NEW BIA PROCEDURAL RULES:

What's in Effect and What's Not

By Aruna Sury

I. Introduction

In February 2026, the U.S. Department of Justice published an Interim Final Rule (IFR), entitled "Appellate Procedures for the Board of Immigration Appeals."[1] The IFR made sweeping procedural changes to Executive Office for Immigration Review (EOIR) regulations that relate to appeals filed before the Board of Immigration Appeals (BIA or the Board). The rule's effective date was March 9, 2026.

Fortunately, several provisions of the IFR are not currently in effect due to a court order finding them legally invalid and partially granting Plaintiffs' motion for summary judgment. In *Amica Center for Immigrant Rights v. EOIR*, Judge Randolf D. Moss of the D.C. District Court primarily based his decision on the agency's failure to follow notice and comment procedures required under the Administrative Procedure Act (APA) for rules that will make substantive, rather than purely procedural, changes.[2] The other provisions of the IFR are currently in effect, but have not been held to be legally valid. The case is currently still before Judge Moss, but is stayed while the government complies with notice and comment procedures and publishes a final rule.

This advisory seeks to clarify which provisions of the new rules are currently in effect, and which are not. It also contains practice tips for legal advocates grappling with these sweeping procedural changes in an environment of other drastic and rapid announcements by the BIA and the Department of Homeland Security (DHS).

I. Portions of the Rule Currently in Effect

Judge Moss's order in Amica did not vacate the entire IFR. The following provisions are currently in effect and apply only to cases where the decision being appealed (typically the IJ's decision) was entered on or after March 9, 2026.[3]

[1] IFR, 91 Fed. Reg. 5,267 (Feb. 6, 2026).
[2] 822 F. Supp. 3d 119 (D.D.C. 2026) (citing 5 USC §§ 553, 706(2)(D)).
[3] IFR, 91 Fed. Reg. 5,271.

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A. In Effect: Simultaneous briefing, no automatic reply brief

The IFR imposes a single, simultaneous briefing schedule for both parties, regardless of whether an individual is detained.[4]The briefs will be due 20 days after the Board issues a briefing schedule, after the preparation of the transcript of proceedings.[5] Under the IFR, the "Board shall not accept" reply briefs unless "invited or ordered" by the Board.[6] This is a major departure from prior practice in non-detained cases, where both parties' briefs would be due consecutively, 21 days apart, and the appealing party would automatically be able to file a reply brief.

Additionally, the BIA will only grant briefing extensions under "exceptional circumstances" as defined by INA § 240(e)(1).[7] Section 240(e)(1), in turn, states that the term "exceptional circumstances" "refers to exceptional circumstances (such as battery or extreme cruelty to the [noncitizen] or any child or parent of the [noncitizen], serious illness of the [noncitizen], or serious illness or death of the spouse, child, or parent of the [noncitizen], but not including less compelling circumstances) beyond the control of the [noncitizen]." The new regulation states that "workload concerns, travel plans, or similar concerns within the control of either party, or their representatives, do not constitute exceptional circumstances."[8]

Currently, practitioners can expect to receive briefing schedules after preparation of the transcript of immigration court proceedings. The briefing schedule will contain the same deadline for each party, with no reply to the deadline.

B. In Effect: Cases must be completed within 90 or 180 days

Practitioners can also expect the BIA to issue a decision more quickly than it has in recent years. The IFR states that "the Board shall dispose of all cases assigned to a single Board member within 90 days of completion of the record, or within 180 days of completion of the record for all cases assigned to a three-member panel."[9]

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[4] *Id*. at 5,272.
[5] The IFR also created a 35-day briefing completion requirement from the time the appeal was filed, for cases in which no transcript is "warranted." 91 Fed. Reg. at 5277 (proposed changes to 8 CFR § 1003.3(c)). But because the court vacated portions of the IFR regarding automatic summary dismissal (discussed below at Part II. B.), there is currently no change to the transcript preparation procedures when an appeal is filed, which means that transcripts of proceedings will continue to be prepared before the BIA sets the simultaneous briefing schedule. Judge Moss issued a separate order stating that the court did not need to clarify that this portion of the IFR does not supersede current transcription procedures at 8 CFR § 1003.3(e)(3), since the government had stated on record that "parties to an appeal before the Board are provided transcripts in those same cases where transcripts were provided prior to the IFR." *See Amica*, Minute Order (Mar. 18, 2026).
[6] IFR, 91 Fed. Reg. 5,277.
[7] *Id*. at 5,273.
[8] *Id*. at 5,277-78 (amending 8 CFR § 1003.3(c)).
[9] *Id*. at 5,277 (amending 8 CFR § 1003.1(e)(8)). The provision indicates that "completion of record" refers to the conclusion of all filings, including "any briefs, motions, or other submissions on appeal."

If an appeal is not adjudicated on time, the IFR requires the Board chairman to assume control of the case or refer it to the Attorney General for final resolution.[10] The IFR also removes "two provisions that authorize the Chief Appellate Immigration Judge to either extend adjudication deadlines in particular cases or to hold cases based on a pending, potentially impactful action, either a new binding case decision or a new regulatory action."[11] So, regardless of other pending cases, such as a circuit court or Supreme Court decision that might impact the legal issues in a case, the Board will not have authority to hold its adjudication if doing so would exceed the 90-day or 180-day timeline mandated by the IFR.

C. In Effect: IJs will not review transcripts of oral decisions

The BIA will no longer request the record from the immigration court and will not wait for IJs to review and approve transcripts.[12] Instead, the record will be automatically forwarded to the BIA when a Notice of Appeal is filed, and the BIA will no longer send a transcript of the oral decision to the IJ for review and approval.

II. Portions of the Rule NOT Currently in Effect

Based on a finding that at least three of the provisions in the IFR constituted substantive rules that should have gone through notice and comment procedures under the APA, Judge Moss declared the provisions legally invalid and remanded the matter to EOIR to issue a final rule after following proper notice and comment procedures.[13]

A. Not in Effect: Appeal deadline shortened from 30 Days to 10 days

The rule seeks to shorten the deadline for filing a Notice of Appeal to the Board from 30 days to 10 days of the IJ's decision, except for certain asylum cases.[14] According to the explanation provided with the IFR, "there is no operational need" for a 30-day appeal period due to the availability of electronic filings since 2021.[15] But the IFR does not address the immense challenge that a 10-day appeal period would pose to noncitizens, particularly detained

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[10] *Id.* (amending 8 CFR § 1003.1(e)(8)(ii)).
[11] *Id.* at 5,274, 5,278 (amending 8 CFR § 1003.5(a)).
[12] 91 Fed. Reg. 5,273 (amending 8 CFR § 1003.5(a)). The IFR also amends several regulations to replace the term "noncitizen" with the dehumanizing term, "alien." 91 Fed. Reg. at 5277–78 (proposed changes to 8 CFR §§ 1003.1(d)(6), 1003.18). But this change was not at issue in *Amica v. EOIR.*
[13] *Amica,* 822 F. Supp. 3d at 168.
[14] IFR, 91 Fed. Reg. 5,272. Because the appeal deadline for certain asylum appeals is set by statute rather than regulation, the IFR did not shorten the 30-day deadline for most asylum denials generally. *See* INA § 208(d)(5)(A)(iv). The only asylum-related appeals that would have been subject to the new 10-day filing deadline (but for the court order vacating the 10-day deadline provision) are asylum applications denied based on a finding by the IJ that the applicant is subject to an Asylum Cooperative Agreement, that the applicant did not file for asylum within one year of their entry and did not meet an exception to the one-year filing deadline, or that the applicant is barred from asylum because they were previously denied asylum. *See* INA §§ 208(a)(2)(A), (B), (C). The IFR
[15] The IFR states the shortening of the appeal deadline would "improve the efficient consideration of appeals." 91 Fed. Reg. 5,272. It also states that the rule would help "harmonize" BIA appeal deadlines with other regulatory deadlines, and cites to the 10-day deadline for government appeals of IJ bond decisions in

noncitizens, to secure legal counsel and the $1,030 filing fee[16]– all in time to meet the 10-day deadline for listing all issues being appealed.

B. Not in Effect: Automatic Summary Dismissal of Appeals

The IFR mandates that the default procedure for appeals filed with the BIA be their summarily dismissal without any review.[17] It states that if the BIA takes no action within 10 days of receipt of the appeal, it "shall be deemed to have been summarily dismissed."

Under the proposed rules, incoming appeals would be distributed to a single BIA member, who would then decide whether to refer it for an en banc vote. The case will be summarily dismissed unless a majority of permanent BIA members vote to accept the case for review within 10 days of the filing of the appeal, and all such summary dismissals "shall constitute the final decision of the Board."[18] Additionally, the IFR requires that such dismissals "shall be effectuated through the issuance of a written order no later than 15 days after the appeal is filed."[19] This sweeping change was vacated by Judge Moss, so the regulations at 8 CFR § 1003.1(e) regarding BIA screening procedures remain unchanged for the time being.

The current regulations in effect require appeals to be initially screened by a screening panel and allow for dismissal only "after completion of the record of proceeding."[20] Summary dismissal can only occur under specific circumstances, such as if the Notice of Appeal is incomplete; the appeal involves conceded factual or legal conclusions; the appeal was filed by the prevailing party; if the Board determines, after reviewing the record, that the appeal was filed for an improper purpose; if the appealing party indicates on the Notice of Appeal form that they will file a brief and fails to do so; if the appeal is not within the Board's jurisdiction; if the appeal is untimely; or if the appellant affirmatively waived their right to appeal.[21]

When a case is not summarily dismissed, "a single Board member" is assigned "to determine the appeal on the merits, unless the Board member determines that the case is appropriate for review and decision by a three-member panel."[22]

The regulations provide for "affirmance without an opinion," which allows the assigned Board member to affirm an IJ's decision without a separate opinion if "the result reached in the decision under review was correct, [and] any errors in the decision under review were harmless or nonmaterial" and one of two additional conditions is met: (1) the issues on appeal are controlled by Board or federal court precedent and do not involve "a novel factual

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order to trigger an automatic stay, and appeals relating to criminal and civil penalties against employers for hiring employees not authorized to work and decisions regarding immigration-related document fraud. *Id.*

[16] The fee for the Notice of Appeal (Form EOIR-26) suddenly jumped from $110 from to $975 in 2021, and then to $1,030 in 2026. See EOIR Fee Review, 85 Fed Reg 82750 (Dec. 18, 2020); Inflation Adjustment for EOIR OBBRA Fees; Fiscal Year 2026, 91 FR 2561 (Jan. 21, 2026).

[17] 91 Fed. Reg. 5,277 (proposed changes to 8 CFR § 1003.1(d)(2)(ii)).

[18] *Id.* at 5,277 (quoting new 8 CFR § 1003.1(d)(2)(iii)).

[19] *Id*. (quoting new 8 CFR § 1003.1(d)(2)(ii)).

[20] 8 CFR §§ 1003.1(e)(1), (3).

[21] 8 CFR § 1003.1(d)(2).

[22] 8 CFR § 1003.1(e)(3). The requirements for a panel decision are at 8 CFR § 1003.1(e)(6) and include factors such as issues of major national import and the need for consistency or precedent in rulings.

situation," or (2) "[t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion on the case."[23]

As mentioned in Part I.B., a provision of the IFR that has not been vacated is regarding case completion timelines. The BIA must issue a decision within 90 days after "completion of the record" if the case is assigned to a single Board member or within 180 days of completion of the record if the case is "assigned to a three-member panel."[24] The remaining portions of the IFR regarding case screenings and automatic summary dismissal are not currently in effect.

C. Not in Effect: Any Issue Not Listed in Notice of Appeal is Waived

The IFR states that any argument not raised in the Notice of Appeal "shall be deemed waived."[25]Judge Moss stated that such a rule not only constituted a substantive rule that should go through notice and comment procedures, but also that "it is a near certainty that the IFR will invite extensive litigation on waiver and exhaustion in the courts of appeals and very possible that, at least in some cases, substantive claims will be lost forever."[26]

III. Practice Tips

- **Continue to file thorough Notices of Appeal, despite the "deemed waived" provision of the IFR being declared invalid.** Advocates should continue to prepare detailed Notices of Appeal, even though the proposed amendment to 8 CFR § 1003.38 was vacated by *Amica*.[27] This is because the BIA has stated that Notices of Appeal that lack details will result in summary dismissals.[28] The BIA could also rely on *Matter of Jean* to dismiss any issue not raised in a Notice of Appeal.[29]
- **File the brief on time.** While it has always been important to meet briefing deadlines, it is now imperative that practitioners plan ahead to meet briefing deadlines with the Board,

[23] 8 CFR § 1003.1(e)(4).
[24] *Id.* at 5277 (amending 8 CFR § 1003.1(e)(8)).
[25] 91 Fed. Reg. 5,278 (amending 8 CFR § 1003.38).
[26] 822 F. Supp. 3d at 159.
[27] 91 Fed. Reg. 5,278 (amending 8 CFR § 1003.38) (stating that any argument not raised in the Notice of Appeal "shall be deemed waived").
[28] *Matter of Valencia*, 19 I&N Dec. 354, 354–55 (BIA 1986) (summarily dismissed the appeal for failure to adequately specify the reasons for appeal); see also *Matter of Cespedes*, 19 I&N Dec. 730, 732 (BIA 1988) ("the statement on the Notice of Appeal. in this case is so general as to provide no guidance as to the reasons for taking the appeal. By stating only that there was a 'denial of constitutional due process,' the respondent has not meaningfully identified the aspect of the immigration judge's decision that is challenged and the reasons underlying the challenge."). See also ILRC, Practice Advisory: "Identifying Issues for a BIA Appeal," at 4-5, available at:https://www.ilrc.org/sites/default/files/resources/identifying_issues_for_bia_appeal_june_2022_final.pdf.
[29] 23 I&N Dec. 373 (A.G. 2002). In *Matter of Jean*, the respondent submitted two Notices of Appeal. The first challenged the immigration judge's denial of adjustment of status, asylum, and withholding of removal, while the second challenged with immigration judge's denial of protection under the Convention Against Torture (CAT). The Attorney General found that the second Notice of Appeal was not timely filed, and since the first Notice of Appeal, which was timely filed, did not preserve the respondent's objections to the immigration judge's CAT denial, the Attorney General dismissed the respondent's appeal of the CAT issue. Id. at 378–80. IFR, 91 Fed. Reg. 5277-78 (amending 8 CFR § 1003.3(c)). *Id.* at 5,277.

since extensions will be very difficult to get. In the past, it was common for practitioners to request a three-week extension on their appeal briefs, citing high workloads or personal reasons. The new regulations state that "workload concerns, travel plans, or similar concerns within the control of either party, or their representatives, do not constitute exceptional circumstances."[30] So, practitioners must assume that, except in the most unusual cases, briefing extension requests will be denied. Planning and filing the brief on time will, therefore, be crucial while these new regulations are in effect.

- **Consider seeking leave to file a reply brief.** Even though the IFR states that "the Board shall not accept" reply briefs unless "invited or ordered" by the Board, advocates should consider filing one along with a motion to accept the reply brief.[31]The motion should point out any unfairness or prejudice that will result to the client
- **Prepare the brief and all filings with an eye toward a federal appeal.** As the tone and substance of the IFR make clear, the BIA wishes to dismiss as many appeals filed by noncitizens as possible, without regard to their procedural or substantive claims. Recent data and trends also reveal that the BIA is not acting as a neutral adjudicatory body, and instead, is an enforcement tool of DHS.[32] It is therefore more important than ever to present arguments to the Board that make clear that the arguments raise errors that can be reviewed by a federal court. Rather than framing a claim as only an error in discretion, for example, carefully review the IJ's decision, as well as the procedures followed by the IJ, for legal and constitutional errors. While the BIA has authority to review discretionary issues, in some cases, the circuit court may not.[33] Consider raising constitutional concerns caused by the IFR provisions in effect, such as the impact of simultaneous briefing on the client's ability to present arguments.
- **Obtain admission to the circuit court in your jurisdiction and familiarize yourself with the court's filing procedures.** As noted above, it is expected that the BIA will dismiss more appeals and will do so more quickly than in the past. When the BIA dismisses a noncitizen's appeal, that person has a final order of removal, which, absent intervention by a court, can be immediately executed.[34] Under such circumstances, advocates should consider immediately filing a petition for review with the applicable circuit court and, separately, filing a motion asking the circuit court to issue an order

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[30] IFR, 91 Fed. Reg. 5277-78 (amending 8 CFR § 1003.3(c)).
[31] *Id.* at 5,277.
[32] *See* NPR, "An immigration court few have heard of is quietly shaping policy behind the scenes" (Mar. 20, 2026), available at: https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation
[33] INA § 242(a)(2)(D) allows the federal courts to review BIA decisions that raise "constitutional claims or questions of law," including mixed questions of fact and law. See, e.g., *Wilkinson v. Garland*, 601 U.S. 209, 222 (2024) (holding that the question of whether a given set of facts constitutes "exceptional and extremely unusual hardship" is a mixed question of law and fact that circuit courts have jurisdiction to review). The statute also allows federal courts to review most aspects of the BIA's denial of asylum applications, except for factual determinations related to the safe third country bar, the one-year filing deadline bar, the number bar, and the changed circumstances exception. INA §§ 208(a)(3), 242(a)(2)(B)(ii). However, the statute bars circuit courts from reviewing discretionary determinations, including findings of fact, related to the denial of discretionary forms of relief other than asylum. *See* INA § 242(1)(2)(B); *Patel v. Garland*, 596 U.S. 328 (2022).
[34] *See* 8 CFR § 1241.1.

staying removal while the petition for review is pending. However, to file with the circuit court, the advocate must first be admitted to the court, which requires setting up a PACER account,[35] applying for admission online, and paying the required admission fee. Depending on the circuit, this process could take several weeks. To be fully prepared, practitioners should seek admission even before the BIA issues a decision and should also familiarize themselves with the court's online filing system and related local rules, which can be found on the court's website.[36]

[35] To set up a PACER account, go to https://pacer.uscourts.gov/register-account.
[36] For example, instructions on using on registering for and using the Ninth Circuit's e-filing system can be found at https://www.ca9.uscourts.gov/filing/efiling/, and the Ninth Circuit's local rules are available at https:/www.ca9.uscourts.gov/rules/

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