

LITIGATING IMMIGRATION CASES IN FEDERAL COURT

Second Edition

Dedication.....	v
Preface	ix
Acknowledgments	xxiii
Table of Decisions	471
Subject-Matter Index	505

Chapter 1: Initial Considerations—The Claims to Be Presented 1

Chapter 2: Exhaustion of Administrative Remedies 11

General Considerations.....	11
Exhaustion as a Prudential Requirement	11
📖 <i>Quick Cites</i>	12
Exhaustion as a Statutory Requirement	14
Review of Orders of Removal	15
Does an Appeal Have to Be Filed with the Board of Immigration Appeals?	16
📖 <i>Quick Cites</i>	17
Does the Issue Have to Be Presented to the BIA?	17
📖 <i>Quick Cites</i>	19
📖 <i>Quick Cites</i>	20
Constitutional Claims and Challenges to Regulations.....	21
📖 <i>Quick Cites</i>	21
Futility	22
Citizenship Claims	22
📖 <i>Quick Cites</i>	22
Manifest Injustice.....	23
📖 <i>Quick Cites</i>	23
Does a Motion to Reopen or Reconsider Have to Be Filed?	23
Waiver of Right to Appeal.....	24
📖 <i>Quick Cites</i>	25
Review of “Release from Custody” Decisions	25
📖 <i>Quick Cites</i>	26
Review of Other Agency Decisions	26
Lawsuit Brought Under the APA.....	28
Statutory Exhaustion Requirement	28
Regulatory Exhaustion Requirement	29
Required Versus Permissive Administrative Appeals.....	29
No Stay of Administrative Decision Pending Administrative Appeal	29
Review of Legalization Denials/LIFE Act Cases	31

Review of Naturalization Decisions	32
Mandamus in “Delay Cases”	34
Chapter 3: General Jurisdictional Considerations.....	37
Constitutional Framework	37
Statutory Framework	37
Limitations on Judicial Review	38
“Channeling” Provisions.....	38
“Preclusion” Provisions	39
📖 <i>Quick Cites</i>	41
Chapter 4: Jurisdictional Considerations for Judicial Review of Removal Orders.....	43
Review Under INA §242	43
What Is a “Final Order of Removal”?.....	43
BIA Issues Order Terminating Proceedings.....	45
BIA Grants Order of Voluntary Departure.....	45
BIA Grants Motion to Reopen or Motion to Reconsider	45
BIA Issues Order of Removal in the First Instance.....	46
BIA Issues Order Remanding to Immigration Judge	47
Immigration Judge Decision on Remand from BIA.....	48
Asylum-Only Proceedings	49
Time for Filing.....	49
Stay of Removal.....	50
Stay of Voluntary Departure Period	52
Scope of Review	53
Standard of Review.....	54
Constitutional Issues and Issues of Law.....	54
📖 <i>Quick Cites</i>	55
📖 <i>Quick Cites</i>	56
Application of Law to Undisputed Facts.....	56
📖 <i>Quick Cites</i>	56
Findings of Fact.....	57
📖 <i>Quick Cites</i>	59
Discretionary Decisions	59
📖 <i>Quick Cites</i>	60
Failure to Provide Reasoned Explanation	61
📖 <i>Quick Cites</i>	61
Jurisdiction-Stripping Provisions.....	63
INA §242(a)(2)(B)—Review of Discretionary Decisions.....	63
<i>Is the Decision “Specified Under this Title” to be Discretionary?</i>	64
<i>What Constitutes a “Discretionary” Decision?</i>	65
📖 <i>Quick Cites</i>	66
<i>Reviewable Aspects of Discretionary Decisions</i>	68

<i>Violation of Due Process</i>	69
✓ <i>Quick Cites</i>	69
✓ <i>Quick Cites</i>	69
<i>Statutory Eligibility for Discretionary Relief</i>	70
✓ <i>Quick Cites</i>	71
Application of Legal Concepts to Facts	72
✓ <i>Quick Cites</i>	72
Findings of Fact.....	73
Lawful Exercise of Discretion.....	74
✓ <i>Quick Cites</i>	74
INA §242(a)(2)(C)—Review of Criminal Cases	77
Do INA §242(a)(2)(C) Restrictions Apply?.....	80
✓ <i>Quick Cites</i>	80
The Scope of Review Under INA §242(a)(2)(C).....	81
✓ <i>Quick Cites</i>	82
INA §240B(f)—Voluntary Departure	83
INA §208(a)(3)—One-Year Time Bar for Asylum Applications	84
✓ <i>Quick Cites</i>	84
INA §242(g)—Prosecutorial and Enforcement Decisions.....	85
✓ <i>Quick Cites</i>	86
Denials of Motion to Reopen.....	87
Judicial Review of the Motion to Reopen.....	87
Cases Not Involving Discretionary Decisions Under INA §242(a)(2)(B)	88
✓ <i>Quick Cites</i>	88
Cases Involving Discretionary Relief Under INA §242(a)(2)(b)	90
<i>Discretionary Relief Not Previously Applied for</i>	90
<i>Discretionary Relief Previously Applied for</i>	91
Delay in Filing the Motion to Reopen	92
Motion to Reopen to Apply for Benefits Outside Removal Proceedings	93
Motion to Reopen After Departure from the United States	94
✓ <i>Quick Cites</i>	94
Preserving Voluntary Departure	95
Sua Sponte Reopening.....	97
Expedited Orders Under INA §235(b)(1) (Arriving Alien).....	98
The Expedited Removal Process	98
Jurisdiction to Review an Expedited Removal Order.....	100
Due Process Challenge to Expedited Removal Procedures	101
Challenge to Expedited Removal Order as Unlawful.....	101
Expedited Orders of Removal Under INA §238 (Aggravated Felony)	104
Expedited Orders of Removal Under INA §217 (Visa Waiver Program)	105
Chapter 5: Review of Streamlined Decisions	109
Jurisdiction to Review Streamlined Decision	112
Due Process Challenges to Streamlining Regulations	112

Other Challenges to Streamlined Decisions.....	114
BIA Violation of Streamlining Regulations	114
Appeals Involving Discretionary and Non-discretionary Aspects	117
“Pattern and Practice” Cases	119
Chapter 6: Review of Reinstated Order of Removal Under INA §241(a)(5)	121
Amendments Made by IIRAIRA.....	122
Categories of Individuals Not Subject to Reinstatement	123
Withholding of Removal and Protection Under CAT	126
Validity of the Regulations Under the Statute	126
Judicial Review.....	128
Time for Filing Petition for Review	129
Scope of Review.....	130
<i>Factual Predicates for Reinstatement</i>	130
<i>Validity of the Prior Order of Removal</i>	130
<i>Traditional View That Collateral Attack on Prior Order of Removal Is Permitted</i>	131
Collateral Attack After IIRAIRA and the REAL ID Act	135
Collateral Challenge in the Courts of Appeals	136
Collateral Challenge by Motion to Reopen	137
Collateral Challenge in Habeas Proceedings.....	139
Chapter 7: Review in Habeas Proceedings.....	141
Historical Use of Habeas to Challenge Order of Deportation.....	142
Scope of Review in Habeas Proceedings	144
<i>Constitutional Claims</i>	145
📖 <i>Quick Cites</i>	145
<i>Statutory and Regulatory Claims</i>	146
📖 <i>Quick Cites</i>	146
<i>Application of Law to Facts</i>	147
📖 <i>Quick Cites</i>	147
<i>Findings of Fact</i>	148
📖 <i>Quick Cites</i>	149
<i>Abuse of Discretion</i>	149
📖 <i>Quick Cites</i>	150
Whether Habeas Review Can Be Eliminated	150
Habeas Review of Removal Orders After REAL ID	153
Petition for Review Not Filed Within 30 Days of the BIA’s Decision	155
Development of a Record Adequate for Judicial Review	158
📖 <i>Quick Cites</i>	158
Ultra Vires Orders of Removal.....	161
Time for Filing.....	162
Stay of Removal.....	163
Naming the Proper Respondent	163
Venue.....	165

Chapter 8: Jurisdictional Considerations for Judicial Review of “Release from Custody” Cases.....	167
The Statutory and Constitutional Framework.....	167
Pre-Final Order	168
Constitutional Considerations	169
Prolonged Detention.....	171
📖 <i>Quick Cites</i>	172
The “When Released” Issue.....	173
📖 <i>Quick Cites</i>	176
📖 <i>Quick Cites</i>	177
Post-Final Order.....	177
Individuals Who Are Applying for Admission.....	181
Administrative Review of Bond Decisions for “Arriving Aliens”	182
Lawful Permanent Residents as “Arriving Aliens”	183
Jurisdictional Considerations.....	186
The “In Custody” Requirement	187
Limitation on Judicial Review	188
📖 <i>Quick Cites</i>	188
Naming the Proper Respondent	190
Venue.....	193
Chapter 9: Jurisdictional Considerations for Judicial Review of Other Agency Decisions	195
Section 1331 Review Versus INA §242 Review.....	196
Decisions Made Outside Removal Proceedings	196
Decisions Made Outside Removal Proceedings but Renewed Before an Immigration Judge	200
“Pattern and Practice” Cases.....	203
Application of the APA	207
Time for Filing.....	207
Scope of Review	208
Proper Plaintiffs	208
Proper Defendants.....	209
Venue.....	210
Review of Discretionary Decisions	211
INA §242(a)(2)(B).....	211
APA §701(a)—“Committed to Agency Discretion by Law”	212
📖 <i>Quick Cites</i>	212
INA §242(g).....	213
📖 <i>Quick Cites</i>	213

Chapter 10: Jurisdictional Considerations for Review of Legalization and LIFE Act Decisions, Naturalization Decisions, and Mandamus for “Delay Cases”	215
Review of Legalization and LIFE Act Decisions	215
📖 <i>Quick Cite</i>	216
Review Under INA §106 “as in Effect Before October 1, 1996”	217
Review of Discretionary Denials	218
Review of Legalization Decisions Issued After a Final Order of Removal Already Exists	219
Judicial Review of Naturalization Decisions	220
Time for Filing	220
Completion of FBI Name Check	221
Scope of Review	223
Pendency of Removal Proceedings	224
Mandamus for “Delay Cases”	228
Delay Is Not Discretionary	229
📖 <i>Quick Cites</i>	230
Elements Necessary for Mandamus	231
Clear Duty on the Agency to Perform the Act	232
Clear Right to the Relief Requested	233
📖 <i>Quick Cites</i>	233
📖 <i>Quick Cites</i>	234
No Adequate Alternative Remedy Available	235
Mootness	235
Consular Nonreviewability	235
📖 <i>Quick Cites</i>	235
Chapter 11: Due Process in Removal Proceedings	237
The Content of Due Process	240
Fair Hearing Before the Immigration Judge	240
Failure to Grant Continuance	241
📖 <i>Quick Cites</i>	242
Failure to Change Venue	242
📖 <i>Quick Cites</i>	243
Failure to Allow Witnesses to Testify	243
📖 <i>Quick Cites</i>	244
Reliance on Hearsay Evidence	245
📖 <i>Quick Cites</i>	245
Inadequate Translation	246
📖 <i>Quick Cites</i>	246
Failure to Provide an Explanation Based on Evidence in the Record	247
📖 <i>Quick Cites</i>	248
📖 <i>Quick Cites</i>	250
The Right to a Neutral Judge	250

📖 <i>Quick Cites</i>	251
📖 <i>Quick Cites</i>	252
Fair Opportunity for an Administrative Appeal.....	252
Notice of Appeal Rights	252
📖 <i>Quick Cites</i>	253
Administrative Notice of New Facts	253
📖 <i>Quick Cites</i>	253
Right to Effective Assistance of Counsel	254
📖 <i>Quick Cites</i>	255
📖 <i>Quick Cites</i>	257
Ineffective Assistance of Counsel as a Private Wrong	259
Ineffective Assistance of Counsel in Connection with Discretionary Relief	261
📖 <i>Quick Cites</i>	264
Prejudice	265
Is a Showing of Prejudice Required?	265
📖 <i>Quick Cites</i>	266
📖 <i>Quick Cites</i>	267
What Is the Standard for Showing Prejudice?	267
📖 <i>Quick Cites</i>	267
What Law to Apply on Remand	268
📖 <i>Quick Cites</i>	268
Chapter 12: Chevron Deference	271
The Administrative Framework.....	271
<i>Chevron</i> Deference	273
Four-Pronged Test Established by <i>Chevron</i>	275
Statutory Ambiguity	276
📖 <i>Quick Cites</i>	276
Congressional Delegation of “Rule-Making” Power	278
📖 <i>Quick Cites</i>	280
📖 <i>Quick Cites</i>	281
Agency Exercise of “Rule-Making” Power.....	282
📖 <i>Quick Cites</i>	283
Reasonableness of Agency Decision.....	284
📖 <i>Quick Cites</i>	284
📖 <i>Quick Cites</i>	286
<i>Brand X</i> Deference	286
Chapter 13: Retroactivity	291
Retroactivity of Statutes	292
The Framework for Retroactivity Analysis	292
Discerning Congressional Intent.....	294
“Retroactive Effect”.....	297
Reliance.....	300

Conduct Showing Reliance	303
Retroactivity of Specific Statutory Provisions.....	304
Elimination of §212(c) Waiver	304
Conviction by Guilty Plea	305
Conviction After Trial	305
Elimination of Suspension of Deportation	308
📖 <i>Quick Cites</i>	308
Amendments to §212(h).....	309
📖 <i>Quick Cite</i>	309
Amendments to §212(i).....	310
📖 <i>Quick Cite</i>	310
Reinstatement of Order of Removal—INA §241(a)(5).....	310
Elimination of <i>Fleuti</i> “brief, casual and innocent” Rule—INA §101(a)(13)	312
📖 <i>Quick Cites</i>	314
Stop Time Rule—INA §240A(d).....	314
📖 <i>Quick Cites</i>	315
Retroactive Application of Agency Regulations and Precedent Decisions	316
Retroactive Application of New Regulations	319
📖 <i>Quick Cites</i>	321
📖 <i>Quick Cites</i>	324
Retroactive Application of New Precedent Decisions	325
📖 <i>Quick Cites</i>	326
Chapter 14: Preparation of the Complaint, Petitions for Review, and Requests for Stay	327
General Considerations.....	327
Complaint Filed in District Court	327
Petition for Review Filed in Court of Appeals	328
Preparation of a Civil Complaint.....	328
Preparation of a Petition for Habeas Corpus	332
Complaint for Writ of Mandamus	334
Petition to Review Naturalization Application.....	334
Petition for Review.....	335
Time for Filing the Petition for Review.....	335
Drafting the Petition for Review.....	336
Request for Stay of Removal	338
Request for Stay of Voluntary Departure	339
Chapter 15: Filing and Service of the Complaint	341
General Considerations.....	341
Civil Complaint	341

When and Where to File	341
What to File	342
Whom to Serve	342
Petition for Habeas Corpus	344
When and Where to File	344
What to File	344
Whom to Serve	344
Complaint for Writ of Mandamus	344
Petition for Review of Naturalization Application	345
Petition for Review	345
When and Where to File	345
What to File	345
Whom to Serve	346
After Service	346
Chapter 16: Attorney's Fees and Costs	349
Purpose of the Equal Access to Justice Act	349
Elements Required for a Fee Award	351
Civil Action	351
Habeas Cases	351
📖 <i>Quick Cites</i>	352
Mandamus Cases	352
📖 <i>Quick Cites</i>	352
Naturalization Cases	352
📖 <i>Quick Cites</i>	353
Filing Within 30 Days of Final Judgment	354
District Court Cases	354
Court of Appeals Cases	354
Net Worth of Petitioning Party	356
Prevailing Party	356
<i>The Catalyst Theory</i>	357
<i>The Buckhannon Standard</i>	359
📖 <i>Quick Cites</i>	360
<i>Remanded Cases</i>	361
Lack of Substantial Justification	362
📖 <i>Quick Cites</i>	363
No Special Circumstances	366
📖 <i>Quick Cites</i>	366
Amount of Award	367
EAJA Statutory Rate Adjusted for Cost of Living	367
Enhanced Fees	368
Limited Availability of Qualified Attorneys	368

<i>Counsel's Possession of Distinctive Knowledge and Skills</i>	369
<i>Needful for the Litigation</i>	369
<i>Qualified Counsel Not Available at the Statutory Rate</i>	370
☞ <i>Quick Cites</i>	370
Bad Faith	370
Prevailing Market Rate.....	370
Compensable Work.....	371
Pre-litigation Work.....	371
Litigation Activity.....	372
☞ <i>Quick Cites</i>	373
☞ <i>Quick Cites</i>	374
Post-Litigation Activity.....	375
Work Before the Agency on Remand	375
Work on EAJA Fee Application.....	376
Fees for Amici	376
Non-Attorney Work.....	376
Other Expenses	377
Adequacy of Documentation	377
Filing the Motion for EAJA Fees	378

APPENDICES—SAMPLE PLEADINGS

Civil Complaint

A-1: Appeal from Denial of Form I-129, Petition for a Nonimmigrant Worker	383
A-2: Appeal from Denial of Form I-485, Application to Adjust Status	389
A-3: Proof of Service.....	397

Petition for Writ of Habeas Corpus

B-1: Petition for Arriving Alien Held in Detention.....	399
B-2: Petition to Stop Unlawful Removal.....	405
B-3: Emergency Motion for Stay of Removal.....	413

Petition for Writ of Mandamus

C-1: Complaint for Injunctive and Mandamus Relief	417
C-2: Mandamus Petition, Failure to Adjudicate Form I-485, Application to Adjust Status	423

Petition for Review of Naturalization Application

D-1: Petition for Review of Denial of Naturalization Application Pursuant to INA §310(c).....	427
D-2: Petition for Review of Naturalization Application Pursuant to INA §336(b).....	431

Petition for Review

E-1: Appeal from Denial of Asylum Application: Petition for Review & Motion for Stay of Removal	435
E-2: Appeal from Reinstatement Order	439
E-3: Motion for Stay of Removal	441
E-4: Motion to Stay Period of Voluntary Departure.....	445
E-5: Form for Appealing Agency Decision, Federal Rules of Appellate Procedure, Appendix 3	449
E-6: Petition for Review and Motion for Stay of Removal	451

Naturalization

F: Motion to Schedule De Novo Hearing and Brief in Support of Application for Naturalization	455
--	-----

EAJA Fees

G-1: EAJA Fees Declaration (1).....	459
G-2: EAJA Fees Declaration (2).....	461
G-3: EAJA Motion for Attorney's Fees	463