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Immigrant Defense Project

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PRO SE ADVISORY:
APPEALING REMOVAL ORDERS IN FEDERAL COURT

On May 11, 2005, the U.S. government adopted a law, called the REAL ID Act. This law eliminated habeas corpus review of orders of removal (deportation) and changed the way that people can appeal these orders to federal courts.

This packet discusses how to file a petition for review to challenge your removal order. It also discusses what will happen to habeas petitions that were filed before the REAL ID Act was adopted.

IMPORTANT NOTES

- **!** This packet is only a preliminary guide to federal court review of orders of removal. Some of the REAL ID Act's judicial review provisions will be challenged in courts, and resulting court decisions may change the information in this packet.
- **!** Everyone's situation is different, and this packet may not discuss special issues that apply to you. Each federal court also has its own requirements and local rules. You may want to seek additional legal assistance to fully evaluate your particular case. Finally, requirements for petitioners represented by counsel may differ from those of *pro se* petitioners.

WHO CAN FILE A PETITION FOR REVIEW?

If you want a federal court to review the decision made by the Board of Immigration Appeals in your immigration case, you should file a **Petition for Review.** Federal courts consider many issues and procedural requirements when deciding challenges to deportation orders. Generally, however, you may be able to file a petition for review if you meet **all** of the following requirements:

- ❑ You were placed in removal, deportation, or exclusion proceedings, or denied asylum.
- ❑ The Immigration Judge decided your case.
- ❑ You or the government appealed this decision to the Board of Immigration Appeals (BIA), and the BIA decided against you.
- ❑ The BIA decision was dated within the last 30 days. (see page 3 for calculating the deadline and page 9 for what to do if the BIA decision was more than 30 days ago).

You can also file a petition for review to challenge certain decisions made by the Bureau of Immigration and Customs Enforcement (BICE) in reinstatement or expedited removal proceedings. However, this advisory does not discuss special issues related to these petitions in detail.

This *pro se* advisory was prepared by Benita Jain with valuable advice from Professor Nancy Morawetz, NYU School of Law; Beth Werlin, AILF; and Matthew Guadagno. If you have comments on the information in this packet, please contact us at (718) 858-9658 ext. 201 or bjain@nysda.org.

WHICH BIA DECISIONS CAN BE APPEALED TO COURT OF APPEALS?

You can appeal most decisions made by the Board of Immigration Appeals (BIA). For example:

1. You lost your case in immigration court, and the BIA affirmed (agreed) with this decision.
2. You won your case in immigration court, but the BIA overturned this decision.
3. You filed a motion asking the BIA to reopen or reconsider the BIA decision, and the BIA denied this request.

If you want to challenge more than one BIA decision, then you must file a separate petition for review for each decision, within the deadline for that decision.

If you are not sure whether you are eligible to file a petition for review, it is probably better to file. If you do not file a petition for review by the deadline, and later realize that you could have challenged the removal/deportation order, it may be too late to appeal. On the other hand, if you do file a petition for review by the deadline, you can change your mind and withdraw it later. Also, court decisions (and sometimes legislation) often change which kinds of cases courts are willing to review.

IF YOU HAVE A CRIMINAL CONVICTION:

You may have heard that people with certain convictions are not allowed to file petitions for review. This was generally true in the past. However, the REAL ID Act changed this bar. Now, people with criminal convictions should be able to file petitions for review – at least in cases where they are raising constitutional and legal issues.

As we've already mentioned, details on how courts will apply this change will be clearer in the future.

IF YOU HAVE AN ASYLUM CASE:

The REAL ID Act also expanded the types of issues in asylum cases that can be raised in a petition for review. You should be able to raise all constitutional issues and issues of law.

IMPORTANT DEADLINES

This petition must be filed within 30 days of the date that the Board of Immigration Appeals decided against you. Use the date that is printed on the BIA's written decision.

The court must receive your petition within 30 days of the BIA decision – if you are mailing the petition, make sure you leave enough time for delivery!

How do I know if the BIA made a decision?

If you do not file a petition for review by the 30-day deadline, you may not be able to appeal your deportation order! You must keep track of the BIA's consideration of your case, so you know as soon as it makes a decision. The BIA should send you its decision in the mail, but people sometimes do not receive it in time. The following steps can help you find out whether the BIA has issued a decision in your case:

1. Keep in regular contact with the immigration attorney that filed your BIA appeal, even if s/he no longer represents you. The BIA often sends the decision only to the "attorney of record." You may want to send the attorney a letter saying that you plan to appeal if the BIA decides against you, so she should make sure to notify you and/or your family **as soon as it comes. K**eep a record of the letter you send to your attorney.
2. Regularly call the Executive Office for Immigration Review hotline to find out if the BIA has decided your case. If you are incarcerated and unable to access this number from your jail, then ask someone to call this hotline for you. See *sidebar*→
3. Notify the Board of Immigration Appeals and Immigration Judge about any address change, *even if you are detained.* Otherwise, they may mail the decision to the wrong address. Keep proof that you notified the courts of your address change. (see page 29 for BIA address change form).

Immigration Court Hotline
1-800-898-7180.

1. Press "1" for English or "2" for Spanish.
2. Enter your 8-digit A-number. This is on your court papers & looks like this: A99 999 999. Press "1" if the system finds the right number, and press "1" again if it finds the right name.
3. Follow the phone prompts for information about your case.
   - Press "1" for time and place of any scheduled immigration court dates.
   - Press "3" to hear when the Judge or BIA decided your case. If you hear that the case is "pending," this means that a decision has not been made yet.
   - Press "4" for more BIA appeal information, including if the BIA received your appeal and due dates for briefs.
   - Press "5" for address and phone number of the immigration court (not BIA) that decided your case.

HOW TO PREPARE YOUR PETITION FOR REVIEW

Your petition for review package should be typed or neatly written in black or blue ink. It should include all of the following things (described below in detail):

- ❑ The signed petition for review.
- ❑ A copy of the BIA decision. If you do not have this decision, simply state this in your petition and forward a copy of the decision as soon as you can.
- ❑ The fee or a request for fee waiver.
- ❑ [In some situations] Motion requesting stay of deportation.
- ❑ A certificate of service.

1. Petition for Review

This is a simple form in which you are notifying the Court of Appeals that you want to appeal the BIA decision. You do not need to include any specific legal arguments at this time. You should always remember to include the following things in this petition:

- ❑ A statement that you are appealing a decision by the BIA, and the type of decision that it made.

- ❑ A statement about whether any court has already upheld or agreed with the BIA decision that you are appealing. For example, if you had already appealed this BIA order in any federal court, and that court agreed with the BIA, then your petition must disclose the name of the court, the date of the decision, and the type of case.

- ❑ (If you received voluntary departure) Request for stay of voluntary departure period. If an Immigration Judge or BIA granted voluntary departure, then you can request that the deadline for you to leave be postponed until the Court decides your petition for review.

- ❑ Sign the petition!

See a *barebones* sample petition for review on page 17 of this packet.

2. A Copy of the Decision of the Board of Immigration Appeals

You must attach a copy of this decision with your petition for review. However, do not miss the deadline if you don't have the decision. Instead, you should file on time, state why you cannot attach a copy of the decision (for example, you did not receive it, the copy machine in your jail is broken, you cannot access it in time, etc.) and then forward a copy of the BIA decision to the Court of Appeals as soon as you can.

3. Fee or Request for Fee Waiver

You must enclose a filing fee, which is currently $250. Some courts may grant time to submit this fee (for example, in the Second Circuit, you have to submit the fee within 10 days after you file).

> If you cannot afford the fee: You can request that the court waive your fee (also called In Forma Pauperis, or IFP). See page 25 for a sample request for a fee waiver. Note: If a court does not grant your request for fee waiver, we are not certain whether the petition will be considered filed on the day you submitted the petition or the day you submit the fee. Check with your court to avoid missing the deadline!

4. Motion Requesting a Stay of Deportation

If you have a final order of removal, DHS can deport you at any time. Filing the petition for review does not stop or postpone your deportation. If you want to remain in the U.S. while the Court of Appeals is considering your case, then you must request a **stay of deportation,** which is an order by the court that temporarily prohibits the government from deporting you. If the court grants the stay of deportation, then DHS cannot deport you until the court lifts the stay or decides the case against you. This motion should be on a separate piece of paper, but can be submitted at the same time as the rest of the petition for review, or submitted at a later date.

> Should I file this motion?
>
> If you are detained or otherwise have reason to believe that DHS has travel documents for you and plans to deport you soon, then should request a stay of deportation as soon as possible. You should tell the court why you think you are about to be deported (for example, you have received a "bag and baggage" order, been told you will be deported soon, you are already in immigration custody, or BICE has procured travel documents) and also why you think you will win your case.
>
> If you have filed a timely petition for review and are not detained, then you may want to wait to file this motion until you receive an order to report to BICE (possibly for detention and/or deportation) or otherwise find that BICE plans to deport you soon. At that point, you should immediately file a request for a stay of deportation, if you have not already done so.
>
> Note: If you do get deported after you file the petition for review, you can continue to pursue this appeal from outside the U.S. Make sure to always notify the court of your current address!

5. A Certificate of Service

This is a statement at the end of your petition, stating that you sent a copy of the petition to all parties. This should include the name and address of the person/people to whom you sent it, the manner in which you delivered it (by regular mail, certified mail, Fed-ex, hand delivery, etc.), and the name and signature of the person who mailed or delivered it (which could be you or someone else). Some courts will only accept certificates that include specific language – see page 18 for a sample certificate of service.

WHERE TO SUBMIT YOUR PETITION

You should try to make at least 9 copies of your petition for review package. (Note: Your court may require a different number of copies, especially for *pro se* petitioners.)

1. File the original and 4 copies of the entire petition for review package with the federal Court of Appeals. This will usually be the court that covers the state where the immigration judge decided your case. For example: if you live in New York, the Immigration Judge decided your case in Oakdale, Louisiana and you are now detained in Alabama, you will file your petition with the Circuit that covers Louisiana (the Fifth Circuit). See pages 15-16 for addresses of each Court of Appeals and the states covered by each court.

   If you mail the petition, be sure to get proof of mailing and delivery to keep for yourself! If you hand-deliver the petition, have the court stamp your copy, so you have proof of delivery.

2. Send one copy to each of the following people. If you mail the copies, be sure to get proof of mailing and delivery to keep for yourself! If you hand-deliver the copies, then have each office stamp your copy. (Note: addresses may have changed since this advisory was written.)

   - **Alberto Gonzales, Attorney General of the United States**
     United States Department of Justice
     10th Street NW and Constitution Ave.
     Washington, DC 20530

   - **ICE Field Office Director**
     Send this copy to the office of the Bureau of Immigration and Customs Enforcement that is in charge of the city where your immigration court case happened. The address may be on some of the documents from your immigration court case. If you are not sure of the address, you can also try to call the ICE office or the immigration court to get the correct address.

   - **Thomas W. Hussey, Director**
     Office of Immigration Litigation
     Department of Justice/Civil Division
     1331 Pennsylvania Ave. NW
     Washington, DC 20004

     OR

     Only if you are filing in the Second Circuit (New York, Connecticut, and Vermont):
     United States Attorney for the Southern District of New York
     Civil Division
     86 Chambers Street
     New York, NY 10007

3. Keep one copy of everything for yourself.

WHAT HAPPENS AFTER I FILE THE PETITION FOR REVIEW?

Once you have filed the basic petition for review described in this packet, the Court <u>usually</u> sets a schedule for each side to submit its papers.

1. First, the Court will require the government to file the "administrative record" in your immigration case – this includes all of the papers and briefs that were submitted, all of the decisions made, and the transcripts of every hearing in immigration court. The government is supposed to mail you a copy of the administrative record and everything else it files.

2. The Court will usually set deadlines for each side to submit *briefs*, or court papers that discuss the issues in greater detail.

   - If the government has already filed the administrative record, but the court has not given you a deadline to submit your brief, then you may want to write the court to ask for further instructions or a deadline.
   - In the absence of some other deadline set by the court, rules usually require that you submit the brief within 40 days of receiving the administrative record.
   - If you need more time to file your papers, you can ask the court for an extension. Some courts often grant one extension for 30 days.
   - Whenever you submit something to the court: put your "docket number" on the cover and send a copy to the government's lawyer. The government must do the same.

3. In some case, the Court also schedules an "oral argument," or hearing for both sides to present their cases to and answers questions from a panel of three judges. This usually will not happen if you are detained and are not represented by an attorney.

What issues might the government raise to challenge my Petition for Review?

The government may raise a variety of issues to challenge jurisdiction, or the authority, of a federal court to review your case. Two common issues they may raise are:

1. **Exhaustion.** The federal courts generally require that you must attempt to get the administrative agencies (example, the immigration courts) to resolve your situation before the federal government will consider it. If you did not appeal your decision to the Board of Immigration Appeals, the government may say that you did not "exhaust your administrative remedies." If you did appeal your case to the BIA, but did not raise the particular issue/defense that you want the federal court to consider, then the government may also say that you did not exhaust your administrative remedies.

   This is a very complicated issue that will require you to do legal research into the cases that have been decided by your circuit courts. At the minimum, you should tell the court if you believe you did raise the issue in immigration court and/or at the BIA, even if it was in a general way. There may be other responses – for example, some people argue that exhaustion is not required if you are raising a constitutional issue that the BIA could not have decided.

2. Scope of Review. The government may say that your petition raises issues that the federal court does not have authority to review. For example:

   "Your case raises issues of fact." An "issue of fact" asks the court to look at whether the immigration judge/BIA made the right factual conclusions about your specific situation. An "issue of law" is about what a law actually requires, how it should be interpreted. Generally, the federal court is able to look at legal and Constitutional issues, but it is not clear whether and when it can look at factual issues.

   "You are asking the court to review a denial of a discretionary form of relief." For discretionary relief, the immigration judge/BIA decides whether they think you deserve that relief. Cancellation of Removal, 212(c), adjustment of status, and voluntary departure are all discretionary forms of relief - the judge must follow strict rules about whether you are eligible to apply for these things, but the judge also has a lot of power to determine whether someone who is eligible to apply should actually get the relief. You can challenge a decision that you are not eligible for relief, but it is more difficult to challenge a judge's discretionary decision to not grant the relief (for example, because she thinks you did not show rehabilitation or have good moral character).

In order to avoid these common obstacles, you should try to make your claim as much about legal issues as possible, instead of about equities/discretion.

Depending on the particular facts of your case, there may be various responses for each of these arguments. If the government's argument will result in your being unable to get any federal court to look at your case or if it will take away any rights you previously had under habeas, then you can challenge this on Constitutional grounds.

How long will it take the Court to decide my case?

It is difficult to predict how long the court will take to decide your case. Some cases take years to decide; others are decided more quickly. If the court thinks you were not allowed to file the petition for review (for example, because you missed the deadline), then it may dismiss your case quickly, even before the sides have submitted their papers.

If I lose my case, can I file another appeal?

Depending on the reason for the loss, some courts allow people to file a motion for rehearing, or request that the court reconsider its decision.

You can also appeal the decision to the Supreme Court. However, the Supreme Court takes only a handful of cases every year and will only take cases it thinks raise important issues, especially if lower federal courts have made conflicting decisions on the same issue.

IF YOU MOVE OR GET DEPORTED

You should notify the Court of Appeals and the government lawyer in your case about your new address. Otherwise, they will continue to send documents to your old address, and you may miss important orders and deadlines.

- Notify the Court even if you are moving from one jail to another.
- Notify the Court even if you get deported - you can continue to pursue your appeal from outside the U.S.

IF YOU MISSED THE 30-DAY FILING DEADLINE

According to the immigration statute (as amended by the REAL ID Act), you must submit a petition for review to the Court of Appeals within 30 days. If you lost your BIA appeal more than 30 days ago and did not file a petition for review, it will be very difficult to appeal your case.

However, you can try the following strategies, which may or may not work in your case:

- ❑ File a Motion to Reopen with the Board of Immigration Appeals (BIA). You should also submit a request for a stay of deportation with the BIA to ensure that you are not deported before the case is decided. See page 19 for a sample Motion to Reopen based on the passage of the REAL ID Act.
  - A Motion to Reopen should show one of the following: new facts or evidence, ineffective assistance of counsel, or changed circumstances in your home country (if applying for persecution-based relief), or lack of notice of hearing (if submitting motion to Immigration Judge).
  - You must submit a Motion to Reopen within 90 days of the BIA decision. After 90 days, you can still ask the BIA to reopen the case *sua sponte* (on its own); however, such motions are not granted easily.
  - If the BIA grants the Motion to Reopen, then you will have another opportunity to present your case to the BIA. If the BIA decides against you again, then the 30-day deadline to appeal that decision to the federal court starts all over again.
  - If the BIA denies your Motion to Reopen, then you can appeal the denial to the federal Court of Appeals by filing a petition for review. In this situation, however, remember that the federal court will primarily consider whether the BIA made a mistake by refusing to reopen your case – and will not necessarily decide whether the underlying removal order was correct.

  If you never appealed your decision to the BIA, and have missed the deadline to do so: you can also file a Motion to Reopen with the Immigration Judge within 90 days.

- ❑ Ask the BIA to reissue its decision. If the BIA reissues its decision, then you will have an additional 30 days from the date of the reissued decision, in which to file the petition for review. See pages 19 and 22 for samples.

- ❑ File the Petition for Review anyway. If you are denied because it is late, then you can try to file a habeas petition. We don't know if this will work – it is only a strategy to try! Although the REAL ID Act has eliminated the right of people to file habeas petitions, people will likely challenge denials of *habeas* petitions on constitutional or other grounds or find other ways to obtain *habeas* review. See "Special Advisory on Habeas Petitions" on page 10.

- ❑ File a habeas petition (see previous bullet).

SPECIAL ADVISORY ON HABEAS CORPUS PETITIONS: Can I still file a habeas corpus petition?

You may have heard or read in older publications that you can challenge a removal order by filing a writ of *habeas corpus* in federal district court. Unfortunately, many people will no longer be able to file *habeas corpus* petitions in federal court.

Challenging Orders of Removal

Before May 11, 2005, people used to be able to challenge their removal/deportation orders by filing *habeas corpus* petitions in federal district court. On May 11, 2005, Congress and President Bush adopted the REAL ID Act. This Act eliminated the right of immigrants to file habeas petitions and other writs in federal court to challenge removal orders. After the REAL ID Act, the only sure way to challenge your removal/deportation order is to a file a petition for review, as already described in this packet. NOTE: Immigrants and advocates may use other, creative arguments to get *habeas* review, but this advisory doesn't discuss these possibilities.

Challenging Detention

You should still be able to file *habeas* petitions to challenge unlawful detention by DHS. For example:

- You were ordered deported, but the government has been unable to carry out the deportation order (e.g. there is no repatriation agreement with your country of origin; no country agrees to take you; BICE has been unable to procure travel documents for you).
- You think you are eligible for bond, but the government has refused to give you a bond hearing.

Challenging the REAL ID Act

As the REAL ID Act is implemented over the next few months, or even years, many of its provisions will be challenged in federal courts. We advise you to stay informed about changes that have arisen since this advisory was written. Although the REAL ID Act has tried to eliminate the availability of *habeas*, it is possible that in the future, some federal courts will say that certain people can still filed these petitions or that the government didn't have the power to eliminate *habeas* at all.

SPECIAL ADVISORY ON HABEAS CORPUS PETITIONS: What happens to my habeas petition that was filed before REAL ID passed?

The REAL ID Act provides a different procedure for habeas petitions that were already filed and pending when the REAL ID Act was adopted on **May 11, 2005**. If your habeas petition was pending, then some or all of it will probably be transferred to a Circuit Court of Appeals.

To which Court of Appeals will my habeas petition be transferred?

The REAL ID Act says that the habeas petition should be transferred to the Court of Appeals where a petition for review could have been filed.

- Usually, this means the Court of Appeals that covers the state where the Immigration Judge decided your case. For example, if your immigration case was in Oakdale, Louisiana, but you filed your habeas petition in the federal district court in New York, then your habeas case will probably be transferred to the Fifth Circuit Court of Appeals, which covers Louisiana.
- You can ask the court for a chance to submit a brief (written argument) asking that the case not be transferred or that it remain in the Court of Appeals for the district court where you filed. Some reasons for this may be: you and your family are there; your lawyer is not able or willing to represent you in the new court; you already submitted all of your papers and transferring will prolong resolution of the case. We don't yet know how the courts will respond to arguments like this.

Will my entire habeas petition be transferred?

This is not clear. The REAL ID Act calls for transfer of the portion of a habeas petition that challenges removal (deportation).

- So, if your habeas petition is saying that the immigration judge and/or BIA decisions **ordering your removal/deportation** were unlawful, then that will probably be transferred to the Court of Appeals.
- If you are challenging your **detention** (for example, you have been ordered removed and the government has been unable to deport you, but is continuing to detain you OR you are challenging whether you should be detained during your immigration proceedings), then this challenge may remain with the district court.
- If you are challenging your removal order **and** your detention, then the two pieces of your case may be separated into different courts.

The district court had given me a stay of deportation. Will this remain in effect?
This is also not clear. Some Circuit Courts have adopted rules for transferring cases that specify what will happen to a stay of deportation. See attachments for the advisories from these courts.

- Second Circuit (Connecticut, New York, Vermont): The court "prefers" that cases should be transferred with a stay of deportation, which will remain in effect until the Court of Appeals removes the stay.
- Fifth Circuit (Louisiana, Mississippi, Texas): The court allows district courts to make their own decisions about whether to grant stays of deportation before transferring cases.
- Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, Washington): The court has ordered that if the petitioner (you) ever requested a stay of deportation from the district court, the transfer will trigger a temporary stay of deportation.

If DHS says that the stay of deportation is no longer in effect after the transfer, you can argue that the stay continues until that judge specifically decides to end the stay. We are not sure what the courts' positions will be, but here are some ideas to try to ensure that your stay will continue:

- Ask the federal district judge that is currently considering your habeas petition to continue the stay. You can ask for a certain amount of time (for example, until the new court rules on your stay request) or just ask the court to continue the stay until the case is resolved.
- Ask the new court to issue its own stay of deportation. You should do this immediately upon transfer because some courts take a long time to make decisions on this issue.

My habeas case has not been transferred yet. Where should I submit my briefs?
If you need to file something more, keep filing in the same court until you get notice of transfer.

My habeas case was already decided by the federal district court in a circuit other than where the original immigration proceeding was conducted. It is now on appeal in the Court of Appeals. Will this be transferred?
As with most of the procedures for pending habeas cases, it is unclear what will happen to these cases – whether they will also be transferred to the Court of Appeals where the immigration judge had initially decided the case, or whether they will remain where they are.

ATTACHMENTS

1. Map of Deportation System
   (page 14)

2. Contact Information for Courts of Appeals - address, phone numbers, and states covered by each Circuit
   (page 15)

3. Sample Petition for Review
   (page 17)

4. Sample Certificate of Service
   (page 18)

5. Sample Motion to Reopen and Reissue BIA Decision (filed with Board of Immigration Appeals)
   (page 19)

6. Sample Motion to Reissue BIA Decision (filed with Board of Immigration Appeals)
   (page 22)

7. Sample Motion to Federal Court for Fee Waiver (In Forma Pauperis) – this is only a sample. Your court may have different requirements or a specific form.
   (page 25)

8. Address Change Form for BIA
   (page 29)

9. Orders from federal courts regarding transfers of habeas petitions after REAL ID Act
   - Administrative Office of the US Courts
   - 2nd Circuit Court of Appeals
   - 3rd Circuit Court of Appeals
   - 5th Circuit Court of Appeals
   - 9th Circuit Court of Appeals

ATTACHMENT 1: MAP OF DEPORTATION SYSTEM

Detention & Starting a Deportation

Bureau of Immigration & Customs Enforcement (BICE) decides to initiate deportation proceeding. Holds immigrant at County Jail, Federal Detention Center, or Private Prison. Facility may be anywhere in the country. BICE issues Notice to Appear (charges) and may hold immigrant until s/he granted bond, is ordered released, or deported.

Immigration Judge

Bond Hearing	**Master Calendar**	**Individual Hearing**
If bond eligible, sets bond amount.	Decides deportability and relief eligibility	Hears applications for relief, orders release/ deportation.

Board of Immigration Appeals (BIA)

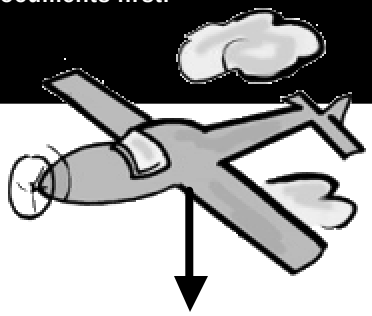
Reviews appeals of IJ decisions filed within 30 days. Issues final order of removal (deportation).

District Court

Since the recently passed REAL ID Act, this court may now only be able to hear habeas corpus petitions challenging detention, and not removal orders. The REAL ID Act is likely to be challenged.

Deportation

If immigrant has a final administrative **order of deportation, and no federal court stay, BICE may deport him/her. Home country (consulate) usually issues travel documents first.**



Circuit Court of Appeals

Reviews appeals of final orders of removal (by way of petitions for review) if filed within 30 days of BIA decision. Also appeals District Court decisions.

Supreme Court

Reviews Court of Appeals decisions that it chooses to accept. Accepts less than 5% of all cases it is asked to review.

Home Country

Practices vary. Some governments regularly detain, torture, and/or monitor detainees. Homelessness and unemployment are common.

This map was borrowed from the "Deportation 101" curriculum, developed by Families for Freedom & NYSDA Immigrant Defense Project.

ATTACHMENT 2: CONTACT INFORMATION FOR COURTS of APPEALS (for filing Petitions for Review)

First Circuit

File here if your immigration proceeding was in the following states: Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island

U.S. Courthouse
One Courthouse Way
Suite 2500
Boston, MA 02210
(617) 748-9057
http://www.ca1.uscourts.gov/

Second Circuit

File here if your immigration proceeding was in the following states: Connecticut, New York, Vermont

Thurgood Marshall U.S. Courthouse
40 Foley Square
Room 1803
New York, NY 10007
(212) 857-8500 (main number)
(718) 783-7002 (Pro Se Case Mgmt Team)
http://www.ca2.uscourts.gov/

Third Circuit

File here if your immigration proceeding was in the following states: Delaware, New Jersey, Pennsylvania, Virgin Islands

Office of the Clerk
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790.
(215) 597-2995
http://www.ca3.uscourts.gov

Fourth Circuit

File here if your immigration proceeding was in the following states: Maryland, North Carolina, South Carolina, Virginia, West Virginia

1100 East Main Street
Suite 501
Richmond, VA 23219
(804) 916-2700
http://www.ca4.uscourts.gov/

- PFR should include "corporate disclosure form" (found on website). If Pro Se, court will send form once they receive petition and fee. If you obtain a fee waiver you do not need to file form.
- File original and 3 copies.
- Mail motion for stay of deportation separately from petition.

Fifth Circuit

File here if your immigration proceeding was in the following states: Louisiana, Mississippi, Texas

600 Camp Street
New Orleans, LA 70130
(504) 310-7700
http://www.ca5.uscourts.gov/

Sixth Circuit

File here if your immigration proceeding was in the following states: Kentucky, Michigan, Ohio, Tennessee

540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202
(513) 564-7000
http://www.ca6.uscourts.gov/internet/

- File original and 3 copies.

Seventh Circuit

File here if your immigration proceeding was in the following states: Illinois, Indiana, Wisconsin

U.S. Court of Appeals
Clerk's Office, Room 2722
219 S. Dearborn Street
Chicago, IL 60604
(312) 435-5850
http://www.ca7.uscourts.gov/

- File original and 3 copies.
- *Pro se* filers can ask to speak with *pro se* clerk by calling above general number.

Eighth Circuit

File here if your immigration proceeding was in the following states: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota

Thomas F. Eaglet on Courthouse
Room 24.329
111 South 10th Street
St. Louis, MO 63102
(314) 244-2400
http://www.ca8.uscourts.gov/

- File original and 3 copies.

Ninth Circuit

File here if your immigration proceeding was in the following states: Alaska, Arizona, California, Guam, Hawai'i, Idaho, Montana, Nevada, Mariana Islands, Oregon, Washington

If sending petition by regular US Postal Services:
U.S. Court of Appeals
Office of the Clerk
P.O. Box 193939
San Francisco, CA 94119-3939

If sending petition by overnight courier services (Federal Express, Airborne, DHL, etc.):
U.S. Court of Appeals
Office of the Clerk
95 Seventh Street
San Francisco, CA 94103-1526

Ninth Circuit, continued
(415) 556-9800 (main number)
(415) 556-9380 (Pro Se office)
http://www.ca9.uscourts.gov/

- File original and 7 copies.

Tenth Circuit

File here if your immigration proceeding was in the following states: Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming

Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257
(303) 844-3157
http://www.ca10.uscourts.gov/

- File original and 3 copies.

Eleventh Circuit

File here if your immigration proceeding was in the following states: Alabama, Florida, Georgia

56 Forsyth Street, NW
Atlanta, GA 30303
(404) 335-6100
http://www.ca11.uscourts.gov

- Enclose copy of Notice to Appear and copy of the order of the immigration judge with petition for review.

DC Circuit

File here if your immigration proceeding was in the Washington, DC

U. S. Court of Appeals
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W. #5423
Washington, D.C. 20001-2866
(202) 216-7280
http://www.cadc.uscourts.gov/
You should also include:

- File original and 4 copies.
- Enclose Corporate Disclosure Statement (see online guidelines).

ATTACHMENT 3: SAMPLE PETITION FOR REVIEW

UNITED STATES COURT OF APPEALS FOR THE _____ CIRCUIT

[Your name] Petitioner, v. Alberto GONZALES, Attorney General, Respondent	**Case File No. _____** **Immigration File No.: A_____** **PETITION FOR REVIEW**

The above-named Petitioner hereby petitions for review by this Court of the final order of **[choose one: removal/deportation/exclusion]** entered by the Board of Immigration Appeals **[or "Immigration and Customs Enforcement (ICE)" if you were ordered removed under INA §241(a)(5) 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 another court has upheld the removal order, then write in the name of the court, date of that court's decision, and the kind of case.]**

Dated: _____

Respectfully submitted,

_____
[Your name and signature]
PRO SE

ATTACHMENT 4: SAMPLE CERTIFICATE OF SERVICE

UNITED STATES COURT OF APPEALS FOR THE _____ CIRCUIT

[Your name] **Petitioner,** **v.** **Alberto GONZALES,** **Attorney General,** **Respondent**	**Case File No. _____** **Immigration File No.: A_____** **PETITION FOR REVIEW** **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I, **[____INSERT Name of person who mailed or delivered your petition_____]**, hereby certify under penalty of perjury that I personally caused to be served a copy of the attached Petition for Review, together with all attachments, by **[INSERT: hand/regular mail/certified mail/Fed Ex/DHL/etc.]** on this **[Date]** to the following individuals and addresses.

[INSERT NAMES and ADDRESSES of GOVERNMENT OFFICIALS YOU are SERVING – also see page 6 of this packet]

Executed on ___(date)___, in _____(city, state)_____.

_____

[Sign this line and write your name below]

ATTACHMENT 5: Sample Motion to Reopen and Reissue the BIA's Decision

NOTE: This motion is based on the following scenario: person ordered removed based on criminal ground; no habeas petition filed; now has missed the deadline to file a petition for review. Do not submit motion "as is" – you must fill in the blanks to cover your situation. You must also comply with the BIA's rules for submitting motions, which this packet does not discuss (for example, filing fees and certificate of service).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In re:	)	
	)	
	)	
[Your Name]	)	No. A_____
	)	**(your A#)**
Respondent.	)	
	)	
In **[Deportation** or **Removal]** Proceedings	)	
	)	
	)	
	)	

MOTION TO REOPEN AND REISSUE THE BIA'S DECISION IN LIGHT OF THE REAL ID ACT

I. INTRODUCTION

Respondent asks the BIA to reopen and reissue the **[Date]** order in this case in light of the recent enactment of the REAL ID Act of 2005, P. L. 109-13, 119 Stat. 231 (May 11, 2005). Prior to the REAL ID Act, Respondent was barred from filing a petition for review in the court of appeals because **[he or she]** was found removable based on one of the criminal grounds enumerated in INA § 242(a)(2)(C). The INA, as amended by the REAL ID Act, now provides Respondent with the opportunity to seek court of appeals review; however, because the BIA issued the order in this case more than 30 days ago, Respondent may be barred from review. *See* INA § 242(b)(1) (petition must be filed within 30 days of final order). Respondent also may be unable to seek review in the district court through a habeas petition, though he could have done so prior to the REAL ID Act. In order to remedy this unintended adverse effect of the enactment of the REAL ID Act, Respondent requests that the Board, in the interest of justice, reissue its order.

II. RELEVANT PROCEDURAL HISTORY

(INSERT the date and decisions of the Immigration Judge and any BIA appeals.)

III. STATUTORY AND LEGISLATIVE BACKGROUND

In 1996, Congress barred respondents with certain criminal convictions from seeking judicial review in the court of appeals. *See* Anti-Terrorism and Effective Death Penalty Act (AEDPA), § 440(a), Pub. L. 104-207, 110 Stat. 3009 (April 24, 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 306, § 309 Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) *codified* at INA § 242(a)(2)(C) and IIRIRA § 309(c)(4)(G). However, respondents with criminal convictions were not precluded from federal court review entirely. The Supreme Court, in *INS v. St. Cyr*, 533 U.S. 289 (2001), held that respondents barred from filing a petition for review in the court of appeals could seek review of their cases through habeas petitions, 28 U.S.C. § 2241, filed in the U.S. district court.

On May 11, 2005, the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, was enacted. Section 106(a) of this new law purports to eliminate habeas corpus jurisdiction over challenges to final orders of removal, deportation, or exclusion. Congress, however, expanded the availability of court of appeals review. Specifically, section 106(a)(1) of the REAL ID Act amended INA § 242 to include a new section INA § 242(a)(2)(D), which says,

> Nothing in subparagraph (B) or (C), or any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

As a result, respondents with criminal convictions who previously would have filed habeas petitions now may file petitions for review in the court of appeals. The legislative history confirms that this provision was intended to concentrate federal court review of all removal proceedings in the courts of appeals. *See* H.R. Conf. Rep. 109-72, at 2873 (2005).[1] ("By placing all review in the court of appeals, Division B would provide an 'adequate and effective' alternative to habeas corpus." (quoting *St. Cyr*, 533 U.S. at 314 n. 38)).

IV. ARGUMENT

A. The BIA Has Authority to Reopen and Reissue Its Decision.

Pursuant to INA § 240(c)(6) and 8 C.F.R. § 1003.2, respondents may file one motion to reopen within 90 days of the BIA's decision. The motion "shall state the new facts that will be proven at the hearing to be held if the motion is granted." INA § 240(c)(6)(B). "A motion to reopen shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1).

Here, the new evidence Respondent offers is the enactment of the REAL ID Act. Given that the BIA issued a decision in Respondent's case on **[enter date]**, **[He/she]** could not have presented this evidence prior to the Board's decision. This evidence is material because it impacts whether the Respondent can file a petition for review in the court of appeals.

Moreover, the BIA is authorized to "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." 8 C.F.R. § 1003.1(d)(ii). In addition, the Board has discretionary equitable powers to serve the interest of justice. *See e.g., Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (stating that as long as the Board has jurisdiction, its "discretionary powers are not limited, restricted, or qualified."); *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998) (exercising *sua sponte* authority to reopen proceedings to pursue certain asylum claims based on coerced population control policies to "serve the interest of justice"). In fact, on numerous occasions, the Board has reissued prior decisions in the interest of justice. *See Etchu-Njang v. Gonzales*, 403 F.3d 577 (8th Cir. 2004); *Roy v. Ashcroft*, 389 F.3d 132, 135 (5th Cir. 2004); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004); *Firmansjah v. Ashcroft*, 347 F.3d 625, 626 (7th Cir. 2003); *Lonyem v. U.S. Atty. Gen*., 352 F.3d 1338, 1340 n.3 (11th Cir. 2003).

In *Firmansjah*, the Seventh Circuit considered the BIA's authority to reissue decisions and the impact on the court's jurisdiction to review the underlying order. *See* 347 F.3d 626-27. The court held that "[b]ecause nothing prevents the Board from entering a new removal order, which is subject to a fresh petition for review, we have jurisdiction over the case and will proceed to briefing." *Id*. at 627.

[1] This report is available at: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=H2813&position=all

B. Reopening and Reissuing the Order in Respondent's Case Satisfies the Interest of Justice and Effectuates Congressional Intent.

Respondent now finds **[himself/herself]** subject to an adverse, and unintended, effect of the READ ID Act. *See* H.R. Conf. Rep. 109-72, at 2873.[2] Prior to the REAL ID Act, Respondent would have been barred from filing a petition for review, but **[he/she]** could have filed a habeas corpus petition. Unlike a petition for review, there is no filing deadline for a habeas petition. *Compare* INA § 242(b)(1) *with* 28 U.S.C. § 2241. Although Congress has said that individuals such as Respondent now must seek review in the court of appeals, as opposed to the district court, Respondent may be barred from filing a petition for review because more than thirty days have passed from the date of the BIA's decision. *See* INA § 242(b)(1). This result would undermine the intent of Congress "to give every alien a fair opportunity to obtain judicial review while restoring order and common sense to the judicial review process." *See* H.R. Conf. Rep. 109-72, at 2873. By reopening and reissuing Respondent's order, the BIA would provide Respondent a "fair opportunity" to seek judicial review in the court of appeals.

Even where a person did not file a motion to reopen within the statutory deadline, the BIA has reopened cases in extraordinary cases where there has been a significant development in the law. *See, e.g.*, *Matter of Muniz*, 23 I&N Dec. at 207-08 (sua sponte reopening a case where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132 1135-36 (BIA 1999) (declining to reopen or reconsider sua sponte where caselaw represented only "incremental development" of the law and respondent's case did not turn on cited authority); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of "refugee" warranted sua sponte reopening).

The REAL ID Act's purported elimination of habeas corpus review of certain cases is a monumental change in immigration law and a dramatic departure from the historical role of habeas corpus in reviewing the legality of deportation. By reopening and reissuing the order in Respondent's case, the Board will prevent unnecessary and potentially irreparable harm to the Respondent. Otherwise, the Respondent may be deprived of all federal court review. Reissuing the decision will effectuate Congress' intent that Respondents have an "'adequate and effective' alternative to habeas corpus."

V. CONCLUSION

For the reasons stated above, Respondent requests that the BIA reopen and reissue the **[removal** or **deportation]** order dated **[date]** .

Dated: **[Date you submit motion]**

Respectfully submitted,

_____

[Your Name]

[2] The legislative history of the REAL ID Act confirms that Congress did not intend that any person be deprived of judicial review: under section 106, "*all* aliens who are ordered removed by an immigration judge will be able to appeal to the BIA and then raise constitutional and legal challenges in the courts of appeals. *No* alien, not even criminal aliens, will be deprived of judicial review of such claims." H.R. Conf. Rep. 109-72, at 2873 (emphasis added).

ATTACHMENT 6: Sample Motion to Reissue the BIA's Decision

NOTE: This motion is based on the following scenario: person ordered removed based on criminal ground; no habeas petition filed; now has missed the deadline to file a petition for review. Do not submit motion "as is." You must fill in the blanks to cover your situation. You must also comply with the BIA's rules for submitting motions, which this packet does not discuss (for example, filing fees and certificate of service).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In re:	)	
	)	
	)	
[Your Name]	)	No. A_____
	)	(your A#)
Respondent.	)	
	)	
In **[Deportation** or **Removal]** Proceedings)	)	
	)	
	)	
_____	)	

MOTION TO REISSUE THE BIA'S DECISION
IN LIGHT OF THE REAL ID ACT

I. INTRODUCTION

Respondent asks the BIA to reissue the **[Date]** order in this case in light of the recent enactment of the REAL ID Act of 2005, P. L. 109-13, 119 Stat. 231 (May 11, 2005). Prior to the REAL ID Act, Respondent was barred from filing a petition for review in the court of appeals because **[he or she]** was found removable based on one of the criminal grounds enumerated in INA § 242(a)(2)(C). The INA, as amended by the REAL ID Act, now provides Respondent with the opportunity to seek court of appeals review; however, because the BIA issued the order in this case more than 30 days ago, Respondent may be barred from review. *See* INA § 242(b)(1) (petition must be filed within 30 days of final order). Respondent also may be unable to seek review in the district court through a habeas petition, though he could have done so prior to the REAL ID Act. In order to remedy this unintended adverse effect of the enactment of the REAL ID Act, Respondent requests that the Board, in the interest of justice, reissue its order.

II. RELEVANT PROCEDURAL HISTORY

(INSERT the date and decisions of the Immigration Judge and any BIA appeals.)

III. STATUTORY AND LEGISLATIVE BACKGROUND

In 1996, Congress barred respondents with certain criminal convictions from seeking judicial review in the court of appeals. *See* Anti-Terrorism and Effective Death Penalty Act (AEDPA), § 440(a), Pub. L. 104-207, 110 Stat. 3009 (April 24, 1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 306, § 309 Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) *codified* at INA § 242(a)(2)(C) and IIRIRA § 309(c)(4)(G). However, respondents with criminal convictions were not precluded from federal court review entirely. The Supreme Court, in *INS v. St. Cyr*, 533 U.S. 289 (2001), held that respondents barred from filing a petition for review in the court of appeals could seek review of their cases through habeas petitions, 28 U.S.C. § 2241, filed in the U.S. district court.

On May 11, 2005, the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, was enacted. Section 106(a) of this new law purports to eliminate habeas corpus jurisdiction over challenges to final orders of removal, deportation, or exclusion. Congress, however, expanded the availability of court of appeals review. Specifically, section 106(a)(1) of the REAL ID Act amended INA § 242 to include a new section INA § 242(a)(2)(D), which says,

> Nothing in subparagraph (B) or (C), or any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

As a result, respondents with criminal convictions who previously would have filed habeas petitions now may file petitions for review in the court of appeals. The legislative history confirms that this provision was intended to concentrate federal court review of all removal proceedings in the courts of appeals. *See* H.R. Conf. Rep. 109-72, at 2873 (2005).[3] ("By placing all review in the court of appeals, Division B would provide an 'adequate and effective' alternative to habeas corpus." (quoting *St. Cyr*, 533 U.S. at 314 n. 38)).

IV. ARGUMENT

A. The BIA Has Authority to Reissue Its Decision in the Interest of Justice.

Pursuant to 8 C.F.R. § 1003.1(d)(ii), the BIA is authorized to "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case." 8 C.F.R. § 1003.1(d)(ii). In addition, the Board has discretionary equitable powers to serve the interest of justice. *See e.g.*, *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (stating that as long as the Board has jurisdiction, its "discretionary powers are not limited, restricted, or qualified."); *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998) (exercising *sua sponte* authority to reopen proceedings to pursue certain asylum claims based on coerced population control policies to "serve the interest of justice"). In fact, on numerous occasions, the Board has reissued prior decisions in the interest of justice. *See Etchu-Njang v. Gonzales*, 403 F.3d 577 (8th Cir. 2004); *Roy v. Ashcroft*, 389 F.3d 132, 135 (5th Cir. 2004); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 972 (9th Cir. 2004); *Firmansjah v. Ashcroft*, 347 F.3d 625, 626 (7th Cir. 2003); *Lonyem v. U.S. Atty. Gen.*, 352 F.3d 1338, 1340 n.3 (11th Cir. 2003).

In *Firmansjah*, the Seventh Circuit considered the BIA's authority to reissue decisions and the impact on the court's jurisdiction to review the underlying order. *See* 347 F.3d 626-27. The court held that "[b]ecause nothing prevents the Board from entering a new removal order, which is subject to a fresh petition for review, we have jurisdiction over the case and will proceed to briefing." *Id.* at 627.

[3] This report is available at: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=H2813&position=all

B. Reissuing the Order in Respondent's Case Satisfies the Interest of Justice and Effectuates Congressional Intent.

Respondent now finds **[himself/herself]** subject to an adverse, and unintended, effect of the READ ID Act. *See* H.R. Conf. Rep. 109-72, at 2873.[4] Prior to the REAL ID Act, Respondent would have been barred from filing a petition for review, but **[he/she]** could have filed a habeas corpus petition. Unlike a petition for review, there is no filing deadline for a habeas petition. *Compare* INA § 242(b)(1) *with* 28 U.S.C. § 2241. Although Congress has said that individuals such as Respondent now must seek review in the court of appeals, as opposed to the district court, Respondent may be barred from filing a petition for review because more than thirty days have passed from the date of the BIA's decision. *See* INA § 242(b)(1). This result would undermine the intent of Congress "to give every alien a fair opportunity to obtain judicial review while restoring order and common sense to the judicial review process." *See* H.R. Conf. Rep. 109-72, at 2873. By reissuing Respondent's order, the BIA would provide Respondent a "fair opportunity" to seek judicial review in the court of appeals. *See Firmansjah*, 347 F.3d at 627.

The BIA's caselaw supports Respondent's request. The Board – in extraordinary circumstances – exercises equitable power to *sua sponte* reopen or reconsider cases. The BIA has held that such exceptional circumstances exist where there has been a significant development in the law. *See, e.g., Matter of Muniz*, 23 I&N Dec. at 207-08 (sua sponte reopening a case where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132 1135-36 (BIA 1999) (declining to reopen or reconsider sua sponte where caselaw represented only "incremental development" of the law and respondent's case did not turn on cited authority); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of "refugee" warranted sua sponte reopening).

Although here Respondent is asking the Board to reissue the order, as opposed to reopen or reconsider the case, the principles involved in the cases cited above are applicable. The REAL ID Act's purported elimination of habeas corpus review of certain cases is a monumental change in immigration law and a dramatic departure from the historical role of habeas corpus in reviewing the legality of deportation. By reissuing the order in Respondent's case, the Board will prevent unnecessary and potentially irreparable harm to the Respondent. Otherwise, the Respondent may be deprived of all federal court review. Reissuing the decision will effectuate Congress' intent that Respondent have an "'adequate and effective' alternative to habeas corpus."

V. CONCLUSION

For the reasons stated above, Respondent requests that the BIA reissue the **[removal** or **deportation]** order dated **[date]**.

Dated: **[Date you submit motion]**

Respectfully submitted,

_____

[Your Name]

[4] The legislative history of the REAL ID Act confirms that Congress did not intend that any person be deprived of judicial review: under section 106, "*all* aliens who are ordered removed by an immigration judge will be able to appeal to the BIA and then raise constitutional and legal challenges in the courts of appeals. *No* alien, not even criminal aliens, will be deprived of judicial review of such claims." H.R. Conf. Rep. 109-72, at 2873 (emphasis added).

ATTACHMENT 7: SAMPLE MOTION TO FEDERAL COURT FOR FEE WAIVER

Note: You should also attach an affidavit listing your financial information and, if you are detained, a certified statement of the amount and activity in your prison account. The sample affidavit on following page is from the Second Circuit Court of Appeals. Your court may use a different form. Also, please note that where a request for fee waiver is not granted, your court may have its own rules about whether the petition is considered filed on the date you submitted the petition and request for fee waiver, or only upon submission of the fee.

UNITED STATES COURT OF APPEALS FOR THE _____ CIRCUIT

[Your name]	
Petitioner,	
v.	**Case File No. _____**
Alberto GONZALES, Attorney General,	**Immigration File No.: A_____**
Respondent	**MOTION TO PROCEED IN FORMA PAUPERIS**

MOTION FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

The above-named Petitioner hereby moves for permission to pursue his petition to review the final order of [choose one: removal/deportation/exclusion] entered by the Board of Immigration Appeals [or "Immigration and Customs Enforcement (ICE)" if you were ordered removed under INA §241(a)(5) or INA § 238(b) *in forma pauperis*. Petitioner does not have the financial resources to pay the filing fee of $250. See attached affidavit.

Dated: _____

Respectfully submitted,

_____
(Your Name and signature)
PRO SE

FINANCIAL AFFIDAVIT
In Support of a Motion to Proceed In Forma Pauperis

Case Name: _____

Docket Number: _____

EMPLOYMENT

Are you now employed? ___ Yes ___ No ___ Self Employed
Name & Address of Employer: _____

If YES, how much do you earn per month? $_____

If NO, give month & year of last employment _____

How much did you earn per month? _____

If married, is your spouse employed? ___ Yes ___ No
If YES, how much does your spouse earn per month? $_____

If a minor under age 21, what is your parents' or guardian's approximate monthly income?
$_____

OTHER INCOME

Have you received in the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent, payments, interest, dividends, retirement or annuity payments, or other sources? ___ Yes ___ No
If YES, give the amount received and identify sources:

Received	Sources:
_____	_____
_____	_____
_____	_____
_____	_____

CASH

Have you any cash on hand or money in savings, a prisoner trust fund account or checking account? ___ Yes ___ No
If YES, state total amount $_____

PROPERTY

Do you own any real estate, stock, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing?) ___ Yes ___ No
If YES, give value and describe it:

Value	Description
_____	_____
_____	_____
_____	_____
_____	_____

DEPENDENTS

Marital status: Total No. of Dependents: _____

___ Single
___ Married
___ Widowed
___ Separated or Divorced

List persons you actually support & your relationship

_____
_____
_____
_____

DEBTS & MONTHLY BILLS

List all creditors, including banks, loan companies, charge accounts, etc.

Creditors:	Total Debt:	Monthly Payment:
Apt. or Home: _____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

I certify the above to be correct. _____ _____
Signature of movant Date

WARNING: A false or dishonest answer to a question in this affidavit may be punishable by fine, imprisonment, or both.

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

OMB#1125-0004; Expires August 31, 2005

Alien's Change of Address Form/ Board of Immigration Appeals

Who should use this form: Use this form for a change of address if you have filed an appeal or motion with the Board of Immigration Appeals. *Note:* If you are an attorney representing a person before the Board, do not use this form to indicate your own change of address; use Form EOIR-27 (Notice of Entry of Appearance as Attorney or Representative Before the Board).

When to use this form: If you move, the law requires you to file this Change of Address Form with the Clerk's Office of the Board of Immigration Appeals. You must file this form within five (5) working days of a change in your address. Even if you have an attorney or representative, you should file this form with the Board every time you change your address. You should also file this form if you get a new telephone number.

How to use this form:

1. Complete the Change of Address Form below.
2. Send a copy of this form to the District Counsel for the Department of Homeland Security, and complete and sign the "Proof of Service" below to show you did this.
3. Send this form to the Board of Immigration Appeals. Follow the mailing instructions on the back of this form.
4. If you prefer to file this form in person, you may bring it to the Board of Immigration Appeals, Clerk's Office, 5201 Leesburg Pike, Suite 1300, Falls Church, Virginia.

Name: _____ *Alien Number: A* _____

My OLD address was:

_____
("In care of" other person, if any)

_____
(Number, Street, Apartment)

_____
(City, State and ZIP Code)

_____
(Country, if other than U.S.)

My NEW address is:

_____
("In care of" other person, if any)

_____
(Number, Street, Apartment)

_____
(City, State and ZIP Code)

_____
(Country, if other than U.S.)

_____
(New Telephone Number)

SIGN HERE → X _____ _____
Signature Date

PROOF OF SERVICE
(You Must Complete This)

I _____ mailed or delivered a copy of this Change of Address Form on _____
(Name) (Date)

to the District Counsel for the Department of Homeland Security (DHS) at _____ .
(Address of DHS District Counsel)

SIGN HERE → X _____
Signature

Form EOIR - 33/BIA
Revised 05/03

MAILING INSTRUCTIONS

1) Fold the page at the dotted lines marked "Fold Here" so that the address is visible. (IMPORTANT: Make sure the address section is visible after folds are made.)
2) Secure the folded form by stapling along the open end marked "Fasten Here."
3) Place appropriate postage stamp in the area marked "Place Stamp Here."
4) Write in your return address in the area marked "PUT YOUR ADDRESS HERE."
5) Mail the form.

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is three (3) minutes. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041**.**

Fold Here First

PUT YOUR ADDRESS HERE

_____

_____

_____

_____

Place Stamp Here

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Clerk's Office
P.O. Box 8530
Falls Church, Virginia 22041

Fold Here Second

Fasten Here

Form EOIR - 33/BIA
Revised 05/03

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

NOEL J. AUGUSTYN
Assistant Director

Office of Court Administration

May 25, 2005

TO: CLERKS, UNITED STATES COURTS OF APPEALS
CLERKS, UNITED STATES DISTRICT COURTS

SUBJECT: REAL ID ACT OF 2005: Aliens Challenging Removal, Deportation Or Exclusion

As some of you may know, the "Real ID Act of 2005" was signed into law (Pub. Law No. 109-13) on May 11, 2005, as Division B of the *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005*, and became effective on the date of enactment. Though there are a number of important provisions that courts may wish to review, the Real ID Act has a specific impact upon both district and appellate clerks' offices with respect to "cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of enactment." Title I, Section 106(c) of the Act states:

> TRANSFER OF CASES.– If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under section 242, except that subsection (b)(1) of such

section shall not apply.

This new law applies only to cases brought under Section 2241 by aliens challenging removal, deportation, or exclusion. It does not apply to those cases challenging detention.

The courts will need to develop procedures to implement the Act's requirement that "...the district court shall transfer the case". Certainly, one option for the district courts is for judges to initiate a review of all of these cases and prepare the transfer orders when appropriate. As an alternative, courts could require counsel to initiate the process. Administrative Office staff have been advised by Department of Justice personnel that some U.S. Attorneys' offices already have begun preparing transfer order motions in these cases. If this is occurring, the district courts should coordinate with the local U.S. Attorney regarding the process to be followed for transferring these cases, including how these cases will be identified and how and when the transfer will be initiated. In addition, the courts will need to determine how to proceed if only part of the case is transferred, and how the court of appeals would handle a stay of deportation or removal entered by the district court.

At the same time, the district courts should coordinate with the clerk of the appropriate appellate court regarding transmittal of all case-related records and the process for providing a complete certified record of these cases. District clerks also should note that the Section 106(c) requirement to transfer the case "to the court of appeals in the circuit in which a petition for review could have been properly filed" raises an issue of venue, since the case may need to be transferred to another circuit. Many district courts have not required the full certified agency record in these cases, but instead they have relied on the Board of Immigration Appeals order and supporting documents. The process for obtaining and transmitting the full certified record to the court of appeals must be worked out with the Department of Justice, since the appellate courts will likely require the full certified record. This is particularly important, as it may take Department of Justice offices several weeks or more to compile their records.

Finally, please note that the Act does not impose the collection of any new fees for the transferred petitions for review.

If appellate clerks have questions regarding the content of this memorandum, they should contact Gary Bowden, Chief, or Gloria Malkin, Attorney Advisor, Appellate Court and Circuit Administration Division.

If district courts have questions regarding the content of this memorandum, they should contact their regional administrator in the District Court Administration Division: James L. Caldwell (2nd, 9th Circuits); Steven Gallagher (1st, 5th, 10th, DC Circuits); David Mercanti (3rd, 4th, 7th Circuits); or, Thomas S. Russell (6th, 8th, 11th Circuits).

Noel J. Augustyn

cc: Circuit Executives
District Court Executives
Senior Staff Attorneys

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

June 8, 2005

SPECIAL NOTICE

Re: **Real ID Act of 2005**, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005)

This notice is to the district courts within the Second Circuit. It outlines the preferred procedures for transferring cases from the district courts to the Court of Appeals pursuant to the Real ID Act of 2005.

1. Please provide the parties with the opportunity to stipulate to, or to brief the propriety of, the transfer.

2. If the district court agrees that the case is appropriate for transfer under the Real ID Act, the district court should issue an order of transfer and send the case to the Court of Appeals as a **Petition for Review**.

3. In its transfer order, the district court should stay the petitioner's removal or deportation pending further order from the Court of Appeals. The Government may move, in the Court of Appeals, to vacate the stay.

4. The transfer order must clearly indicate that the transfer is made pursuant to the Real ID Act. The transfer order must also include the petitioner's Alien Number (the eight-digit number preceded by the letter "A").

5. The district court clerks are requested to transmit the entire record to the Court of Appeals at the same time they transmit the transfer order. If only a portion of the district court case is being transferred to the Court of Appeals as a Petition for Review, that portion of the district court record which relates to the Petition for Review should be forwarded. The Court of Appeals will accept paper documents or electronic documents.

John M. Walker, Jr.
Chief Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 16, 2005

SPECIAL NOTICE

RE: Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat 231 (May 11, 2005)

This notice is to the District Courts and litigants within the Third Circuit. It outlines the preferred procedures for transferring cases from District Courts to the Court of Appeals pursuant to the Real ID Act of 2005.

1. Because not all petitions for habeas corpus are subject to transfer and because cases to be heard as a petition for review must be transferred to the Circuit Court of Appeals where the Immigration Judge concluded proceedings, it is suggested that District Judges provide the parties an opportunity to stipulate to or brief the propriety of the transfer order.

2. If the District Court agrees that the case is appropriate for transfer under the Real ID Act, the District Court should issue an order of transfer and send the case to the appropriate Court of Appeals as a petition for review.

3. The transfer order should indicate that the transfer is made pursuant to the Real ID Act. The transfer order should also indicate where the Immigration Judge concluded the proceedings, which Court of Appeals the case should be transferred to, and include the petitioner's Alien Number (the eight-digit number preceded by the letter A).

4. Any stay previously issued by the District Court shall remain in place during and after transfer. The Government may move in the Court of Appeals to vacate the stay if appropriate.

5. The District Court clerks are requested to transmit the entire record to the Court of Appeals at the same time they transmit the transfer order. If only a portion of the District Court case is being transferred to the Court of Appeals as a petition for review, that portion of the District Court record which relates to the petition for review should be forwarded to the Court of Appeals. The Court of Appeals will accept paper documents or electronic documents.

6. Within ten days of the case being opened in the Court of Appeals, the parties shall inform the clerk whether the record transmitted by the District Court is sufficient for purposes of the petition for review or whether additional documents are necessary.

/s/ Anthony J. Scirica
Chief Judge

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Memorandum

To: District Court Clerks

From: Charles R. Fulbruge III

Date: May 31, 2005

Re: Real ID Act

On May 11, 2005, "The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005," also known as The Real ID Act, became law. Section 106 of the act has a major impact on courts of appeals. It provides as follows:

> (c) TRANSFER OF CASES. If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section, or under section 309 (c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S. C. § 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242. . . .

This section raises numerous questions of both substance and procedure which we bring to your attention in the discussion below.

I. Transferring Cases

After reviewing the AO's May 25, 2005 memo, and participating in a conference call on May 25, there is a general consensus district courts will transfer cases under the act after review by a district or magistrate judge. Individual district courts will determine whether transfer review will be undertaken *sua sponte* by the court, or on motion

by the U.S. Attorney or the petitioner's attorney. Current record keeping does not identify this specific type of case, so we do not know how many case might be involved. To date we have received four transfers, one from the Eastern District of Louisiana and three from the Western District of Texas, El Paso.

II. Court to Which Transfer is Made

The act provides the cases shall be transferred "to the court of appeals for the circuit in which a petition for review could have been properly filed. . . ." Habeas corpus challenges to an order of removal, exclusion, or deportation are filed in the district court where the alien is located; petitions for review of such orders are filed in the district court where the final administrative order was issued. Thus, we expect there are some cases in the district courts in this circuit that should be transferred to another court of appeals, and *vice versa*. We ask our district courts to review the cases thoroughly enough to determine the proper court of appeals.

III. The Record

In most cases, the record in the district court will consist of little more than the Immigration Judge's decision and the BIA order affirming it. Our court will want more than what likely is available at the district court. The Justice Department will provide the necessary records but there will be a substantial delay. We ask that the district court send everything it has when the case is transferred. After we have reviewed the case, we will determine whether the administrative record is necessary and, if so, order it from DOJ.

IV. Stay of Removal

Often, habeas petitions are not filed until there is an order of imminent removal or deportation. The petitioner then also submits an application for stay of deportation. There is some sentiment that the district court should grant at least a temporary stay to prevent the issue from becoming moot during the transfer process. In most cases, it should not be necessary to do this as a routine matter. This court has recently adopted the four-factor test applied to preliminary injunctions, which is decidedly more favorable to petitioners. *Tesfamichael v. Gonzales*, — F.3d —, 2005 WL 1220939 (5th Cir. May 24, 2005). It should be relatively easy for the district courts to determine whether a stay is warranted on the merits without having to grant a stay automatically in every case.

V. Limited Transfer

The act specifies that, if a habeas petition in the district court attacks both the order of removal, exclusion, or deportation and the fact of detention, only the portion dealing with the order of removal, etc. can be transferred. The detention challenge will remain with the district court to be decided separately and the court of appeals will have no jurisdiction

over that portion of the case unless and until the district court has entered a final judgment that has been appealed.

As we get more information and experience, we may supplement this memo. If you have questions, please contact Bill Zapalac, Counsel to the Clerk at (504) 310-7660.

Sincerely,

Fritz Fulbruge

cc: Bill Zapalac

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

June 2, 2005

SPECIAL NOTICE

Re: Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005)

This is a notice to the District Courts within the Circuit, as well as to concerned parties, regarding the preferred procedure for transferring cases from the district courts to the court of appeals in the aftermath of the Real ID Act of 2005, enacted May 11, 2005. It is suggested that the district courts:

1. Allow the parties the opportunity to stipulate to, or brief the propriety of, transfer.

2. If the district court agrees that the case is appropriate for transfer, the district court should issue an order expressly transferring appropriate cases, or portions of them, to the Ninth Circuit Court of Appeals as a ***Petition for Review***.

3. In its transfer order, the district court should inform this court whether the petitioner ever sought a stay of removal from the district court and what the district court's decision was, if any, on the stay request.

4. The district court clerks are requested to transmit the entire case file to the Court of Appeals, simultaneous with the transfer order. If only a portion of the case is transferred, the parties should notify the district court clerk's office as to which portions of the file should be transmitted to the Court of Appeals.

5. If a stay of removal had been requested in the district court at any time during the proceedings, then, absent further order of this Court, the district court's order transferring a case to this court as a petition for review shall trigger the temporary stay of removal contemplated by this court's General Order 6.4. This court will then issue an order directing the transferred parties on how to proceed further.

By direction of the Court Executive Committee:

Cathy A. Catterson
Clerk of Court