



Practice Alert: DOJ’s Office of Immigration Litigation Publishes Petition for Review Remand Criteria¹

July 18, 2022

I. Introduction

On July 15, 2022, the Department of Justice’s Office of Immigration Litigation (OIL) published its [criteria](#) for agreeing to remand petitions for review (PFR) filed by individuals in U.S. courts of appeals to challenge final removal orders issued by the Board of Immigration Appeals (BIA). OIL’s appellate section represents the U.S. government before the U.S. courts of appeals when a noncitizen files a PFR, commonly of a BIA final removal order or a BIA decision denying a motion to reopen or reconsider.²

A “remand” from the U.S. court of appeals where the PFR is pending means that the case returns to the BIA for further action, which might include reconsideration of the prior BIA decision,³ dismissal, administrative closure, granting of a motion to reopen, or remand to the immigration judge for fact-finding. Remand is a relatively common way that PFRs are resolved before they ever get decided on the merits by the federal appellate court. A joint motion to remand increases the likelihood that the U.S. court of appeals will grant the motion and remand the case.

Previously, OIL’s internal criteria for agreeing to seek remand were not publicly available. Advocates, led by NIPNLG, pushed for OIL to make its remand criteria public to promote transparency and fairness.

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² While the Department of Homeland Security’s (DHS) Office of the Principal Legal Advisor (OPLA) represents DHS in immigration court and before the BIA, OIL’s appellate section represents the U.S. government before the U.S. courts of appeals when an individual files a PFR.

³ One example is the June 2021 [memorandum](#) from Associate Attorney General Vanita Gupta recognizing the appropriateness of seeking remand of pending PFRs for the BIA to reconsider asylum claims based on change in the law after the vacatur of [Matter of A-B- I](#), [Matter of A-B- II](#), and [Matter of L-E-A- II](#).

II. OIL's Remand Criteria

The OIL [guidance](#) notes that OIL makes decisions to remand on a case-by-case basis after reviewing the facts, circumstances, and posture of the case. The guidance states that when OIL decides to seek remand, that decision “will rest on one or more” of the following criteria:

1. The agency decision under review contains a material error of law.
2. The agency decision contains a material factual error.
3. The agency decision is contrary to circuit law.
4. The administrative record demonstrates a material procedural error.
5. There are material and unexplained discrepancies between the decision of the immigration judge and the Board of Immigration Appeals.
6. The agency decision lacks essential analysis (*e.g.*, when the agency decision under review fails to make a determination required by law or fails to address a claim properly raised or preserved).
7. The agency decision cannot be sustained without the reviewing court invading the discretion or adjudicatory authority of the agency (*i.e.*, when the reviewing court cannot decide the matter without violating the principles set forth in *SEC v. Chenery*, 332 U.S. 194 (1947), or *INS v. Ventura*, 537 U.S. 12 (2002)).
8. Circumstances outside the administrative record indicate that the record has become stale (*i.e.*, where circumstances of the case have changed in a substantial and material way, such as when a court vacates a conviction for legal error, and that conviction formed the basis for the removal order or denial of benefits under review).
9. Defense of the case would place significant agency policies or programs at substantial risk.
10. There are circumstances indicating that the defense of the case would be patently inappropriate (*e.g.*, cases in which an immigration judge arguably showed bias, hostility, or other inappropriate behavior that was not addressed and resolved by the Board, regardless of whether the claim was raised to the Board).

Importantly, in addition to the ten reasons listed above, the OIL guidance also recognizes that remand may be appropriate to facilitate exercise of prosecutorial discretion by the Department of Homeland Security (DHS), or in other circumstances where DHS believes that reopening the case before the BIA is appropriate, such as for a petitioner to pursue adjustment of status for which they are newly eligible or given equities in the petitioner's case.

III. Takeaways for Practitioners

The newly published OIL remand guidance reinforces the important role that remand can play in achieving a desirable outcome for individuals with pending PFRs. Practitioners litigating PFRs on behalf of noncitizen clients should consider the following general tips in cases where remand is in the client's interest and the client wishes to pursue remand⁴:

⁴ Note that depending on the U.S. court of appeals, there may be other options short of a merits judicial decision. For example, in the Ninth Circuit, the parties may seek judicial administrative closure, and the Second Circuit may grant a “*Jacobson* remand.” Practitioners should explore all available options in developing a strategy in any given case.

- Reach out to the OIL attorney assigned to the case. It is generally beneficial to approach OIL in the early stages of the PFR litigation, before briefing.⁵
- Ask the OIL attorney if they would agree to a motion to remand, articulating how the case presents one or more of the factors present in the OIL remand guidance.
 - Even if the case does not neatly fit into one of the above-specified remand criteria, nothing prevents petitioner’s counsel from approaching OIL for agreement to remand in any case where counsel believes remand is warranted.
- If OIL does not initially respond, or respond favorably, to the remand request, consider reaching out to OIL again and repeatedly as needed as the litigation progresses. Unfortunately, sometimes OIL attorneys may not carefully review the case and thus be prepared to agree to remand until the petitioner has filed their opening brief.
- When in the client’s interest, negotiate for a more directed remand order, such as one that narrows the substantive issues for the BIA to review or remands specifically for reopening, administrative closure, or dismissal. OIL may take the position that coordination with DHS is necessary before it will agree to remand for a reason related to prosecutorial discretion, such as for dismissal or administrative closure of the case. In such circumstances, practitioners should communicate with OPLA if the OIL attorney directs them to make their request to OPLA (*e.g.* for dismissal upon remand), but should also continue communicating and advocating with OIL for the desired outcome.
- In situations where OIL does not respond, or where the OIL response is problematic or at odds with the remand guidance, practitioners may consider escalating the request to the director of the OIL appellate section, who has the ultimate discretion, according to the [guidance](#), to agree to remand.

NIPNLG is continuing to engage with OIL and DOJ alongside our partners on this and other litigation-related issues. If you encounter roadblocks in this process, have questions about this practice alert or the remand guidance, or need other assistance or support, please contact Victoria Neilson, vneilson@nipnlg.org.

⁵ Practitioners may also consider seeking to have the case included in the relevant U.S. court of appeals’ mediation program, if available. A mediator can help facilitate the remand negotiation and assist in crafting desirable remand order language.