

## BIA Appellate Check-List

1. The new Appellate Procedures Regulation: 2/6/2026 IFR
  - a. Applies to appeals of IJ and DHS decisions entered after the effective date
  - b. Deadline for filing Notice of Appeal is 10 days (previously 30)
    - i. Exception: many asylum cases, excluding ACA prepermissions, one-year filing deadline cases for which no exception applies, and cases involving prior denial of asylum
  - c. Appeals will be resolved by summary dismissal with no briefing unless a majority of the permanent AIJs vote to decide the case on the merits.
  - d. Biggest functional takeaways:
    - i. As long as this rule is in effect, there will be a lot less briefing at the BIA level. And if there is briefing, it will be simultaneous, with no reply briefs and very limited extensions (extraordinary circumstances only)
    - ii. Practitioners will need to make their Notices of Appeal as fulsome as possible and will need to learn the PFR process, including the process for seeking an emergency stay of removal in the relevant circuits.
    - iii. Fees for obtaining meaningful appellate review will dramatically increase, because clients will need to pay both the BIA appeal fee and the PFR filing fee.
    - iv. Substantively, more *Loper Bright* arguments will be available because the BIA has announced its intention not to add reasoning or rationale to supplement the IJs' decisions.
    - v. Potential effects on habeas petitions: if an appeal moves faster and the client ends up with a final order, the detention converts from pre-order to post-order. Consult with habeas experts to develop responsive strategies.
2. Read the Immigration Judge Decision
  - a. What factual findings did the IJ make?
  - b. What legal conclusions did the IJ make?
3. Read the Record! All of it!
  - a. Charging Documents/Hearing Notices
  - b. Applications
  - c. Documentary Evidence
  - d. Testimony
4. Identify the errors by the Immigration Judge
  - a. Errors of Fact
    - i. Standard of Review: Clear error
      1. Predictive findings about what is likely to happen in the future are considered factual. *See Matter of L-A-G-B-*, 29 I. & N. Dec. 343, 344 (BIA 2025).
    - ii. Challenge an adverse credibility determination, and capitalize on the power of a positive credibility determination
  - b. Errors of Law
    - i. Standard of Review: De novo

1. The Board also reviews de novo whether established facts meet a given legal standard. *See, e.g., Matter of E-M-F-S-*, 29 I. & N. Dec. 379, 381 (BIA 2026) (whether harm rises to the level of persecution); *Matter of L-T-A-*, 29 I. & N. Dec. 362, 363 (BIA 2025) (whether facts support a finding of firm resettlement).
      - ii. Did the IJ allocate the burdens of proof properly?
        1. Issues: Non-citizenship (evidence of foreign birth?), removability, inadmissibility, relief
        2. Consider effect of any concessions below
      - c. Exhaust the issues, but pick your battles
5. Define what success looks like, and create a road map
- a. The elephant in the room: success may not be possible at the Board level, even if you do everything right.
    - i. Discuss the obstacles to success with your client. Does your client understand the investment of time (and legal fees) needed for a PFR, if the Board dismisses the appeal? Does your client know that the Board has specifically announced summary dismissal is the most likely result of every case?
    - ii. Consider whether issues will be reviewable by a court of appeals. For example, denials of relief based on discretion are unreviewable absent an error of law or a constitutional error (but ignoring record evidence may rise to the level of a due process violation).
    - iii. Consider viable challenges to pretermissions
      1. Due process/reasonable opportunity to brief the issue before the IJ
      2. Country-specific challenges
      3. Challenges concerning fear claim in the third country
      4. Legal question if withholding and CAT remain available: preserve!
  - b. Threshold question: do you have a roadmap to success? Cured of the errors made by the IJ, does your client win?
  - c. A road map to success includes a compelling narrative as well as a legal argument. It may be related to the facts of the asylum case, or it may be something else- due process violations or really compelling equities. “What makes this case important/different?”
  - d. Remember that under the new IFR, every argument needs to be articulated in the Notice of Appeal, because most cases will never go to briefing.
6. Legal arguments
- a. Avoid lengthy boilerplate
    - i. You may have standard language available for why some published Board decisions are not viable in your circuit, but tailor that argument to the facts of each client’s case.
  - b. Preserve legal arguments that are likely to prevail at the circuit level while acknowledging any contrary Board caselaw.
    - i. Do you have the option to argue that adverse Board precedent is precluded by caselaw in your circuit?
    - ii. Even if not, what *Loper Bright* arguments can you advance? Preserve them!

1. If the IJ's legal conclusions were unreasoned or unpersuasive, say so, and cite *Loper Bright*. If the Board does not correct the IJ's error, the argument will be preserved for a petition for review.
7. Edit, Edit, Edit. Have a colleague edit! If you get to briefing, make those 25 pages work for you.
  - a. Is the "What makes this case important/different" right up front?
  - b. Make sure every word/sentence is moving the reader in the right direction
  - c. Don't say what you are going to say. Just say it. Say it once and say it well.
8. Avoid procedural pitfalls
  - a. Is your client detained? Does your client have a check-in?
    - i. File your Notice of Appeal ASAP
    - ii. To account for Board recordkeeping delays, communicate to DHS in writing that the Notice of Appeal is on file.
  - b. Practice Manual compliance: review the full manual, but pay particular attention to section 4.6 for BIA appeal briefs
  - c. Deadlines and Service
    - i. Guard against a "gotcha" dismissal as much as possible: now more than ever
    - ii. See, e.g., *Matter of F-B-G-M- & J-E-M-G-*, 29 I. & N. Dec. 52 (BIA 2025) (addressing sufficiency of notice of briefing schedule); *Matter of Iskandrani*, 29 I. & N. Dec. 26 (BIA 2025) (addressing date of decision for purposes of calculating 30-day appeal period).
9. Defending against a DHS appeal
  - a. If applicable, remind the Board that the 10-day filing deadline and summary dismissal reg applies to DHS, too
  - b. Remind the Board that it cannot make its own findings of fact
  - c. Remind the Board that DHS must show error under the applicable standard of review; this is not the time to make your client prove the case anew
  - d. Be ready to defend everything
    - i. Under the new reg, if the case is briefed, the briefing will be simultaneous. Consider any need to defend a positive credibility determination or a finding of nexus, etc.
    - ii. If DHS goes beyond the arguments in the notice of appeal or withdraws from stipulations, consider requesting leave to file a reply brief. The new IFR prohibits it, but this will preserve due process challenges to the denial at the PFR stage.
  - e. Is your client detained? Evaluate habeas options.