Litigation Briefing: Administrative Review vs. Judicial Review of an Employment-Based Petition Denial

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Litigation Briefing: Administrative Review vs. Judicial Review of an Employment-Based Petition Denial

by the AILA Administrative Litigation Task Force[i]

If USCIS denies an employment-based petition, the petitioner may appeal to the Administrative Appeals Office (AAO), or request reopening or reconsideration by USCIS, by filing Form I-290B, Notice of Appeal or Motion within 30 days (plus 3 days if received in the mail) of the decision. The petitioner may also seek judicial review in federal court without going to the AAO.[ii] While refiling the petition may at times be the best strategy, refiling may not be option if, for example, the H-1B cap has already been reached for the fiscal year or the beneficiary's nonimmigrant status has ended and consular processing would be problematic. This briefing discusses the advantages and disadvantages of administrative review versus judicial review.

Advantages of Seeking Administrative Review

Filing Form I-290B is administratively convenient, efficient, and less costly for the client. If USCIS has made an obvious error, asking it to either reopen or reconsider (or both) may be an effective and simple strategy. In addition, if the petition has been denied on substantive grounds, filing an appeal to the AAO allows one to supplement the record by providing additional evidence such as a more detailed expert evaluation. Procedurally, the AAO is less formal than federal court. A brief in support of the appeal or motion is in part an extension of what was already articulated in the response to the Request for Evidence, although new and creative arguments must be set forth to overcome the denial.

Even when an appeal on Form I-290B is filed, the official who made the initial decision will first review the appeal and determine whether to take favorable action. This process is called "initial field review." Thus, every appeal is first treated as a motion to reopen or reconsider. In many situations, an egregious denial can be reopened and reversed without

even getting to the AAO. If the case gets to the AAO, it could either outright reverse a denial or remand the case back to the USCIS Service Center, which in turn, could issue another RFE. If the AAO dismisses the appeal, one can still seek review in federal court.

Disadvantages of Seeking Administrative Review

The success rate at the AAO is very low. In fiscal year 2017, the AAO dismissed 598 H-1B appeals, sustained only 22, and remanded 44. The same year the AAO dismissed 181 L-1 appeals, sustained only 15, and remanded 6.[iii] The process is also not quick. A beneficiary who is in the United States and does not have another underlying nonimmigrant status, will start accruing unlawful presence for purposes of the 3/10-year bar upon denial of the request for change or extension of status. If the appeal is not successful and 180 days of unlawful presence have accrued, the beneficiary will be subject to the bar upon departing the United States.[iv] In addition, the AAO may not just affirm the USCIS denial, but may also strengthen it by providing better reasoning or affirming for different or additional reasons. This would make a federal court challenge more difficult.

Advantages of Seeking Judicial Review

One major advantage of judicial review is that the case is reviewed by a judge who is not part of USCIS and is not influenced by USCIS prevailing policy as is the AAO. Judicial review also presents the opportunity to resolve the case with an Assistant U.S. Attorney who may advise USCIS to reverse the decision rather than fight it out in court. If the plaintiff prevails, the attorney may seek fees under the Equal Access to Justice Act.

In addition, extraordinary remedies, such as a preliminary injunction (or temporary restraining order followed by a preliminary injunction) to maintain the nonimmigrant status of the beneficiary during the pendency of the matter or prevent the beneficiary from accruing unlawful presence may be available. In a few cases, the beneficiary has been able to establish standing as a plaintiff in litigation involving nonimmigrant visas.[v]

Disadvantages of Seeking Judicial Review

Judicial review can be more expensive and time consuming than administrative review. In addition, under the Administrative Procedure Act, a denial may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" – a standard that affords a certain level of deference to the agency.[vi] Factual findings may be set aside only if "unsupported by substantial evidence"—which is not quite as high as "clear error" but is still far from *de novo* review.[vii] The AAO, on the other hand, can undertake *de novo* review of all issues of fact, law, policy, and discretion, and can also address new issues that were not addressed in the prior decision.[viii] New evidence cannot be introduced when seeking judicial review.

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[i] Special thanks to Cyrus Mehta and Stephen Yale-Loehr.

[ii] For more information, see the American Immigration Council's "Practice Advisory: Failure to Appeal to the AAO: Does It Bar All Federal Court Review of the Case?," *available at* **https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/failure_to_appeal_to_aao_practi**

[iii] *See* AAO Decision Data, *available at* **https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-decision-data**.

[iv] If the appeal is successful, any related application for change or extension of status is likely to be reopened on Service motion following the granting of the petition, but one cannot know for sure whether this will happen.

[v] *See, e.g., Tenrec, Inc. v. USCIS*, No. 3:16-cv-995-SI, 2016 U.S. Dist. LEXIS 129638 at **21-22 (D. Or. Sept. 22, 2016). In the administrative review context, USCIS has recognized that the beneficiary of an I-140 may administratively challenge the revocation of an I-140 petition who has exercised job portability pursuant to INA 204(j). ***Matter of V-S-G- Inc.***, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

[vi] *See 5 U.S.C. § 706(2)(A); United States v. Bean*, 537 U.S. 71, 77 (2002).

[vii] *See* 5 U.S.C. § 706(2)(E); *Dickinson v. Zurko*, 527 U.S. 150 (1999).

[viii] *See* AAO Practice Manual, Chapter 3 Appeals, *available at* **https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/practice-manual/chapter-3-appeals**.

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