert that BIA/ICE violated a constitutional right (*e.g.*, due process or equal protection); (3) factual claims assert that certain findings of fact made by BIA/ICE were erroneous; and (4) discretionary claims assert BIA/ICE abused its discretion by the manner in which it reached its conclusion.

- **Jurisdictional Bars**

The restrictions on judicial review imposed by INA §242 require practitioners to analyze each case to determine whether a particular claim is reviewable in the court of appeals. In order to decide if review is permitted, practitioners first must consider whether the INA contains a bar to review that is related to the decision, nature of the claim, or the person bringing the challenge. To do this, practitioners must be familiar with evolving case law within their circuit interpreting the relevant bar to review. Second, if there is a bar to review, practitioners must evaluate whether the petition raises a constitutional claim or a question of law. Pursuant to INA § 242(a)(2)(D), enacted as part of the REAL ID Act, courts of appeals retain jurisdiction to review constitutional and legal questions raised in a petition for review.

- **Discretionary Decisions**

INA §242(a)(2)(B) contains two sub-provisions which generally prohibit review of discretionary decisions including waivers of removal under §§ 212(h) and 212(i), cancellation of removal, voluntary departure, and adjustment of status, and other decisions or action the authority for which is specified in Title II of the INA to be discretionary. With respect to this last category, discretionary decisions in Title II, the Supreme Court held in *Kucana v. Holder* that the proscription against review of discretionary determinations applies only to Attorney General determinations made discretionary by statute, not to determinations declared discretionary by the Attorney General through regulation.[6] Prior to the enactment of REAL ID's provisions authorizing review of constitutional claims or questions of law,[7] several circuits found jurisdiction to review non-discretionary determinations that were within the context of a discretionary benefit—such as statutory eligibility issues.[8] Following the REAL ID amendments to the statute, review of constitutional and legal issues remains available even in cases in which the agency has exercised discretion. For example, while the ultimate decision to deny cancellation of removal is not reviewable because it is discretionary, a court has jurisdiction to consider questions of statutory interpretation involved in the case, and thus courts have decided whether the hardship standard is consistent with international law,[9] whether the individual has

[6] *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010).

[7] See INA § 242(a)(2)(D).

[8] *See Santana-Albarran v. Ashcroft*, 393 F.3d 699,703 (6th Cir. 2005); *Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 851 (9th Cir. 2004) (holding that there is jurisdiction to consider the continuous presence requirement for cancellation of removal); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2001) (holding there is jurisdiction to review the definition of child).

[9] *See Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1009 (9th Cir. 2005).

met the continuous presence requirement,[10] or whether a qualifying relative meets the definition of "child."[11] Similarly, the complete failure to consider evidence in the context of a cancellation case may be a reviewable question of law.[12]

- **Criminal Offenses**

INA §242(a)(2)(C) prohibits review of cases involving criminal offenses under INA § 212(a)(2) or specific subsections of INA § 237(a)(2). Nonetheless, the court retains jurisdiction to review whether the individual to be removed 1) is a non-citizen, 2) who is removable, 3) based on a disqualifying offense.[13] Thus, the individual must actually be removable on a basis specified in the relevant section of the statute. For example, if the individual is not charged and found removable on grounds that might implicate the bar, such as for an aggravated felony, the bar does not apply. In addition, INA §242(a)(2)(D) restores review over constitutional and legal questions in cases where review otherwise is barred by INA § 242(a)(2)(C). For example, the court retains jurisdiction to determine whether an individual subject to the aggravated felony grounds of removal is eligible to apply for 212(c) relief if there is no statutory counterpart in the grounds of inadmissibility.[14]

- **Asylum**

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). 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 to excuse the late filing of an asylum application.[15]

Again, the prohibition does not apply to constitutional claims or questions of law. Not all courts agree on what constitutes a "question of law." The Ninth and Second Circuit have held, for example, that a question of law includes the application of statutes or regulations to undisputed facts, or mixed questions of facts and law.[16] Therefore, in the Ninth and Second Circuits, a

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[10] *See Augustin v. AG of the United States*, 520 F.3d 264, 267 (3d Cir. 2008).

[11] *See Partap v. Holder,* 603 F.3d 1173, 1174 (9th Cir. 2010); *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1176-78 (9th Cir. 2007) (court reviewed whether unborn child or grandchild met the definition of "child" under the statute).

[12] *See Champion v. Holder,* 626 F.3d 952, 956 (7th Cir. 2010).

[13] *See Moore v. Ashcroft*, 251 F.3d 919, 923 (11th Cir. 2001).

[14] *See De La Rosa v. U.S. Atty. Gen.*, 579 F.3d 1327, 1328 (11th Cir. 2009) cert. denied *De La Rosa v. Holder,* 130 S. Ct. 3272 (2010).

[15] INA § 208(b)(2)(A).

[16] Other circuit courts have not found jurisdiction where there is a mixed question of law and fact. *See*, *e.g.*, *Viracacha v. Mukasey*, 518 F.3d 511, 515 (7th Cir. 2008) (criticizing approach of the 9th Circuit); *Zhu v. Gonzales*, 493 F.3d 588, 591 n. 31 (5th Cir. 2007) (declining to adopt the 9th Circuit's approach in the case before it).

decision on "changed circumstances" or "extraordinary circumstances" is a mixed question of law and fact over which the court has jurisdiction.[17]

In conclusion, the limitations on jurisdiction affecting discretionary decisions, cases involving criminal offenses, and specific asylum determinations are partially mitigated by the court's authority to review constitutional claims and questions of law. In addition, courts retain jurisdiction to determine whether they have jurisdiction over the petition for review. As discussed below, following the REAL ID Act amendments, few, if any, issues outside of challenges to detention remain reviewable via habeas corpus. Thus, it is advisable to *timely* file a petition for review to preserve the individual's right to seek review.[18]

IV. PETITION REQUIREMENTS

- **Filing Deadline**

A petition for review "*must be filed not later than thirty days after the date of the final order*" of removal or the final order of exclusion or deportation. *See* INA §242(b)(1) (removal orders).

The 30-day deadline for filing a petition for review of the underlying decision is *not* extended by the filing of a motion to reopen or reconsider, nor is it extended by the grant or extension of voluntary departure. To obtain review of issues arising from a BIA decision and issues arising from the denial of a motion to reopen or reconsider, separate petitions for review of each BIA decision must be filed. If separate petitions are not filed, the court's review may be limited to the issues arising from the BIA decision for which review is sought. For example, if a petition for review of the BIA's decision denying a motion to reopen or reconsider has been filed, but a petition for review of the BIA decision underlying the motion has *not* been filed, the court may not review issues arising from the underlying BIA decision.

The deadline for filing a petition for review is "mandatory and jurisdictional" and is "not subject to equitable tolling." *Stone v. INS*, 514 U.S. 386, 405 (1995). Because the 30-day deadline is jurisdictional, circuit courts lack authority to consider late-filed petitions for review.[19] Consequently, if in doubt about whether the court of appeals has jurisdiction, it may be prudent to timely file the petition for review to preserve the individual's right to seek review.

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[17] *See 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).

[18] Courts have held that review of detention issues, including the length and conditions of detention, remains available in habeas corpus proceedings. *See* the Immigration Council's practice advisory titled Introduction to Habeas Corpus.

[19] There are very few situations in which a court might excuse a late-filed petition for review: (1) where the court or the BIA provided misleading information as to the deadline for filing a petition for review; and (2) where the BIA failed to comply with the applicable regulations regarding mailing the decision to petitioner or petitioner's counsel. For further information on these situations and potential remedies, see the Immigration Council's Practice Advisory, Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court.

The 30-day time period begins running from the date of the BIA's decision. If the BIA denied a motion to reopen or reconsider, the 30-day time period begins running from the date of the BIA decision denying the motion. In reinstatement cases under INA §241(a)(5), or administrative deportation cases under INA §238(b), the 30-day deadline begins running from the date of the final ICE order.[20] In computing the 30 day period to file the petition for review, if the last day to file the petition for review is a Saturday, Sunday, or legal holiday, the filing period continues to run until the day after the Saturday, Sunday, or legal holiday.[21] The petition for review must be **received** by the clerk's office on or before the thirtieth day and not merely mailed by that date. The date the petition is postmarked is **not** relevant.

Where the 30-day deadline has expired due to ineffective assistance of counsel, new counsel may consider filing a motion to reopen to the BIA (provided the motion is filed within the 90-day statutory time period for filing motions to reopen). *See Matter of Compean*, 25 I. &N. Dec. 1, 3 (AG 2009) (finding that BIA may consider claims of ineffective assistance based on conduct that occurred after the entry of a removal order). Counsel also may consider filing a motion requesting that the BIA rescind and re-issue its decision to allow petitioner to seek judicial review.[22]

- **Attachments and Contents**

Under INA §242(c), a petition for review must and need only: (1) include a copy of the final administrative order; and (2) state whether any court has upheld the validity of the order, and if so, state which court, the date of the court's ruling, and the type of proceeding.

However, the circuit court rules may mandate additional requirements for the filing of the petition for review beyond those specified in the statute. These additional requirements affect only those cases filed in that circuit. For example the Ninth Circuit rule governing the contents of a petition for review requires the petition to state whether the petitioner is detained in the custody of the Department of Homeland Security or at liberty and whether the petitioner has filed a motion to reopen before the BIA or applied to the district director for an adjustment of status.[23] Therefore, it is crucial that practitioners familiarize themselves with the circuit rules for the circuit in which the petition will be filed prior to filing the petition for review.

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[20] At least one circuit has held, however, that the thirty day deadline does not commence until *service* of the final ICE order where government misconduct delayed service beyond the thirty day period. *See Villegas de la Paz v. Holder*, 640 F.3d 650 (6th Cir. 2010), *reh'g en banc denied*, *Villegas de la Paz v. Holder*, 2010 U.S. App. LEXIS 26935 (6th Cir. Dec. 28, 2010)

[21] FRAP 26(a).

[22] For further information regarding motions to rescind and re-issue, see the Immigration Council's Practice Advisory, Suggested Strategies for Remedying Missed Petition for Review Deadlines or Filings in the Wrong Court. In addition, the Ninth Circuit has said that there is habeas jurisdiction to consider a claim of ineffective assistance relating to counsel's failure to file the petition for review. *See Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007).

[23] Ninth Circuit Rule 15-4. Counsel should update the court regarding any pertinent changes subsequent to the filing of the petition for review.

The petition should state the name of each individual petitioning for review and should not use "et al." to reference more than one petitioner. FRAP 15(a)(2)(A). For example, where a family is in immigration proceedings, but the BIA decision only references the lead respondent, the petition for review should name each family member whose case was decided by that order and include their A number, even if all family members were not specifically listed in the BIA decision. Individual petitions for review need not be filed for each family member.

A sample petition for review is attached as Appendix A. Although it is not necessary to discuss the jurisdictional basis or merits of the case in the petition for review, some attorneys choose to do this. For that reason, a more detailed sample containing the basis for jurisdiction and venue, also is attached as Appendix B. An affirmative explanation of jurisdiction may be desirable in cases where an opposition to jurisdiction is anticipated.

V. STAY OF REMOVAL AND TERMINATION OF VOLUNTARY DEPARTURE

- **Stay of Removal**

The filing of a petition for review does *not* provide an automatic stay of removal. Immigration and Customs Enforcement (ICE) may deport an individual as soon as the BIA issues its order; ICE need not wait until the 30-day period for filing a petition for review has run. Likewise, in reinstatement cases under INA §241(a)(5), and administrative removal cases under INA §238(b), deportation may occur as soon as ICE issues its removal order. In the post-AEDPA[24] and IIRAIRA era, serving the petition for review does *not* stay deportation, "unless the court orders otherwise." Thus, petitioner also may want to file for a stay of the removal order pending the petition for review. Obtaining a judicial stay is necessary to prevent petitioner's removal from the country. If the court orders the stay of removal, the stay remains in place until the court's mandate issues.

In *Nken v. Holder,*[25] the Supreme Court held that a court of appeals should apply the traditional criteria governing stays when adjudicating a stay of removal. In doing so, the Court rejected the government's argument that the stringent standard in INA § 242(f)(2) ("clear and convincing evidence" that the removal order "is prohibited as a matter of law") applies. The Court's decision reversed the Fourth and Eleventh Circuits, which had held that INA § 242(f)(2) applies to stays of removal pending petitions for review.

Under the traditional standard for stays, the court shall consider (1) whether the stay applicant has made a strong showing that he/she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The *Nken* Court noted that the first two factors are most critical. The last two factors merge because the government is the respondent. In addition, the Court advised "that the burden of removal alone cannot constitute the requisite irreparable injury" and that courts should not assume that "'ordinarily, the balance of hardships will weigh heavily in the applicant's favor.'"

[24] Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[25] *Nken v. Holder*, 129 S. Ct. 1749, 1754 (2009).

Unlike the filing of the petition for review, the filing of a motion for a stay requires a detailed analysis of the facts of petitioner's case, the legal issues raised in the case, the BIA's errors of law, and the hardships that would ensue if the petitioner were forced to return to his or her native country pending review of the petition. In most cases practitioners will be preparing and filing the stay request without the benefit of the administrative record, which, pursuant to the FRAP must be filed within 40 days of service of the petition for review. The absence of the administrative record increases the burden on practitioners who did not represent the petitioner before the BIA. Practitioners in this situation must examine the BIA decision, all information available from previous counsel, and the facts of the case as recounted by the petitioner. Stay motions should not be cursory; they require significant care and analysis. The government may or may not oppose a stay motion. If an opposition if filed the petitioner has an opportunity to reply. See FRAP 27(a)(4).

- **Voluntary Departure**

Under regulations that took effect on January 20, 2009, an order of voluntary departure will terminate automatically upon the filing of a petition for review or other judicial challenge and the alternate order of removal will take effect.[26] 8 C.F.R. § 1240.26(i). However, if a person then departs within 30 days of filing the petition for review and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. *Id.* See 73 Fed. Reg. 76927, 76933 (Dec. 18, 2008) for a discussion of what proof and evidence may be sufficient.[27]

VI. WHERE TO FILE THE PETITION FOR REVIEW

Venue is restricted to the court of appeals for the judicial circuit in which the IJ completed the proceedings. INA §242(b)(2), 8 USC §1252(b)(2). If a case is conducted by video hearing, the immigration judge must state on the record the location of the hearing, which may be different from where the IJ and the parties are located. *See* OPPM 04-06, Creppy, Chief IJ, EOIR (August 18, 2004) available at http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-06.pdf.

VII. FILING FEE AND MOTION FOR PRO BONO COUNSEL

The filing fee for a petition for review is currently $450. Petitioner may request leave to proceed *in forma pauperis* by filing a motion and supporting affidavit with the court.[28] The request to proceed *in forma pauperis* is governed by 28 U.S.C. § 1915. In the affidavit and motion, petitioner must demonstrate that he/she is incapable of paying the filing fee because of indigence. Local circuit court rules may require the submission of a form demonstrating petitioner's income. If petitioner is represented by counsel, the affidavit and motion may explain whether such representation is pro bono.

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[26] This rule applies prospectively only, and therefore does not apply to cases where the voluntary departure was ordered prior to January 20, 2009. *See* 73 Fed. Reg. at 76936.

[27] For more on voluntary departure, see the Immigration Council's Practice Advisory, Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart.

[28] *See* FRAP 24(b) and corresponding local circuit court rules.

Indigent petitioners without counsel may also move the court to appoint counsel to pursue the petition for review. The motion for pro bono counsel should contain information about the legal merits of the case and the petitioner's indigency. The court appoints counsel in a limited number of civil cases and the motion must present compelling legal and humanitarian reasons for the appointment.

VIII. SERVICE ON RESPONDENT

- **Whom to Sue**

The INA states that "[t]he respondent is the Attorney General." INA §242(b)(3)(A).

- **Whom to Serve**

The petition must be served "on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 240 was entered." INA §242(b)(3)(A).[29]

Serve the Attorney General by sending a complete copy of the petition for review to the address set forth in Appendix D. Attorneys from the Office of Immigration Litigation (OIL), a division within the Civil Division of the Department of Justice, litigate on behalf of the Attorney General. Thus, it is advisable to also serve a copy of the petition on OIL at the address listed in Appendix D. After receiving a copy of the petition, the OIL attorneys assigned to the case will enter their appearance before the court and should inform petitioner's counsel.

To serve the officer in charge of the district, counsel should serve the ICE Field Office Director for Enforcement and Removal Operations (formerly Detention and Removal) with jurisdiction over the district where the final administrative order was issued. Counsel may need to make inquiries to learn the name of the officer in charge of detention and removal in their area. Counsel also will need to ascertain the proper mailing address for the ICE Field Office Director in order to serve this official.

At the same time, petitioner must file a certificate of service listing the names and addresses of those served and the manner of service. FRAP 15(c). Addresses for the Attorney General and the Office of Immigration Litigation are attached as Appendix D. Counsel may contact the local ICE office to get the correct address of that office. FRAP 15(c) further requires that petitioner must give "the clerk enough copies of the petition . . . to serve each respondent." Presumably, an original plus one copy of the petition must be filed where the Attorney General is the only named respondent. However, counsel should verify the number of copies required by checking local procedures or contacting the clerk's office. *See also* FRAP 25 (Filing and Service) and corresponding local court rules.

[29] If the order of removal was entered under another section of law, for example, INA §§238(b) or 241(a)(5), counsel presumably is bound by the service requirements of INA §242(b)(3)(A).

- **Service of Future Pleadings**

After opposing counsel has entered his or her appearance, future pleadings' service "must be made on the party's counsel" by a prescribed method. FRAP 25(b) and (c). Such pleadings must be filed with either: (1) an acknowledgement of service by the person served; or (2) a statement by the person effectuating service attesting to the date and manner of service, the names of those served, and the appropriate mail, e-mail or delivery address or facsimile number, depending on the manner of service. The proof of service may appear on or be affixed to the pleading. *See* FRAP 25(d)(3). The local rules set out acceptable methods of service.

- **Electronic Filing**

Many courts of appeals now require electronic filing as permitted under FRAP 25(a)(2)(D). The local rules specify which documents are exempt from electronic filing and practitioners must consult local rules. Currently the filing of a petition for review is exempt from electronic filing requirements and paper filing is required. While the filing of the petition for review is exempt from the electronic filing requirements, subsequent filings, including motions and briefs, must be filed electronically in some circuit courts if the petitioner is represented by counsel. In order to be prepared for future filings in the circuit court, it is important that attorneys register as electronic filers in advance. This registration will create an account in the circuit court of appeals. See the Immigration Council's Practice Advisory, Electronic Filing and Access to Electronic Federal Court Documents.

IX. LITIGATING THE PETITION IN THE COURT OF APPEALS

- **Admission and Entry of Appearance**

Attorneys must be admitted to practice before the court of appeals in which the petition for review is filed or, in some courts, must file an application for admission either simultaneously or within a prescribed time period. Some courts of appeals allow an attorney who is not admitted to appear pro hac vice.

The courts of appeals require counsel to enter an appearance in each case. Entry of Appearance forms are available on the court's website and from the clerk's office.

For further information regarding admission and appearance requirements, counsel may consult FRAP 46 and corresponding local circuit rules. Information also is available on court websites. *See* Appendix C, listing websites for the courts of appeals.

- **Federal Rules of Appellate Procedure**

The rules and procedure for litigation in the courts of appeals are governed by the Federal Rules of Appellate Procedure in conjunction with each circuit's local rules. This advisory provides a brief overview of appellate procedure related to petition for review litigation; however, it does not address all of the Federal Rules of Appellate Procedure nor does it address local circuit rules.

- **Mediation Program**

FRAP 33 establishes the availability of appeal conferences to aid the court in the disposition of cases and the possibility of settlement. All civil cases, including immigration petitions for review, may be considered for acceptance in circuit court mediation programs. However, not all

circuits permit mediation in immigration cases. For example, the 4th Circuit Court of Appeals does not offer mediation in immigration cases. Counsel must determine if mediation is available and request a mediation conference.

Mediation is generally requested pre-briefing before each side has invested significant resources in the case. An example of an instance where mediation may resolve the case is a petition for review raising an asylum issue where an adjustment of status possibility becomes available.

- **Certified Record of Proceedings and Briefing Schedule**

Once a petition for review is filed, the court generally issues an order/schedule for the parties to file: (1) the Certified Record of Proceedings (also known as the "Administrative Record"); (2) Petitioner's Opening Brief (and possibly Excerpts of Record); (3) Respondent's Answering Brief; and (4) Petitioner's Reply Brief (optional).

The agency is obligated to file the Certified Record of Proceeding within 40 days of service of the petition for review. FRAP 17(a). The record must include: (1) the order involved; (2) any findings or report on which it is based; and (3) pleadings, evidence, and other parts of the proceeding before the agency, including the transcripts of hearings. FRAP 16(a). Where the petition seeks review of a BIA order, the record is prepared by the Executive Office for Immigration Review and filed by OIL.

INA §242(b)(3)(C) states that petitioner must serve and file the opening brief no later than 40 days after the date on which the administrative record is available, and further states that petitioner may serve and file a reply brief within 14 days *after service* of the government's brief. *See also* FRAP 31(a)(1) ("The appellant must serve and file a brief within 40 days after the record is filed."). The statute and rule say these deadlines may only be extended by motion upon a showing of good cause. INA §242(b)(3)(C); FRAP 31(a)(1). Also, if the brief is not filed, INA §242(b)(3)(C) instructs courts to dismiss the appeal unless a manifest injustice would result. In circuits that require electronic filing of briefs, the circuit rules state the manner of electronically filing and whether paper copies are also required. *See* FRAP 31 and local rules. In circuits that do not require electronic filing of briefs, local rules may also modify the number of paper briefs required for filing FRAP 31.

Importantly, most courts do not rely on the time frame in the statute or rule; instead, they issue a schedule setting out due dates for the filing of both the administrative record and the briefs. Further, it is common for counsel on either side or both sides to move to extend the briefing schedule or move to hold briefing in abeyance.

When filing briefs in the circuit courts, counsel should consult FRAP 28 (Briefs), 30 (Appendix to the Briefs), 31 (Serving and Filing), and 32 (Form of Briefs, Appendices, and Other Papers), as well as all corresponding local rules. A list of websites for the courts of appeals is attached as Appendix C.

- **Motions**

Written motions are governed by FRAP 27 and corresponding local rules. Some courts also allow telephonic motions for an extension of time to file a brief. In addition, the briefing schedule may be

delayed or vacated if the government files a motion to dismiss for lack of subject matter jurisdiction claiming that petitioner is barred from review in the court of appeals.

Generally, motions are supported by an affidavit or declaration.[30] When the motion requests relief by a date certain, the request must be included in the caption.[31] Frequently local rules require that the motion include the position of the opposing party to the request, and the 9th Circuit Court of Appeals requests a statement of the petitioner's detention status.[32] Deadlines for responses and replies to motions are set forth in FRAP 27. Local rules may provide special procedures for the filing of an emergency motion. If the petitioner is detained and wishes to get a decision on his or her case as quickly as possible, counsel should discuss whether to file a motion to expedite consideration of the petition for review with the court.

Practitioners must be prepared to respond to motions to dismiss and motions for summary disposition. Motions to dismiss for lack of jurisdiction may allege that the petition raises a discretionary decision, criminal offense, or asylum case that is barred under INA §242. Practitioners must be ready to address the court's jurisdiction affirmatively and address whether the petition raises constitutional claims or questions of law or whether the petitioner is removable. Similarly a motion for summary disposition may allege that the questions raised on review are insubstantial. In that case, practitioners must provide information about the petition's significant legal issues.

- **Supplemental Authorities—28(j) Letters**

If pertinent and significant authorities come to petitioner's attention after briefing is completed or after oral argument, but before the court issues a decision, counsel should advise the court of the supplemental citations pursuant to FRAP 28(j). The advisal is made by letter and copied to opposing counsel. "The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited." FRAP 28(j).

- **Oral Argument**

Pursuant to FRAP 34, any party may file, or a court may require by local rule, a statement explaining why an oral argument should, or need not, be permitted. Oral arguments must be permitted unless a panel of three judges decides that:

  - the appeal is frivolous;
  - the dispositive issue(s) have already been decided; or
  - the facts and arguments are adequately presented in the briefs and records.

The court clerk will notify the parties of the date, time, place, and amount of time allotted for argument if the court determines oral argument is necessary.

- **Judgment and Post-Judgment Review**

The judgment (or decision) is entered on the docket by the clerk after he or she receives the court's opinion or upon the court's instruction (where judgment is rendered without opinion). FRAP 36

[30] 28 U.S.C. § 1746.
[31] FRAP 27(a)(3)(B).
[32] Ninth Circuit Rule 27-8.2

(Entry of Judgment). A petition for rehearing and/or petition for rehearing en banc may be filed within 45 days after entry of judgment, unless otherwise specified by the court or local rule. FRAP 35 (En Banc Determination) and FRAP 40 (Petition for Panel Rehearing). Unless the court directs otherwise, the mandate will automatically issue seven calendar days after the time to file a petition for rehearing expires, or seven calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. FRAP 41. For additional information regarding petitions for panel and en banc rehearing, see the Immigration Council's Practice Advisory, How To File A Petition For Rehearing, Rehearing En Banc And Hearing En Banc In An Immigration Case.

APPENDIX A: SAMPLE PETITION FOR REVIEW

Notes:

1. Complete ALL underlined spaces (except "Case File No.") as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk's Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n.4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, rules regarding admission and entry of appearance as counsel, and electronic filing requirements.
5. **If the local circuit court rules require it**, add information about whether the petitioner is detained and whether the petitioner has filed a motion to reopen to the BIA or applied for adjustment of status.

UNITED STATES COURT OF APPEALS FOR THE _____CIRCUIT

[Name of Petitioner],	)	
	)	
Petitioner,	)	**Case File No._____**
	)	
v.	)	
	)	**Immigration File No.: A_____**
Eric H. HOLDER,	)	
Attorney General,	)	
	)	**PETITION FOR REVIEW**
Respondent .	)	
_____	)	

The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court's ruling, and the kind of proceeding).

Dated: _____ Respectfully submitted,

_____

Attorney/s Name
Firm / Organization
Address
Telephone:
Facsimile:
Attorney/s for Petitioner

APPENDIX B: SAMPLE PETITION FOR REVIEW (MORE DETAILED)

Notes:

1. Complete ALL underlined spaces (except "Case File No.") as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk's Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n. 4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, rules regarding admission and entry of appearance as counsel, and electronic filing requirements.
5. **If the local circuit court rules require it**, add information about whether the petitioner is detained and whether the petitioner has filed a motion to reopen to the BIA or applied for adjustment of status.

UNITED STATES COURT OF APPEALS FOR THE _____CIRCUIT

[Name of Petitioner],	)	
	)	
Petitioner,	)	**Case File No._____**
	)	
v.	)	
	)	**Immigration File No.: A_____**
Eric H. HOLDER,	)	
Attorney General,	)	
	)	**PETITION FOR REVIEW**
Respondent .	)	
_____	)	

The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court's ruling, and the kind of proceeding).

Jurisdiction is asserted pursuant to 8 U.S.C. § 1252(a)(1) (removal cases) / § 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as amended by § 106 of the REAL ID Act of 2005 (deportation and exclusion cases.)

Venue is asserted pursuant to 8 U.S.C. § 1252(b)(2) (removal cases) / IIRIRA § 309(c)(4)(D) (deportation/exclusion cases) because the immigration judge / ICE (in cases under INA §§ 241(a)(5) or 238(b)) completed proceedings in City, State, within the jurisdiction of this judicial circuit.

This petition is timely filed pursuant to 8 U.S.C. § 1252(b)(1) (removal) / IIRIRA § 309(c)(4)(C) (deportation / exclusion) as it is filed within 30 days of the final order of removal / deportation / exclusion.

Dated: _____

Respectfully submitted,

_____
Attorney/s Name
Firm / Organization
Address
Telephone:
Facsimile:

Attorney/s for Petitioner

APPENDIX C: WEBSITES FOR U.S. COURTS OF APPEALS

Each listing below includes a sample of guidance included on the court's website. Be sure to explore to see what additional resources are available on each site.

First Circuit: www.ca1.uscourts.gov
First Circuit Forms and Instructions webpage, with a link to a Checklist for Briefs: http://www.ca1.uscourts.gov/forms-instructions.

Second Circuit: www.ca2.uscourts.gov
Second Circuit Forms and Instructions web page: http://www.ca2.uscourts.gov/clerk/case_filing/forms/forms_home.html.

Third Circuit: www.ca3.uscourts.gov
Third Circuit Standing Orders: http://www.ca3.uscourts.gov/standing-orders-0.

Fourth Circuit: www.ca4.uscourts.gov
Fourth Circuit Appellate Procedure Guide: http://www.ca4.uscourts.gov/rules-and-procedures/resources/appellate-procedure-guide.

Fifth Circuit: www.ca5.uscourts.gov
Fifth Circuit Practitioner's Guide: http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/documents/practitionersguide.pdf.

Sixth Circuit: www.ca6.uscourts.gov
Sixth Circuit Forms webpage which includes a Checklist for Briefs: http://www.ca6.uscourts.gov/internet/forms/forms.htm.

Seventh Circuit: www.ca7.uscourts.gov
Seventh Circuit Practitioner's Handbook: http://www.ca7.uscourts.gov/Rules/handbook.pdf.

Eighth Circuit: www.ca8.uscourts.gov
Eighth Circuit Appeal Preparation webpage: http://www.ca8.uscourts.gov/appeal-preparation-information.

Ninth Circuit: www.ca9.uscourts.gov
Appellate Practice Guide: http://cdn.ca9.uscourts.gov/datastore/general/2015/05/06/Final_2014_ALR_Practice_Guide_82514.pdf.
Ninth Circuit Immigration Outline: http://www.ca9.uscourts.gov/guides/immigration_outline.php

Tenth Circuit: www.ca10.uscourts.gov
Tenth Circuit Practitioner's Guide:
http://www.ca10.uscourts.gov/clerk/practitioners-guide.

Eleventh Circuit: www.ca11.uscourts.gov
Eleventh Circuit Briefing and Filing Instructions:
http://www.ca11.uscourts.gov/briefing-filing-instructions.

DC Circuit: www.cadc.uscourts.gov
DC Circuit Handbook of Practice and Internal Procedures :
https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/$FILE/HandbookJune2015WITHTOCLINKS22%20final.pdf.

APPENDIX D: LIST OF ADDRESSES FOR SERVICE OF A PETITION FOR REVIEW

Attorney General

Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of Immigration Litigation

Thomas W. Hussey, Director
Office of Immigration Litigation
U.S. Department of Justice / Civil Division
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

ICE District Offices

Service must also be made on the Field Office Director or, where none exists, the most senior officer in the Detention & Removal Unit. Counsel will need to contact the local ICE office to obtain the name and position title of the appropriate local officer and to obtain the mailing address for service on this individual.

Appendix D:
Form 25. Certificate of Service for Paper Filing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 25. Certificate of Service for Paper Filing

ATTENTION ELECTRONIC FILERS: DO NOT USE FORM 25
Use Form 25 only if you are **not** registered for Appellate Electronic Filing.

Instructions

- You must attach a certificate of service to each document you send to the court and to opposing counsel.
- Include the title of the document you are serving, the name and address of each person you served with a copy of the document, and the date of mailing or hand delivery.
- Sign and date the certificate. You do not need to have the certificate notarized.
- Remember that you must send a copy of **all** documents and attachments to counsel for **each** party to this case.

9th Cir. Case Number(s) _____

Case Name _____

I certify that I served on the person(s) listed below, either by mail or hand delivery, a copy of the _____ and any attachments.

(title of document you are filing, such as Opening Brief, Motion for __, etc.)

Signature _____ **Date** _____

Name	Address	Date Served

Mail this form to the court at:

Clerk, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix E:
Form 4. Motion and Affidavit for Permission to Proceed in Forma Pauperis

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 4. Motion and Affidavit for Permission to Proceed in Forma Pauperis

Instructions for this form: http://www.ca9.uscourts.gov/forms/form04instructions.pdf

9th Cir. Case Number(s)

Case Name

Affidavit in support of motion: I swear under penalty of perjury that I am financially unable to pay the docket and filing fees for my appeal. I believe my appeal has merit. I swear under penalty of perjury under United States laws that my answers on this form are true and correct. 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Signature **Date**

The court may grant a motion to proceed in forma pauperis if you show that you cannot pay the filing fees **and** you have a non-frivolous legal issue on appeal. Please state your issues on appeal. (*attach additional pages if necessary*)

1. *For both you and your spouse, estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

	Average monthly amount during the past 12 months		**Amount expected next month**	
Income Source	**You**	**Spouse**	**You**	**Spouse**
Employment	$	$	$	$
Self-Employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$
Interest and Dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child Support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment Payments	$	$	$	$
Public-Assistance (such as welfare)	$	$	$	$
Other (specify)	$	$	$	$
TOTAL MONTHLY INCOME:	$	$	$	$

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of Employment	Gross Monthly Pay
		From To	$
		From To	$
		From To	$
		From To	$

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of Employment	Gross Monthly Pay
		From To	$
		From To	$
		From To	$
		From To	$

4. *How much cash do you and your spouse have?* $

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount You Have	Amount Your Spouse Has
		$	$
		$	$
		$	$
		$	$

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishing.*

Home	Value	Other Real Estate	Value
	$		$

Motor Vehicle 1: Make & Year	Model	Registration #	Value
			$
Motor Vehicle 2: Make & Year	**Model**	**Registration #**	**Value**
			$

Other Assets	Value
	$
	$
	$

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse	Amount owed to you	Amount owed to your spouse
	$	$
	$	$
	$	$

7. *State the persons who rely on you or your spouse for support. If a dependent is a minor, list only the initials and not the full name.*

Name	Relationship	Age

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$	$
- Are real estate taxes included? ○ Yes ○ No - Is property insurance included? ○ Yes ○ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$
Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
- Homeowner's or renter's	$	$
- Life	$	$
- Health	$	$
- Motor Vehicle	$	$
- Other	$	$
Taxes (not deducted from wages or included in mortgage payments)		
Specify	$	$

	You	Spouse
Installment payments		
- Motor Vehicle	$	$
- Credit Card (name)	$	$
- Department Store (name)	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for the operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify)	$	$
TOTAL MONTHLY EXPENSES	$	$

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?* ○ Yes ○ No

If Yes, describe on an attached sheet.

10. *Have you spent—or will you be spending—any money for expenses or attorney fees in connection with this lawsuit?* ○ Yes ○ No

If Yes, how much? $

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

12. *State the city and state of your legal residence.*

City State

Your daytime phone number (ex., 415-355-8000)

Your age Your years of schooling

Appendix F:
Form 27. Generic Motion & Instructions

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 27. Motion for _____

Instructions for this form: http://www.ca9.uscourts.gov/forms/form27instructions.pdf

9th Cir. Case Number(s) _____

Case Name _____

Lower Court or Agency Case Number _____

What is your name? _____

1. **What** do you want the court to do?

2. **Why** should the court do this? Be specific. Include all relevant facts and law that would persuade the court to grant your request. *(Attach additional pages as necessary. Your motion may not be longer than 20 pages.)*

Your mailing address:

_____

City _____ State _____ Zip Code _____

Prisoner Inmate or A Number (if applicable) _____

Signature _____ **Date** _____

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSTRUCTIONS for Form 27. Generic Motion

USE FORM 27 ONLY IF YOU DO NOT HAVE A LAWYER

Do not use Form 27 if you are counsel of record in the case.

A "motion" asks the court to do something. Be specific and state **what** you want the court to do and **why** the court should do it.

- Include a title for your motion (what you want the court to do) in the blank at the top of Form 27 after "Motion for ___." Include your case number and sign the form.
- To ask the court to appoint counsel, use Form 24 instead.
- To ask the court to waive your filing fees, use Form 4 or Form 23 instead.
- To ask the court to extend your deadline to file any document, use Form 14 instead.
- If you need a decision in fewer than 21 days to avoid serious harm, notify the court's Emergency Motions department by calling (415) 355-8020 or emailing emergency@ca9.uscourts.gov **before filing the motion.**
- You do not have to use Form 27. You may write your own motion instead.

If you are not registered for electronic filing, mail the completed form to: U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939.

To file Form 27 electronically, use the electronic document filing type "Motion for Any Type of Relief."

How to prepare fill-in forms for filing:

- If you have Adobe Acrobat or another tool that lets you save completed forms:
  1. Complete the form.
  2. Print the completed form to your PDF printer (File > Print > select Adobe PDF or another PDF printer listed in the drop-down list).

- If you do not have Adobe Acrobat or another tool that lets you save completed forms:
  1. Complete the form.
  2. Print the completed form to your printer.
  3. Scan the completed form to a PDF file.

Note: The fill-in PDF version of the form is available on the court's website at http://www.ca9.uscourts.gov/forms/.

Do not file this instruction page

Appendix G:
Example of a Motion for a Stay of Removal

Sample Motion for Stay of Removal:

What follows is an example of a Stay of Removal motion for a fiction applicant Mr. Doe, who is appealing from a BIA decision finding that he was not a credible witness (adverse credibility finding) and that country conditions in Mexico did not support a well-founded fear of persecution. This motion is here only as an example. The arguments included in the motion may not apply to your case. Do not rely on these arguments if they do not reflect your situation.

When writing your own motion, research in both the Detention Law Library and the Ninth Circuit Immmigration Outline (https://www.ca9.uscourts.gov/guides/immigration-outline/) to identify cases with similar questions and facts to your case. It is important that you really understand the BIA's decision against you and the key issues that you plan to push back against.

Introduction

Petitioner John Doe ("Mr. Doe") requests a stay of removal pending this Court's resolution of the Petition for Review filed Month Day, Year. See De Leon v. INS, 115 F.3d 643, 644 (9th Cir. 1997) (stay of deportation); Andreiu v. Ashcroft, 253 F.3d 477 (9th Cir. 2001) (stay of removal). Along with the Petition for Review, Mr. Doe filed a Motion for Stay of Removal ("Motion") on Month Day, Year indicating that he would supplement the Motion within 14 days. Dkt. 1-2. Pursuant to the Court's General Orders, a temporary stay of removal was placed in effect as of the filing date. See Ninth Circuit General Order 6.4(c)(2). On Month Day, Year, counsel for the U.S. Department of Justice said that the government would not oppose Mr. Doe's request for an extension to Month Day, Year in order to file the supplemental motion to allow for filing and review of the Certified Administrative Record. Dkt. 6. On Month Day, Year, the Appellate Commissioner ordered any supplemental motion for stay be filed on or before Month Day, Year, and that the Administrative Record was due on Month Day, Year. Dkt. 8. The Administrative Record was filed with the Court on Month Day, Year.

Mr. Doe hereby supplements the Motion. Mr. Doe warrants a stay because he is able to make a strong showing that his case is likely to succeed on the merits; he will be irreparably injured absent a stay; the issuance of the stay will not injure any other party interested in the

proceeding; and the public interest lies in ensuring that Petitioner receives a full and fair hearing before he is removed. See Nken v. Holder, 556 U.S. 418 (2009) (holding that traditional stay factors govern a court of appeals' authority to stay a removal pending judicial review). If he is deported, by contrast, he will face physical violence, torture, and possibly death due to his gender identity and sexual orientation, and because of his relationship with his abusive ex partner from which he is unable to leave or escape.

Petitioner contacted counsel for the Respondent on Month Day, Year via electronic mail seeking the Respondent's position on this motion. Counsel for the Respondent indicated that Respondent opposes this motion.

Statement of Facts

Mr. Doe is a 22-year-old transgender man and a native and citizen of Mexico. Respondent has been aware that he is lesbian and a male since he was a child. However, out of concern for his safety and relationship with his family he did not "come out" as transgender until 2018.

When he was in high school, Mr. Doe began to date a woman by the name of Susan Smith who was five years older than he was. Over the course of two years, Ms. Smith physically, emotionally, and psychologically abused Mr. Doe. In fact, on one occasion in 2013, Ms. Smith attacked Mr. Doe by hitting his head with a glass bottle causing him to lose consciousness and require emergency medical treatment. He suffered a head injury that required six stitches and bothers him to this day. Out of fear of retaliation by Ms. Smith and concern that the police would not protect him, Mr. Doe did not press charges for the attack.

In fear of further violence from Ms. Smith, Mr. Doe went to the Anonymous Safe House when he was discharged from the hospital, and later relocated to Guanajuato in August 2018

where he lived with his cousin, who is homosexual, and cousin's husband. During this period Mr. Doe began publicly identifying as a male and began to dress, and still dresses, as man and project, and still projects, and image of himself as male to the outside world. Mr. Doe explicitly stated on the record during his removal proceedings that he is a lesbian and identifies as a male.

In November 2018, while Mr. Doe was at a friend's house, his cousin and cousin-in-law were attacked by their neighbors and savagely beaten. They were hospitalized for their injuries which included broken ribs and a broken arm. Mr. Doe's cousin reported the attack to the local police, but the police failed to take any action to investigate the crime. Because of his sexual orientation and gender identity, Mr. Doe grew increasingly terrified that he too would be physically attacked yet not be offered protection or assistance by the local police.

Unfortunately, conditions in Mexico only worsened for Mr. Doe. Ms. Smith, Mr. Doe's ex-partner, was able to locate Mr. Doe in Guanajuato. Mr. Doe saw Ms. Smith while out in public one day. He quickly returned home to his cousin's house fearing that Ms. Smith would harm him; but Mr. Doe was not safe at home either. Only a few days later, Ms. Smith ambushed Mr. Doe's home with a group of armed men, engaged by Mr. Doe ending the relationship and Mr. Doe's gender identity. Mr. Doe managed to escape but was soon again found and confronted by Ms. Smith and a group of armed individuals. Ms. Smith attempted to force Mr. Doe into her vehicle. Mr. Doe's cousin was able to intervene and prevent Ms. Smith from kidnapping Mr. Doe. Mr. Doe realized it was only a matter of time before Ms. Smith would succeed in her attempts to take revenge by physically harming or killing him.

In fear for his life, Mr. Doe fled Mexico and presented himself at the U.S. XX Port of Entry on approximately Month Day, 2020 to seek asylum. Since this time, he has been in the custody of U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement

at the XX Detention Facility in XX, California. Mr. Doe testified before the United States Executive Office for Immigration Review on Month Day, 2020 at his individual hearing. Mr. Doe explained the grounds for his asylum claim, including the history of violence and threats to his life and his well-founded fear of his continued persecution on account of his sexual orrientation and gender identity.

The immigration judge ("IJ") denied all forms of relief, finding Mr. Doe not credible and finding that the evidence Mr. Doe submitted did not demonstrate a well-founded fear of future persecution. Mr. Doe timely filed a Form EOIR-26 Notice of Appeal establishing that the IJ made several errors in denying his application for relief.

In particular, (1) the IJ erred in finding Mr. Doe not a credible witness, as supposed omissions and inconsistencies in the record are in fact just additional, consistent details that were not included in his initial credible fear interview, (2) as a result of this incorrect finding, the IJ failed to properly consider Mr. Doe's gender identity and how that gender identity supports a well-founded fear of persecution, and (3) the IJ erred by not considering whether the instances of violence suffered by Mr. Doe, the attitudes of government officials, and the widespread persecution of the LGBTQ community made Mr. Doe eligible for asylum as a member of a "disfavored group."

The Board of Immigration Appeals (BIA) denied the appeal on Month Day, Year, finding no clear error in the IJ's factual findings. The BIA upheld the IJ's finding that Mr. Doe was not credible and that the country conditions in Mexico did not support a finding of a well-founded fear of future persecution.

Jurisdiction and Venue

This Court has jurisdiction pursuant to 8 U.S.C. § 1252(a)(1). Venue is proper under 8 U.S.C. § 1252(b)(2) because Mr. Doe's claims were adjudicated in XX, California, which is within this judicial circuit.

Argument

The Court considers four factors in deciding on a motion for a stay of removal: (1) whether the applicant demonstrates a strong likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether granting the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Nken v. Holder, 556 U.S. 418, 434 (2009). The first two factors "are the most critical," and the threshold for these factors is low. *Id*. The petitioner must simply show more than a "mere possibility of relief" and more than "some possibility of irreparable injury." *Id*. In Leiva-Perez v. Holder, 640 F.3d 962 (9th Cir. 2011), this Court described the "strong likelihood" requirement as being a "reasonable probability" or "fair prospect" of success, "a substantial case on the merits," or that "serious legal questions are raised." *Id*. at 967-68. Most importantly, "none of [these formulations] demand a showing that success is more likely than not." Id. at 968

I. Mr. Doe Shows a Strong Likelihood of Success on the Merits

"[T]o justify a stay, petitioners need not demonstrate that it is more likely than not that they will win on the merits." Leiva-Perez v. Holder, 640 F.3d 962, 9666 (9th Cir. 2011) (emphasis added). Rather, "a stay petitioner [need only] show either 'a probability of success on the merits' or that 'serious legal questions are raised.'" *Id*. at 967 (quoting Abbassi v. I.N.S., 143 F.3d 513, 514 (9th Cir. 1998)). Mr. Doe meets that standard here because the IJ and BIA made at least one independent reversible error. The proper standard of review in immigration proceedings depends on the nature of the decision being reviewed. See Virdiana v. Holder, 646 F.3d 1230,

1233 (9th Cir. 2011). Questions of law are reviewed de novo. See, e.g., Zuniga v. Barr, 946 F.3d 464, 466 (9th Cir. 2019). The IJ's or BIA's factual findings are reviewed for substantial evidence. See, e.g., Arrey v. Barr, 916 F.3d 1149,1157 (9th Cir. 2019). Here, both the BIA and IJ made several findings that were unsupported by substantial evidence and should therefore be reversed or remanded.

A. The Adverse Credibility Finding Is Not Supported By Substantial Evidence

In the Ninth Circuit, an adverse credibility finding must be reversed if the evidence substantially supports a different conclusion. Singh v. INS, 292 F.3d 1017, 1020 (9th Cir. 2002); see also Singh v. Mukasey, 288 F. App'x 420, 421 (9th Cir. 2008) (IJ's adverse credibility finding unsupported by substantial evidence where the IJ failed to consider a doctor's letter containing the dates the immigrant was hospitalized); Li v. Sessions, 740 Fed. Appx. 866, 868 (9th Cir. 2018) (BIA's adverse credibility determination not supported by substantial evidence due to applicant's testimony and corroborating medical record); Sahi v. Ashcroft, 104 Fed. Appx. 88 (9th Cir. 2004) (IJ's adverse credibility determination not supported by substantial evidence where applicant's affidavits from relatives provided corroborating evidence).

Here, the BIA rejected Mr. Doe's arguments that the IJ erred in its adverse credibility finding because the IJ focused on minor details and ignored the fact that Mr. Doe's testimony at his merits hearing fleshed out the narrative he provided at his Credible Fear Review. Instead, the BIA affirmed the IJ's adverse credibility finding on the basis that several purported omissions or inconsistencies demonstrated that Mr. Doe "presented new allegations in an attempt to provide a different or more compelling story of persecution." However, as explained below, that conclusion is not supported by substantial evidence, and therefore Mr. Doe is likely to prevail on his appeal.

First, the IJ's conclusion that Mr. Doe is not accuratly representing his gender identity relies on a single statement that was not made by Mr. Doe and ignores the great weight of evidence in the record reflecting Mr. Doe's identity as a transgender man. The IJ relied upon a visa application which alleged that he was female. In fact, this visa application and statement were not made by Mr. Doe but by the individual applying for the visa on his behalf. Further, the IJ made great issue about when Mr. Doe began living openly as a man. Mr. Doe stated that he was aware of his gender identity since age ten. However, as he stated in his declaration and as reflected in the affidavits submitted on his behalf, he did not start identifying as a male until 2018. Mr. Doe clearly explains this seeming discrepancy by stating that he did not manifest his true gender identity until 2018 out of concern for his ability to live safely and openly and maintain a relationship with his parents. Given the country conditions of Mexico, this is understandable and should not be used to undermine Mr. Doe's credibility.

Mr. Doe has produced substantial evidence that he is accurately representing his identity. The Asylum Office who conducted the credible fear interview found that the "Applicants' testimony··was credible: Considering the totality of the circumstances and all relevant factors, the applicants' testimony was consistent, detailed, and plausible. Therefore, it is found credible." In addition, both the affidavits from Ms. Johnson and Mr. Doe's cousin support that he has been presenting openly as a man for five years. The IJ did not give any weight to these sworn statements from three individuals and the Asylum Officer's findings.

Second, citing to the IJ's decision that Mr. Doe "omitted details on matters of central important to his claim" at his credible fear interview, the BIA observed that Mr. Doe explained at his credible fear interview that "gay people in his town were regularly attacked" but later, at his merits hearing, Mr. Doe testified that his own cousin was assaulted in in the home he was sharing

with Mr. Doe. The IJ stated that "even after mentioning that individuals were assaulted, Mr. Doe made no mention of his cousin's injuries at any time during the [credible fear] interview." This is simply not true. At his credible fear interview, when describing the various instances of violence and threats inflicted upon him, Mr. Doe told the asylum officer: "even my family was hurt." In his declaration and at the hearing, Mr. Doe repeated that same fact. Thus, the IJ and the BIA were simply wrong to conclude that Mr. Doe introduced his cousin's ham for the first time at the merits hearing. Accordingly, the BIA erred in finding that his supposed omission amounted to an attempt by Mr. Doe to "provide a different or more compelling story."

Third, the Board erred by relying on small details that did not come up during Mr. Doe's credible fear interview. In particular, the BIA (and the IJ) focused on the fact that Mr. Doe did not mention in his credible fear interview that he went to the hospital after the 2013 assault. But it is clear from the record that the asylum officer's line of questioning took Mr. Doe away from the events following Ms. Smith's attack to focus on his concerns with the police in Mexico. Mr. Doe was simply answering the asylum officer's questions and not volunteering information that he may not have considered significant.

Fourth, with respect to Mr. Doe's supplemental evidence, the Board found that supporting affidavits lacked certain details. As to Ms. Johnson's letter, the IJ merely found it did not have many details regarding Mr. Doe personally, which is not relevant to Mr. Doe's credibility. Ms. Johnson is the head of a domestic violence safehouse, Anonymous Safe House, who interacts with many clients every year, and an overly-detailed declaration may have been viewed equally suspiciously. In any event, the details that it did contain regarding Mr. Doe and his case were accurate. Most importantly, Ms. Johnson testified to what she knows personally about Mr. Doe and about the current status of the LGBTQ community in Mexico.

The remaining alleged inconsistencies identified by the IJ and relied upon by the BIA amount to minor details that do not effect the heart of Mr. Doe's asylum claim, such as precisely how many people were with Ms. Smith in her kidnapping attempt, or that the affidavits submitted in support of Mr. Doe did not all contain the exact same set of facts. At most, the IJ and the Board have noted a handful of discrepancies, none of which contradict each other or otherwise cast doubt on the claim that Mr. Doe would be subject to persecution in Mexico.

Considering the totality of the circumstances, Mr. Doe, his story, and his evidence were all credible. He provided consistent testimony and evidence regarding the dates of key events, his flight from Mexico, and his persecution and fear of violence. Mr. Doe has provided substantial evidence of past persecution as a member of a disfavored group that the government was unable or unwilling to prevent and a well-founded fear of future persecution.

B. The evidence in the Record Reflects a Pattern and Pratice of Persecution Faced by the LGBTQ Community in Mexico Which is Sufficient to Demonstrate a Well-Founded Fear of Persecution

To demonstrate a well-founded fear of persecution, an applicant need not show that they will be singled out individually for persecution if "(A) The applicant establishes that there is a pattern or practice in his or her country…of persecution of a group of persons similarly situated to the applicant on account of [a protected ground] and (B) the applicant establishes his or her own inclusion in and identification with, such a group of persons such that his or her fear of persecution upon return is reasonable." See 8 C.F.R. § 1208.13(b)(2)(iii).

The BIA erroneously affirmed the IJ's determination that Mr. Doe did not establish a well-founded fear of persecution because although the LGBTQ community has faced discrimination and its members have been victims of hate crimes in Mexico, there are laws being

passed by the governmental to protect and make society more equal for members of the LGBTQ community in Mexico. AR 7, AR 104-05. This is an incorrect and inadequate assessment of the record because the BIA failed to consider the ample country condition evidence which demonstrates that a pattern or practice of persecution exists in Mexico against the LGBTQ community. Arrey, 916 F.3d at 1157; AR 345-553. While the IJ noted that anti-LGBTQ discrimination legislation had been recently passed in Mexico City and that some states have legalized same-sex marriage in Mexico, AR 104, neither the IJ nor BIA appeared to have specifically considered the protection or effectiveness of these laws as they directly apply to Mr. Doe. See generally AR 3-8, 97-113. In determining whether an applicant's fear of future persecution is objectively reasonable in light of current country conditions, the agency must conduct an individualized analysis of how such conditions will affect the applicant's specific situation. See Marcos v. Gonzales, 410 F.3d 1112, 1120-21 (9th Cir. 2005).

In Avendano-Hernandez v. Lynch, the Court found the BIA's analysis on likelihood of future harm "fundamentally flawed" because the BIA primarily relied on Mexico's passage of laws purporting to protect the gay and lesbian community but "mistakenly assumed that these laws would also benefit Avendano-Hernandez, who faces unique challenges as a transgender woman." 800 F.3d 1072, 1081 (9th Cir. 2015). The Court noted that "laws recognizing same-sex marriage may do little to protect a transgender woman like Avendano-Hernandez from discrimination, police harassment, and violent attacks in daily life." Id. Similarly, here, a law recognizing same-sex marriage does little to protect Mr. Doe, a transgender man, from future harm or persecution. Further, an anti-LGBTQ discrimination law passed in one federal jurisdiction of a country containing 32 federal jurisdictions, simply does not support a finding

that Mr. Doe would be safe from future harm or persecution based on his gender identity or sexual orientation.

In fact, despite the existence of these inadequate laws, the country conditions evidence in the record shows that these laws have failed to protect members of the LGBTQ community from harm and are not enforced. AR 345-553. Mexico is ranked as the second most deadly country in Latin America for transgender persons. AR 440. Transgender deaths in Mexico rose to 71 in 2018 from 47 in 2017. AR 437-38. "Overall, 80-85% of LGBTQ Mexicans will face some degree of discrimination and/or physical violence on a regular basis during their lifetime. The nature of hate crimes and violence against transgender individuals is extreme. The bodies of victims often show signs of torture, of being shot, beaten, dismembered and burned." AR 440.

Moreover, the 2018 Department of State's Human Rights Report on Mexico states that "…police routinely subjected LGBTI persons to mistreatment while in custody…Discrimination based on sexual orientation and gender identity was prevalent, despite a gradual increase in public tolerance…" and "There were reports the government did not always investigate and punish those complicit in abuses…" AR 375.

"A finding by the IJ is not supported by substantial evidence when any reasonable adjudicator would be compelled to conclude to the contrary based on the evidence in the record." Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1059 (9th Cir. 2017) (en banc). Here, record evidence clearly showed a pattern and practice of abuse and persecution of the LGBTQ community in Mexico. Neither the IJ nor the BIA contested Mr. Doe's membership in the LGBT community as a lesbian, even if the IJ and BIA erred in their treatment of Mr. Doe's gender identity. Accordingly, the BIA's finding that the IJ had not erred in their analysis of the record was unsupported by substantial evidence and warrants reversal. *Arrey*, 916 F.3d at 1157.

C. Although Clearly Established in the Record, The BIA Fails to Consider Mr. Doe's Gender Identity Rendering its Analysis of his Appeal Erroneous

The BIA incorrectly concluded that, given their affirmation of the IJ's adverse credibility finding, that there was no clear indication from the record that Mr. Doe is a member of the transgender community. AR 3, n.1. As explained above, treating Mr. Doe as a cisgender woman in this case goes against the reality of Mr. Doe's identity and the great weight of the evidence in the record, and radically misrepresents the dangers facing Mr. Doe in Mexico. By explicitly ignoring Mr. Morales's gender identity – which is one of the bases for his applications for relief – the BIA's analysis of the appeal is fundamentally flawed and incomplete. This error alone is good reason for the court to remand the case for proper consideration of Mr. Morales's gender identity within the context of his fear of future persecution.

A Respondent can show a well-founded fear of future persecution where there is a pattern and practice of persecution of a particular group. See 8 C.F.R. § 1208.13(b)(2)(iii); see also Rusak v. Holder, 734 F.3d 894, 896 (9th Cir. 2013). Here, the IJ expressly considered country conditions evidence in Mexico for transgender people and opined that the majority of persecution faced by LGBTQ people in Mexico were transgender: "[t]here is also indication that although clearly there are still hate crimes and homophobic attitudes, that most of the victims of these crimes are men and transgender, and that women amount or only a very, very small percentage of the crime [sic] committed against members of the LGBT community—that is lesbian women." AR 105 (emphasis added).

Despite Mr. Doe's express identification of himself as male, supported by multiple documents in the record, the BIA declined to recognize him as such and correct the IJ's erroneous finding. This again was clear and reversible error because record evidence compels a

finding that Mr. Doe did identify as male, and the IJ's own analysis indicated that had she considered Mr. Doe as transgender, country conditions evidence would compel a finding of a well-founded fear of future persecution. See 8 U.S.C. § 1252(b)(4)(B); see also Mairena v. Barr, 917 F.3d 1119, 1123 (9th Cir. 2019) (per curiam).

Beyond the well-founded fear of persecution, this error extends throughout the claims raised by Mr. Doe on appeal before the BIA. The BIA's refusal to acknowledge Mr. Doe's gender identity, which is unsupported by substantial evidence, impacts its interpretation and analysis of all the elements of asylum and withholding of removal, including: his membership in a particular social group, any causal connection between that group and past or future persecution, and whether Mr. Morales was subject to past persecution. See Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (en banc); Parussimova v. Mukasey, 555F.3d 734, 741 (9th Cir. 2009); Deloso v. Ashcroft, 393 F.3d 858, 863-64 (9th Cir. 2005). Remand is therefore warranted for the BIA to consider Mr. Doe's claims for asylum and withholding of removal in light of his transgender identity, which the BIA refused to do here.

II. Mr. Doe Will Suffer Irreparable Harm Absent a Stay of Removal

Along with the likelihood of success on the merits, the irreparable injury inquiry is one of "the most critical" factors in adjudicating stay applications. Nken, 556 U.S. at 434. To show irreparable injury, Mr. Doe need demonstrate only that it is "the more probable or likely outcome." Leiva-Perez, 640 F.3d at 968. He meets this standard, because he faces imminent deportation to Mexico, where he credibly fears persecution. Further, DHS cannot afford his effective relief if he is removed but later prevails on the merits of his Petition for Review, because it lacks a consistent, predictable, or reliable return policy for wrongly deported

noncitizens. In addition, removal would adversely impact Mr. Doe's ability to participate in this petition for review.

A. DHS's Discretionary Return Policy Does Not Afford Mr. Doe Effective Relief if He Prevails on His Petition for Review

Mr. Doe faces irreparable injury because Respondent cannot ensure that the Government will facilitate his return to the U.S. if this Court grants his petition for review. Indeed, there are "significant impediments" facing erroneously deported noncitizens who seek to return. Ltr. From Michael R. Dreeben, Deputy Solicitor General, to William K. Suter, Clerk of the Supreme Court, at 3–4 (Apr. 24, 2012) (noting the Government was "not confident that the process for returning removed aliens, either at the time the brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in Nken implied"). The process governing the return of immigrants to this country is covered by a general policy directive that was issued by U.S. Immigration and Customs Enforcement ("ICE"), a component agency of DHS, on February 24, 2012. See ICE Policy Directive Number 11061.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens (ICE Policy Directive). ICE supplemented the policy directive with a "Frequently Asked Questions" page on its website. See FAQs on Facilitating Return for Lawfully Removed Aliens. Because DHS, who is not a party to this case, controls the implementation of this policy, Respondent lacks authority to address whether DHS could or would apply the policy in Mr. Doe's case.

Even if Respondent could speak authoritatively, the policy is inadequate to ensure Mr. Doe's return and the restoration of his pre-removal status should he win his appeal. Under the policy, ICE facilitates only the return of persons who were previously lawful permanent residents or whose "presence is necessary for continued administrative removal proceedings"—and,

within those groups, only those who can afford to pay. ICE Policy Directive ¶¶ 2, 3.1. The policy directive does not address mechanisms to facilitate the return of non-lawful permanent residents. Nor does it define under what circumstances a noncitizen's presence is "necessary" for proceedings. Thus, as Mr. Doe is not and has never been a lawful permanent resident, ICE will have unfettered discretion to determine whether and how to facilitate his return if he prevails in this Petition for Review.

B. Removal Would Adversely Affect Mr. Doe's Participation In This Case

Additionally, removal would undermine Mr. Doe's ability to pursue this petition and, should he prevail, his case on remand. ICE's suggested use of teleconferencing and videoconferencing from U.S. embassies and consulates abroad, see FAQ ¶ 4, is not a workable solution for a variety of due process reasons. These include, but are not limited to, little or no ability for individuals to communicate with the clerk's office, problematic presentation of evidence, and technological malfunctions and/or failure. There also is no indication that a system is in place to facilitate the use of videoconferencing or teleconferencing from abroad.

III. The Issuance of a Stay Will Not Substantially Injure the Government, and the Public Interest Lies in Granting a Stay

The Court in Nken found that the last two stay factors—injury to other parties in the litigation and the public interest—merge in immigration cases because Respondent is both the opposing litigant and the public interest representative. Nken, 556 U.S. at 435. While the public and the government have a heightened interest in "prompt execution of removal orders" where "the alien is particularly dangerous" or "has substantially prolonged his stay by abusing the process provided to him," Nken, 556 U.S. at 436 (citations omitted), Mr. Doe is neither a flight risk, nor is there a criminal or otherwise negative immigration history. Neither Respondent nor

the public have any particular interest in Mr. Doe's removal beyond the general interest noted in Nken.

However, the public does have a strong interest in "preventing [noncitizens] from being wrongfully removed, particularly to countries where they are likely to face substantial harm." Leiva-Perez, 640 F.3d at 970 (quoting Nken, 129 S. Ct. at 1762). Here, Mr. Doe faces homelessness, physical harm, and torture if wrongfully returned to Mexico. Because the government cannot make any showing that granting a stay of removal in Mr. Doe's particular case would substantially injure its interests or conflict with the public interest, the stay should be granted.

Conclusion

For the foregoing reasons, Mr. Doe respectfully requests that this Court grant his motion for stay of removal.

Appendix H:
Form 24. Motion for Appointment of Counsel

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 24. Motion for Appointment of Counsel

Instructions for this form: http://www.ca9.uscourts.gov/forms/form24instructions.pdf

9th Cir. Case Number(s)

Case Name

Lower Court or Agency Case Number

1. My name is

2. I am asking the court to appoint an attorney to help me with this case.

3. My fee status is as follows *(select one)*:

- ○ The district court or this court granted my motion to proceed in forma pauperis.
- ○ I filed a motion to proceed in forma pauperis but the court has not yet ruled on the motion.
- ○ This motion is accompanied by a motion to proceed in forma pauperis.
- ○ I paid the filing fees for this case. However, I cannot afford an attorney for the following reasons:

4. Is this a civil appeal or petition for review? ○ Yes ○ No

   If yes, attach an additional page(s) describing the issues on appeal.

My current mailing address

City State Zip Code

Prisoner Inmate or A Number (if applicable)

Signature **Date**

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix I:
Form 16. Certificate for Emergency Motion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: http://www.ca9.uscourts.gov/forms/form16instructions.pdf

9th Cir. Case Number(s)

Case Name

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

Relief is needed no later than *(date)*:

The following will happen if relief is not granted within the requested time:

I could not have filed this motion earlier because:

I requested this relief in the district court or other lower court: ○ Yes ○ No

If not, why not:

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: ○ Yes ○ No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*:

By *(method)*:

Position of other parties:

Name and best contact information for each counsel/party notified:

I declare under penalty of perjury that the foregoing is true.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Appendix J:
Form 13. Streamlined Request for Extension of Time to File Brief

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 13. Streamlined Request for Extension of Time to File Brief

ATTENTION ELECTRONIC FILERS: DO NOT USE FORM 13
Use Form 13 only if you are **not** registered for Appellate Electronic Filing.

Electronic filers must make the request by using the electronic document filing type "Streamlined Request to Extend Time to File Brief," which does not require any form.

Instructions

- Use Form 13 only to request more time to file a **BRIEF**. To request an extension of time to file *anything other than a brief*, use Form 14.
- You may request a new due date of up to 30 days from your current due date.
- Submit Form 13 on or before your brief's current due date. The clerk will mail you the new briefing schedule.
- Use Form 13 only for your **first** request for an extension of time to file **each** brief. To request any additional extension of time to file the brief or to request a first extension of more than 30 days pursuant to Cir. R. 31-2.2(b), use Form 14.

9th Cir. Case Number(s)

Case Name

Name of each party requesting the extension:

For which brief are you requesting an extension?

- ○ Opening Brief
- ○ Answering Brief
- ○ Reply Brief
- ○ First Brief on Cross-Appeal
- ○ Second Brief on Cross-Appeal
- ○ Third Brief on Cross-Appeal
- ○ Cross-Appeal Reply Brief

What is your current due date?

What is your requested due date?

Print Name

Signature **Date**

Mail this form on or before your brief's current due date to the court at:
Clerk, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, CA 94119-3939

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix K:
Form 14. Motion for Extension of Time

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 14. Motion for Extension of Time

Instructions for this form: http://www.ca9.uscourts.gov/forms/form14instructions.pdf

9th Cir. Case Number(s)

Case Name

Requesting Party Name(s)

I am:
- ○ The party requesting the extension.
- ○ Counsel for the party or parties requesting the extension.

I request an extension of time to file a:

- ☐ Brief (*you **must** also complete the Declaration on page 3*)
- ☐ Motion to proceed in forma pauperis
- ☐ Motion for a certificate of appealability
- ☐ Response/opposition to a pending motion
- ☐ Reply to a response/opposition to a pending motion
- ☐ Certified Administrative Record
- ☐ Response to court order dated
- ☐ Other *(you **must** describe the document)*

The requested new due date is:

I request the extension of time because (**cannot be left blank**):
(attach additional pages if necessary)

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Recitals in criminal and immigration cases pursuant to Circuit Rule 27-8
Complete this section for criminal or immigration cases.

Previous requests for extension of time to file the document, including any request for a Streamlined Extension of Time under Circuit Rule 31-2.2(a) (*select one*):

- ○ I have **NOT** filed a previous request to extend time to file the document.
- ○ I have previously requested an extension of time to file the document.

  This motion is my _____ request.
  (Examples: first, second)

Bail/detention status (*select one*):

- ○ The defendant is incarcerated. The projected release date is: _____.
- ○ The petitioner is detained.
- ○ The defendant/petitioner in this criminal/immigration case is at liberty.

Signature _____ **Date** _____
*(use "*s/[typed name]*" to sign electronically-filed documents)*

Declaration in support of extension to file brief under Circuit Rule 31-2.2(b)
Complete this section if you are requesting an extension of time to file a brief.

1. I request an extension of time to file the ☐ brief.

(Examples: opening, answering, reply, first cross-appeal)

2. The brief's current due date is: ☐

3. The brief's first due date was: ☐

4. A more detailed explanation of why the extension of time to file the brief is necessary: *(Under Circuit Rule 31-2.2(b), a request for extension of time to file a brief must be "supported by a showing of diligence and substantial need" and a conclusory statement as to the press of business does not constitute such a showing. Attach additional pages if necessary.)*

☐

5. The position of the other party/parties regarding this request is:

☐ Unopposed.

☐ Opposed by *(name of party/parties opposing this motion):*

☐

☐ Unknown. I am unable to verify the position of the other party/parties because:

☐

6. ☐ The court reporter is not in default with regard to any designated transcripts.

If the court reporter is in default, please explain:

☐

7. ☐ I have exercised diligence and I will file the brief within the time requested.

I declare under penalty of perjury that the foregoing is true and correct.

Signature ☐ **Date** ☐

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix L:
Form 8. Certificate of Compliance for Briefs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) _____

I am the attorney or self-represented party.

This brief contains _____ **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature _____ **Date** _____

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix M:
Form 19. Notice of Sealing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 19. Notice of Sealing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form19instructions.pdf

9th Cir. Case Number(s)

Case Name

☐ Pursuant to Circuit Rule 27-13(d), the filing of the accompanying document or set of documents under seal is required by a statute or procedural rule.

The applicable statute/rule is:

☐ Pursuant to Circuit Rule 27-13(g), maintaining this entire case under seal is mandated by statute or procedural rule.

The applicable statute/rule is:

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) _____

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)*:

Signature _____ **Date** _____

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix N:
Form 11. Certificate of Compliance for Petitions for Rehearing/Response

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) _____

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

○ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: _____.

(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature _____ **Date** _____

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Appendix O:
Petitioner's Informal Opening Brief
(Immigration)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____ 9th Cir. Case No. _____
Petitioner(s),

Alien Registration No. _____
vs. *("A number")*

_____
Respondent(s).

PETITIONER'S INFORMAL OPENING BRIEF
Immigration

(attach additional sheets as necessary, up to a total of 50 pages including this form)

JURISDICTION. This information helps the court determine if it can review your case.

1. Timeliness of Appeal

   a. What date did the immigration judge enter a decision? _____

   b. What date did you file your notice of appeal with the Board of Immigration Appeals (BIA)? _____

   c. What date did the BIA enter a decision? _____

   d. What date did you file your petition for review? _____

      - For prisoners or detainees, what date did you give your petition for review to prison authorities for mailing? _____

FACTS. Include all facts that the court needs to know to decide your case.

2. What are the facts of your case?

PROCEEDINGS BEFORE THE BIA. In this section, we ask you about what happened in your case before you filed your petition for review. The term "agency" refers to the agency, court, or officer that made the final decision in your case. The agency is most likely the BIA. If the BIA did not hear your case, the term "agency" may mean the immigration court or officer that made the final decision.

3. What did you ask the agency to do? What type of relief did you request—for example, ask the agency for cancellation of removal or asylum or to re-open a prior removal proceeding?

4. What legal claim or claims did you raise with the agency?

5. What did the agency do?

PROCEEDINGS BEFORE THE COURT OF APPEALS. In this section, we ask you about issues related to this case before the court of appeals and any previous cases you have had in this court.

6. What issues are you asking the court to review in this case? What do you think the agency did wrong?

7. Did you present all issues listed in Question 6 to the immigration court and/or BIA? Answer yes or no: _____

   If not, why not?

8. What law supports your position? (You may refer to cases and statutes, but you are not required to do so.)

9. **Other Pending Cases.** Do you have any other cases pending in the court of appeals? If so, give the name and docket number of each case.

10. **Previous Cases.** Have you filed any previous cases that the court of appeals has decided? If so, give the name and docket number of each case.

_____ _____
Name Signature

_____

_____

_____ _____
Address Date

Appendix P:
Form 32. Response to Notice of Case Being Considered for Oral Argument

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 32. Response to Notice of Case Being Considered for Oral Argument

Instructions for this form: http://www.ca9.uscourts.gov/forms/form32instructions.pdf

9th Cir. Case Number(s)

Case Name

Hearing Location (*city*)

Your Name

List the sitting dates for the three sitting months you were asked to review:

Do you have an unresolvable conflict on any of the above dates? ○ Yes ○ No

If yes, list the specific day(s) and the specific reason(s) you are unavailable:

Do you have any other cases pending in this court for which you received a notice of consideration for oral argument during the three sitting months listed above?

○ Yes ○ No

If yes, list the number, name, and hearing city of each of the other case(s):

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Appendix Q:
Contact Information for Court Houses

Contact information for the clerk at each federal court. Contact the one that you think is closest to you.

First Street U.S. Courthouse
350 W 1st Street, Suite 4311
Los Angeles, CA 90012-4565
(213) 894-1565

Edward R. Roybal Federal Building and United States Courthouse
255 East Temple Street
Los Angeles, CA 90012-3332
(213) 894-1565

George E. Brown, Jr. Federal Building and United States Courthouse
3470 Twelfth Street
Riverside, CA 92501-3801
(951) 328-4450

Ronald Reagan Federal Building and United States Courthouse
411 West 4th Street, Room 1053
Santa Ana, CA 92701-4516
(714) 338-4750

Robert T. Matsui Federal Courthouse
501 I Street, Room 4-200
Sacramento, CA 95814
(916) 930-4000

Robert E. Coyle Federal Courthouse
2500 Tulare Street, Room 1501
Fresno, CA 93721
(559) 499-5600

Redding Federal Courthouse
2986 Bechelli Lane
Redding, CA 96002
(530) 246-5416

Bakersfield Federal Courthouse
510 19th Street, Suite 200
Bakersfield, CA 93301
(661) 326-6620

Yosemite Federal Courthouse
9004 Castle Cliff Court
Yosemite, CA 95389

(209) 372-0320

Phillip Burton Federal Building and United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102
(415) 522-2000

Ronald V. Dellums Federal Building and United States Courthouse
1301 Clay Street
Oakland, CA 94612
(510) 637-3530

Robert F. Peckham Federal Building and United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113
(408) 535-5363

United States Courthouse
3140 Boeing Avenue
McKinleyville, CA 95519
(707) 445-3612

Edward J. Schwartz United States Courthouse
221 West Broadway
San Diego, CA 92101
(619) 557-5600

James M. Carter & Judith N. Keep United States Courthouse
333 West Broadway
San Diego, CA 92101
(619) 557-5600

El Centro United States Courthouse
2003 W. Adams Ave, Ste 220
El Centro, CA 92243
(760) 339-4242

Appendix R:
Contact for Public Defenders

CONTACT INFORMATION FOR PUBLIC DEFENDERS IN CALIFORNIA, BY COUNTY

Alameda County Public Defender: (510) 272-6600

Alpine County Superior Court: (530) 694-2113

Amador County Public Defender: (209) 223-0877

Butte County Superior Court: (530) 532-7002

Calaveras County Public Defender: (209) 754-4321

Colusa County Superior Court: (530) 458-5149

Contra Costa County Public Defender: (925) 335-8000

Del Norte County Superior Court: (707) 464-8115

El Dorado County Public Defender: (530) 621-6440

Fresno County Public Defender: (559) 600-3546

Glenn County Superior Court, Criminal Division: (530) 934-6446, extension 7001

Humboldt County Public Defender: (707) 445-7634

Imperial County Public Defender: (442) 265-1705

Inyo County Public Defender: (760) 582-2484

Kern County Public Defender: (661) 868-4799

Kings County Superior Court: (559) 582-1010

Lake County Public Defender (Lake Indigent Defense): (707) 900-5177

Lassen County Public Defender: (530) 251-8312

Los Angeles County Public Defender: (833) 700-2812 (toll-free) or (213) 974-2811

Madera County Public Defender: (559) 674-4696

Marin County Public Defender: (415) 473-6321

Mariposa County Superior Court, Criminal Division: (209) 966-2005

Mendocino County Public Defender: (707) 234-6950

Merced County Public Defender: (209) 385-7692

Modoc County Public Defender: (530) 233-2474

Mono County Public Defender: (760) 934-4558

Monterey County Public Defender: (831) 755-5058

Napa County Public Defender: (707) 253-4442

Nevada County Public Defender: (530) 265-1400

Orange County Public Defender: (657) 251-6090

Placer County Public Defender: (916) 644-1100

Plumas County Public Defenders: (530) 283-2410, (530) 283-1179, (530) 283-1010, (530) 283-5155, (530) 394-7764, or (530) 836-4625

Riverside County Public Defender: (951) 955-6000

Sacramento County Public Defender: (916) 874-6411

San Benito County Superior Court, Criminal/Traffic Division: (831) 636-4057

San Bernardino County Public Defender: (909) 387-8373

San Diego County Public Defender: (619) 338-4700

San Francisco Public Defender: (415) 553-1671

San Joaquin County Public Defender: (209) 468-2730

San Luis Obispo County Public Defender (San Luis Obispo Defenders): (805) 541-5715

San Mateo County Private Defender Program: (650) 298-4000

Santa Barbara County Public Defender: (805) 568-3470

Santa Clara County Public Defender: (408) 299-7700

Santa Cruz County Public Defender: (831) 429-1311

Shasta County Public Defender: (530) 245-7598

Sierra County Public Defender: (530) 265-4565

Siskiyou County Public Defender: (530) 842-8105

Solano County Public Defender: (707) 784-6700

Sonoma County Public Defender: (707) 565-2791

Stanislaus County Public Defender: (209) 525-4200

Sutter County Public Defender: (530) 822-7355

Tehama County Superior Court, Criminal Division: (530) 527-3563

Trinity County Superior Court: (530) 623-1208

Tulare County Public Defender: (559) 636-4500

Tuolumne County Public Defender: (209) 533-6370

Ventura County Public Defender: (805) 654-2201

Yolo County Public Defender: (530) 666-8165

Yuba County Public Defender: (530) 741-2331

Appendix S:
Judicial Council of California's *pro se* Form

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	*FOR COURT USE ONLY* DATE: TIME: DEPARTMENT:

MOTION TO VACATE CONVICTION OR SENTENCE

☐ Pen. Code, §§ 1016.5 ☐ Pen. Code, §§ 1473.7(a)(1) ☐ Pen. Code, §§ 1473.7(a)(2)

Instructions—Read carefully if you are filing this motion for yourself

- The term "Moving Party" as used in this form refers to you.
- This motion must be clearly handwritten in ink or typed. Make sure all answers are true and correct. If you make a statement that you know is false, you could be convicted of perjury (lying under oath).
- You must file a separate motion for each separate case number.
- Fill in the requested information. If you need more space, add an extra page and note that your answer is "continued on added page," or use *Attachment to Judicial Council Form* (form MC-025) as your additional page.
- Serve the motion on the prosecuting agency.
- **File the motion in the superior court in the county where the conviction or sentence was imposed.** Only the original motion needs to be filed unless local rules require additional copies.
- Notify the clerk of the court in writing if you change your address after filing your motion.

1. This motion concerns a conviction or sentence in the above case number. On *(date)* , the Moving Party was convicted of a violation of the following offenses *(list all offenses included in the conviction)*:

CODE	SECTION	TYPE OF OFFENSE *(felony, misdemeanor, or infraction)*

If you need more space for listing offenses, use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.

Form Approved for Optional Use
Judicial Council of California
CR-187 [Rev. January 1, 2020]

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

2. ☐ **MOTION UNDER PENAL CODE SECTION 1016.5**

a. **GROUNDS FOR RELIEF: The Moving Party requests relief based on the following:**

(1) Before acceptance of a plea of guilty or nolo contendere to the offense, the court failed to advise the Moving Party that the conviction might have immigration consequences as required under Penal Code section 1016.5(a).

(2) The conviction that was based on the plea of guilty or nolo contendere may result in immigration consequences for the Moving Party, including possible deportation, exclusion from admission to the United States, or denial of naturalization.

(3) The Moving Party likely would not have pleaded guilty or nolo contendere if the court had advised the Moving Party of the immigration consequences of the plea. *(People v. Arriaga* (2014) 58 Cal.4th 950.)

b. **Supporting Facts**

Tell your story briefly. Describe the facts you allege regarding (1) the court's failure to advise you of the immigration consequences, (2) the possible immigration consequences, and (3) the likelihood that you would not have pleaded guilty or nolo contendere if you had been advised of the immigration consequences by the court. (*If necessary, attach additional pages.You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.*)

3. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7(a)(1), Legal Invalidity**

The Moving Party is not currently in criminal custody (criminal custody includes in jail or prison; on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUNDS FOR RELIEF: Moving Party requests relief based on the following:**

The conviction or sentence is legally invalid due to a prejudicial error (a mistake that causes harm) that damaged the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere (no contest). (Note: A determination of legal invalidity may, *but is not required to*, include a finding of ineffective assistance of counsel.) If you are claiming that your conviction or sentence is invalid due to ineffective assistance of counsel, before the hearing is held on this motion you (or the prosecutor) must give timely notice to the attorney who you are claiming was ineffective in representing you.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

3.b. **Supporting Facts**

Tell your story briefly. Describe the facts you allege to be prejudicial error. Include information that shows that the conviction you are challenging is currently causing or has the possibility of causing your removal from the United States, or the denial of your application for an immigration benefit, lawful status, or naturalization.

CAUTION: You must *state facts, not conclusions.* For example, if claiming ineffective assistance of counsel, you must state facts detailing what the attorney did or failed to do and how that affected your plea.

Note: There is a presumption of legal invalidity (it will be assumed that your conviction or sentence is not legally correct) if:
(1) you pleaded guilty or nolo contendere based on a law that provided that the arrest and conviction would be deemed never to have occurred if specific requirements were completed;
(2) you completed those specific requirements; and
(3) despite completing those requirements, your guilty or nolo contendere plea has been or possibly could be used as a basis for adverse immigration consequences.

(*If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

4. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7(a)(2), Newly Discovered Evidence of Actual Innocence**

The Moving Party is not currently in criminal custody (criminal custody includes in jail or prison; or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUNDS FOR RELIEF: Moving Party requests relief based on the following:**

(1) Newly discovered evidence of actual innocence exists that requires vacating the conviction or sentence as a matter of law or in the interests of justice.

(2) The Moving Party discovered the new evidence of actual innocence on *(date):*

b. **Supporting Facts**

Tell your story briefly. Describe the facts you allege to constitute newly discovered evidence of actual innocence. (*If necessary, attach additional pages.You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

5. ☐ The Moving Party requests that the court hold the hearing on this motion without the Moving Party's personal presence for the following reasons:

6. The Moving Party requests that the court vacate the conviction or sentence in the above-captioned matter.

7. The Moving Party requests that the court allow the withdrawal of the plea of guilty or nolo contendere in the above-captioned matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF MOVING PARTY OR ATTORNEY)