



PRACTICE ADVISORY¹

August 20, 2018

LITIGATION FOR BUSINESS IMMIGRATION PRACTITIONERS

By Leslie K. Dellon²

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 provides information practitioners 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 addresses federal court challenges to an erroneous business-related USCIS decision 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 statutes or regulations, as it provides far-reaching injunctive 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 or application 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. Attorneys considering federal litigation for the first time are encouraged to review all 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.

¹ Copyright © 2018 American Immigration Council. Click [here](#) for information on reprinting this practice advisory. 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.

² The author wishes to acknowledge the contributions of Denyse Sabagh of Duane Morris, LLP, Christina C. Haines of Erickson Immigration Group, and Melissa Crow, former Legal Director of the American Immigration Council, to an earlier version of this Practice Advisory, and Emily Creighton and Mary Kenney, who assisted with editing this update.

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.”). There are, however, several exceptions to this rule.³

In most cases, though, the court will decide the legality of USCIS’ decision based on the record before the agency. An attorney cannot supplement that record to strengthen a client’s position during litigation. Thus, a solid record in support of the immigration benefit the client seeks is critical. Practitioners should prepare the petition and supporting evidence with an understanding of the statutory and regulatory requirements for the immigrant or nonimmigrant classification or other benefit.

Additionally, the source of the evidence provided will affect the weight the decision maker gives in assessing veracity. The petitioner must present all relevant facts about the petitioner and the beneficiary (in the petition and supporting documentation, which may include a petitioner letter). The attorney then can discuss the law and apply the statutory and regulatory standards to the facts in a separate attorney letter or memorandum.

Read all Notices of Action thoroughly. When responding to a Request for Evidence (RFE), a Notice of Intent to Deny (NOID) or a Notice of Intent to Revoke (NOIR), practitioners must 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 of recruitment for the job when the petitioner is a multinational company seeking to transfer a manager from its foreign subsidiary, then identify the agency error and re-direct the agency to the proper standard and the evidence that supports petition approval based on the petitioner’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, a petitioner will have a much stronger foundation for demonstrating to the court that USCIS ignored or mischaracterized the evidence.

³ The primary exceptions to this rule are 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 142-43, 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). Additionally, the Ninth Circuit has recognized the following exceptions: 1) if discovery is necessary to determine whether the agency has considered all relevant factors and has explained its decision; 2) if the agency has relied on documents not in the record; 3) when supplementing the record is necessary to explain technical terms or complex subject matter; or 4) when plaintiffs make a showing of agency bad faith. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

III. Deciding Whether to File a District Court Action

Several factors will influence a client's and attorney's 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. For all denials, attorneys can 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? For example, did USCIS violate the statute and regulations when it denied an H-1B petition because the agency erroneously decided that the job offered was not in a specialty occupation because there was no "specifically tailored and titled degree program" typically available to enter the field.⁴ 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 petition? Finally, was the decision based upon the exercise of discretion? If so, there may be a jurisdictional bar to the court's review under 8 U.S.C. § 1252(a)(2)(B).⁵

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

When reviewing the strength of the record presented to USCIS or the legal errors that the agency may have committed, weigh the likelihood of making "bad law" if the court rules against the 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 otherwise 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.

If, as usual, the APA is the basis for challenging a denial of an employment-based visa petition, then the answer is "no." The Supreme Court held in *Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993), that in federal court cases brought under the APA, a plaintiff can be required to exhaust only administrative remedies that are mandated by either a statute or regulation—establishing a major exception to the exhaustion requirement. At least two decisions involving the denial of a

⁴ See *Chung Song Ja Corp. v. USCIS*, 96 F. Supp. 3d 1191, 1198 (W.D. Wash. 2015).

⁵ 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 (June 20, 2013).

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).⁶

In recent years, USCIS is more likely to move to dismiss for lack of a final decision (see § IV(B) *infra*), than to claim that the plaintiff failed to exhaust by not appealing to the AAO. However, if the government raises failure to exhaust, practitioners can explain why exhaustion is not required under *Darby*, relying both on the relevant immigration cases and non-immigration cases within the same circuit that have found that the *Darby* exception applies in similar contexts. See the Council’s Practice Advisory, [Failure to Appeal to the AAO: Does It Bar All Federal Court Review of the Case?](#) (Sept. 26, 2016) (explaining in more detail the *Darby* holding and citing both immigration and non-immigration cases from different circuits). While the risk of bypassing the AAO appears quite small, there is at least one unreported decision in which the federal district court concluded that the regulation for appeal of an I-140 denial is mandatory and, therefore, the *Darby* exception did not apply. 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). The decision appears to be an aberration, and its reasoning has not been followed by other courts.⁷

An appeal to the AAO can delay a case considerably, particularly when the result is that the AAO simply rubberstamps the decision below. Another concern is the AAO may affirm the denial on a different ground that would be more difficult to overcome than the original denial.

Despite these concerns, one practical reason to appeal to the AAO is that—unlike in an APA challenge in federal court—a petitioner *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 reviewing a denial, practitioners should consider whether

⁶ 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); *Mantena v. Hazuda*, No. 17cv5142, 2018 U.S. Dist. LEXIS 132826, *10-11 (S.D.N.Y. Aug. 7, 2018) (citing *Darby*, court denied agency request to dismiss by exercising judicial discretion to require exhaustion, after USCIS’ second re-opening of employment-based adjustment application denials while suit pending; “it is hornbook law APA claims are not subject to exhaustion requirements unless specifically required by statute.”)

⁷ *ASP* misapplies *Darby* on two grounds. First, the court disregards permissive language in 8 C.F.R. §§ 103.3(a)(1)(iii)(A) (“may seek judicial review”) and 204.5(n)(2) (“right to appeal”). Second, even assuming the regulation mandated an appeal, *Darby* still provides an exception when, as with the I-140 denial in *ASP*, the agency does not stay its decision pending administrative appeal. *Darby*, 509 U.S. at 153. The district court also cites 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 did exhaust, filing suit only after appeal denied at AAO).

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; *see 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.” *Darby*, 509 U.S. at 144 (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 refused to apply the *Darby* exception where a party pursued an optional administrative appeal to the 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.

Unlike USCIS, the Department of Labor (DOL) specifies that a failure to timely request administrative review of a labor certification application denial “constitutes a failure to exhaust administrative remedies.” 20 C.F.R. § 656.24(e)(3). DOL also specifies that a timely-filed appeal to the Board of Alien Labor Certification Appeals (BALCA) of the Certifying Officer’s denial makes the denial non-final. *See* 20 C.F.R. § 656.24(e). *Darby* would not provide an exception because DOL regulations mandate administrative review and non-finality while a timely-filed administrative appeal remains pending.

USCIS sometimes reopens a case that it denied while an appeal of the denial is pending in federal court. The agency then argues that the court lacks jurisdiction because the decision is no longer final so the petitioner cannot seek APA review. In an unpublished decision, one appellate court upheld the district court’s grant of summary judgment to USCIS after USCIS *sua sponte* reopened the H-1B petition denial and issued a request for evidence. *See 6801 Realty Co., LLC v. USCIS*, 719 Fed. Appx. 58, 59, 61 (2d Cir. 2018). The court concluded that by requesting more evidence, the reopening “nullified the prior denial and left nothing for the district court to review.” *Id.* at 60.

A few federal district courts have dismissed for lack of jurisdiction complaints challenging H-1B petition denials on USCIS' motion after USCIS reopened and issued a new RFE. *See Utah Life Real Estate Group, LLC v. USCIS*, 259 F. Supp. 3d 1294, 1296, 1299-1300 (D. Utah 2017) (dismissing suit after USCIS issued second RFE after suit filed, petitioner refused to respond or stipulate to litigation stay, and USCIS denied again); *Net-Inspect, LLC v. USCIS*, No. C14-1514JLR, 2015 U.S. Dist. LEXIS 24951, *3-4, *10-11 (W.D. Wash. March 2, 2015) (USCIS issued third RFE thirty days after suit filed); *True Capital Mgmt. v. DHS*, No. 13-261 JSC, 2013 U.S. Dist. LEXIS 87084, *3-4, *8 (N.D. Cal. June 20, 2013) (USCIS issued second RFE after suit filed).⁸ 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.

In *Utah Life*, the court held that the APA's finality requirement was jurisdictional and thus it dismissed for lack of subject matter jurisdiction. For this reason, the court also rejected Utah Life's request that it be permitted to amend its complaint to challenge USCIS' second denial of the H-1B petition. *See Utah Life*, 259 F. Supp. 3d at 1299. In contrast, however, a number of courts have held that the APA's finality requirement is *not* jurisdictional or have left the question open.⁹ For instance, in *6801 Realty*, the federal district court denied USCIS' motion to dismiss for lack of subject matter jurisdiction on the ground that the APA's finality requirement was not jurisdictional. *6801 Realty*, 719 Fed. Appx. at 59 n.1. The appellate court declined to resolve the "open question" in the Second Circuit as to whether the APA's finality requirement is jurisdictional. *Id.* This approach allowed the appellate court to review whether the district court correctly decided, as a matter of law, that the decision was no longer final. Without a final decision, the plaintiff would not have a claim that the APA was intended to protect.¹⁰ The District of Columbia Circuit went further, deciding that pursuant to Supreme Court pronouncements, 5 U.S.C. § 704 is not jurisdictional. *See Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) ("We think the proposition that the review provisions of the APA are not jurisdictional is now firmly established.").¹¹

⁸ *See also Shihuan Cheng v. Baran*, CV 17-2001-RSWL-KSx, 2017 U.S. Dist. LEXIS 122696, *3, *19 (C.D. Cal. Aug. 3, 2017) (USCIS issued RFE two months after an immigrant investor filed suit based on adjudication delay of more than two years. Court dismissed for lack of jurisdiction finding delay not unreasonable and finality lacking.)

⁹ *See, e.g., Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232 (4th Cir. 2008) (assuming, without deciding, that under Supreme Court precedent for determining whether requirements are jurisdictional, the APA finality rule is not); *Trudeau v. FTC*, 456 F.3d 178, 183-85 (D.C. Cir. 2006) (holding that the APA finality requirement is not jurisdictional); *R.I. Dep't of Env'tl. Mgmt. v. United States*, 304 F.3d 31, 40 (1st Cir. 2002) (same); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) (*dicta*, APA finality requirement not jurisdictional). Not all courts have ruled on the issue yet. *See, e.g., Sharkey v. Quarantillo*, 541 F.3d 75, 87-88 (2d Cir. 2008) (finding it unnecessary to resolve the issue in case presented).

¹⁰ *See* § V(D) *infra*, for more information on standing to sue.

¹¹ Prior to 2006, the District of Columbia Circuit repeatedly concluded that the APA review provisions were jurisdictional. *See id.* However, the court's change in position was cemented by *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006). While *Arbaugh* did not involve a cause of action under the APA, the Court made clear that lower courts err when they treat statutory

At least one court has held that USCIS has no authority to decide an issue after it is pending with the federal district court, *see Otero v. Johnson*, No. CIV 16-090-TUC-CKJ, 2016 U.S. Dist. LEXIS 151961, *23-25, *35-38 (D. Ariz. Nov. 2, 2016) (USCIS' regulations did not permit the agency to reopen on its own motion after the court had jurisdiction over the denial of an application to adjust status to lawful permanent resident).¹² *See also Mantena*, 2018 U.S. Dist. LEXIS 132826, *17-18 (citing *Otero*, court found USCIS denials of employment-based adjustment applications final, distinguishing *6801 Realty* because USCIS did not identify issues requiring further development or request additional evidence and circumstances "suspect" due to prior re-openings, followed by denials.)¹³

While USCIS does not always reopen a denial after a plaintiff files a federal action, attorneys need to advise their clients of the possibility that they will be back before the agency. If a court decides to dismiss for lack of finality, attorneys should consider asking the court to retain jurisdiction. If the APA's finality requirement is only a statutory limitation on review, then the court could retain the case so that the client can seek relief without refiling if the agency upholds the denial.¹⁴

restrictions as jurisdictional where Congress has declined explicitly to identify the restrictions as jurisdictional. *Id.*

¹² Although INA § 242(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of relief under section ...245," a number of courts have held that this prohibition does not apply when the claims do not rest on the exercise of the agency's discretion. These include constitutional questions, questions of law, or challenges to the agency's failure to comply with procedural requirements. *See Mantena v. Johnson*, 809 F.3d 721, 730 (2d Cir. 2015) (procedural requirements not shielded from review); *Ramalingam v. Johnson*, Civ. No. 13-7416 KM, 2016 U.S. Dist. LEXIS 43003, *10-11 (D.N.J. Mar. 30, 2016) (due process challenge to USCIS procedures not barred from review).

¹³ After denying the motion to dismiss, the court stayed the action because it could not provide relief until USCIS resolved an administrative appeal concerning its revocation of a related immigrant visa petition. The adjustment applicant had relied on that petition to "port" to new employment and to provide an earlier priority date for another approved immigrant visa petition filed by the new employer. (The "priority date" refers to the date an immigrant visa number would be available to her and is crucial given the lengthy backlog the applicant faces to adjust her status due to her nationality and visa category). *See id.* at *5-6, *18.

¹⁴ *See Gracious Ark Church v. United States*, No. CV 12-3990 GAF (SSx), 2013 U.S. Dist. LEXIS 192042, *21 (C.D. Cal. May 15, 2013) (Case stayed pending final agency action after court concluded agency action no longer final; AAO *sua sponte* reopened denials of religious worker and spouse's applications to adjust status to lawful permanent resident while cross-motions for summary judgment pending). The plaintiff may need to file an amended complaint if USCIS asserts new reasons to deny rather than simply affirming its prior decision.

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).¹⁵

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).¹⁶ Although the APA does not confer jurisdiction but instead serves as a cause of action (see Section V(C) *infra*), attorneys often list it in the jurisdictional section of a complaint because it also 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 Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) (“[S]overeign immunity is jurisdictional in nature.”).

The APA is not available as a cause of action 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, attorneys should confirm that the client’s claims do not fall within these provisions. The government most frequently asserts the bar on review of discretionary decisions, 8 U.S.C. § 1252(a)(2)(B)(ii). Importantly, most courts have held that statutory eligibility determinations are not discretionary and thus do not fall within § 1252’s bars to review of discretionary decisions.¹⁷ 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

¹⁵ 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 as violating a statute enacted after December 1, 1990. In that case, the prudent practice would be to file within four years when possible.

¹⁶ *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).

¹⁷ 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](#) (June 20, 2013).

laid out in the statute, including specifically a definition of “specialized knowledge”); *Spencer Enters., Inc. v. United States*, 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, practitioners 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, provides an alternative basis for jurisdiction. *See Sawan v. Chertoff*, 589 F. Supp. 2d 817, 822 (S.D. Tex. 2008); *Kim v. USCIS*, 551 F. Supp. 2d 1258, 1261-62 (D. Colo. 2008); *Dong v. Chertoff*, 513 F. Supp. 2d 1158, 1161 (N.D. Cal. 2007). In cases involving delay, it makes sense to include both an APA and mandamus claim, and then also to include the mandamus statute as a basis for jurisdiction. However, there is “little practical difference” as to whether jurisdiction rests on the federal question statute or mandamus, assuming that the relief requested under the APA and mandamus statute 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)).¹⁸

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, 671-72 (1950); *see also Fleet Bank, Nat’l Ass’n v. Burke*, 160 F.3d 883, 886 (2d Cir. 1998); *Missouri ex rel. Mo. Highway and Transp. 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.

B. Venue: Where to File

APA and mandamus actions arising from employment-based immigration petitions (or applications) must be filed in federal district court. Whether a case is filed 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.¹⁹ 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).

¹⁸ Relief is discussed at Section VI *infra*.

¹⁹ 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) (“Congress enacted § 1404(a) to permit change of venue between federal courts.”).

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 USDHS*, 783 F.3d 156 (3d Cir. 2015) (APA challenge to denial of special immigrant religious worker visa classification); *Spencer Enters., Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003) (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. Fed. Trade Comm’n*, 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).

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).²⁰

²⁰ 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(1), can be asserted. *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189-90 (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](#) (March 8, 2017).

D. Parties

1. Plaintiffs

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). Several courts have held that beneficiaries of employment-based visa petitions satisfy this test. *See, e.g., Shalom Pentecostal Church*, 783 F.3d at 162-63; *Patel v. USCIS*, 732 F.3d 633, 637-38 (6th Cir. 2013); *but see id.* at 642 (Dougherty, Cir. J., dissenting) (arguing that beneficiary failed to show necessary redressability because he could not get an approved I-140 unless the employer first obtained a labor certification from DOL, neither of which were parties).

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) (internal citation omitted).²¹

To fall within the “zone of interests,” the plaintiff’s claims must be among those the statute “arguably” was intended to protect or regulate—a broader category than those Congress specifically intended to protect. *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Lexmark*, 134 S. Ct. at 1388-89 (internal citations omitted); *see Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 399-400 (1987) (“[T]here need be no indication of congressional purpose to benefit the would-be plaintiff”). 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

²¹ 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 Pottawatomis 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 Lexmark*, 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.

assumed that Congress authorized that plaintiff to sue.” *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2210) (internal citation and quotations omitted).

Normally, the plaintiff in a suit challenging the denial of an employment-based visa petition in federal court is the petitioning employer. At the administrative level, a regulation bars an appeal by a beneficiary for purported lack of standing. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B).²² However, this regulation does not apply to the standing analysis in a federal court case and some noncitizen beneficiaries have brought successful challenges to denials of employment-based visa petitions.

Courts that have ruled favorably have held that a beneficiary of an employment-based immigrant visa petition (Form I-140) is within the zone of interests of the applicable sections of the INA and thus has standing to sue to challenge the petition denial. *See Patel v. USCIS*, 732 F.3d at 637 (beneficiary has standing to challenge I-140 denial because his interest in receiving visa places him within the zone of interests); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986) (holding that where DOL has certified that the employment of the foreign worker would have no adverse impact on U.S. workers and the prospective employer had filed the I-140, then the beneficiary has an interest in the visa classification.)²³ *See also Shalom Pentecostal Church*, 783 F.3d at 164 (noting that for various reasons special immigrant religious workers have an even greater interest in the petition than foreign nationals in some of the other employment-based categories). *But see Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 131-32 (D.D.C. 2012) (beneficiary not within the zone of interests because his interests were “inconsistent with” congressional intent in protecting U.S. workers with the labor certification requirement applicable to his employment-based visa category); *Pai v. USCIS*, 810 F. Supp. 2d 102, 107, 111 (D.D.C. 2011) (beneficiary abroad lacked concrete injury because uncertain when/whether could enter the United States to work for the petitioner; not within the zone of interests because Congress intended that the labor certification requirements applicable to her employment-based visa category primarily protect “American labor” and protect employers’ right to hire foreign workers if no qualified/available U.S. workers.)

²² In November 2017, USCIS created a limited exception to its regulatory prohibition against the participation of beneficiaries in administrative proceedings involving petitions filed by employers. *See Matter of V-S-G, Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0149-Matter-of-V-S-G-Inc.-Adopted-Decision.pdf>; *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G, Inc.* (“VSG PM”), PM-602-0152 (Nov. 11, 2017), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0152-Guidance-Beneficiary-Standing-Matter-of-V-S-G.pdf>. USCIS now will give notice of its intent to revoke or notice of revocation of an I-140, if a beneficiary previously submitted a porting request which USCIS “reviewed and favorably adjudicated.” *See VSG PM, id.* at 9, revision to AFM, ch. 20.3(b), (b)(1).

²³ For practitioners in a circuit where the issue of beneficiary standing has not been decided, it may be helpful to draw analogous arguments from cases where the courts have held that beneficiaries of family-based visa petitions are within the “zone of interests.” *See, e.g., Bangura*, 434 F.3d at 499-500; *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998).

With respect to the revocation of a previously-approved employment-based immigrant visa petition (I-140), courts have held that the beneficiary falls within the zone of interests and thus has standing to sue over USCIS' failure to comply with procedural prerequisites for revocation. *See, e.g., Mantena v. Johnson*, 809 F.3d 721, 731-32 (2d Cir. 2015) (I-140 beneficiary who "ported" to new employer has a statutory interest in receiving notice (either to her or her new employer) of USCIS' intent to revoke the petition); *Kurapati v. USBCIS*, 775 F.3d 1255, 1261 (11th Cir. 2014) (per curiam) (beneficiaries of an approved I-140 (not limited to only workers who "port") have standing because of their statutory interest in receiving an immigrant visa) (citing *Patel*, 732 F.3d at 636-38). *See also Musunuru v. Lynch*, 831 F.3d 880, 888, 890-91 (7th Cir. 2016) (beneficiary had standing to raise pre-revocation procedural claims, but only his current employer was entitled to notice).

Reported cases addressing whether beneficiaries of employment-based nonimmigrant petitions have standing are scarce. At least one court found that beneficiaries of H-1B visa petitions have standing because they were within the statute's zone of interests. *Tenrec, Inc. v. USCIS*, No. 3:16-cv-995-SI, 2016 U.S. Dist. LEXIS 129638, *21-22 (D. Or. Sept. 22, 2016) (H-1B petition beneficiaries have constitutional standing and are within the zone of interests because approval gives them "the right to live and work in the United States and imposes obligations such as complying with "extensive regulations" on their conduct; they also have the potential for future employment with a new petitioner). Still another court found that an L-1A petition beneficiary had standing because of the harm he would suffer from a denial of the petition. *Ore*, 675 F. Supp. 2d at 223 (L-1A petition beneficiary had constitutional standing because he would benefit from being able to enter the United States to work, which the petition denial harmed, and the court could redress).

However, other courts have found that beneficiaries of nonimmigrant visa petitions do not have standing. *See, e.g., Commonwealth Utils. Corp. v. Johnson*, 245 F. Supp. 3d 1239, 1255-58 (N. Mar. I. 2017) (CW-1 petition beneficiaries are not within the zone of interests because nothing in the law indicates congressional intent authorizing them to challenge the agency's petition selection process; they have no right to be admitted to this U.S. territory to work temporarily); *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 368 (D.D.C.) (H-2A shepherders not within the zone of interests because congressional intent was to protect U.S. workers), *modified*, 319 F.R.D. 3 (D.D.C. 2016);²⁴ *Cost Saver Mgmt., LLC v. Napolitano*, No. CV 10-2105-JST, 2011 U.S. Dist. LEXIS 156096, *11-12 (C.D. Cal. June 7, 2011) (L-1A petition denial did not injure beneficiary outside the United States because only the prospective employer had a legally protected interest in the petition).

²⁴ The district court concluded it was bound by *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014), which held that Congress clearly intended to protect U.S. workers from being adversely affected by the employment of H-2A workers. *Id.* at 368. (The court granted reconsideration as to the plaintiff association's standing to sue on its members' behalf because it had U.S. worker members, specifically lawful permanent residents. *See* 319 F.R.D. at 7-8.) But there were no H-2A worker plaintiffs in *Mendoza*, and their interests are not mutually exclusive of U.S. workers' interests. *See Tenrec*, 2016 U.S. Dist. LEXIS 129638, *25 ("The D.C. Circuit did not, however, find that the INA's H-2A provisions were *only* concerned with American workers.") (Emphasis in original).

A few courts have held that the beneficiary of a labor certification application has standing. *See De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (finding standing where there was no statutory indication that Congress intended to preclude beneficiaries from suing; but affirming petition denials because employers did not comply with DOL review requirements); *Stenographic Machines, Inc. v. Reg'l Adm'r Employment & Training*, 577 F.2d 521, 528 (7th Cir. 1978) (noting that the test is whether plaintiff is within the zone of interests to be *protected or regulated*, and finding that beneficiary satisfied both) (emphasis added).²⁵ In so holding, the Seventh Circuit emphasized that the test could be met by showing that the plaintiff fell within the zone of interests either “protected” or “regulated” by the statute. *Id.* (citing *Data Processing*, 397 U.S. at 153).

Even though a beneficiary may be found to have standing to sue, he or she nevertheless may lose an appeal if the visa category requires continued sponsorship, but the employer (or prospective employer) is no longer committed to hiring the beneficiary. Since an I-140 beneficiary who has “ported” to new employment does not require the petitioning employer’s continued support, the beneficiary’s independent interest in the approved I-140 is easier to establish in these cases.

2. Defendants

The APA 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.” 5 U.S.C. § 702. Accordingly, an APA action would name as a defendant the specific individual within DHS who is authorized to carry out any injunction or other mandatory order of the court. In the case of visa petition denials, this individual usually would be the Director of USCIS.²⁶ Similarly, a mandamus action could name the official with ultimate authority over the action that the suit seeks to compel (such as, for example, the Director of USCIS), as well as the director of the particular office responsible for taking the action. In both types of cases, the defendants are named in their official capacities.

VI. Relief

A. Non-Monetary Damages

A prevailing party in an APA or mandamus action does not receive money damages. The relief sought will depend upon the nature of the claim. If the USCIS denial was wrong as a matter of law, the court can vacate the denial and approve the petition. If the challenge is to USCIS’

²⁵ As these decisions predate *Lexmark*, 134 S. Ct. at 1386-89, they discuss whether the beneficiaries had “prudential standing.” *See* n.21, *supra*. They also predate the current system for permanent employment certification. *See* 20 C.F.R. Part 656. However, the regulatory change in the certification process does not affect whether the beneficiary’s interest falls within the statute’s zone of interests.

²⁶ Some attorneys also name the Director of the Service Center who issued the denial. 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](#) (May 13, 2010).

findings of fact or application of the law to the facts, then the court can remand with specific instructions as to how the agency must correct its errors. If mandamus is sought, the complaint should make clear the duty that the court should order USCIS to perform. If applicable, a complaint should include a request for reasonable attorney’s fees under the Equal Access to Justice Act²⁷ and a “catch all” provision, asking the court to order any other relief that the court deems appropriate.

B. Standard of Review

The standard applied by the court can be critical in a case; among other things, it will determine the level of deference that the court gives to the agency’s interpretation of applicable statutes or regulations. While the relevant standard of review can be specified in a complaint, parties most often urge the court to apply a particular standard in their briefs filed in support of summary judgment.

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. *See* 5 U.S.C. § 706(2)(E); *Family Inc. v. USCIS*, 469 F.3d 1313, 1315-16 (9th Cir. 2006) (USCIS’ finding that the beneficiary was not engaged in primarily managerial duties, and thus not eligible for a multinational manager classification, “is supported by substantial evidence.”)

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 (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 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

²⁷ *See* Section VI(C) *infra*.

and capricious standard “incorporates” substantial evidence standard, so use substantial evidence standard to review informal agency proceedings); *Family Inc.*, 469 F.3d at 1315. *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 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) (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, a petitioner or applicant must show that it is “more likely than not” a claim is true based on “relevant, probative and credible evidence.” *Matter of Chawathe*, 25 I&N Dec. at 376; AFM ch.11.1(c). If USCIS erroneously held a petitioner or applicant to a higher standard, he or she 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, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (explaining deference with respect to agency interpretation of a statute); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (explaining deference with respect to agency interpretation of a regulation). Where the language is ambiguous, the court only can defer to the agency’s interpretation if it is reasonable and if such interpretation falls within the authority Congress gave to the agency. *Id.* at 843-44. In general, courts are more deferential to agency interpretations issued through a formal binding rule, such as a regulation or a precedent decision. *See generally United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

In contrast, courts are less deferential to agency actions that are not formal, binding statements of the agency’s interpretation of the law. *See generally Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In such cases, the level of deference depends upon “the thoroughness evident in [the agency’s] consideration [of the issue], 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.” *Id.* *See also Fogo de Chao (Holdings)*, 769 F.3d at 1136 (finding USCIS’ interpretation of its specialized knowledge regulation did not merit deference, in part, because the regulation “largely parrots” the statute).

As noted, courts must consider the consistency of an agency’s position. Where an unexplained, abrupt change in policy has occurred, a court may find the change arbitrary and capricious, and thus not entitled to deference. A new agency policy may be arbitrary and capricious if it represents an abrupt change in an agency’s pattern of decision-making and is adopted without an adequate explanation of its rationale. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (finding that in administrative rulemaking, agency must give adequate reason for changing its position, particularly when affected parties have substantial reliance interests in the prior position); *Davila-Bardales v. INS*, 27 F.3d. 1, 5 (1st Cir. 1994) (holding that BIA’s change of position, even from decisions not formally designated as precedent, which court described as a “zigzag course,” is not permissible where “the agency has failed to explain why it is changing direction...”); *Omni Packaging, Inc. v. USINS*, 733 F. Supp. 500, 504 (D.P.R. 1990) (in denying immigrant visa petition, INS failed to satisfactorily explain why beneficiary was not a manager, when the agency previously approved an initial nonimmigrant petition and extensions as a manager). *See also INS v. Yang*, 519 U.S. 26, 32 (1996) (“If an agency announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned.”). Thus, in reviewing any decisions that apply a new policy, a court will have to consider whether the abrupt policy change was rationally explained.

C. Attorneys’ Fees under the Equal Access to Justice Act

While a request for attorneys’ fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq.*, should be listed in the complaint as part of the relief sought, practitioners must file a separate motion for fees and costs with the court within the statutory deadline (unless the parties settle the fee issue). The following are the general requirements for recovering fees and must be included in the motion:

- A showing that the client is the prevailing party, *i.e.*, that the party was awarded some relief by the court. 28 U.S.C. § 2412(d)(1)(A); *Buckhannon Board of Care & Home Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001).²⁸ 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.
 - Order granting mandamus to adjudicate application to adjust status to lawful permanent residence.
- A showing that the client meets the “net worth” requirements. 28 U.S.C. § 2412(d)(2)(B).
 - For an individual, net worth cannot exceed \$2 million when suit filed.

²⁸ While *Buckhannon* did not involve EAJA, it applies to EAJA motions. *See Aronov v. Napolitano*, 562 F.3d 84, 89 (1st Cir. 2009) (en banc) (“*Buckhannon* sets the minimum standards for prevailing party status under the EAJA.”).

- For an owner of an unincorporated business, a partnership or a corporation, with certain exceptions, net worth cannot exceed \$7 million and cannot have more than a maximum 500 employees when suit filed.
- A showing 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) (holding that government’s position must be reasonably based in law and fact); *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (recognizing court’s obligation to consider both the underlying agency action and the agency’s litigation position).
- A showing that there are no special circumstances to make an award unjust. 28 U.S.C. § 2412(d)(1)(A). The burden of proof is on the government to establish the existence of special circumstances. *United States ex rel. Wall v. Circle C Constr., LLC*, 868 F.3d 466, 471 (6th Cir. 2017).
- A statement that includes the total amount of fees and costs requested, accompanied by an itemized account of the time spent and rates charged. Attorneys must take the time to prepare contemporaneous time records, which describe the work accomplished and the cost incurred. Attorneys also can submit time records for law clerks and paralegals.

Practitioners also need to have a written assignment of fees agreement with the client and, if there are 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). Finally, motions for fees and costs under EAJA must be filed within 30 days of the entry of final judgment. *See* 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(G).²⁹

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. Any attorney who would like to discuss the viability of a federal court challenge in an employment-based immigration case may contact the American Immigration Council at clearinghouse@immcouncil.org.

²⁹ 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).