American Immigration Council

PRACTICE ADVISORY[1]
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LITIGATION FOR BUSINESS IMMIGRATION PRACTITIONERS

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I. Introduction

Filing suit can be a powerful tool that can prompt U.S. Citizenship and Immigration Services (USCIS) to issue an approval notice soon after the complaint is filed or lead to a judicial decision holding that USCIS was wrong as a matter of law. This Practice Advisory is intended to give practitioners the information they need to assess whether a lawsuit in federal court is the right option for a client that has reached its limit with USCIS' overly restrictive interpretations of legal requirements, shifting adjudications standards and general lack of transparency in decision-making.

This Practice Advisory provides information about how to challenge an erroneous business-related USCIS decision by suing in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*., the Declaratory Judgment Act, 28 U.S.C. § 2201, and/or the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361. The APA is the most commonly used cause of action to overturn an agency decision that is contrary to law or implementing regulations, as it provides the most far-reaching relief. The Declaratory Judgment Act can be used to obtain a court order stating that a particular action by USCIS violates the applicable law or regulations. The Mandamus and Venue Act can be used to obtain an order requiring USCIS to adjudicate a petition that has been pending for an unreasonably long time—but not to order the agency to make a particular decision. The Council has additional advisories—referenced and linked to throughout—which expand upon many of the topics discussed here. If you are considering federal litigation for the first time, we encourage you to review all of the relevant advisories.

II. A Solid Administrative Record is a Litigation Prerequisite

Judicial review under the APA generally is limited to the administrative record that was before the agency when it made its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.

 This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Practitioners are strongly encouraged to conduct independent research to determine if there have been subsequent developments in the law since the publication date of this practice advisory.

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402, 414, 420 (1971); *see also Camp v. Pitts,* 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review [in an APA suit] should be the administrative record already in existence, not some new record made initially in the reviewing court").[3] Consequently, your court case is only as good as the case you made to USCIS. You must build a solid record in support of the immigration benefit your client seeks. The petition and supporting evidence must be prepared with an understanding of the statutory and regulatory requirements for the immigrant or nonimmigrant classification. The court will decide the reasonableness of USCIS' decision based on the record before the agency. You cannot supplement that record to strengthen your client's position during litigation.

You also need to be conscious of the source of the information provided, which will affect the weight the decision maker gives in assessing veracity. Make sure that the petitioner presents all relevant facts (in the petition and supporting documentation, which may include a petitioner letter). You can discuss the law and apply the statutory and regulatory standards to the facts in a separate attorney letter or memorandum, but your client must present directly the information about the petitioner and the beneficiary.

Read all Notices of Action thoroughly. When you respond to a Request for Evidence (RFE), a Notice of Intent to Deny (NOID) or a Notice of Intent to Revoke (NOIR), answer each query either by providing a complete response or stating why a particular query is unwarranted or irrelevant. If USCIS has made a false assumption in its query, such as asking for evidence only relevant if the H-1B petitioner is a third-party placement consulting company, then identify the agency error and re-direct the agency to the proper standard and the evidence that supports petition approval based on your client's intended employment of the beneficiary. With gaps in the evidence, a court is more likely to find that USCIS' decision was reasonable. With a thorough response, you will have a much stronger foundation for demonstrating to the court that USCIS ignored or mischaracterized the evidence.

III. Deciding Whether to File a District Court Action

A number of factors will influence your client's and your decision about whether to challenge an agency decision in federal court. Initially, it is important to review the agency decision to identify the errors that might be challenged. If you receive a denial, compare the reasons USCIS asserted to the requirements in the applicable section(s) of the Immigration and Nationality Act (INA) and regulations. Is the decision based on a legal error? Has USCIS tried to impose a requirement that does not exist? Or, is the issue a factual one? For example, has USCIS erroneously stated that the beneficiary does not have the degree required by the employer for an H-1B specialty occupation when a copy of the beneficiary's diploma was submitted with the

[3] There are very limited exceptions to this rule. The primary exception applies when there is no administrative record for the court to review or the record is insufficient with respect to the claims in the suit. Such an incomplete record may frustrate effective judicial review," *Camp*, 411 U.S. at 143, and the court may expand review beyond the record or permit discovery. *See also Animal Def. Council v. Hodel,* 840 F.2d 1432, 1436 (9th Cir. 1988), *as corrected by* 867 F.2d 1244 (9th Cir. 1989) (court may inquire outside the record when necessary to explain the agency's action or when the agency has relied on documents not in the record).

petition? Finally, you also must consider whether the decision was based upon the exercise of discretion. If it was, there may be a jurisdictional bar to the court's review under INA § 242(a)(2)(B).[4]

In a mandamus case, there will be no decision to review since the issue is the agency's delay in making a decision. In such a case, your primary considerations will be the length of time that the agency has delayed and whether it is outside of normal processing times.

When reviewing the strength of the record you presented to USCIS or the legal errors that the agency may have committed, you also need to weigh the likelihood of making "bad law" if the court rules against your client. Remember that when a federal court reviews a denial, the court is not deciding whether USCIS made the best decision or the same decision the court would have reached—only whether USCIS' decision was correct legally and whether it acted reasonably in denying the petition based on the evidence presented.

IV. Factors to Consider Before Filing Suit

A. Exhaustion of administrative remedies

Generally, before seeking federal court review of an agency's decision, a party must exhaust all administrative remedies. Otherwise, the court may find that it has no jurisdiction or refuse to review the decision. For this reason, lawyers often ask whether they must appeal to USCIS' Administrative Appeals Office (AAO) before filing suit in federal court.

A major exception to the exhaustion requirement applies to cases that are brought under the APA. The APA is the usual basis for challenging a denial of an employment-based visa petition. The Supreme Court held in *Darby v. Cisneros*, 509 U.S. 137 (1993), that in federal court cases brought under the APA, a plaintiff can only be required to exhaust administrative remedies that are mandated by either a statute or regulation. At least two decisions involving the denial of a nonimmigrant employment-based petition concluded, per *Darby*, that an appeal to the AAO is not a prerequisite because there is no statute or regulation mandating an administrative appeal. *See Ore v. Clinton*, 675 F. Supp. 2d 217, 223-24 (D. Mass. 2009) (L-1A petition denial); *EG Enters. v. DHS*, 467 F. Supp. 2d 728, 732-33 (E.D. Mich. 2006) (H-1B petition denial; USCIS agreed in its cross-motion that exhaustion not required).[5]

If no appeal is taken to the AAO, the government may move to dismiss the case by arguing that the plaintiff failed to exhaust. In response, you will have to explain to the court why exhaustion is not required under *Darby*, relying both on the relevant immigration cases and also on cases within your circuit that have found that the *Darby* exception applies in other, similar contexts.

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[4] *See* Section V(A) *infra*. For additional discussion of this provision, *see* the Council's Practice Advisory, *Immigration Lawsuits and the APA: The Basics of a District Court Action*, at 8-10 (Updated June 20, 2013).

[5] *See also Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (per *Darby*, no statutory or regulatory mandate requiring administrative appeal of spousal immigrant visa petition denial before filing APA action in federal court).

See the Council's Practice Advisory, *Failure to Appeal to the AAO: Does It Bar All Federal Court Review of the Case?* (July 22, 2004) (explaining in more detail the *Darby* holding and citing both immigration and non-immigration cases from different circuits). However, given the paucity of case law, there is still some risk that a court will misapply *Darby* and dismiss your client's case for failure to exhaust administrative remedies because the client never appealed to the AAO. *See ASP, Inc. v. Holder*, No. 5:12-CV-50-BO, 2012 U.S. Dist. LEXIS 188426, *8 (E.D.N.C. Dec. 11, 2012) (employer failed to exhaust because the regulation provided for appeal of an I-140 denial to the AAO).[6] Until the law is more well-established with regard to AAO appeals, make sure your client understands the possible risk of bypassing the AAO and going directly to federal court.

An appeal to the AAO can delay a case considerably, particularly when the result is that the AAO simply rubberstamps the decision below. You also need to consider the possibility that the AAO may affirm the denial on a different ground that would present greater obstacles to overcome than the original denial. Despite these concerns, one practical reason you might decide to appeal to the AAO is that—unlike in an APA challenge in federal court—you *can* supplement the record before the AAO. *See* 8 C.F.R. § 103.3(a)(1)(iii)(C); AAO Practice Manual § 3.8 ("Appellants may … submit a supplemental brief or additional evidence"). When you review a denial, think about whether additional evidence would significantly improve the likelihood of prevailing in an administrative appeal or in court if the AAO ultimately dismisses the appeal. *See Matter of* _____, ID# 12521 (AAO Sept. 15, 2015) (record, as supplemented on appeal, "now contains sufficient evidence to overcome the basis" for the L-1B petition denial), AILA Doc. No. 15092101 (posted Sept. 21, 2015). If so, this might be a reason to consider an administrative appeal to the AAO.

B. Final Agency Action

The APA also requires that the challenged agency decision be "final." 5 U.S.C. § 704. S*ee also Darby*, 509 U.S. at 144 (distinguishing between doctrines of finality and exhaustion of administrative remedies). A decision is final when a "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* (internal citation omitted). In most cases, a USCIS decision denying a petition (or application) will be a final decision under this standard.

However, several courts have held that the agency's decision was not "final" when there was a pending administrative appeal. In these family-based immigration cases, the courts also refused to apply the *Darby* exception where a party pursued an optional administrative appeal to the

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[6] The court did not apply the *Darby* criteria, instead elevating the mere existence of an administrative remedy to a mandatory requirement, and cited as authority cases that are distinguishable: *Howell v. INS*, 72 F.3d 288, 293 (2d Cir. 1995) (exhaustion required because plaintiff was in deportation proceedings and could renew her adjustment application before the immigration judge); *Oddo v. Reno*, 17 F. Supp. 2d 529, 531 (E.D. Va. 1998), *aff'd without opinion*, 175 F.3d 1015 (4th Cir. 1999) (*dicta* because plaintiff filed suit challenging I-140 revocation only after appeal denied at AAO, but court said she had exhausted by pursuing her right to appeal).

Board of Immigration Appeals and then also filed an APA action while the administrative appeal remained pending. *See*, *e.g.*, *Bangura*, 434 F.3d at 501; *Ma v. Reno*, 114 F.3d 128, 130 (9th Cir. 1997); *Naik v. Renaud*, 947 F. Supp. 2d 464, 472 (D.N.J. 2013), *aff'd*, 575 Fed. Appx. 88 (3d Cir. 2014). Presumably, if the party had only filed suit without taking an administrative appeal, the courts in these cases would not have been able to require exhaustion, per *Darby*, since administrative review was optional. Because the administrative review was underway, however, each court dismissed the suit on the basis that there was not yet a "final" agency decision. Applying the same reasoning, a court would likely find that a USCIS decision on an employment-based petition was not final if an AAO appeal was pending at the time an APA suit was filed.[7]

C. Timing

When a civil cause of action against the government is not subject to a separate statute of limitations, the general six-year limitation in 28 U.S.C. § 2401(a) applies. Where the issue has arisen, courts have applied the general limit to the APA, which does not have a statute of limitations, including in the immigration law context. *See Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014); *Nagahi v. INS*, 219 F.3d 1166, 1171 (10th Cir. 2000).[8]

V. Preparing the Complaint

A. Jurisdiction

In an APA case for the review of agency action, subject matter jurisdiction is based on 28 U.S.C. § 1331, the "federal question" statute. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).[9] Although the APA does not confer jurisdiction but instead serves as a cause of action (see Section V(C) *infra*), we recommend that it be listed in the jurisdictional section of a complaint because it also

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[7] Occasionally, USCIS will create a lack of finality by reopening its denial. *See Net-Inspect, LLC v. USCIS*, No. C14-1514JLR, 2015 U.S. Dist. LEXIS 24951 *3, 10-11 (W.D. Wash., March 2, 2015) (complaint challenging H-1B petition denial dismissed on agency motion after USCIS "reopened" petition and issued third RFE thirty days after suit filed) (citing *True Capital Mgmt. v. DHS*, No. 13-261 JSC, 2013 U.S. Dist. LEXIS 87084 (N.D. Cal. June 20, 2013) (complaint challenging H-1B petition denial dismissed on agency motion after USCIS "sua sponte reopened" and issued second RFE)). The *Net-Inspect* court acknowledged that its decision "might very well be different" if the agency was found to be avoiding judicial review through "repeatedly reopening" its decision. 2015 U.S. Dist. LEXIS 24951 *17 n.7.

[8] However, be aware of an exception that imposes a four-year statute of limitations for suits that arise under a statute adopted after December 1, 1990. 28 U.S.C. § 1658. *See Middleton v. City of Chi.*, 578 F.3d 655, 665 (7th Cir. 2009). While this exception would not apply to the APA, which was enacted before 1990, it is unclear whether § 1658 would apply if the APA-based suit challenged conduct for violating a statute enacted after December 1, 1990. In that case, the prudent practice would be to file within four years when possible.

[9] *See also Bowen v. Massachusetts,* 487 U.S. 879, 891 n.16 (1988); *ANA International Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004) ("default rule" that agency actions are reviewable under federal question jurisdiction applies in the immigration context).

provides a waiver of sovereign immunity that allows a party to sue the federal government over unlawful agency action for non-monetary damages. *See Bowen*, 487 U.S. at 891-92 (undisputed that Congress intended to expand judicial review of agency action by amending § 702 to eliminate sovereign immunity defense). Such a waiver is necessary for the court to exercise jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (sovereign immunity is jurisdictional in nature).

You cannot rely on the APA to the extent that another statute precludes judicial review. *See* 5 U.S.C. § 701(a)(1). Since the INA contains provisions that bar judicial review, you should confirm that your client's claims do not fall within these provisions. The government most frequently asserts the bar on review of discretionary decisions, INA § 242(a)(2)(B). Importantly, most courts have held that statutory eligibility determinations are not discretionary and thus do not fall within the INA's bars to review of discretionary decisions.[10] In most employment-based cases, the statutory eligibility requirements for visa classifications are sufficiently specific to overcome this threshold. *See*, *e.g.*, *Fogo de Chao (Holdings) Inc. v. USDHS*, 769 F.3d 1127, 1138 (D.C. Cir. 2014) (no jurisdictional bar to challenging L-1B visa classification denial because the criteria for L-1B visa determinations are laid out in the statute, including specifically a definition of "specialized knowledge"); *Spencer Enters., Inc. v. U.S.*, 345 F.3d 683, 688 (9th Cir. 2003) (the statute setting forth eligibility requirements for immigrant investor visas provided meaningful standards to review petition denial). In any case, you should always be prepared for the government to file a motion to dismiss for lack of jurisdiction.

In some cases, the mandamus statute, 28 U.S.C. § 1361, which gives a federal court authority to compel a federal agency or officer to perform a nondiscretionary duty owed to the plaintiff, may provide an alternative basis for jurisdiction. *See Kim v. USCIS*, 551 F. Supp. 2d 1258, 1261 (D. Colo. 2008); *Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1161 (N.D. Cal. 2007). However, there is "little practical difference" as to whether jurisdiction rests on the federal question statute or mandamus, assuming that the relief you would request under the APA and mandamus is identical—namely, to compel agency action that has been unreasonably denied. *See Dong*, 513 F. Supp. 2d at 1161-62 (N.D. Cal. 2007) (citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997)).[11]

In contrast, the Declaratory Judgment Act, 28 U.S.C. §2201, is a procedural statute that does not confer jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see also Fleet Bank Nat'l Ass'n v. Burke,* 160 F.3d 883, 886 (2d Cir. 1998); *State ex rel. Missouri Highway and Transportation Comm'n v. Cuffley,* 112 F.3d 1332, 1334 (8th Cir. 1997). As such, the Declaratory Judgment Act provides for relief rather than for jurisdiction. The jurisdictional basis for a claim under the Declaratory Judgment Act, as under the APA, is 28 U.S.C. §1331.

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[10] For more information on jurisdictional concerns regarding an APA suit, see the Council's Practice Advisory, *Immigration Lawsuits and the APA: The Basics of a District Court Action*, (Updated June 20, 2013).

[11] Relief is discussed at Section VI *infra*.

B. Venue: Where to File

An APA suit must be filed in federal district court—and in most cases so will a mandamus suit. Whether you are in the correct district court depends upon venue—the location over which the court has jurisdiction. Venue for challenging federal agency action is based on 28 U.S.C. §1391(e), which provides that a suit against the federal government or a federal official acting in his or her official capacity can be brought in any judicial district where (1) a defendant resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or (3) the plaintiff resides if no real property is involved in the action. [12] For a business that is legally able to file suit in its own name, the residence would be its principal place of business. 28 U.S.C. § 1391(c). *See Blacher v. Ridge*, 436 F. Supp. 2d 602, 608 (S.D.N.Y. 2006).

C. Causes of Action

The APA is the most common statutory basis for challenging the denial of an employment-based petition. *See*, *e.g.*, *Shalom Pentecostal Church v. Acting Sec'y, DHS*, 783 F.3d 156 (3d Cir. 2015) (APA challenge to denial of special immigrant religious worker visa classification); *Spencer Enters.*, 345 F.3d at 693 (APA challenge to denial of immigrant investor visa classification); *Chung Song Ja Corp. v. USCIS*, 96 F. Supp. 3d 1191 (W.D. Wash. 2015) (APA challenge to denial of specialty occupation visa classification); *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002) (APA challenge to denial of nonimmigrant religious worker visa classification). The APA creates a "cause of action" because it provides a basis to sue a federal agency where Congress has not provided a basis elsewhere in the law. *See Bennett v. Spear*, 520 U.S. 154, 175 (1997). Specifically, the APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

Although the APA does not explicitly provide for a private right of action, it "permits the court to provide redress for a particular kind of 'claim.'" *Trudeau v. Federal Trade Commission,* 456 F.3d 178, 188 n.15 (D.C. Cir. 2006). Accordingly, the Supreme Court has repeatedly held that a separate indication of Congressional intent of the right to sue is not necessary. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (finding that a private right of action is not necessary because review is available under the APA).

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[12] Be aware that even when venue is proper, a court may grant a motion to transfer "in the interest of justice" to any jurisdiction where the suit "might have been brought." 28 U.S.C. § 1404(a). *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981).

The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361, may provide an additional cause of action. Congress has given federal district courts the authority to compel a federal officer or employee, including those who work for federal agencies, to carry out a non-discretionary duty clearly owed to the plaintiff, who has no other adequate remedy. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Since mandamus only applies to actions that *must* be performed and do not require the exercise of discretion, courts often describe the duty as "ministerial." *See Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003).[13]

D. Parties

In all federal court litigation, Article III of the Constitution requires that a plaintiff have standing, or legal capacity, to sue. To this end, a plaintiff must have suffered 1) an "injury in fact," *i.e.,* harm to a legally protected interest that is "concrete and particularized" and "actual or imminent"; 2) "fairly traceable to" the challenged conduct; and 3) "likely to be redressed" by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

For APA claims, a plaintiff also must establish that her claim falls within the relevant "zone of interests." As discussed above, the APA provides that a person who has suffered a "legal wrong" or been "adversely affected or aggrieved by" agency action within the meaning of a relevant statute is entitled to judicial review. 5 U.S.C. § 702. The Supreme Court has interpreted this language to require a showing that the plaintiff 's claim falls within the "zone of interests" that the statute was intended to protect and has suffered injuries "proximately caused" by the alleged statutory violation. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388, 1390 (2014). [14]

To fall within the "zone of interests," the plaintiff's claims must be among those the statute "arguably" was intended to protect—a broader category than those Congress specifically intended to protect. *Id*. at 1388-89. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) ("there need be no indication of congressional purpose to benefit the would-be plaintiff").

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[13] Even when an agency is not subject by law or regulation to a specific deadline, the reasonableness requirement of the APA, 5 U.S.C. § 706, can be asserted. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1188, 1190 (10th Cir. 1999); *Kim*, 551 F. Supp. 2d at 1263. For more information about mandamus suits, see the Council's Practice Advisory, *Mandamus Actions: Avoiding Dismissal and Proving the Case* (November 2015).

[14] Until recently, the "zone of interests" also was considered to be jurisdictional and often was characterized as "prudential standing." *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210-11(2012). While explicitly citing to *Match-E-Be-Nash-She-Wish Band* for the application of the zone of interests test in the APA context, the Supreme Court in *Lexmark* rejected the "prudential standing" label. *See* 134 S. Ct. at 1387, 1389. The Court further indicated that the zone of interests test is not jurisdictional since whether a party has a valid cause of action is a question of the court's "statutory or constitutional *power* to adjudicate the case" and not of subject matter jurisdiction. *Id*. at 1387 n.4 (emphasis in original, internal citations omitted). Whether analyzed as a jurisdictional or a substantive issue, the test is applied as described above.

In the APA context, the test is not "especially demanding," since the "benefit of any doubt goes to the plaintiff" and the APA has "generous review provisions." *Lexmark*, 134 S. Ct. at 1389 (internal citations omitted). The zone of interests test would preclude an APA claim "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id*. (quoting *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2210).

Normally, the plaintiff in a suit challenging the denial of an employment-based visa petition in federal court is the petitioning employer. However, numerous courts have held that a noncitizen beneficiary of a family- or employment-based visa petition also falls within the "zone of interests" under the APA and thus has standing to sue over the denial of a visa petition. *See*, *e.g.*, *Mantena v. Johnson*, 809 F.3d 721, 731-32 (2d Cir. 2015); *Patel v. USCIS*, 732 F.3d 633, 637-38 (6th Cir. 2013); *Bangura*, 434 F.3d at 499-500; *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986).

The APA provides that the United States can be named as a defendant in an APA suit. 5 U.S.C. § 702. It also specifies that an action seeking mandatory or injunctive relief "shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance." *Id*. Accordingly, you should include as a defendant the specific individual within DHS who is authorized to carry out any injunction or other mandatory order of the court – which, in the case of visa petition denials, usually would be the Director of USCIS. This individual would be sued in his or her official.[15]

VI. Relief

A. Non-Monetary Damages

When you prevail in an APA or mandamus action, your client does not receive money damages. In crafting your request for relief, you need to think through what you are asking the court to do. If the USCIS denial was wrong as a matter of law, then you would ask the court to vacate the denial and approve the petition. If you are challenging USCIS' findings of fact or application of the law to the facts, then you would ask for a remand with specific instructions as to how the agency must correct its errors. If you request mandamus, then your request needs to state the duty that the court should order USCIS to perform. If applicable, include a request for reasonable attorney's fees under the Equal Access to Justice Act.[16] Always include a "catch all" provision, asking the court to order any other relief that the court deems appropriate.

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[15] For further information on who should be named as defendants, see American Immigration Council and National Immigration Project of the National Lawyers Guild Practice Advisory, *Whom To Sue and Whom To Serve in Immigration-Related District Court Litigation* (Updated May 13, 2010).

[16] *See* Section VI(C) *infra*.

B. Standard of Review

The applicable standard of review under the APA, with respect to factual findings and application of the law to the facts, depends upon whether agency action is taken after a formal hearing on the record. *See* 5 U.S.C. § 706(2)(E). Since USCIS' denial of an employment-based petition does not involve a formal hearing, the standard of review should be whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under the "arbitrary and capricious" standard, the court reviews whether an agency "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). *See also Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985, 996-97 (S.D. Ohio 2012) (USCIS made "inexplicable errors" constituting a "litany of incompetence that presents fundamental misreading of the record…" and thus failed to articulate "an untainted, satisfactory explanation for the denial that rationally connected the facts to the decision"). However, some courts describe the standard as whether an agency's findings are supported by "substantial evidence"—which is the standard when the agency decision follows a formal hearing on the record.

Some federal circuit courts have held that there is not much difference between these two standards. *See*, *e.g.*, *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1071-72 (9th Cir. 2015) (defining and comparing the two standards); *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) ("the distinction between the substantial evidence test and the arbitrary or capricious test is 'largely semantic'") (citations omitted). Under the "substantial evidence" standard, the court is reviewing whether, based on what was in the record before the agency, a reasonable fact finder would be compelled to reach a different result. *See Ursack, Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958 & n.4 (9th Cir. 2011) (arbitrary and capricious standard "incorporates" substantial evidence standard, so use substantial evidence standard to review informal agency proceedings); *Family Inc. v. USCIS*, 469 F.3d 1313, 1315 (9th Cir. 2006). *See also Fogo de Chao (Holdings)*, 769 F.3d at 1147 (substantial evidence standard "not boundless," but agency not allowed to "close its eyes to on-point and uncontradicted record evidence" without explanation).

When reviewing the agency's factual findings, a federal court is not acting as a fact finder itself. "[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (footnote and citation omitted).

In contrast, a federal court always exercises de novo review under the APA over purely legal issues. *See Wagner v. NTSB*, 86 F.3d 928, 930 (9th Cir. 1996). One example of an error of law would be USCIS's application of an incorrect standard of proof. USCIS is supposed to apply the "preponderance of the evidence" standard of proof in deciding whether a party has submitted sufficient proof of eligibility for the visa classification. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (precedent decision) (noting that preponderance of the evidence is the standard of proof in administrative immigration proceedings unless a different standard is specified by law); *see also* USCIS Adjudicator's Field Manual (AFM), ch. 11.1(c). To satisfy the "preponderance" standard, you must show that it is "more likely than not" a claim is true

based on "relevant, probative and credible evidence." *Id.* If USCIS impermissibly held your client to a higher standard, you may have a strong basis for arguing that the agency erred as a matter of law and the court would review this issue de novo.

Where the issue involves the interpretation of a statute or regulation, the first step is for the court to consider the statutory or regulatory language. Where the language is plain, the court is bound to implement it as written. *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Where the language is ambiguous, the court generally defers to the agency's interpretation. *Id*. at 843-44. However, courts tend to be more deferential where an agency has issued its interpretation through a formal binding rule. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Less formal agency actions are subject to the *Skidmore* standard, with deference dependent upon "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Thus, where the issue involves the interpretation of either a statute or regulation, be sure to clarify the level of deference applicable to USCIS' interpretation. *See Fogo de Chao (Holdings)*, 769 F.3d at 1135-36 (no deference due to USCIS' interpretation of its specialized knowledge regulation when this regulation "largely parrots" the statute).

For mandamus, the court must be satisfied that the plaintiff has a clear right to the relief requested; the defendant has a clear duty to perform the act at issue; and the plaintiff has no other adequate remedy available. *See*, *e.g.*, *Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002); *Eldeeb v. Chertoff*, 619 F. Supp. 2d 1190, 1208-09 (M.D. Fla. 2007).

C. Attorney's Fees under the Equal Access to Justice Act

To successfully recover attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 et seq., you must think about the requirements before you file suit in federal court. The following are the preconditions to recovering fees and must be included in your fee petition:

- A showing that your client is the prevailing party, *i.e.*, that the party was awarded some relief by the court. *See Buckhannon Board of Care & Home Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001).[17] Examples would include:
    - Enforceable judgment on the merits.
    - Consent decree enforceable by the court in which the government agrees to stop the alleged illegal activity, even without an admission of guilt or wrongdoing.

[17] While *Buckhannon* remains valid authority for this point, the decision has been abrogated by statute, as applied to the recovery of attorneys' fees in FOIA actions, with regard to when a party has "substantially prevailed." *See* 5 U.S.C. § 552(a)(4)(E)(ii). Recovery of attorneys' fees in a FOIA action is not governed by the EAJA.

- Order granting mandamus to adjudicate application to adjust status to lawful permanent residence.

- A showing that your client meets the "net worth" requirements:
  - For an individual, net worth not exceeding $2 million when suit filed.
  - For an owner of an unincorporated business, a partnership or a corporation, net worth not exceeding $7 million and maximum 500 employees when suit filed. *See* 28 U.S.C. § 2412(d)(2)(B).

- An allegation that the government's position, either pre-litigation or during litigation, was not substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A); *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (government's position must be reasonably based in law and fact); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (court will consider the underlying agency action and the agency's litigation position).

- An allegation that there are no special circumstances to make an award unjust. The burden of proof is on the government to establish close or novel questions of law or equitable considerations such as bad faith on the part of the prevailing party. *See* 28 U.S.C. § 2412(d)(1)(A); *Chiu*, 948 F.2d at 714.

- A statement that includes the total amount of fees and costs requested, accompanied by an itemized account of the time spent and rates charged. You must take the time to prepare contemporaneous time records, which describe the work accomplished and the cost incurred. You also can submit time records for your law clerks and paralegals.

You also need to have a written assignment of fees agreement with your client and, if you have co-counsel, a separate agreement on how the fees will be allocated if awarded by the court or in a settlement agreement. The best practice would be to enter into these agreements at the same time the engagement letter is signed. Without a fee assignment agreement, EAJA fees will belong to the client. *See Astrue v. Ratliff*, 560 U.S. 586, 596-97 (2010). Also be conscious of the filing deadline for your fee application, which is within 30 days of the entry of final judgment. *See* 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G).[18]

VII. Conclusion

Federal court litigation is an important tool in reaching the goal of more consistent, less restrictive agency decisions. In particular, federal court litigation is an important way to check the agency's misapplication of the law, which happens all too often in immigration cases. If you would like to discuss the viability of a federal court challenge in one of your cases, please contact the American Immigration Council at clearinghouse@immcouncil.org.

[18] For more information on the EAJA requirements, see American Immigration Council and National Immigration Project of the National Lawyers Guild Practice Advisory, *Requesting Attorneys' Fees Under the Equal Access to Justice Act* (June 17, 2014).