

**PREPARING & DELIVERING ORAL  
DECISIONS**

**JUDGE J. DANIEL DOWELL  
JUDGE JACK H. WEIL**

## Preparing & Delivering Oral Decisions

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### **Objectives:**

**After this session, you should be able to:**

1. State the purpose and importance of the oral decision.
2. Use the master calendar hearing to identify issues in dispute.
3. Collect evidence in an organized fashion.
4. Use closing argument to benefit your resolution of the case.
5. Dictate a clear decision that will withstand appellate scrutiny within EOIR case completion goals.

### **I. Purpose & Importance of the Oral Decision**

- A. The parties in an immigration proceeding have a dispute.
- B. They do not agree on whether the respondent should be allowed to stay in the United States.
- C. They may disagree on a fact.
- D. They may disagree on the law.
- E. They may disagree on both.
- F. Your job as the judge is to resolve the dispute.
- G. You must decide which facts are true. This is called a "finding of fact."
- H. You must decide what the law is. This is called a "conclusion of law."
- I. The purpose of the oral decision is for you to tell the parties your decision/resolution of the dispute and to explain how you reached that result.
- J. You are speaking on behalf of the Attorney General of the United States.

### **II. Step 1 – Identify the Dispute at Master Calendar**

#### **A. Removability**

##### **1. Factual Disputes**

- a. DHS **alleges** the facts that they believe to be true in the NTA.
- b. Have the respondent **ADMIT** or **DENY** the truth of each fact.
- c. If the respondent **admits** the fact, it is not in dispute.
- d. If the respondent **denies** the truth of the fact alleged, there is a dispute and you are going to have to resolve/decide that factual dispute.

- e. Make a list for yourself as to which factual disputes you need to resolve.
- f. You are going to need to make a "finding of fact" on each of these factual disputes.

## 2. Disputes of Law

- a. DHS charges that the respondent is subject to removal under a particular section of law.
- b. Have the respondent **concede** or **contest** that he is removable under the law charged.
- c. If the respondent **concedes** the charge, it is not in dispute. (Make sure there is a factual and legal basis for the concession.)
- d. If the respondent **contests** the charge, there is a dispute and you are going to have to resolve/decide that dispute of law.
- e. Determine which element of the charge is disputed.
- f. Make a list for yourself as to which disputes of law (i.e., legal disputes) you need to resolve.
- g. You are going to need to make a "conclusion of law" on each of these disputes of law.

## B. Availability of Relief - It is your job to determine whether the respondent is eligible for any form of relief in lieu of removal.

- 1. Identify the factual elements that need to be proven to qualify for the identified form of relief.
- 2. Identify the legal requirements that need to be proven to qualify for the identified form of relief.
- 3. Make a notation for yourself as to which factual elements are in dispute.
- 4. Make a notation for yourself as to which legal elements are in dispute.
- 5. You are going to need to make "findings of fact" on each disputed factual element.
- 6. You are going to make "conclusions of law" with regard to each disputed legal element.

## C. Other Disputes

- 1. Follow the same steps for other disputes raised (i.e., proper service of the NTA, proper cause to arrest, correct country for removal, good cause to continue, etc.).

III. **Step 2 – Frame the Issue - Yes or No**

- A. When we "frame the issue" we are identifying the question that we are being asked to decide (regardless of whether it is a dispute of fact or law).
- B. For clarity it is recommended that you frame the question by beginning with the word "**whether**". For example:
  - 1. **Whether** the respondent was present in the United States prior to January 1, 1972? (question of fact)
  - 2. **Whether** ephedrine is a "controlled substance"? (question of law).
- C. You should have a "whether" question (i.e., issue framed) for each of the disputes identified in Step 1 above.
- D. Frame your issue as narrowly as possible.

IV. **Step 3 - Determine the Burden of Proof – What Number on the Scale**

- A. Decide who has the burden of proof on each framed issue.
  - 1. DHS generally has the burden of proving removability.
  - 2. Respondent generally has the burden of proving eligibility for relief.
- B. Remain unbiased - leave your mind open to be swayed.
- C. Be careful of presumptions (i.e., presumption of alienage based upon birth abroad, presumption based upon showing of past persecution, etc.)
- D. Determine what is the burden of proof on each issue.
  - 1. Clear and convincing
  - 2. Preponderance of the evidence
  - 3. More likely than not
  - 4. Clear probability
  - 5. Beyond a doubt

V. **Step 4 – Collect Evidence on Questions/Disputes of Fact in an Organized Fashion**

A. **Match Evidence with Issues**

- 1. You are going to collect evidence on disputed issues.
- 2. Try to keep track of the identified issue for which the evidence is being offered and on which side of the issue it is being offered.
  - a. Bifurcate removability and relief issues - Address removability first. Evidence of removability should precede evidence on relief in the record.

B. **Collect Evidence in an Organized Fashion**

- 1. **Collect Documentary Evidence First**
  - a. Label and number each document with an exhibit stamp in the lower right corner.
  - b. Record the evidence on your evidence collection worksheet.
  - c. Rule on the admissibility (i.e., reliability) of the document
  - d. Mark your ruling on your evidence worksheet.

- e. When in doubt admit the evidence and state that you will give the document appropriate weight.
- f. Continue until all documents have been collected.

**2. Take Testimony Second**

- a. Record the name of the witness on your evidence collection worksheet.
- b. Swear in the witness.
- c. Take copious notes of the testimony separating into direct, cross, re-direct, re-cross, court questions, etc.
- d. Record rulings on your notes.
- e. Mark issues in the testimony requiring clarification.
- f. Let the parties proceed with their case before you begin to question.
- g. Offer parties a final opportunity to question.
- h. Move on to the next witness.

**3. Collect Other Evidence Last**

- a. Collect all other types of evidence last (e.g., proffers, descriptions of tattoos or scars, etc.) and record it on your evidence collection worksheet.

**4. Clarify the record**

- a. Ask questions to clarify any unclear evidence.

**5. Last call**

- a. When it appears that collection of all evidence is exhausted, ask both parties whether they have any other evidence to offer.
- b. When all have indicated that they have no additional evidence to present, announce that the evidentiary portion of the proceeding is closed.
- c. This process forecloses any argument on appeal that the IJ deprived a party of due process and an opportunity to present all evidence.

**6. Control Your Courtroom and Record**

- a. Be Predictable – People feel comfortable when they know what to expect.
- b. Enforce well-established rules and practices.
- c. Keep things neat.

**VI. Step 5 – Take Argument on Questions/Disputes of Law**

**A. Keep Argument Productive and Brief**

1. Do not allow parties to regurgitate the evidentiary record.
2. Argument should address:
  - a. what is the law in the area,
  - b. what evidentiary weight should be accorded to each piece of evidence, and/or
  - c. why the evidence does or does not meet the respective burden of proof.
3. Have long argument put in written briefs and adopted as closing argument. Allow parties to supplement, but not repeat, the arguments contained in their written briefs.
4. Ask questions to clarify the arguments or positions of the parties.
5. Let the parties disagree and close the argument portion of the hearing.
6. Argument should educate or help you decide the case.

**VII. Step 6 – How to Decide the Case**

**A. Make Findings of Fact**

1. Find non-contested facts to be true.
2. Start with issue number 1 on your list of factual disputes.
3. Recall who has the burden of proof on that issue and what that burden of proof is.
4. Look at your list of evidence offered on both sides of that issue.
5. Decide what weight each piece of evidence offered on the issue gets.
6. Weigh the evidence.
7. Determine whether it meets the assigned burden of proof.
8. Based upon the weighing, find whether the fact is true or not.
9. Move on to the next factual issue.

**B. Draw Conclusions of Law**

1. Determine what the substantive law is based upon your knowledge, research, and the arguments.
  - a. Research difficult legal issues in advance (or have your law clerk do it).
  - b. Have the parties brief difficult legal issues.
2. Determine who has the burden of proof and what that burden is.
3. Apply the law to the facts that you have found to be true.
  - a. Do the facts fit the elements of the offense and/or relief?
  - b. Do the facts fit within the requirements of law for the charge and/or relief?
  - c. Are you persuaded that the law applies to the facts you found to be true?

## **VIII. Step 7 – Dictate the Oral Decision**

### **A. Dictate the “Plug Ins” First**

1. Caption
2. Introduction and Jurisdictional Statement
3. Service of the Notice to Appear
4. Ten day period following service of the Notice to Appear
5. Pleading to the Charges
6. Designation of Country of Removal

### **B. Dictate your list of Framed Issues in the “Statement of the Issues”**

1. List all framed issues in the “Statement of Issues” section” (e.g., “The issues before this tribunal are ...”).
2. Use this section to make the record clear that there are certain things that are not in issue. For example, why the respondent does not qualify for other forms of relief or respondent did not derive or acquire U.S. citizenship.
  - a. Example:
    - 1) “The respondent does not qualify for the reliefs of registry, cancellation of removal for permanent residents, cancellation of removal for non-permanent residents, and post-conclusion voluntary departure as he testified that his first entry into the United States was eight months ago.”
    - 2) “The respondent did not acquire or derive citizenship through his parents because he was thirty-eight years old when his parents naturalized.”

### **C. Identify the Evidentiary Record from Your Evidence Collection Worksheet**

1. List the Evidentiary Record (e.g., “The evidentiary record of this proceeding consists of documentary exhibits X, Y, and Z; the testimony of X, Y, and Z; and demonstrative evidence in the form of ...”).
  - a. It is really helpful if you break down the evidentiary record by issue. You can do it here or later in the decision. Example:
    - 1) “Documentary exhibits 2 through 4 were offered to establish the respondent’s physical presence in the United States over the last ten years. Documentary exhibits 5 through 8 were offered to establish the good moral character of the respondent.”
2. Assess Weight to be Given Each Piece of Evidence
  - a. Key Question - *Is it Reasonable, Substantial, Probative Evidence? Is it RELIABLE?*

- b. **Rule on Objections** (e.g., "Each piece of documentary evidence is admitted without objection." or "The Department of Homeland Security has objected to the declaration of the respondent's mother as hearsay. Hearsay evidence is admissible before this Court. However, based upon the unavailability of the witness for cross examination, I find that the document only deserves minimal weight.")
- c. **Make Express Credibility Findings for Each Witness**

3. **Expressly mention that you considered the entire evidentiary record whether specifically discussed or not.**

**D. Dictate Your Factual Findings in the "Statement of Facts"**

- 1. Put your express findings of fact in this section.
  - a. You may want to divide your express findings of fact by issue (e.g., removability v. relief; elements of removability, elements of relief, etc.)
  - b. Indicate the fact that you find to be true and by what quantity of evidence (e.g., I find as a matter of fact that each factual allegation numbers one through four are true by clear and convincing evidence).

**E. Dictate your "Statement of Law"**

- 1. State the substantive law.
  - a. Try keeping a binder with boilerplate.
- 2. Identify who has the burden of proof.
- 3. Identify what that burden of proof is (e.g., clear and convincing, more likely than not, beyond a reasonable doubt, etc.)

**F. Dictate your "Holding"**

- 1. The "holding" explains what you hold or find to be true.
- 2. Draw and dictate express "conclusions of law" – this is the portion of the decision where you explain how and why you reached your resolution of the dispute.
  - a. Explain:
    - 1) Why the facts fit the elements of the offense and/or relief?
    - 2) Why the facts fit within the requirements of law for the charge and/or relief?
    - 3) Why you are persuaded or not that the law applies to the facts in your case that you found to be true?
    - 4) Who did or did not meet their burden or proof and why?
- 3. Make sure you have a holding for each framed issue.
- 4. Pacing test – If you have paced the hall outside your chambers many times and still can not make a decision, then the party carrying the



burden of proof probably did not meet their burden of proof and must lose on that issue.

- G. **Rule on Other Motions and Requests** (.e.g., motions to continue, motions to withdraw, motions to suppress, etc.)
- H. **Resolve the dispute with your "Order"**
  - 1. The order answers or resolves the dispute.
  - 2. The order should be simple, direct, clear, and to the point (e.g., grant, deny, terminate, etc.).
  - 3. The order should not be conditional or restate your reasoning or analysis.

#### **IX. Time Saving Tips**

- A. Hold pretrial conferences.
  - 1. Ask what type of evidence the opposing party wants to see.
  - 2. Encourage stipulations.
  - 3. See if the parties are willing to proffer testimony.
  - 4. Determine what problems there are with the evidence.
- B. Encourage evidence sharing in advance of court.
- C. Schedule the case to maximize completion.

#### **X. Dictation and Decision Tips**

- A. Give clear direction to the transcriber (e.g., bolding, italics, underlining, paragraphs, punctuation, spelling, etc.).
- B. Arrange your bench and courtroom to maximize for clear transcription.
- C. Decision must be separate from the rest of the transcript.
- D. Start with standard language to pick up momentum.
- E. Divide the decision with section headings.
- F. Resolve the case on the simplest issues.
- G. Avoid reserving decisions and keep the context of the task in mind.
- H. Issue a summary order.
- I. In absentia orders must issue the same day.
- J. A second effort involving another decision is not permitted. You may correct spelling, punctuation, syntax, and grammar.
- K. Use your evidence collection worksheet as a checklist.

#### **XI. Special Issues**

- A. **Credibility**
  - 1. Your oral decision must include an explicit finding as to whether the testimony is credible or not.
  - 2. If you find a witness not credible, it is imperative that you explain why.

3. There are reasons why someone may be found to be not credible besides lying (e.g., lack of capacity to observe or recall the events in question, implausibility, etc.).
4. If you are going to deem a witness incredible due to inconsistencies in the testimony, you should identify the inconsistency, give the respondent an opportunity to explain the inconsistency, explain why his explanation does not persuade you, and explain how the inconsistency is central to the case.
5. Be culturally sensitive in assessing demeanor.
6. Credibility factors:
  - a. Candor
  - b. Responsiveness
  - c. Inherent plausibility
  - d. Demeanor
  - e. Consistency
    - 1) Between written and oral statements
    - 2) Internal consistency
    - 3) External consistency
  - f. Any other relevant factor
  - g. Corroboration

**B. Withholding of Removal**

1. If you grant withholding or deferral of removal, without a grant of asylum, the decision must include an explicit order of removal. Matter of I-S- & C-S-, 24 I&N 432 (BIA 2008).

**C. Past Persecution**

1. In an asylum case, you must make a specific finding that the alien has or has not suffered past persecution and if the alien has suffered past persecution, follow the analytical regulatory framework at 8 CFR 1208.13(b)(1). Matter of D-I-M-, 24 I&N Dec. 448 (BIA 2008).

## **Evidence Collection Worksheet**

**Matter of \_\_\_\_\_; A \_\_\_\_\_**

**A. Documents**

Exhibit 1 - Notice to Appear ( ID / AD )

Exhibit \_\_\_\_ - \_\_\_\_\_ ( ID / AD )

Exhibit \_\_\_\_ - \_\_\_\_\_ ( ID / AD )

Exhibit \_\_\_\_ - \_\_\_\_\_ ( ID / AD )

Exhibit \_\_\_\_ - \_\_\_\_\_ ( ID / AD )

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Exhibit \_\_\_\_ - \_\_\_\_\_ ( ID / AD )

Exhibit \_\_\_\_ - \_\_\_\_\_ ( ID / AD )

COR/LPR  
COR/NLPR  
PRE -VR  
POST-VR  
ASYLUM  
WITHHOLDING  
TORTURE  
REFUGEE  
REGISTRY  
ADJUSTMENT  
212(h)  
TPS  
NACARA  
212(c)

\_\_\_\_\_  
\_\_\_\_\_  
Parents = USC

**A. Testimony**

**Name of Witness:**

**Called by:**

\_\_\_\_\_  
( I / R )

\_\_\_\_\_  
( I / R )

\_\_\_\_\_  
( I / R )

\_\_\_\_\_  
( I / R )

\_\_\_\_\_  
( I / R )

\_\_\_\_\_  
( I / R )

**B. Other Evidence**

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_ of \_\_\_\_