

**BIA APPEALS  
FUNDAMENTALS**

Tahirih Pro Bono Network  
July 15, 2020



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## Today's Presenters

**Tahirih National Office**

Kursten Phelps  
Co-Director of Client Advocacy

**Tahirih Atlanta Office**

Lynn Pearson  
Senior Staff Attorney

**With Special Guest**

David Neal  
Former Chair  
Board of Immigration Appeals

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## Agenda

- **Welcome** Introductions
- **COVID-19 Updates**
- **Other Legal Updates** Case law, regulatory updates
- **BIA Appeals Fundamentals**
- **Questions**

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## Learning Objectives

### TODAY'S OBJECTIVES:

- Learn the basics of practice before the BIA
- Learn the mechanics of how to appeal an immigration judge decision
- Learn how to avoid summary dismissal and make sure your appeal is heard



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## COVID-19 UPDATES



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## Agency Operating Status

Tahirih updates its Pro Bono eLibrary every day when there is a relevant agency update.

Agency	Status
EOIR- Detained Hearings	Open
EOIR- Non-detained	Postponed through <b>July 31</b> <b>Baltimore open now</b> <b>Arlington open July 20</b>
USCIS	Open
ICE ERO	Suspended or Telephonic*
State	Routine Visa Interviews Suspended*

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# USCIS

### Asylum Offices

- In-office, videoconferencing interviews
- Bring interpreter, listed family members.
- No penalty delay for reschedule request due to illness or potential risk of Covid.
- No walk in inquiries.
- All affirmative asylum decisions will be mailed out.

### RFEs, NOIDs, NOIRs, Appeals

- 60 day period to submit RFE, NOID, NOIR response or file AAO appeal extended for notices or denials dated between March 1-September 11, 2020, inclusive.

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# OTHER LEGAL UPDATES



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# Supreme Court Update

### DHS v. Thuraissigiam (June 25, 2020)

- INA 1252(e)(2)—which allows an arriving asylum seeker placed in expedited removal to bring extremely limited habeas claims does not violate the Suspension Clause of the Constitution.
- The majority opinion endorsed the views that 1252(e)(2) is categorically consistent with the Suspension Clause and that even asylum seekers already present in the U.S. for a short period of time have no due process rights beyond the right to statutory procedures.



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## Supreme Court Update

### ***DHS v. Regents of the Univ. of Cal.*** **(June 18, 2020)**

- Invalidates the administration's rescission of DACA as arbitrary and capricious
- Leaves the door open for the administration to try to rescind DACA again
- In the meantime, mandate issued this Monday, which means DHS now legally obligated to accept new DACA applications



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## Transit Ban Litigation

### ***I.A. v. Barr & CAIR Coalition v. Trump*** **(D.D.C. June 30, 2020)**

- Holds that Tahirih & CAIR have standing to challenge transit ban
- Strikes down the transit ban as unlawfully enacted without public notice and comment
- Decision effective immediately

### ***East Bay Sanctuary Covenant v. Barr*** **(9th Cir. July 6, 2020)**

- Holds transit bar to be contrary to INA
- Also holds, unanimously, that transit bar arbitrary & capricious because of dangerous conditions for asylum seekers in Mexico/Northern Triangle

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## Expansion of Expedited Removal

### ***Make the Road N.Y. v. Wolf*** (D.C. Cir. June 23, 2020)

- Reverses preliminary injunction blocking the expansion of expedited removal
- Holds that cannot challenge expansion under APA because 8 USC 1252(b)(1)(A)(iii)(I) gives the executive branch "sole and unreviewable discretion" to apply expedited removal within and up to limits set by Congress
- As of August 14, anyone who cannot prove 2 years of continuous presence to satisfaction of an immigration officer can be placed into expedited removal

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## The First Circuit

### *Hernandez Lara v. Barr, No. 19-1524* (June 15, 2020)

- A good opinion on the right to counsel.
- Among other things, it relies on data on the difficulty of finding counsel from detention, pushes back on government arguments that an asylum seeker was given ample continuances to find a lawyer, and explains at some length what difference a lawyer could have made (without formally taking a position on whether a showing of prejudice is necessary in a denial of counsel case).

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## The Seventh Circuit

### *Morales v. Barr, No. 19-1999* (June 26, 2020)

- The Seventh Circuit has now joined the Fourth Circuit in rejecting *Matter of Castro-Tum* and holding that Us may administratively close cases.

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## The Ninth Circuit

### *Sierra Club v. Trump & California v. Trump* (June 26, 2020)

- Budgetary transfers for wall not authorized by Congress

### *Xochichua-James v. Barr* (No. 18-71460)

- Mexican government's ineffective cartel control measures not necessarily sufficient to show government won't acquiesce in torture
- LGBTQ+ people face possible persecution/torture throughout Mexico

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## The Second and Fourth Circuits

### **Ordonez Azmen v. Barr (2d Cir. No. 17-982)**

- Stresses that the BIA must consider PSGs on a case-by-case basis in light of the record evidence
- May use evidence of changed circumstances that occur after asylum application submitted to argue for an exception to the one-year limitations period

### **Cedillos-Cedillos v. Barr (4th Cir. No. 18-2233)**

- Adverse decision, but reiterates that families can be PSGs (without mentioning *Matter of L-E-A*)
- Also reiterates that mixed-motives cases can satisfy the nexus inquiry

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## Board of Immigration Appeals

### **Matter of R.I. Ortega, 28 I&N Dec. 9 (BIA 2020):**

- A person who has conspired to enter into a marriage for the purpose of evading the immigration laws by seeking to secure a K-1 fiancée) nonimmigrant visa is subject to the bar under section 204(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1154(c)(2) (2018).
- For purposes of section 204(c)(2) of the Act, a conspiracy requires an agreement to enter into a marriage for the purpose of evading the immigration laws and an overt act in furtherance of that agreement

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## Board of Immigration Appeals

### **Matter of M-D-C-V, 28 I&N Dec. 18 (BIA 2020):**

- Does all it can to clear away challenges to "Remain in Mexico"
- Holds that anyone who EWs and is encountered near the border is "arriving" and therefore subject to the contiguous-territory-return provision
- Rejects challenge to applicant being tagged as an "arriving alien" for lack of prejudice
- Rejects due process challenge re: inability to access counsel in Mexico for supposed lack of prejudice

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## Attorney General Decision

### Matter of O-F-A-S-, 28 I&N Dec. 35 (AG 2020):

- Improves a recent precedential BIA decision re: CAT relief
- Says the test for whether torture is inflicted by someone "acting in an official capacity" is whether torture is inflicted "under color of law"
- Question whether an official is "rogue" not appropriate
- "Under color of law" = misuses power possessed by virtue of law and made possible only because the actor was clothed with the authority of law
- No distinction between low- and high-level officials for purposes of determining whether torture inflicted under color of law

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## Regulatory Updates

### "Public Health" NPRM

- The latest attempt to end asylum
- Would bar anyone from asylum and withholding if they came from, or through, an area with "prevalent or epidemic" levels of COVID-19
- Or any other disease designated by DHS/DOJ
- Would also drastically restrict CAT relief by requiring individuals to meet the ultimate CAT standard in a CFI & by allowing DHS to remove those with meritorious CAT claims to third countries
- [Comments](#) due on August 10.

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## Regulatory Updates

### Executive Order on Non-Immigrant Visas (June 23, 2020)

- Bars entry of almost anyone on an H-1B, H-2B, J, or L visa unless issued before June 24
- Requires DHS to propose regulations that, among other things, prevent those with final orders of removal or who are inadmissible or deportable or have been arrested for, charged with, or convicted of a crime from receiving eligibility to work in the U.S.

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## What is the BIA?

The Board of Immigration Appeals (BIA) is an administrative tribunal housed within the Executive Office for Immigration Review (EOIR), which is an agency of the Department of Justice.

**Size**

- 23 Judges and 250 attorneys, paralegals, and administrative personnel (with more on the way!)

**Location**

- Falls Church, Virginia (in metropolitan Washington DC)

**Jurisdiction**

- Most immigration judge decisions (including removal, relief, and bond)
- Certain DHS officer decisions (e.g., family-based immigrant visa petitions)
- Discipline decisions regarding attorneys and accredited representatives that practice before EOIR



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## The Asylum Process



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## Reasons to Appeal

- Continue pursuing relief; zealous advocacy
- Obtain an automatic stay of removal
- Preserve right to judicial review
- Counter a DHS appeal
- Preserve opportunity for facts or law to ripen, as long as appeal is made in good faith
- Address inconsistencies in application of the law in immigration courts



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## 'Go To' Resources

### Tahirih Co-Counsel

Your Tahirih co-counsel and mentor will assist in guiding through the appellate process as well as identifying the strongest issues for appeal based on the immigration judge's decision.

### Practice Manual

The BIA Practice Manual is a how-to on practicing before the BIA. It has chapters on appeals, briefs, motions, and court rules.

### I&N Decisions

BIA and Attorney General precedents cases are compiled online. These cases are binding on IAs, the BIA, and DHS.

### EOIR Virtual Law Library

EOIR's "VL" is a compilation of country condition information, which can be useful for asylum and other forms of relief.

### EOIR Forms

Many EOIR forms are downloadable and fillable from the EOIR website, including forms for entry of appearance, appeal, and changes of address.

### EOIR Hotline/Online Portal

The BIA provides automated case information at (800) 888-7180 or <https://portal.eoir.justice.gov/>. There is also a live assistance line at (703)605-1007, but the information the phone clerk can provide is limited.

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## Before you file an appeal

### eRegister

- If you have never before appeared before the BIA or an immigration judge, you must register with EOIR's eRegistry prior to your first appearance.
- If you represented your client before the immigration judge, you have already done this and need not do it again.
- Include your EOIR number on all filings

### Review the record

If you are taking this case at the appeals stage, review the trial record insofar as you are able.

- Request to see the official Record of Proceedings (ROP)
- Request to hear the audio recording (DAR)
- File a FOIA request

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## Time is not on your side



### Know the idiosyncrasies of BIA deadlines

- 30 calendar days to file an appeal.
- Receipt rule, **not** mailbox rule.
- Delivery errors are **your** problem.
- Dire consequences for a late filed appeal.
- Confirm receipt and save the evidence.

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## The Appeal Packet



- Cover letter
- Notice of Appeal (EOIR-26)
- Addendum to the Notice of Appeal
- Fee or fee waiver request (EOIR-26A)
- Entry of Appearance (EOIR-27)
- Proof of payment for voluntary departure bond
- Anything else

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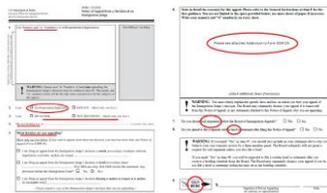
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## The Notice of Appeal

### Be especially careful with

- Box 1 – Respondent info
- Box 6 – Reasons for appeal
- Box 7 – Oral argument
- Box 8 – Briefing
- Page 3 – Proof of service



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## The Appeal Addendum

### In one or two pages:

- Succinctly but clearly articulate grounds for appeal and how the immigration judge erred.
- Cite facts and law specific to your case. Avoid boilerplate law, inflammatory rhetoric.
- Request 3 Board Member review.
- Reserve the opportunity to make additional arguments in your brief.
- Ensure your argument is consistent with the applicable standard of review.



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## While You're Waiting

Regularly monitor your client's appeal. Never wait for the mail.

Monitor your client's employment authorization.

Keep your and your client's contact information current.

Make sure your client complies with any order of supervision.

Discourage your client from leaving the country, even if authorized by DHS.

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## New Resource

### FILING BIA APPEALS: A GUIDE FOR PRO BONO ATTORNEYS

- A Tahirih "how to" guide
- Newly updated to reflect recent changes
- Includes material from this presentation and more
- Available on Tahirih [Pro Bono e-Library](#)



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## Questions?

### After the webinar, contact

- Your Tahirih mentor attorney
- Kursten Phelps, [kurstenp@tahirih.org](mailto:kurstenp@tahirih.org)
- Lynn Pearson, [lynnp@tahirih.org](mailto:lynnp@tahirih.org)



Questions | tahirih.org



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## How You Can Help

Our work is amplified by the power of many. As Pro Bono Network members, there are many ways to contribute your time, resources, and expertise.

### CO-COUNSEL

Directly assist with Tahirih mentorship, an immigrant survivor in their asylum, WVA, T, U visa, or Special Immigrant Juvenile Status immigration matters.

### IMPACT LITIGATION

Work with Tahirih on federal litigation, amicus briefs, and other impact litigation opportunities.

### ADVOCATE

Respond to our advocacy alerts to submit comments or engage in other advocacy on behalf of immigrant survivors.

### RESEARCH

Help Tahirih with [greatertable.org](https://www.greatertable.org/) and analyze legal questions on research country conditions evidence to help immigrant survivors seeking asylum and other forms of relief.

### DONATE

Tahirih's Client Fund is a pool of money that we may use to provide immediate and critical support to survivors of gender-based violence who are currently in crisis.

### SPREAD THE WORD

Encourage a colleague to join Tahirih's Pro Bono Network.

How You Can Help | [tahirih.org](http://tahirih.org)



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## Contact Us



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