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OUTLINE: APPEALS TO THE BOARD OF IMMIGRATION APPEALS AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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by
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This outline was prepared in conjunction with Mr. Mehta's presentation at a continuing legal education program sponsored by the Federal Bar Council, Asylum 101: Learning How To Effectively Navigate The Asylum Process, on July 2, 2008 in New York City. This outline will be useful to readers who need a quick reference for filing appeals of asylum decisions to the Board of Immigration Appeals or to the United States Court of Appeals for the Second Circuit.

A. **BOARD OF IMMIGRATION APPEALS (BIA)**

1. **Notice of Appeal**. File Notice of Appeal on EOIR Form-26 within 30 days of IJ decision, and it must be filed directly to the BIA within 30 calendar days of an IJ's oral decision or the mailing of of an IJ's written decision. 8 CFR § 1003.38. If the final date is a Saturday, Sunday or public holiday, the appeal time shall be extended to the next business day. *Id.* A Notice of Appeal may not be filed by a party who has waived appeal. *Id; But see US v. Calderon,* 391 F.3d 370 (2d Cir. 2004) (waiver can be challenged where respondent did not knowingly and intelligently waive his right to appeal).The 30 day deadline is mandatory and jurisdictional.

2. **Briefs.** The NOA must specify in detail the factual and legal grounds, as well as the errors relating to the statutory ground of eligibility or to the exercise of discretion. 8 CFR §1003.3(b). It must be accompanied by an EOIR-27, and a certificate of service with a complete address

demonstrating service on DHS counsel. 8 CFR § 1003.3(a)(1). The BIA will create a record of the proceeding and schedule a briefing schedule. For a non-detained case, each party has 21 days to submit a brief. Each party may obtain an extension of the 21 day period by filing a motion prior to the date. In a detained case, the parties must simultaneously file their briefs within the 21-day period. 8 CFR § 1003.3(c).

3. **1 Member vs. 3 Member Panel**. Since most decisions will be decided by one Board member, it is important to explain in detail why the case should be referred to a 3-member panel. 8 CFR § 1003.3(b) and state the reasons under 8 CFR §1003.1(e)(6): i) to settle inconsistencies among the rulings of different immigration judges; ii) to establish a precedent construing the meaning of laws, regulations or procedures; iii) to review a decision by an IJ or DHS that is not in conformity with the law or with applicable precedents; iv) to resolve a case or controversy of major national import; v) to review a clearly erroneous factual determination by an IJ; or vi) to reverse the decision of an IJ other than by the procedure for a brief order by a single Board member. *See* Proposed BIA Rule on Affirmance Without Opinion , where AWO will be deemed to have considered all arguments and claims, and is not to be construed as waiving a party's obligation to exhaust remedies. The preamble to the proposed BIA rule also refers to *National Cable & Telecom Ass'n v. Brand X Internet Services,* 545 US 967 (2005) (unless the court finds a statutory provision unambiguous under *Chevron* step one – the administrative agency is free to adopt a contrary interpretation, as long as it does so with proper foundation and explanation, and the courts are thereafter required to defer to the agency's new interpretation under *Chevron* step two). If BIA has affirmed the IJ's decision without opinion, Second Circuit will review the IJ's decision as a final agency determination. *Ming Xia Chen v. BIA*, 435 F.3d 141 (2d Cir. 2006).

4. **New Evidence**. The BIA will not accept new evidence "xcept for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand." 8 CFR § 1003.1(d)(3). The BIA will only grant the remand if the new evidence would change the outcome of the case.

Matter of Coelho, 20 I&N Dec. 464 (BIA 1992). A motion to remand while the appeal is pending does not trigger the time or number limitations for a motion to reopen pursuant to 8 CFR § 1003.2(c)(2). BIA also has *sua sponte* authority to remand a case for further fact finding. *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005).

5. **Standard of Review**. Pursuant to 8 CFR § 1003.1(d)(3), BIA will not engage in de novo review of factual findings, including credibility, and such findings shall only be reviewed to determine whether the findings of the immigration judge are clearly erroneous. The BIA has retained de novo standard for: 1) all questions of law, discretion, and judgment and all other issues in appeals from decision of immigration judges. BIA will also apply de novo review regarding application of law to particular set of facts, such as past persecution or a well founded fear of persecution. *See Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008) ("in determining whether established facts are sufficient to meet a legal standard, such as "well founded fear," the Board is entitled to weigh the evidence in a manner different form that accorded by the Immigration Judge, or to conclude that the foundation of the IJ's legal conclusions was insufficient or otherwise not supported by the evidence of the record"). Prior to the clearly erroneous standard, in *Matter of S-A*, 22 I&N Dec. 1328, the BIA relied on *Matter of A-S-,* 21 I&N Dec. 1106 (BIA 1998) in holding: "We recently articulated a three-pronged approach to assessing an Immigration Judge's credibility findings. *Matter of A-S-, supra*. We held that we will generally defer to an adverse credibility determination based on inconsistencies and omissions regarding events central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions."

6. **Time and Numerical Limitations to Motions**. A motion to reopen or reconsider may be made before the IJ, 8 CFR §1003.23 or the BIA, 8 CFR §1003.2. A motion to reopen must be filed no later than 90 days from the date on which the final administrative decision was rendered. 8 CFR § 1003.2 (c)(2); and a motion to reconsider must be filed "within 30 days

after mailing the of the Board decision," 8 C.F.R. 1003.2(b)(2). The same timeline applies to motions before the IJ. 8 CFR §1003.23(b)(1). A motion to reconsider is on legal grounds alone. It is a "request that the BIA examine its decision in light of additional legal arguments, a change in law, or perhaps and argument or aspect of the case which was overlooked." *Matter of Ramos*, 23 I&N Dec. 336 (citing *Matter of Cerna*). A motion to reopen is on factual grounds and must be supported by affidavits or other evidentiary materials. 8 CFR §1003.2(c)(1). The applicant must show that the evidence was 1) material, 2) unavailable at time of hearing and 3) could not have been discovered or presented at original hearing. 8 CFR §§ 1003.2(c)(1). One court has held that the supporting evidence for a motion to reopen need not be filed simultaneously with the motion. *Yeghiazaryan v. Gonzales*, 439 F.3d 994 (9th Cir. 2006). An ineffectiveness claim against counsel will be treated as a motion to reopen, *Matter of Lozada*, 19 I&N Dec. 637, and the production of new evidence is not required. However, it is still important to show that counsel's ineffectiveness was prejudicial.

7. **Exceptions to Time and Numerical Limitations**. Even if a motion is time or numerically barred, the relevant exceptions for this CLE are Changed Circumstances, *Sua Sponte* and ineffective assistance of counsel. An asylum applicant may, at any time, move to reopen his/her case "based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and cound not have been discovered or presented at the previous hearing." 8 CFR §1003.2(c)(3)(ii)(2003). BIA abused its discretion in denying motion to reopen as IJs and BIA have duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim. *Poradisova v. Gonzales*, 420 F.3d 70 (Where Jewish applicants from Belarus submitted reports from the DOS and international organizations that demonstrated that hostility to Jews had worsened since the decision, the BIA abused its discretion in not reopening). The BIA may sua sponte reopen the proceedings. 8 CFR §1003.2(a). This authority may only be used in exceptional circumstances. *Matter of J-J*, 21 I&N Dec. 976 (BIA 1997). Ineffective assistance of counsel can also result in equitable tolling. *Iovarski v. INS*, 232 F.3d 124 (2d Cir. 2000)(finding that 90 day time limitation may be equitably tolled because it is not jurisdictional but denying tolling on facts of the case because

Respondent did not act with due diligence).

8. **Effect of Removal**. Pursuant to regulation, "A motion to reopen or a motion to reconsider shall not be made by . . . a person who is the subject of . . . removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the . . . removal of a person who is the subject of . . . removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." 8 C.F.R. § 1003.2(d). A stay of removal may be requested from the BIA pending disposition of the motion (stays are automatic for motions to reopen *in absentia* orders, but not otherwise). "hough the BIA has discretion to deny the motion for a stay, it may constitute an abuse of discretion for the BIA to do so where the motion states nonfrivolous grounds for reopening." *Dada v. Mukasey*, ___ S. Ct. ___, 06-1181, 2008 WL 2404066 (June 16, 2008), slip op. at 19.

B. **UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (SECOND CIRCUIT)**

9. **Petition for Review**. The Court of Appeals can review through a petition for review a final removal order of the BIA, which includes a final order denying asylum in "asylum-only proceedings" (proceedings against an alien who entered on the Visa Waiver Program and gave up the right to contest removal except by applying for asylum, withholding, or CAT relief). *Kanacevic v. INS*, 448 F.3d 129 (2d Cir. 2006). A PFR "must be filed not later than thirty days after the date of the final order" of removal or the final order of exclusion or deportation. INA §242(b)(1). This deadline is "mandatory and jurisdictional" and is not subject to equitable tolling. A PFR can also be filed over the denial of a motion to reopen or reconsider, but such a PFR will not preserve the underlying issues arising from the original denial. Often, one must file two PFRs, one over the BIA decision and the second over the denial of a motion to reopen or reconsider. A PFR must include a copy of a final administrative order and state whether any court has upheld the validity of the order, and if so, provide the necessary details, ie. which court, date of ruling and type of proceeding. INA §242(c). The PFR must be filed in court of appeals where the IJ completed the proceeding. Effective April 9, 2006, the filing fee is $450. In the Second Circuit, the original plus three bound copies and one unbound copy (for

ease of scanning by the clerk) must be filed.

10. **Service of the Petition for Review.** The petition must be served on the Attorney General and the local Field Office Director of ICE (Immigration and Customs Enforcement). It should also be served on the Office of Immigration Litigation within the Department of Justice in Washington D.C., as a courtesy, since they are the attorneys who will actually be handling the case for the government.

11. **Limitation on Jurisdiction**. Although INA §208(a)(3) states, with respect to the 1 year deadline and the exceptions based on changed circumstances or extraordinary circumstances, that "o court shall have jurisdiction to review any determination of the Attorney General, the Real ID Act of 2005 amended INA § 242(a)(2)(D) to provide that "nothing in ...any...provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *Xiao Ji Chen v. US DOJ*, 471 F.3d 315 (2d Cir. 2006). The issues reviewable under this provision are "the same types of issues that courts traditionally in habeas review over Executive detentions." *Id.* at 326- 327.

12. **Stay of Removal and Voluntary Departure**. Filing of PFR does not stay deportation "unless the court orders otherwise." INA §242(b)(3)(B). The PFR must be accompanied by a stay of removal. In the Second Circuit, there exists an informal forbearance policy under which a petitioner will not be removed after filing a motion for a stay unless and until the court denies that motion. With respect to a stay of voluntary departure, the Second Circuit has held that a petitioner may request a stay of VD pending consideration of the merits of the PFR, although petitioner must demonstrate possibility of success on the PFR. *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006). The Supreme Court recently held that an alien must be permitted to withdraw a request for voluntary departure at any time before the voluntary departure period expires, for example in connection with a motion to reopen. *Dada v. Mukasey*, ___ S. Ct. ___, 06-1181, 2008 WL 2404066 (June 16, 2008). *Dada* noted and reserved the question whether cases such as *Thapa* were correctly decided. For the moment, *Thapa* and *Dada* are both good law in the Second Circuit, so a petitioner can either

seek a stay of voluntary departure or withdraw the request for voluntary departure.

13. **Federal Rules of Appellate Procedure and local rules.** The procedure is governed by the FRAP and the Second Circuit's local rules. Upon filing the PFR, petitioner receives a Certified Record of Proceedings within 40 days of the services of the PFR. The Court will set the schedule for opening brief, Respondent's answering brief and Petitioner's reply brief. The Second Circuit has placed asylum cases on a fast track, and has done away with oral argument. Petitioner must also file a pre-argument statement within 10 days of filing the PFR. Review the Second Circuit's Civil Appeal Management Plan (CAMP). The Second Circuit's mediation facilities under CAMP are very useful. Effective July 6, 2004 Conferences in counseledimmigration appeals will no longer be automatic. If a party thinks that a conference would be beneficial, that party will be permitted to request a conference. A request for mediation will not extend the briefing schedule. Staff Counsel issues a Pre-Argument Conference Notice whereby the Staff Counsel sets the time and place for the pre-argument conference in the conference order. Typically these conferences proceed in the Offices of the Staff Counsel, located in the Woolworth Building, 233 Broadway, NY on the 6th floor. The CAMP notice concerning mediation will state: (a) It is imperative that the lead attorney in charge of the appeal and whose guidance and judgment the client most relies upon attend the pre-argument conference and have the fullest settlement authority from the client; (b) The attorney must be fully prepared to discuss the legal merits of each issue on appeal; (c) Counsel should be prepared to narrow, eliminate or clarify issues on appeal. It is best to consult with opposing counsel prior to the mediation, as often, it may be possible to settle the matter that way too.

14. **Standard for Review**. The Second Circuit reviews all questions of law *de novo*, *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007), and applies the substantial evidence standard to all factual findings, which will be upheld unless "any reasonable adjudicator would be compelled to conclude to the contrary." *Tao Jiang v. Gonzales*, 5000 F.3d 137 (2d Cir. 2007). Despite the deferential standard, the Second Circuit requires a certain minimum level of analysis from the IJ and BIA opinions denying asylum, and indeed must require such if judicial review is to be meaningful. *Diallo v. INS*, 232

F.3d 279 (2d Cir. 2000) (vacating a decision because the BIA failed to make a credibility finding, explain why its demand for corroborative evidence was reasonable, or assess Diallo's stated reasons for failure to provide any corroboration). Where the IJ's finding rests on credibility, the Second Circuit requires the IJ to detail the reasoning leading to an adverse finding, by giving cogent reasons for rejecting the applicant's testimony. *Secaida-Rosales v. INS*, 331 F.3d 297 (2d Cir. 2003). The Court will vacate and remand for a new finding if the agency's reasoning or fact finding process was sufficiently flawed. *Bah v. Mukasey*, 07-1715-ag (2d Cir. June 11, 2008); *Rizal v. Gonzales*, 442 F.3d 84, 89 (2d Cir. 2006). The Second Circuit reviews denials of motions to reopen for abuse of discretion. *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Poradisova, supra*. The BIA may not deny a motion to reopen to assert a claim for withholding of removal or CAT protection simply because the asylum applicant was found not credible, as long as the new claim is supported by objective evidence of a likelihood of future persecution that can stand independently of the previous testimony found not to be credible. *Paul v. Gonzales*, 444 F.3d 148, 156 (2d Cir. 2006).

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