

## INTRODUCTION

The purpose of this guide is to help attorneys practicing in immigration court navigate various procedural obstacles to fair and full hearings; its genesis is Appleseed’s work on immigration court reform, which started in 2009 with the publication of *Assembly Line Injustice* and has continued with advocacy to the Executive Office for Immigration Review (“EOIR”), individual immigration courts, the Department of Homeland Security, the White House, and Congress. Appleseed also has published additional reports on immigration reform: *Reimagining the Immigration Court Assembly Line* in 2012, and *Texas Appleseed’s Justice for Immigration’s Hidden Population* in 2010, which focuses on the rights of detained immigrants with mental disabilities. Although Appleseed has had success in advocating for change in the immigration courts, we came to realize that our advocacy was missing one critical element: change at the most basic level, from the advocates appearing in immigration court who are taking on these issues case-by-case to help their individual clients.

The immigration courts pose many challenges, particularly for pro bono counsel. On the one hand, the EOIR has policies that encourage pro bono representation, and many immigration judges go out of their way to welcome and accommodate pro bono counsel. On the other hand, pro bono counsel enter an environment that is often foreign to them and their clients, while the deportation officers, DHS counsel, and immigration judges are familiar colleagues. Moreover, DHS trial attorneys often have a “deport-in-all-cases approach” that distracts them from seeking fair and just results.

Even immigration court personnel can be uncooperative to immigrants and their counsel. One practitioner who observed exchanges between the Baltimore “court administrator” and immigrants asking for procedural help noted that the administrator’s responses were completely unhelpful and confusing, and even to get these “useless” answers, the immigrants had to shout their most personal information because the court administrator was positioned behind bullet-proof glass.<sup>3</sup> Appleseed has found that court rules and practices—even the seemingly minor ones—reinforce an “us vs. them” culture in the immigration courts.<sup>4</sup>

Accordingly, we developed this guide to help advocates immediately address the obstacles we have identified, which include:

- **Section 1: Working with a Client in Detention:** This section discusses the difficult conditions faced by respondents in detention facilities.

- **Section 2: Discovery:** From requesting A-Files to filing FOIA requests, this section suggests ways for practitioners to identify what documents they need and how to retrieve them.
- **Section 3: Pre-Hearing Conferences:** This section aims to help practitioners bridge the communication gap with opposing counsel by providing techniques for requesting and holding court-ordered or informal pre-hearing conferences to narrow disputed case issues.
- **Section 4: Interpretation:** Applesseed’s research shows that language interpretation procedures differ significantly from court-to-court. This section summarizes the different interpretation standards and procedures while providing helpful tips for how to ensure that translation issues do not harm a respondent’s case.
- **Section 5: Videoconferencing:** This section focuses on helping the practitioner handle common logistical problems and evidentiary risks behind videoconferencing use.
- **Section 6: Immigration Judge and DHS Attorney Misconduct:** Some immigration courts continue to suffer from an anti-immigrant culture, which can manifest as judicial and government attorney misconduct. Because many such incidents go unreported, this section focuses on providing practitioners with the tools needed to report such misconduct.

## Brief Orientation on Immigration Court Proceedings

This guide aims to help attorneys and advocates who are handling substantive claims in immigration court. While there are a number of different types of immigration court proceedings, pro bono attorneys are mostly likely to be involved with removal proceedings—i.e., the hearing to determine whether the immigrant is deported or merits relief.

DHS initiates removal proceedings by serving an alien with a charging document known as a Notice to Appear.<sup>5</sup> An alien in removal proceedings is called a “respondent.” A Notice to Appear orders the respondent to appear before an immigration judge and advises the respondent about the nature of the proceedings, along with the alleged immigration violations.

Removal proceedings typically involve an initial “master calendar” hearing and, subsequently, an “individual” or “merits” hearing. During the master calendar hearing, the immigration judge must ensure that the respondent understands the alleged violations and charges and explain the availability of pro bono or low-cost legal representation resources in the area. The judge also will review the charges brought against the respondent and allow the respondent to state his requested relief from removal (e.g., asylum). The judge will then schedule deadlines for any document submissions and, unless she re-sets the master calendar for another scheduling hearing, will also set the date of the individual hearing. Every immigration court also has a court administrator in charge of scheduling who can be a valuable help in terms of scheduling hearings, especially if an attorney takes a case on short notice.

During the individual hearing, the respondent or his legal counsel and the DHS attorney prosecuting the case present the merits of the case to the immigration judge. In most cases,

the immigration judge issues an oral decision at the conclusion of the individual hearing. Once a case is completed, either the respondent or DHS (or both) may appeal the decision to the Board of Immigration Appeals (“BIA”), whose decisions are thereafter appealable to the federal appeals court in which the immigration court is located for the circuit.

In most cases involving respondents seeking protection from persecution, the respondent will concede that he is removable, typically because he has no valid visa to enter or remain in the United States,<sup>6</sup> but will then apply for one or more forms of relief from removal. The following are the common bases to seek relief in removal cases:

- **Asylum:** Asylum protection provides relief from removal to respondents who are unable or unwilling to return to their country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In asylum proceedings, the immigration judge hears the applicant’s claim and also hears any concerns about the validity of the claim raised by the DHS attorney. The immigration judge then makes a determination of eligibility. If the court finds the respondent ineligible for asylum, the immigration judge determines whether the respondent is eligible for any other forms of relief from removal (listed below) and, if not, orders the individual removed from the United States.
- **Withholding of Removal:** Withholding of removal prohibits the government from removing the respondent to a country where her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Although the grounds for withholding of removal are the same as for asylum, it is harder to qualify for withholding. A court will grant withholding of removal when the respondent shows a clear probability of future persecution, meaning that the respondent is more likely to be persecuted than not. In addition, withholding of removal has a narrower scope of relief than asylum. For example, if the respondent can safely be removed to another country other than the country of his or her nationality, he or she will be sent there over remaining in the United States.
- **Protection under the United States Convention Against Torture (“CAT”):** Like withholding, CAT protects a respondent from being returned to a country where there are substantial reasons for believing that she would be in danger of being subjected to torture.<sup>7</sup> A court will grant CAT when the respondent shows that it is more likely than not that she would be tortured if removed to the country from which she is claiming protection. This also requires the respondent to show that the harm feared meets the statutory definition of “torture,” meaning any act in which severe pain or suffering— physical or mental—is intentionally inflicted on a person, with the consent of a public official, for purposes such as punishment, intimidation, coercion, discrimination, or obtaining a confession.<sup>8</sup> As with withholding of removal, CAT protection has more limited benefits than asylum, including possible removal to a safe third country.

- **Cancellation of Removal:** § 240A(b) of the Immigration and Nationality Act allows respondents to have their removal cancelled if they establish before an immigration judge that they fall into various enumerated categories qualifying them for cancellation. For example, a respondent must prove he maintained a continuous physical presence in the United States for several years, is a person of good moral character, and/or that the respondent's removal would result in extreme hardship to family members who are themselves United States citizens or permanent lawful residents.

#### METHODOLOGY

In researching and writing our 2009 and 2012 reports, [Assembly Line Injustice](#) and [Reimagining the Immigration Court Assembly Line](#), Chicago Appleseed, Appleseed, Akin Gump Strauss Hauer & Feld LLP and Latham & Watkins focused a clear eye on practical and achievable reforms to improve the efficiency of immigration courts. We interviewed practitioners, observed courtrooms, conducted surveys, reviewed primary and secondary sources, discussed issues with judges and administrative officials, and vetted preliminary conclusions with practitioners familiar with immigration advocacy. Appleseed Board member and an author of the above reports and this guide, Steven Schulman of Akin Gump, brings his considerable experience and leadership to this task. This practice guide benefits from his direct experience as an immigration attorney and pro bono partner at a firm with a longstanding commitment to immigration work, as well as his leadership of the Association of Pro Bono Counsel, APBCo.

Reports alone cannot trigger change, and while Appleseed advocacy plans for immigration courts may tend to advance in fits and starts, advocates can and should be empowered to provide the most effective representation for their clients. These practice tips, flowing from research, interviews with expert practitioners across the country, and Appleseed's past policy reports, will be helpful to individual clients; they will empower more attorneys to help address the monumental access to the justice crisis before us; and they will produce changes in Department of Homeland Security's counsel offices as well as immigration courts across the country. In this sense, this guide also serves as a companion piece to the very practical, practitioner-oriented report from 2014, [A DREAM Deferred: From DACA to Citizenship, Lessons for Advocates and Policymakers](#).

Appleseed also thanks the many immigration court practitioners who selflessly offered their wisdom and war stories. There are too many to list here – and many wanted to remain anonymous for reasons that will be obvious as you read this Guide.

## ABOUT APPLESEED

A non-profit network of public interest justice centers in the U.S. and Mexico, Appleseed and many of the Appleseed Centers have long been researchers and advocates regarding various aspects of immigration—from fair courts, to fair administrative processes, to fairness in immigrants' financial transactions, to safety in workplace conditions, and more. For more information on Appleseed, please visit [www.appleseednetwork.org](http://www.appleseednetwork.org).

Appleseed and Appleseed Centers seek large-scale changes. Almost any aspect of immigration law and policy is large-scale, with approximately 400,000 persons deported annually and 70,000 persons granted refugee status.

Appleseed's deep commitment to civic engagement is reflected in this publication. We believe that lawyers have a special responsibility to ensure that the law is fair to all and that governmental institutions provide fair process to all. While the country's current understanding of constitutional protections does not require the appointment of counsel in asylum or deportation proceedings, we believe lawyers can and should step up to help those facing return. Through this publication, Appleseed seeks to deepen the pool of those able and willing to help.

The Appleseed Network Immigration Collaborative includes the following Centers that contribute to this Guide:

- Chicago
- Texas
- South Carolina
- Nebraska

## Getting Off the Assembly Line: Overcoming Immigration Court Obstacles in Individual Cases

### *Introduction*

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#### OTHER USEFUL RESOURCES

We have not attempted a substantive review of immigration law or all the defenses and claims counsel might make for their client. Other resources and organizations that may be useful include:

- American Immigration Counsel, Immigration Policy Center, How the United States Immigration System Works, A Fact Sheet, <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.
- The American Immigration Lawyers Association, <http://www.aila.org/>
- CLINIC, Catholic Legal Immigration Network, Inc., <https://cliniclegal.org/resources>
- Immigration Advocates Network, Pro Bono Resource Center, [https://www.immigrationadvocates.org/probono/newsletter/item.3421-Introduction\\_to\\_Immigration\\_Court](https://www.immigrationadvocates.org/probono/newsletter/item.3421-Introduction_to_Immigration_Court)
- Immigration Judge Benchbook, <https://www.justice.gov/eoir/immigration-judge-benchbook>
- Immigration and Nationality Act (INA), <https://www.uscis.gov/laws/immigration-and-nationality-act>
- Title 8 of the Code of Federal Regulations (CFR), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/8cfr.html>

## Glossary of Terms

<b>A-Number:</b>	Alien Registration Number
<b>A-File:</b>	Alien Files
<b>ACIJ:</b>	Assistant Chief Immigration Judge
<b>AMPED:</b>	Advancing Merits Proceedings for Efficient Docketing
<b>BIA:</b>	Board of Immigration Appeals
<b>CAT:</b>	United Nations Convention Against Torture
<b>CRCL:</b>	DHS Office of Civil Rights and Civil Liberties
<b>DHS:</b>	Department of Homeland Security
<b>EOIR:</b>	Executive Office for Immigration Review
<b>FOIA:</b>	Freedom of Information Act
<b>FRCP:</b>	Federal Rules of Civil Procedure
<b>ICE:</b>	U.S. Immigration and Customs Enforcement, an agency within the Department of Homeland Security
<b>INA:</b>	Immigration and Naturalization Act
<b>OCC:</b>	DHS Office of Chief Counsel
<b>OCIJ:</b>	Office of the Chief Immigration Judge, regional offices that represent ICE in immigration court
<b>OIG:</b>	Office of Inspector General
<b>OPLA:</b>	Office of the Principal Legal Advisor
<b>PTSD:</b>	Post-Traumatic Stress Disorder
<b>VTC:</b>	Video-conference and/or Video conferencing

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### Endnotes

- 1 Note: The recommendations made in this report are just that, recommendations. Before pursuing any course of action, counsel should consider all potential outcomes and always act in the client's best interest.
- 2 EOIR Immigration Court Listing, EOIR (April 2016), <https://www.justice.gov/eoir/eoir-immigration-court-listing>.
- 3 See Appleseed, Assembly Line Injustice: Blueprint To Reform America's Immigration Courts, APPLESEED, 31 (2009), <http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf>.
- 4 Appleseed, Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System 34, APPLESEED, (2012) <http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf>.
- 5 Executive Office for Immigration Review, EOIR at a Glance, U.S. DOJ (Sep. 9, 2010), <https://www.justice.gov/eoir/eoir-at-a-glance>.
- 6 Increasingly, pro bono attorneys are representing individuals who do not concede removal, in particular, permanent residents charged with removability due to criminal convictions. The New York Immigrant Family Unity Project is also undertaking the first public defender program in the country for immigrants facing deportation, and is a valuable resource to any attorneys who encounter such criminal immigration matters. This Guide applies in most circumstances with equal force to these criminal immigration cases, even though the Guide often discusses issues in the context of hearings involving respondents seeking protection from persecution.
- 7 Withholding of Removal and protection under CAT are both more temporary forms of relief than asylum, as they do not allow the respondent to seek permanent legal status in the United States and can be revoked if the government determines the immigrant is no longer likely to be subjected to persecution or torture. However, immigrants who are ineligible for asylum for one reason or another can still seek to avail themselves of these forms of relief.
- 8 See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, [1465 U.N.T.S. 85](#).