Removal Proceedings for Family-Based Practitioners*

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"Don't sway to the unjust. No matter what they say - Never give in! Never give in!"[1]

BASICS OF REMOVAL PROCEEDINGS EVERYONE SHOULD KNOW: NTAs, EOIR-28s, etc.

Removal Proceedings begin when U.S. Immigration and Customs Enforcement (ICE) files a Notice to Appear (NTA) on form I-862, with the immigration court.[2] Currently, across the country, this process is taking months, and sometimes longer than a year. For those stopped at the border, ICE may file the NTA with the court having jurisdiction over the location they gave when released from custody. Also, NTA's are issued when U.S. Citizenship and Immigration Services (USCIS) denies an application which renders the person inadmissible or removable, such as an I-751, I-485, or even N-400. The NTA is sent to the Office of Chief Counsel (OCC) where it is reviewed and sometimes amended before being filed with the Court, again - often after sometimes significant delays. If you have an NTA in your hand, a good way to check to see if it has been filed with a court is to call the Executive Office for Immigration Review (EOIR) 1-800-898-7180 number and enter their A-number.

If you have a client with an NTA and you want to represent them before the Immigration Court, you cannot enter your appearance before EOIR until it has received the NTA from ICE. Entering

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* This practice advisory was published originally in *Immigration Practice Pointers*, 2020–21 Ed. (AILA 2020).

[1] From "At the Movies," by Bad Brains.

[2] 8 CFR §1003.14(a).

your appearance requires you to register with EOIR.[3] Once you have your EOIR number, you can include it on all your court filings, like your bar number. Once you have entered your appearance, all future notices will come to your office. You will be expected to appear at all future hearings until you have withdrawn, or until another attorney has substituted as counsel. Both options require written motions.[4]

Once the NTA has been filed with the court and you have entered your appearance, you will need to review the NTA to determine how you will plead to it. Those pleadings can be done orally or in writing, and if written, a copy needs to be served on OCC.[5] OCC now has an electronic service for receipt of filings[6], but it is cumbersome, and places the burden on you to make sure all parts of your filing were received and accepted. You may still file paper copies by regular mail, as the regulations allow.

In reviewing the NTA, pay close attention to whether the document has all the required information, such as the date and time of hearing. The Supreme Court has found that without such necessary information, an NTA is deficient.[7] Additionally, ICE bears the burden of showing by "clear and convincing" evidence that your client is in fact an "alien," and that they are removable, etc.[8] For these reasons, you may want to deny proper service of the NTA, deny the allegations and charges, and put the government to their burden.

One of the ways OCC often overcomes their burden in this regard is by submitting a form I-213, a document created by an ICE officer, where they list what they claim your client told them when interviewed and list any known immigration and criminal history. The form is often full of mistakes and bad information, so it should be challenged when appropriate. Similarly, many people with NTAs were stopped at the border, and may have requested a credible fear Interview with an asylum officer. If so, you will want to review the credible fear determination and paperwork before pleading, and certainly before completing any applications for relief.

KNOWING YOUR COURT: COMMON PET PEEVES FROM IMMIGRATION JUDGES

Since taking power, the Trump Administration has put in place a series of draconian anti-due process restrictions on immigration judges to speed up and rule on life-and-death cases. Where once immigration defense attorneys were expected to put on numerous witnesses on hardship, discretion and asylum country conditions, where hearings were not only hours long affairs but entailed several adjournments to hear ever more and more witnesses, individual merits hearings have now devolved into rapid-fire interrogations run by immigration judges, with witness declarations serving in place of live witness testimony. Now, more than ever, cases are won and lost on the evidence submitted, even before you and your client have walked into the courtroom.

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[3] https://portal.eoir.justice.gov (Instructions to register are available here: www.justice.gov/eoir/page/file/1132791/download)
[4] Immigration Court Practice Manual (ICPM) §2.3(i)(i-ii).
[5] ICPM, Appendix L-1.
[6] https://eserviceregistration.ice.gov
[7] *Pereira v. Sessions*, __ U.S. __, 138 S. Ct. 2105 (2018)
[8] 8 CFR § 1240.8(a)

For the immigration practitioner comfortable with USCIS interviews but unaccustomed to immigration court, this new order may prove soothingly familiar. In essence, immigration court proceedings now more resemble a USCIS adjudication, except with a U.S. Department of Homeland Security (DHS) attorney at the other table to further complicate your case. Knowing your way around the immigration court and its procedures, and reminding all parties involved that this is a court hearing and not an agency interview, has become all the more essential.

The key difference between USCIS adjudication and immigration judge (IJ) decision-making is the evidentiary record you will be dealing with. The evidence upon which USCIS makes decisions is contained in the "A-file", which contains a variety of documents created by DHS, some in public and some in secret, along with various applications, filings and evidence submitted by the applicant, petitioner and beneficiary. By contrast, the immigration courts, and by extension the Board of Immigration Appeals (BIA or Board), both must rest their decisions within the confines of the evidence contained in the Record of Proceedings (ROP). If a case goes up to the federal circuit courts, that ROP is sent up to the circuit court as the Certified Administrative Record (CAR).

When practicing before the immigration court and Board, your role concerns the admission, exclusion and consideration of evidence into the ROP, and not the A-file. On the flipside, whatever materials are held in the A-file will not be subject to consideration by the immigration judge until DHS files that evidence and seeks its admission into the court's evidentiary record. In fact, the immigration judge will have no idea of the existence of any materials contained in the A-file. A key error by newer immigration court practitioners is to assume that any evidence contained in the A-file, whether adverse or favorable, is or will be made known to the immigration judge. As your client's defender, your obligation is to ensure exclusion of adverse evidence from the ROP and make sure that favorable evidence makes it into the record.

Familiarity with the *Immigration Court Practice Manual* (ICPM) is key to this, along with the federal regulations at 8 CFR Parts 1003, 1240 and 1287. Although practice before the immigration court has changed significantly since 2017, the ICPM has not. At a basic level, failure to meet the ICPM's requirements regarding application filing deadlines,[9] proper service on opposing counsel,[10] tabbing exhibits,[11] page numbering,[12] and filing deadlines for motions and responses will run the risk that evidence in support of your relief application from removal could be excluded.

In the experience of this author, consistent application of the ICPM against DHS counsel has remained elusive. Nonetheless, defense counsel must make objections to adverse evidence where DHS counsel has failed to meet ICPM filing requirements. In a sense, the ICPM is the procedural expression of what constitutes fair play and minimum professional diligence when it comes to appearing, filing evidence and relief applications before the immigration court. Where DHS fails to comply with rules regarding filing deadlines[13] or the proper inclusion of a sworn declaration in support of an assertion made in a motion for continuance or accept and untimely filing,[14] then DHS

[9] ICPM at 37.
[10] ICPM at 41.
[11] ICPM at 49.
[12] ICPM at 92.
[13] ICPM at 39.
[14] ICPM at 40.

has not only violated the ICPM but has conducted itself in a manner that is unfair towards your client. DHS, and by extension, the immigration judge, must be held accountable in such instances. If the immigration judge permits such conduct on the part of DHS in a way that prejudices your client, you may have a sound basis for appeal, and you are ethically obligated to object on the record, and argue that the proper remedy is either exclusion of DHS's evidence, giving minimal weight to the evidence being admitted, or at minimum a continuance to develop a proper response. Where defense counsel has neglected to object to DHS conduct that violates the ICPM, and the client as a result suffers legal prejudice, then counsel may have engaged in ineffective assistance of counsel for failure to put on a competent, diligent and zealous defense.

Recent directives to speed up case adjudication[15] have placed pressure to limit live-witness testimony, thereby making it all the more critical for defense counsel to efficiently examine supporting witnesses. Under the ICPM, all live witnesses to be called in support of the case-in-chief must provide a declaration in support of their planned testimony,[16] and the names of such witnesses must be filed in a witness list pursuant to the court's filing deadlines.[17] In general, all percipient witnesses must be available to testify in court. In some instances, the immigration judge may permit telephonic appearance by expert and forensic witnesses, including country conditions experts and those providing forensic medical and psychological evidence.[18]

In all cases, keep your questions crisp, to the point, single issue, and open-ended.[19] Put your expert witnesses to the test: "why should the court find your conclusions reliable?" Anticipate difficult themes that might trouble the immigration court and attack them head on. Remember: the more your client fears a question, the more important it is for you to beat DHS counsel to the punch and ask it yourself.

In a USCIS adjudication, when an immigration officer goes rogue at the interview, immigration counsel has recourse to request a pause of the interview to speak to the officer's supervisor. That option is not available in immigration court. However, a wise immigration judge once told the author, "A case, a problem, an appeal." If the problem cannot be resolved at the IJ hearing, then defense counsel must set up the issue for appeal to the Board and the federal circuit court. First, counsel must first discern if the trouble is really emanating from the immigration judge, or only from DHS counsel. If the trouble comes from DHS counsel on evidentiary filings or mistreatment of a witness, then you should address the court directly on the record (not DHS counsel) and plainly state your objection, whether it be with regard to technical inadmissibility or due process, fundamental fairness or relevance. However, if the trouble comes from the immigration judge or the court's endorsement of DHS's improper conduct, then make your objection, but always do so in terms the court must respect, i.e., fundamental fairness, due process, legal error, the sound exercise of discretion, and the likely rejection of the IJ's decision once on appeal.[20]

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[15] *See* "EOIR Issues Memo on Its Strategic Caseload Reduction Plan" (Feb. 22, 2019), AILA Doc. No. 19021932.
[16] ICPM at 53.
[17] ICPM at 53.
[18] ICPM at 79.
[19] An effective style for examining witness is to open questions with: "Can you tell/explain for the court ..." or "The Court needs to know when/where/why."
[20] In the rare instance the immigration judge turns a disagreement on the law into a personal issue, it is fair and appropriate to politely state on the record that you do not understand why the judge is treating the matter personally and responding with anger to what is simply a legal argument. For immigration attorneys, it is always crucial to

MATTER OF CASTRO-TUM, MATTER OF L–A–B–R–, AND *MATTER OF SANCHEZ SOSA*: GETTING CONTINUANCES FOR USCIS ADJUDICATION OF I-130S, I-918S, I-929S, ETC.

EOIR is making significant strides to greatly reduce the delays involved in handling removal cases, which greatly affects judges' ability to manage their own dockets. As a result, judges' ability to grant continuances, administratively close cases, terminate cases, and place cases on the status docket has been greatly curtailed. This directly affects practitioners who are seeking collateral relief.[21]

Collateral relief is any relief that your client will be seeking outside of immigration court, usually before USCIS. This could consist of filing an application for Special Immigrant Juvenile Status, U or T nonimmigrant status, adjustment of status, I-751 removal of conditions, etc. When seeking collateral relief, you will want the immigration court to essentially "hold" your case so that USCIS exercise its jurisdiction and adjudicate your petition, but the courts are no longer able to administratively close cases except under very rare circumstances (the filing of T nonimmigrant status is one of those).

In *Matter of L-A-B-R-,*[22] former Attorney General Jeff Sessions decided that courts are now empowered to assess the likelihood that collateral relief will be granted and whether that relief will materially affect the outcome of proceedings. Practically, it gives judges authority to review applications for relief filed before USCIS and decide whether your client's application will be successfully adjudicated. For SIJS, that means that judges are asking for copies of the predicate orders obtained before the state court and copies of the I-360 petition in its entirety. For family-petitions being filed before USCIS, that means you have to convince judges of the bona fides of the underlying petition.

Judges will no longer hand out continuances easily. If you are seeking collateral relief before USCIS, you have to show that you are acting with all due diligence in seeking relief. You need to have receipts and copies of the applications ready after the first continuance, or you likely won't get a second. With the receipt in hand, you can file a continuance along with processing time printouts from USCIS to show that further delays are not attributable to your client.

Continuances are still governed by *Matter of Sanchez-Sosa,* which was affirmed by *Matter of L-A-B-R-*. Under *Sanchez Sosa*[23], the BIA stated that non-citizens who have filed a prima facie approvable petitions for U visas with USCIS will *ordinarily warrant a favorable exercise of discretion for a continuance for a reasonable time.* Further, *Sanchez-Sosa* says that USCIS processing time delays should not be attributed to the applicant. Generally, judges will grant continuances for U visas if you can demonstrate that the case is prima facie approvable and that your client did not delay in filing the application. Most judges will want to see a complete copy of the application filed, which means that if your client is a derivative, you'll also have to demonstrate

remain mindful of your anger, to take a deep breath and never take the misconduct of others as a negative reflection on your zealous advocacy.

[21] The standard for a continuance remains unchanged- good cause. *See* 8 CFR § 1003.29.

[22] *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018).

[23] *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012).

that the principal was prima facie eligible as well- redacting of names and addresses are important in this circumstance if the principal is not also a respondent in the case.

More recently, the Board has said that for detained clients, a continuance may not be granted even where a U visa has been filed and they are prima facie eligible for relief.[24] In that case, the Board determined that the respondent had not exercised due diligence in pursuing his U application. You'll want to distinguish your case from this when advocating for a continuance.

Because administrative closure is practically unavailable, the status docket is now your best friend. If you have a petition that is likely to be awaiting adjudication for a long time (i.e. U petition, SIJS), you'll want to file a motion to place the case on the status docket. This is essentially the same sum and substance as a continuance motion, and often you can motion for the two together in the alternative, arguing the same factors which warrant both. However, if your case is placed on the status docket, you'll get call-up dates for filing "status updates", and if your petition is denied, the court will recalendar your case. Some courts are now moving away from status dockets, however, resulting in repeated motions to continue where you will need to show that they meet all the factors for continuance as outlined in *Matter of L-A-B-R-*, etc.

If you are representing a respondent before EOIR, you must understand when USCIS has initial jurisdiction, when EOIR and USCIS share concurrent jurisdiction, and when EOIR has jurisdiction. This can get complicated if your client is filing an adjustment of status (USCIS will have jurisdiction over the I-130, and EOIR over the adjustment, unless your client is NTA'ed as an arriving alien), or if your client is an unaccompanied minor who has "aged out."

CHALLENGING I-751 DENIALS BEFORE AN IMMIGRATION JUDGE

There are several ways that a conditional resident can end up in removal proceedings. Often, if a conditional resident neglects to file to remove the condition in a timely manner, USCIS will send an NTA charging the individual with failing to remove the condition as required. Other times, a conditional resident has filed the petition (either jointly or requesting a waiver of the joint filing) and, after an interview, USCIS denies the petition and issues an NTA. This is also what would happen if an interview is scheduled and the conditional resident fails to appear for the interview.

Typically, the charge on the NTA will be pursuant to INA § 237(a)(1)(D)(i) which applies to someone whose conditional residence status has been terminated. Essentially, proceedings will proceed in one of two ways: if the client is in proceedings after their I-751 petition was denied by USCIS, then the Immigration Judge has jurisdiction to review the merits of the petition and make an independent assessment as to whether to remove the conditional status on the client's green card. However, if the conditional resident never filed the I-751 petition, USCIS still retains initial jurisdiction despite the pending removal proceedings. Thus, counsel should file the I-751 with USCIS and then present the fee receipt and, depending on your IJ, a copy of the complete application package to the IJ. The removal case will then be continued for USCIS to have enough time for its initial adjudication on the merits of the petition.

[24] *Matter of Mayen*, 27 I&N Dec. 755 (BIA 2020).

Sometimes a USCIS adjudicator may deny an I-751 petition for a failure to establish the bona fides of the marriage and believe that the marriage was fraudulent. If this occurs, the NTA may also have a factual allegation to that effect and also a second ground of removability under INA §237(a)(1)(A) as someone inadmissible at the time of admission because she sought to procure admission by fraud. When presented with an NTA that charges such fraud, the question becomes what types of relief may be available. First, even with an allegation of fraud, a client can still seek IJ review of the I-751 and deny the fraud. You can help your client properly develop sufficient documentary and witness testimony to overcome the assertion of fraud and prevail on the I-751 in proceedings.

However, if the IJ eventually sustains the fraud charge, it will be worth exploring whether the client may be eligible for a waiver under INA §237(a)(1)(H). The BIA and various circuit courts have held that a fraud waiver under §237(a)(1)(H) can be used to waive various grounds of inadmissibility under §237(a)(1). The Ninth Circuit has specifically ruled that if the basis for termination of conditional permanent residence "is that the marriage was not bona fide-the termination of status ground of removal provided in §237(a)(1)(D) is "relat[ed] to" the removal of aliens on the ground that they were inadmissible at the time of admission as aliens who sought to procure admission by fraud and therefore a respondent is eligible for a fraud waiver under §237(a)(1)(H)."[25] This is a limited waiver as the client must be "otherwise admissible" so a more detailed, case specific analysis would be required before pursuing this option.

There may be times when a client has no choice but to seek review by the IJ of a USCIS denial of an I-751 petition. That means that the removal proceeding continues as it would for any other type of relief before the IJ. An Individual Hearing will be scheduled and case preparation needs to begin. When an IJ schedules the Individual Hearing (trial), they will provide an exact call-up date and any other parameters. For instance, lately, many IJs have been setting page limitations on documentary submissions. Even though a client will already have had the opportunity to present evidence in support of the I-751 petition to USCIS, the BIA has ruled that when a respondent's conditional status was terminated after an adjudication of the I-751 petition, that the respondent "may introduce, and the Immigration Judge should consider, material and relevant evidence without regard to whether it was previously submitted or considered in proceedings before the DHS."[26] This case serves as a reminder that there is additional time to work with your client and keep digging to try to find additional documentation in support of the petition to submit to the IJ prior to the Individual Hearing.

Witness lists are a necessity and many IJs require that the list be accompanied by detailed witness statements/affidavits. At a minimum, the witness list should include the proposed witness's full name, A-number if applicable, a written summary of the testimony to be provided, whether the witness will need an interpreter and a CV if the proposed witness is an expert.[27] While the ICPM provides for a 15-day "call up" date for all evidence prior to an Individual Hearing; however, in practice, you will find that many IJs have established their own specific, earlier filing deadlines. The Federal Rules of Evidence do not apply in immigration proceedings; however, they can be a useful guide when you are preparing your case for trial. It is important to have careful

[25] *See Vasquez v. Holder*, 602 F.3d 1003 (9th Cir. 2010).
[26] *Matter of Herrera*, 25 I&N Dec. 589, 595 (BIA 2011).
[27] *See* Immigration Court Practice Manual, Chapter 3.3(g).

conversations with a client about the possible documentary and witness testimony that could be presented in support of their petition.

When a respondent or other witnesses testify during the individual hearing, the IJ may interrupt direct or cross exam at any time to ask other questions. Preparing a client for all three types of questioning can be crucial to ensure that the client's testimony comes across as strongly as possible. A useful way to prepare clients for testimony is to ask them questions while acting in each role (counsel, Government counsel, and the IJ).

WHEN DHS WON'T AGREE TO TERMINATION TO ALLOW FOR USCIS ADJUDICATION

Under previous administrations, defense counsel with the concurrence of DHS could obtain termination of removal proceedings to pursue adjustment of status before USCIS. This collaborative process allowed immigration judges to better manage their dockets and generally promoted faster adjudication of the adjustment of status application.

The new administration, in a series of precedential decisions by the Attorney General, has for all intents and purposes ended this practice, so that all adjustment of status applications for non-citizens in removal proceedings must be heard by the immigration court. Recently, the Attorney General ruled that IJs may only dismiss or terminate removal proceedings where expressly authorized under 8 CFR §1239.2(c), (f), or where DHS has failed to sustain removability under 8 CFR §1240.12(c).[28] As no express regulatory authority exists to permit an order of dismissal or termination to pursue adjustment of status for a foreign national whose removability has been established, immigration judges are following *Matter of S-O-G-* and declining to dismiss removal proceedings to allow foreign nationals to pursue adjustment of status before USCIS.

Beyond an order of dismissal or termination of removal proceedings, immigration judges previously exercised their authority to administratively close removal proceedings to permit foreign nationals adequate time to pursue immigration relief outside the immigration court. Under its prior decision in *Matter of Avetisyan*, the Board held that IJs held authority—even in the face of DHS objection—to order a matter administratively closed, particularly where ongoing and repeated motions to continue would prove onerous and inconvenient, as in the case of adjudicating a current visa petition to allow a non-citizen to pursue adjustment of status before the immigration court.[29] More recently, this practice was specifically contemplated and commonly applied in the context of non-citizens before the court pursuing an I-601A waiver application to overcome inadmissibility under INA §212(a)(9)(B) upon departure abroad to pursue immigrant visa processing.[30]

The practice of entering an order to administratively close removal proceedings was put to a halt in 2018 by the Attorney General's decision in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G.

[28] *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).
[29] *Matter of Avetisyan*, 25 I. &N. Dec. 688 (B.I.A. 2012), overruled, *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
[30] See 81 Fed. Reg. 50244, 50255 (July 29, 2016); 8 CFR § 212.7(e)(4)(iii) (noncitizens in removal proceedings are ineligible for an I-601A waiver "unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the application for a provisional unlawful presence waiver").

2018). In that case, the Attorney General ruled that an Immigration Judge did not possess general authority to order removal proceedings administratively closed, and only possessed such authority where expressly authorized by law and regulation or federal court order.[31]

Among those instances listed, however, the Attorney General omits administrative closure to permit adjudication of the I-601A waiver, as set forth under 8 CFR § 212.7(e)(4)(iii). Under that regulation, applicants subject to INA § 212(a)(9)(B) are barred from consideration for an I-601A waiver while in removal proceedings unless those proceedings have been ordered administratively closed. The Attorney General specifically addressed this omission and ruled that in the absence of a corollary regulation authorizing an order of administrative closure that the regulations at 8 CFR § 212.7(e)(4)(iii) permitting consideration of I-601A waivers for non-citizens in removal proceedings subject to an order of administrative closure were ineffective. This interpretation defies reason, since the Attorney General's interpretation has now rendered 8 CFR § 212.7(e)(4)(iii) meaningless, and immigration counsel should argue that the immigration judge retains authority to order administrative closure under these circumstances. For those I-601A applicants whose cases have been ordered administratively closed, these individuals should remain eligible to proceed with the waiver process.[32]

For practitioners in U.S. Court of Appeals for the Fourth Circuit jurisdiction, the Fourth Circuit in *Zuniga Romero v. Barr* expressly overruled in *Castro-Tum*, holding that the regulations[33] grant the immigration judge and Board unambiguous authority to administratively close cases in removal proceedings for the appropriate disposition of cases.[34] In matters before the immigration court where an order of administrative closure would have been appropriate under *Avetisyan*, counsel should argue that denial of such an order as a matter of law on the basis of the Attorney General's erroneous legal analysis in *Castro-Tum* constitutes legal error in light of the holding in *Zuniga Romero* and the regulations.[35]

AFFIRMATIVE AND DEFENSIVE BIA APPEALS: AUTOMATIC STAYS

Even after the IJ decision has been rendered in a client's case, the removal proceedings may not be at an end. If the client has successfully fought the charges on the NTA or has prevailed on an application for relief, the OCC can reserve appeal and then has 30 days in which to submit a Notice of Appeal to the Board of Immigration Appeals. By the same token, if a client has been ordered removed, counsel can also reserve appeal and then file a Notice of Appeal to the BIA. The Notice of Appeal is filed on Form EOIR-26. If an IJ has ordered a respondent removed, the order is automatically stayed during the 30-day filing period for a Notice of Appeal. Then, if a timely-filed appeal is submitted, the removal order remains automatically stayed until the BIA renders a decision in the case.[36]

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[31] *Castro-Tum*, 27 I&N Dec. at 282.
[32] *See* American Immigration Council, *Administrative Closure Post-Castro-Tum* at 7 (October 22, 2019).
[33] 8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii).
[34] *Zuniga Romero v. Barr*, 937 F.3d 282, 288-289 (4th Cir. 2019); *pet. reh. denied, Romero v. Barr*, No. 18-1850, 2019 U.S. App. LEXIS 32449 (4th Cir. Oct. 29, 2019).
[35] 8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii).
[36] *See* 8 CFR § 1003.6(a).