

When No One Was Listening: Tolling Deadlines for Unaccompanied Children

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An attorney representing an unaccompanied immigrant or refugee child often must surmount logistical, cultural, linguistic, developmental, and emotional obstacles to establish a relationship with the child before the child is able to tell the attorney her story. What can an attorney do when this connection is made too late—when the attorney learns of a valid claim for relief for the child only *after* a critical deadline has passed? Following are excerpts from case law and statutes to provide ideas for arguments that deadlines should be tolled for unaccompanied children, especially when the circumstances show that the child’s story went unspoken because the child had no adult to stand for her and give her a voice.

The Legislature does not expect a child...to understand or act upon his legal rights; he should not be made to suffer for failure to do so. Nor should he be penalized for the ignorance or neglect of his parents or guardian in failing to assert those rights.

LaFage v. Jani, 766 A.2d 1066, 1073 (N.J. 2001) (internal quotation omitted).

I. Equitable Tolling

A. Third Circuit

The United States Court of Appeals for the Third Circuit has established three general scenarios under which equitable tolling is appropriate:

- (1) the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff in some extraordinary way has been prevented from asserting his rights, or

¹ This document is intended as assistance for research only and should not be relied on without independent research and analysis. Please feel free to contact me with any questions or ideas at 713-651-5376 or hsibiski@fulbright.com.

(3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

School Dist. of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981).

The Third Circuit also has admonished, however, that “[a]bsent a showing of intentional inducement or trickery by the defendant, a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.” *U.S. v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998) (internal quotation omitted).

Attorney misconduct may be grounds for tolling in some circumstances:

Petitioner further contend[ed] that his January 30, 2003 motion to reopen was thus timely, notwithstanding that it was filed almost two years after the BIA denied his appeal on March 30, 2001, because he was prevented from filing earlier due to his former counsel’s misconduct. We need not resolve the issue as it is not before us in the BIA’s order. Even if it were²...it is likely that Petitioner could have enjoyed such tolling only through “early 2002,” when he learned of his dismissed appeal and one would presume that he should have learned of the related alleged misconduct of his attorney. Yet Petitioner did not file his motion to reopen until almost a year later.

Zayets v. Ashcroft, 118 F.App’x 653, 656 n.1 (3d Cir. 2005).

B. Western District of New York

On review of a petition of writ of habeas corpus in which petitioner claimed he was eligible for a waiver of deportation but prior counsel failed to waive his defenses, the United States District Court for the Western District of New York noted that:

² The text omitted here, “and even if § 240(c)(6)(A) were subject to equitable tolling,” was deleted because of the later holding by this Court in *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005), that equitable tolling *does* apply to the 180-day limitations period for reopening an *in absentia* order of removal. *Id.* at 406. *Zayets* was issued December 30, 2004, and was amended in January 2005 and again February 4, 2005; *Borges* was issued March 30, 2005.

Unlike the two-year delay in *Iavorski*... here petitioner had six months between the last day for a timely motion to reopen (March 11, 2002) and his petition by new counsel (July 18, 2002). Petitioner should be allowed to move either for reconsideration or to reopen based on the equitable toll from the ineffectiveness of prior counsel.

Montague-Griffith v. Holmes, 2003 U.S. Dist. LEXIS 25059, *5 (W.D.N.Y. Sept. 29, 2003) (not designated for publication) (discussing *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000)).

C. Middle District of Pennsylvania

The United States District Court for the Middle District of Pennsylvania applied Pennsylvania state law to two children's FTCA claims and found that their situation constituted extraordinary circumstances that prevented the children from asserting their rights. *Albright v. Keystone Rural Health Ctr.*, 320 F.Supp. 2d 286, 287-91 (M.D. Pa. 2004).

The *Albright* court explained that because: (1) Pennsylvania state law tolls statutes of limitations for children until they are 18; and (2) it was difficult or impossible for the minor plaintiffs to determine that the defendants, a hospital and physician, were federal entities or employees, "to dismiss Plaintiffs' case...would be ignoring Pennsylvania's valid interest in protecting its minors...." *Id.* at 291. In that case, the federal status of defendants was difficult to ascertain because none of the medical care was subsidized by the federal government and no one informed plaintiffs of defendants' federal status either when the services were provided or when the medical records were requested and delivered to plaintiffs' attorney. *Id.* at 287-91.

The *Albright* court also relied in part on the fact that Congress had amended the FTCA to allow a grace period for plaintiffs who mistakenly filed FTCA claims in court and then discovered the defendants were U.S. entities so that the plaintiffs could bring their FTCA claims to the federal agency as required. The court therefore concluded that not tolling the limitations requirements for minors "would also be placing the State's minors in a worse position than its adults who bring FTCA claims," because it would deprive the minors of the usual tolling they receive until they reach the age of 18. *Albright*, 320 F.Supp. 2d at 290-91.

D. Congress

The United States Congress has established that all states must toll the statute of limitations on criminal prosecution for sexual abuse, physical abuse, or kidnapping of a child until the child's death. *U.S. v. Jeffries*, 405 F.3d 682, 684 (8th Cir. 2005) (concerning 18 U.S.C. § 3283 (Bender 2005)).

II. Equitable Tolling for Children Without a Parent or Guardian

Most federal courts to date set out as a general rule that FTCA limitations do *not* equitably toll for children because their parents are assumed to act on their behalf and preserve their claims. *See, e.g., Crawford v. U.S.*, 796 F.2d 924, 927 (7th Cir. 1986). This rule acts as a corollary to the discovery rule—the parent's knowledge of the injury is imputed to the child. *See Fernandez v. U.S.*, 673 F.2d 269, 271 (9th Cir. 1982) (citing *U.S. v. Kubrick*, 444 U.S. 111 (1979)); *Hughes v. U.S.*, 263 F.3d 272, 276-78 (3d Cir. 2001) (relying on *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), in which the Supreme Court held that equitable tolling should apply to the government in FTCA actions just as it does to private litigants).

The Seventh Circuit has explained that the rule that the FTCA statute does not toll for minors is based on a presumption that the child's parent is an *adequate* surrogate, however. *Crawford*, 796 F.2d at 927. In this regard, the Ninth Circuit has extended equitable tolling to minors' FTCA cases when the minors do not have parents to speak for them. *Fernandez*, 673 F.2d at 271.

While no court has explicitly held that limitations should toll for a child who has a parent or guardian when that parent or guardian is not an "adequate means" of preserving the child's rights and claims, the Seventh Circuit has discussed the possibility of a rule that limitations should toll for a child whose parent or guardian has an adverse interest to the interest of the child or "could not be expected to make legal decisions in the best interests of the child." *McCall v. U.S.*, 310 F.3d 984, 988 (7th Cir. 2002). In *McCall*, the court found that the mother did not have interests adverse to her newborn child's, as evidenced by the fact that she sought legal counsel within six months of his birth. *Id.*

III. Other Laws Protecting Children

Children receive a free and appropriate education from the age of 3 to 21 (TEX. EDUC. CODE § 29.001 (2004)) and cannot work before age 14, with strict limitations on the hours and circumstances they can work when they are 14 and 15.

TEX. LAB. CODE §§ 51.013-51.014 (2004). Children are also restricted from free choice in many ways, deemed too young to make their own decisions or to bear the weight of the consequences of their decisions. Children must be 18 before they can:

- leave school (TEX. EDUC. CODE § 25.085(b) (2004)) (with certain exemptions for some 16 and 17 year olds);
- marry (TEX. FAM. CODE § 2.101 (2004)) (without parental or court consent);
- smoke (TEX. HEALTH & SAFETY CODE § 161.252 (2004));
- vote (TEX. CONST. art. VI, sec. 1);
- enlist (10 U.S.C. § 505(a) (Bender 2005)) (without parental consent);
- be drafted (50 U.S.C.S. Appx § 454 (Bender 2005)); or
- be sentenced to death. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (no death penalty for crimes committed before age 18).

These protections and restrictions last past age 18, as well. The legal drinking age is 21 (TEX. ALCO. BEV. CODE §§ 106.01, 106.04, 106.05 (2004)), and, under recent legislation, children in Texas state custody will receive foster care, adult living transitional services, and Medicaid coverage until they are 21. TEX. FAM. CODE § 264.121(A)(2)(a)-(b) (eff. Sept. 1, 2005), *as amended by* S.B. 6, 79th Leg., § 1.51 (June 6, 2005), *at* 2005 Tex. ALS 268.

Further, as a matter of common law, children can avoid all contracts because they have no capacity to enter into a binding legal contract regardless of their personal capacities. *Commissioner of Internal Revenue v. Allen*, 108 F.2d 961, 962 (3d Cir. 1939), *writ denied*, 309 U.S. 680 (1940). Statutes in some states allow children to enter into contracts under some circumstances. *E.g.*, TENN. CODE ANN. §§ 50-5-206, 50-5-207 (Tenn. 2005) (regarding children's limited ability to enter into artistic and creative services contracts). Ohio finds children incapable of contracting before 18. ORC Ann. 3109.01 (Bender 2005).



AMERICAN IMMIGRATION LAW FOUNDATION

REQUESTING ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT¹

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I. INTRODUCTION

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 et seq., authorizes payment of attorney's fees and costs for successful litigation against the government in the federal courts. A successful litigant who establishes eligibility under EAJA is entitled to a fee award for both litigating the case and litigating the fee request. Fees and costs under EAJA can be awarded without regard to what the client paid or did not pay, including in cases taken on a pro bono basis.

This advisory addresses the deadline for filing an EAJA fee application and discusses the statutory requirements for eligibility. In addition, the advisory addresses procedural aspects of filing an EAJA fee application, including documenting and calculating fees. Highlights of this advisory include:

Preparing for Filing an EAJA Fee Application Even Before Commencing Litigation

- Have a clear, written agreement with your client (and co-counsel, if any) at the outset of the representation regarding who is entitled to the fees in the event of a court award or settlement. Fees belong to the client absent a representation agreement to the contrary.

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- Keep contemporaneous time records with descriptive billing entries on all time spent by attorneys, paralegals and law clerks preparing for and litigating the case and an itemization and description of all costs incurred.
- Pursuant to the Supreme Court’s decision in *Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, a judicially enforceable court order or settlement agreement memorializing a federal court victory is necessary to establish prevailing party status.
- Although EAJA does not require it, it may be advisable to state in the original pleadings or brief that attorneys’ fees will be requested under EAJA.

Assessing EAJA Fee Eligibility and Filing an EAJA Fee Application After Winning in Federal Court

- The fee application must be filed within 30 days of entry of final judgment in the action; i.e. within 30 days after the expiration of time for filing an appeal, or, if an appeal is filed, within 30 days of entry of final judgment by the court of appeals or Supreme Court.
- The fee application must establish that the petitioning party is a prevailing party who has met the appropriate “net worth” requirements. The application also must allege that the pre-litigation and litigation position of government was not substantially justified and that there are no special circumstances that would make an award unjust.
- The fee application must include a statement of the total amount of fees and costs requested along with an itemized account of time expended and rates charged.
- If the fee application is for work performed in more than one court (i.e., district court and court of appeals), check the relevant case law and local court rules to see where the application should be filed.

This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client’s case. As the case law relating to EAJA is extensive and is not limited to immigration cases, attorneys are advised to research the case law in their circuits and consult local court rules.

II. PROCEDURAL REQUIREMENTS

A. Overview of the Components of an EAJA Fee Application

An application for fees and costs under EAJA should include the following:

- A written motion explaining why your client is statutorily eligible (See Part V)

- A signed affidavit executed by each named party attesting that he/she met the appropriate net worth requirements at the time the action was filed (See Part VD)
- Contemporaneous time records and description of costs (See Part IIB)
- Evidence of award calculation/formula used to calculate the requested fee award (See Part VI)

In addition, an application may include:

- An application form, if required by local rule
- Evidence of prevailing market rates for paralegal or law clerks in your area (surveys, declarations from other attorneys)
- Evidence of prevailing market rates for attorneys claiming enhanced rates based on specialize knowledge (See Part VIC)

Before filing an EAJA fee request (if not done earlier) attorneys should have a clear, written agreement with their client (and co-counsel) regarding who is entitled to the fees in the event of a court award or settlement. Fees belong to the client absent a representation agreement to the contrary.

B. Documenting Fees and Costs

1. Compensable work

In general, fee-shifting statutes like EAJA compensate for time that is "reasonably expended *on the litigation*." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). In preparing the fee request, the petitioning party should exercise "billing judgment," i.e. "make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary...." *Hensley*, 461 U.S. at 434.

The initial work performed before the immigration service or the immigration courts is not compensable.³ However, requesting compensation for time preparing litigation is permissible. The Supreme Court has expressly approved compensation for time spent drafting the initial pleadings and developing the theory of the case. *Webb v. Board of Education*, 471 U.S. 234, 243 (1985) (citation omitted).⁴

³ See *Ardestani v. INS*, 502 U.S. 129, 135 (1991). See also n. 9, *infra*.

⁴ But see *LaPointe v. Windsor Locks Bd. of Educ.*, 162 F. Supp. 2d 10, 18 (D.Conn. 2001) (reducing fee award for pre-litigation time spent in telephone conferences with client and co-counsel, drafting memos to file, drafting correspondence to her client because, that court concluded, "none of these activities were actually spent 'on the litigation'").

A petitioning party who has established eligibility for fee award is entitled to recover “fees on fees.” In other words, the party is entitled to compensation for time reasonably expended on litigating the fee request. *Commissioner, INS v. Jean*, 496 U.S. 154, 163-165 (1990).

2. Keeping Contemporaneous and Detailed Time Records

The EAJA fee applicant bears the burden of documenting fees and costs. *Hensley v. Eckerhart*, 461 U.S. 424, 438 (1983). A fee award may be reduced for insufficient or inadequate documentation. For this reason, it is best to keep contemporaneous time records indicating: (1) the date; (2) the identity of the timekeeper; (3) a description of the specific task performed; and (4) the amount of the time spent on the task.

Include some detail when describing the specific task performed. For example, instead of “research and drafting legal brief or motion” one might write “research for opening brief” or “drafting habeas petition.”⁵

Maintain a list containing the date and description of all costs stemming from the litigation, including, for example, filing fees, long-distance telephone and facsimile charges, messenger/courier fees, computer research and expert witness fees.

Itemize the fees and costs incurred. This will assist the court in determining whether the hours and costs claimed are reasonable for the work performed. Thus, an EAJA fee application should include a tally of the total number of hours expended on the litigation by each timekeeper, the total amount of costs, and the total amount of combined fees and costs requested.

3. Defending Against Allegations of Improper Time Records

Once an EAJA fee application is filed, the government’s response often raises objections to billing entries that it deems to be vague, imprecise or duplicative. The government will usually request that the court remedy the alleged impropriety by reducing any fee award in the exercise of discretion.

Case law addresses the degree of specificity required for billing records and whether the records, taken in context, are sufficient to identify the substance of the work done. In addition, presenting documentary or testimonial evidence from qualified attorneys who have reviewed the billing records and can attest that the records comport with general standards of timekeeping may rebut the government’s allegations of vague or non-descriptive billing records.

The government may also contest a claimed EAJA fee based on duplication and similarly request the court to reduce the award in the exercise of discretion. At least one circuit court has held that reductions for alleged duplication, however, are appropriate “only if

⁵ See *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) (“plaintiff’s counsel ... is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures.”).

the attorneys are *unreasonably* doing the *same* work.”⁶ The burden is on government to show specific instances of unreasonable duplication.⁷

The need for multiple attorneys to prepare briefs to ensure timely filing, share information, assign responsibilities, and plan strategy is well recognized.⁸

III. FILING DEADLINE

The EAJA statute requires fee applications to be filed within 30 days of "final judgment" in the action. 28 U.S.C. § 2412(d)(1)(B). A "final judgment" means a judgment that is final and not appealable, and includes an order of settlement. 28 U.S.C. § 2412(d)(2)(G). Thus, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal. In immigration cases (where longer appeal deadlines apply because the government is always a party), the time for filing an appeal varies depending on whether the case was litigated in district or circuit court.

In district court cases, a party has 60 days after the judgment or order is entered by the district court to file an appeal. Fed. R. App. P. 4(a)(1)(B). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 60-day time period for filing an appeal. If an appeal is taken, the district court's judgment is not final and therefore the 30-day period for filing an EAJA fee application does not begin to run until all the appellate proceedings are concluded. *Al-Harbi v. INS*, 284 F.3d 1080, 1084 (9th Cir. 2002) ("final judgment" is "the date on which a party's case has met its final demise, such that there is no longer any possibility that the district court's judgment is open to attack").

If the circuit court remands the case, a motion for fees must be filed within 30 days after the expiration of time for filing an appeal following the district court's entry of judgment on remand.

In circuit court cases, a party has 90 days after the judgment or order is entered by the circuit court to file a petition for certiorari to the Supreme Court. Sup. Ct. R. 13(1). Thus, an EAJA fee application must be filed within 30 days after the expiration of the 90-day time period for filing a petition for certiorari. *Al-Harbi v. INS*, 284 F.3d 1080 (9th Cir. 2002) and cases cited therein.

If a petition for rehearing is filed in the court of appeals, the 90-day period to file a petition for certiorari runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. Sup. Ct. R. 13(3). Moreover, if the losing party files a petition for certiorari, the circuit court's judgment is

⁶ *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original).

⁷ *McGrath v. County of Nevada*, 67 F.3d 248, 255-256 (9th Cir. 1995).

⁸ See, e.g., *Berberena v. Coler*, 753 F.2d 629, 633-634 (7th Cir. 1985); *McKenzie v. Kennickell*, 645 F. Supp. 437, 450 (D.D.C. 1986).

not final and therefore the 30-day period for filing an EAJA fee application would not begin to run until the Supreme Court denies the petition for certiorari. In the event that the Supreme Court grants the petition for certiorari, the 30-day period would not begin to run until the Supreme Court enters judgment or, if the case is remanded, until the circuit (or possibly the district court if the circuit court orders remand) enters judgment.

IV. WHERE TO FILE

The EAJA statute does not specify where to file an EAJA fee request. However, logic and common practice dictate that where only one court has considered the merits of the case, that same court should consider the merits of the EAJA fee request. In a petition for review, an EAJA fee application is properly filed in the court of appeals that adjudicated the petition. In district court actions where neither side appealed to the court of appeals, the application is properly filed in the district court where the action was adjudicated.

In district court actions where one side appeals on the merits, the issue of where to file is more complicated as the appellate court may issue the final judgment in the case when adjudicating the appeal or may remand the case for further proceedings. When an EAJA fee request includes fees for appellate work, it is advisable to review the appropriate circuit court case law and consult the court's local rules.

Some courts have indicated a preference for district courts to adjudicate fee requests that include appellate fees.⁹ Other courts have awarded fees for appellate work without remanding for the district court to award fees in the first instance.¹⁰ Still other courts

⁹ See, e.g. *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 144-45 (1st Cir. 1991) (noting that determination of fee award by appellate court in first instance would usurp trial court function); *McDonald v. Secretary of Health and Human Services*, 884 F.2d 1468, 1481 (1st Cir. 1989) ("Plaintiffs may also apply to the district court for attorneys' fees reasonably incurred in connection with the present appeal.") (footnote omitted); *Garcia v. Schweiker*, 829 F.2d 396, 398 (3d Cir. 1987) (reiterating the district court should set the fees for work in both courts when representation in each was required) (citation omitted); *Smith v. Detroit Bd. of Educ.*, 728 F.2d 359, 360 (6th Cir. 1984) (per curiam) (district court more appropriate forum to award fees incurred in appeal); *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 588-91 (9th Cir. 1984) (remanding to district court to reconsider award of attorney fees for appellate work); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1527 (10th Cir. 1984) (antitrust action remanded to district court to award appropriate attorney fees for appellate work), *aff'd*, 472 U.S. 585 (1985). See also *Spell v. McDaniel*, 852 F.2d 762, 766 (4th Cir. 1988) (reviewing district court award of fees for appellate work under § 1988). And see *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970) (stating that the amount of attorneys' fee award for appellate services under § 4 of the Clayton Act "should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered.").

¹⁰ See e.g. *Jenkins by Jenkins v. Missouri*, 127 F.3d 709, 719 (8th Cir. 1997) and cases cited therein.

have suggested that either the district court or the court of appeals may adjudicate fee requests that include fees for work on appeal.¹¹ In the Second Circuit, applications for appellate fees are filed directly with the court of appeals.¹²

Some courts have separate local rules for attorneys' fees requests in general and local rules for fee requests under EAJA. Many local rules expressly provide that the court of appeals may remand fee requests filed in the courts of appeals to the district court for adjudication upon a motion or in the exercise of the court's discretion.¹³

For a discussion regarding where to file an EAJA fee application for work done before the Supreme Court, see *Dague v. Burlington*, 976 F.2d 801, 803-805 (2d Cir. 1991).

V. STATUTORY REQUIREMENTS

The EAJA statute, 28 U.S.C. §§ 2412(d)(1)(A)&(B), directs that a fee application must include:

- A showing that the petitioning party is a prevailing party.
- An allegation that the pre-litigation and litigation position of government was not substantially justified. See also 28 U.S.C. § 2412(d)(2)(D).
- An allegation that there are no special circumstances that would make an award

¹¹ *Martin v. Heckler*, 754 F.2d 1262, 1265 n. 6 (5th Cir. 1985) ("In some cases, applications for fees and expenses should be considered in the district court in the first instance. In others, we may consider them first.") (citations omitted); *Ekanem v. Health & Hosp. Corp.*, 778 F.2d 1254, 1257 (7th Cir. 1985) ("our research reveals that a petition on entitlement to appellate attorneys fees may be filed in either the district court or the court of appeals"). See also 11th Circuit R. 39-2 (e) (permitting attorneys fees request to be filed in district court in lieu of court of appeals where appeal resulted in remand for further proceedings).

¹² *Smith v. Bowen*, 867 F.2d 731, 736 (2d Cir. 1989) ("applications [under the EAJA] for appellate fees in this Circuit should be filed directly with the Court of Appeals"); *McCarthy v. Bowen*, 824 F.2d 182, 183 (2d Cir. 1987) (per curiam) (directing the filing of EAJA appellate fee applications in court of appeals so that it may determine whether to enlist the aid of the district court in resolving disputed issues).

¹³ See e.g. 1st Circuit R. 39(a) ("The court in its discretion may remit any such [EAJA fee] application to the district court for a determination."); 8th Circuit R. 47A ("On the Court's own motion or at the request of the prevailing party, a motion for attorneys fees may be remanded to the district court or administrative agency for appropriate hearing and determination."); 9th Circuit R. 39-1.8 ("Any party who is or may be eligible for attorneys fees on appeal to this Court may, . . . , file a motion to transfer consideration of attorneys fees on appeal to the district court . . . from which the appeal was taken."); 11th Circuit R. 39-2 (d) (permitting motion to transfer fee application to district court from which the appeal was taken).

unjust.

- A showing that the petitioning party has met the appropriate “net worth” requirements. *See also* 28 U.S.C. § 2412(d)(2)(B).
- A statement of the total amount of fees and costs sought along with an itemized account of time expended and rates charged.

Each of these statutory requirements is discussed in detail below.

A. Prevailing Party Status

To qualify for an EAJA award, the petitioning party has the burden of proving that he is a prevailing party. A “prevailing party” is one who “has been awarded some relief by a court.” *Buckhannon Board of Care & Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 603 (2001).

1. Prevailing Party Status Cannot Be Based On the “Catalyst Theory”

Under the so-called “catalyst theory,” a litigant was entitled to prevailing party status if the lawsuit was a catalyst that prompted the government to voluntarily alter its conduct. For example, a party could be considered a “prevailing party” under the catalyst theory if the lawsuit prompted the government to voluntarily grant the requested relief or pass legislation that mooted the federal case.

In *Buckhannon*, the Supreme Court held that the “catalyst theory” is no longer a permissible basis for an attorneys’ fees award under the fee-shifting statutes at issue in that case. The “catalyst theory” “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” 532 U.S. at 605. The Court held that a party can only be deemed a prevailing party, for purposes of fee-shifting statutes such as EAJA, if there has been an enforceable “alteration of the legal relationship of the parties.” *Id.* at 621. Thus, under *Buckhannon*, a party whose suit prompts the precise relief sought may be a prevailing party if there is a judicially enforceable court entry memorializing the victory.

2. Types of Court Entries That May Prove Prevailing Party Status

Examples of court entries that may serve as the basis for an award of EAJA fees include enforceable judgments on the merits and settlement agreements that are favorable to one-side and enforceable through a consent decree. *Buckhannon*, 532 U.S. at 604-606. A consent decree is technically a judgment entered by consent of the parties whereby the government agrees to stop the alleged illegal activity without necessarily admitting guilt or wrongdoing.

Examples of court entries that may not serve as the basis for an award of attorney’s fees include judicial pronouncements that the government has violated the INA or the

Constitution without any grant of judicial relief. *Id.* at 606-607. In addition, changes in the actual circumstances of the parties that are not related to the federal court case may not be used as the basis for an EAJA fee award. *Id.* For example, if the BIA grants a motion to reopen or reconsider after the filing of federal lawsuit challenging the final removal order, the petitioner in the federal lawsuit cannot be considered a prevailing party for purposes of an EAJA fee award if the federal case has been mooted out by the BIA's order.

In light of *Buckhannon*, if the government grants the relief sought before the court decides the case on the merits, memorializing the victory in a court-approved order or settlement will preserve eligibility for an award of EAJA fees. In this situation, counsel also may face tactical and ethical questions, including whether to attempt to negotiate attorney's fees and costs in the order or settlement agreement or wait and file an EAJA fee request after the court approves the order or settlement agreement.

3. Court Ordered Remand

a. Remand Where the Court Enters Judgment

Whether a court-ordered remand to the Board confers prevailing party status can be tricky. The primary case on this issue is *Shalala v. Schaefer*, 509 U.S. 292 (1993). In *Shalala*, the Supreme Court held that a social security claimant who obtained a reversal and remand of a Secretary of Health and Human Services' administrative decision pursuant to sentence four of 42 U.S.C. § 405(g) was a prevailing party. 509 U.S. at 300-301. Significantly, in cases remanded under this section, the court enters judgment in the claimant's favor immediately and the litigation is terminated. In cases remanded under another social security provision, the court enters judgment after post-remand agency proceedings have been completed and their results are filed with the court. The Court's opinion in *Shalala* relied heavily on this distinction.

Therefore, *Shalala* supports finding prevailing party status when a court orders remand to the agency, enters a formal judgment immediately and does not retain jurisdiction over the federal court action. Arguably, the securing of the remand order is itself sufficient success on the merits to confer prevailing party status.

In *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997), the Ninth Circuit granted the petition for review of the denial of petitioners' asylum applications and remanded their case to the BIA for further proceedings in light of its decision. The court's order terminated the proceedings and the court did not retain jurisdiction over future appeals. Petitioners then sought attorney's fees under EAJA. The Ninth Circuit reasoned that, since it could "perceive no difference between a 'sentence four' remand under 42 U.S.C. § 405(g) [at issue in *Shalala*] and a remand to the BIA for further proceedings," petitioners who obtain such remand are prevailing parties. *Rueda-Menicucci*, 132 F.3d at 495. *See also Salem v. United States INS*, 122 F. Supp. 2d 980, 984 (C.D.II. 2000) (finding remand to the INS conferred prevailing party status under the rationale of *Rueda-Menicucci*).

As a practical matter, because the question of whether a party has prevailed on a significant issue in litigation potentially could be equated with whether the party requested the relief obtained, it is advisable to ask the court to vacate *and/or remand* the decision of the immigration service or court when drafting a request for relief.

b. Remand Where the Court Postpones Entering Judgment

If the court orders remand to the agency, postpones entering judgment until the completion of post-remand agency proceedings, and also retains jurisdiction over the federal court action, the petitioning party still may be eligible for prevailing party status if they are successful before the agency on remand.¹⁴ In this situation, there is some authority – primarily in the non-immigration context - suggesting that it *might* be possible to recover fees for administrative work on remand.

In *Ardestani v. INS*, 502 U.S. 129, 135 (1991), the Supreme Court held that EAJA fees cannot be awarded for the initial work done in administrative immigration proceedings. However, some courts have held that fees and costs for administrative work done pursuant to a remand order where the court retains jurisdiction (and postpones entering judgment until the remand proceedings are complete) are recoverable. *See Sullivan v. Hudson*, 490 U.S. 877, 889-890 (1989); *Melkonyan v. Sullivan*, 501 U.S. 89, 97 (1991); *Pollgreen v. Morris*, 911 F.2d 527, 536 (11th Cir. 1990) (INS forfeiture case); *Hafner v. Sullivan*, 972 F.2d 249, 252 (8th Cir. 1992).

B. Substantial Justification

An initial EAJA fee application must, at a minimum, *allege* that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).¹⁵ However, as the government routinely attempts to demonstrate that its position was substantially justified, it is advisable to fully brief this important issue in the initial fee application rather than waiting to brief it in the reply brief when page space is more limited.

¹⁴ *Shalala*, 509 U.S. 299-300, discussing *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989). *See also Former Emples. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1361 (Fed. Cir. 2003) (“We hold that parties who secure a consent order remanding a proceeding to an administrative agency because of an alleged error on the merits (where the court also retains jurisdiction) are ‘prevailing parties’ under EAJA if they succeed on the merits in the remand proceeding.”); *Davidson v. Veneman*, 317 F.3d 503, 505-506 (5th Cir. 2003) (where district court ordered remanded to Farm Services Agency and stayed motion for EAJA fees pending completion of remand proceedings and plaintiff was successful in remand proceedings, plaintiff was entitled to prevailing party status).

¹⁵ In *Scarborough v. Principi*, ___ U.S. ___, 124 S. Ct. 1856 (May 3, 2004), the Supreme Court held that a timely filed EAJA fee application may be amended after the 30-day filing period has run to cure an initial failure to allege that the government's position in the litigation lacked substantial justification.

Once the petitioning party establishes prevailing party status, the government can avoid payment of fees only if it can show that its pre-litigation conduct and litigation position were "substantially justified." In order to meet this heavy burden of proof, the government must show that its position has a reasonable basis both in law and in fact.¹⁶ The government should meet this threshold twice -- it must independently establish that the agency misconduct that gave rise to the litigation was substantially justified, and that its litigation positions were also substantially justified.¹⁷

Thus, if the court finds that the government's underlying, pre-litigation conduct lacks substantial justification, arguably the court need not consider whether its litigation positions were substantially justified.¹⁸

A court evaluates whether the government's position is reasonable based on several factors, including the clarity of the governing law¹⁹; the foreseeable length and complexity of the litigation, the consistency of the government's position, views expressed by other courts on the merits, legal merits of the government's position, and

¹⁶ See *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (defining substantially justified as "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person").

¹⁷ 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 158-160 (1990); *Dantran, Inc. v. United States DOL*, 246 F.3d 36, 41 (1st Cir. 2001) ("To satisfy its burden, the government must justify not only its pre-litigation conduct but also its position throughout litigation."); *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988) ("The inquiry into the existence of substantial justification therefore must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court.").

¹⁸ *Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990) ("The single finding that the Government's position lacks substantial justification, like the determination that a claimant is a 'prevailing party,' thus operates as a one-time threshold for fee eligibility."); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 138 (4th Cir. 1993) ("...*Jean* instructs that a single finding of governmental misconduct compelling a party to resort to litigation or to prolong litigation can open the door to recovery under the EAJA. . ."); *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993) (stating that "once a court determines that the government's position on the merits of the litigation is not substantially justified, it may not revisit that question as to any component of the dispute.") (citations omitted).

¹⁹ However, the government's position is not *per se* justifiable simply because the case involves a new statute or an issue of first impression. *United States v. Real Prop. at 2659 Roundhill Drive*, 283 F.3d 1146, 1153 (9th Cir. 2002) citing *Gutierrez v. Barnhart*, 274 F.3d 1255, 1261 (9th Cir. 2001) ("There is no *per se* rule that EAJA fees cannot be awarded where the government's position contains an issue of first impression"). *But see Cornell v. Schweiker*, 741 F.2d 170, 172 (8th Cir. 1984) (holding government reasonable in defending a district court judgment where "all of the purely legal issues were questions of first impression").

the stage at which the litigation was resolved. *See, generally, Jean v. Nelson*, 863 F.2d 759, 767-768 (11th Cir. 1988) *affirmed by Commissioner, INS v. Jean*, 496 U.S. 154 (1990).

In some circuits, there may be case law finding a *per se* lack of substantial justification where the government's position violates the Constitution, a statute, or its own regulations. *See, e.g., Mendenhall v. National Transp. Safety Bd.*, 92 F.3d 871, 874 (9th Cir. 1996) (citation omitted). *See also Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (concluding that "the agency's position lacked substantial justification because it was 'wholly unsupported by the text' of the applicable regulations.") (citation omitted).

Once the court determines that the government's position lacks substantial justification, the prevailing party is presumptively eligible for fees for all phases of the federal case unless the prevailing party has "unreasonably protracted" a portion of the litigation, which would warrant exempting fees for that portion of the litigation from the award.²⁰

C. Special Circumstances

The government has the burden of proving the existence of special circumstances that would make a fee award unjust.²¹ This "special circumstances" exception to awarding attorneys fees was intended as a "safety valve" to allow the government to advance "novel but credible" legal theories and to give courts discretion to deny awards for equitable considerations. This provision of the EAJA is to be narrowly construed so as to not interfere or defeat Congress's purpose in passing the EAJA.²²

Special circumstances include close or novel questions.²³ Equitable considerations can mean that the "prevailing party" acted in bad faith or has "unclean hands."²⁴

D. Net Worth

If an individual plaintiff's net worth did not exceed \$2,000,000 at the time the lawsuit was filed, he or she has met the net worth requirement for EAJA fee eligibility. 28 U.S.C. § 2412(d)(2)(B). A corporation must establish that it did not have more than 500 employees and its net worth did not exceed \$7,000,000 at the time the lawsuit was filed.

²⁰ 28 U.S.C. § 2412(d)(2)(D); *Commissioner, INS v. Jean*, 496 U.S. 154, 161 (1990).

²¹ 28 U.S.C. § 2412(d)(1)(A); *Abela v. Gustafson*, 888 F.2d 1258, 1266 (9th Cir. 1989).

²² *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985).

²³ *National Truck Equip. Ass'n v. NHTSA*, 972 F.2d 669, 671 (6th Cir. 1992); *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 431 (5th Cir. 1982).

²⁴ *Taylor v. U.S.*, 815 F.2d 249, 252-254 (3rd Cir. 1987); *Midwest Research Institute v. United States*, 554 F. Supp. 1379, 1392 (W.D. Mo. 1983), *aff'd*, 744 F.2d 635 (8th Cir. 1984); *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983).

28 U.S.C. § 2412(d)(2)(B). A non-profit entity must only show that it did not have more than 500 employees at the time the lawsuit was filed.

Net worth is calculated for each individual named party to the lawsuit. Net worth should, at a minimum, be documented by submitting a signed affidavit attesting that the petitioning party met the appropriate requirements at the time the lawsuit was filed.²⁵

VI. Calculating Fees, Rates and Adjustment for Inflation

EAJA fees are based upon “prevailing market rates for the kind and quality of the services furnished, except . . . attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A).

Thus, the statutory hourly rate of compensation for attorneys is \$125 for cases commenced on or after March 29, 1996. This amount can be “adjusted” or “enhanced” for inflation based on cost of living adjustments (COLA) or the presence of a special factor.

1. EAJA Statutory Rate Adjusted for Inflation

Most courts calculate the “adjustment” or “enhancement” for inflation by using the Consumer Price Index for All Urban Consumers (CPI-U).²⁶ The CPI-U is published by the Bureau of Labor Statistics and is updated monthly. It can be located on-line at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>. The courts measure the COLA as of March 1996, when the statutory hourly rate of attorney compensation was raised from \$75 per hour to \$125 per hour. The March 1996 CPI-U is 155.7, and also can be located on-line at the link above.

One formula that is often used for calculating the cost of living adjustment is:

$$\text{\$125} \times \frac{\text{(current CPI-U)}}{\text{(March 1996 CPI-U)}}$$

See Ramon-Sepulveda v. INS, 863 F. 2d 1458, 1463, fn. 4 (9th Cir. 1988); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004); *Edwards v. Barnhart*, 214 F.

²⁵ *United States v. Heavrin*, 330 F.3d 723, 732 (6th Cir. 2003); *Shooting Star Ranch, LLC v. United States*, 230 F.3d 1176, 1178 (10th Cir. 2000).

²⁶ *See, e.g. Harris v. Sullivan*, 968 F.2d 263, 264-266 (2d Cir. 1992) and cases cited therein; *Dewalt v. Sullivan*, 963 F.2d 27, 27-30 (3d Cir. 1992); *Sullivan v. Sullivan*, 958 F.2d 574, 578 (4th Cir. 1992); *Begley v. Secretary of HHS*, 966 F.2d 196, 199-200 (6th Cir. 1992); *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Ramon-Sepulveda v. INS*, 863 F. 2d 1458, 1463 (9th Cir. 1988).

Supp. 2d 700, 702, n. 3 (W.D. Tex. 2002); *Walker v. Barnhart*, 302 F. Supp. 2d 1072, 1075 (S.D. Iowa 2002).

Case law suggests that the regional CPI-U, and not the national, is appropriate to use in computing the EAJA rate adjusted for inflation.²⁷ For individuals in areas with higher costs of living, the use of the regional CPI-U would mean a higher statutory rate of compensation.

Some courts have required that COLA calculation be done for the year of the fee award. In the equation set forth above, this would mean that the “current” CPI-U reflects the figure of the current year.²⁸ More recently, however, courts have applied a COLA adjustment for each year in which the work was performed.²⁹ In the equation set forth above, this means that the hourly rate for each year attorney work was performed would require a separate COLA rate calculation using a different CPI-U figure for each year.

2. Enhanced Rates Based on Special Factors

Attorney rates also may be increased if a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. 28 U.S.C. § 2412(d)(2)(A)(ii). The Supreme Court has addressed the meaning of the phrase “the limited availability of qualified attorneys for the proceedings involved” as follows:

We think it refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of general lawyerly knowledge and ability useful in litigation. An example of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

Pierce v. Underwood, 487 U.S. 552, 572 (1988).³⁰

Some courts have recognized that a specialized knowledge of immigration law could warrant enhanced attorney rates.³¹

²⁷ See *Chen v. Slattery*, 842 F. Supp. 597, 600 n.2 (D.D.C. 1994); *Stanfield v. Apfel*, 985 F. Supp. 927, 931 (E.D. Mo. 1997); *Peterson v. Shalala*, 818 F. Supp. 241, 245 n. 3 (S.D. Ill. 1993).

²⁸ See e.g. *Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990); *Garcia v. Schweiker*, 829 F.2d 396, 401-402 (3d Cir. 1987).

²⁹ See e.g. *Sorenson v. Mink*, 239 F.3d 1140, 1143 (9th Cir. 2001); *Willett v. Interstate Commerce Com.*, 857 F.2d 793, 875 (D.C. Cir. 1998); *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992).

³⁰ In the Ninth Circuit, an enhanced rate may be warranted if the attorney possesses distinctive knowledge and skills developed through a practice specialty; the skills are needed in the litigation; and the skills are not available elsewhere at the statutory rate. *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (citation omitted).

Special factors do *not* include the limited availability of qualified attorneys, litigation that involves novel and difficult issues, the undesirability of the case, expertise of counsel, or the results obtained. These factors are considered “applicable to a broad spectrum of litigation” *Pierce*, 487 U.S. at 573.

Declarations from other attorneys will help document a claim for enhanced rates based on expertise in immigration law. The declarations could explain why immigration law expertise was necessary to litigating the case and further attest that petitioner/s would be unable to find an attorney with the requisite immigration expertise at the \$125 EAJA statutory rate.

3. Prevailing Market Rates

Attorneys Seeking Enhanced Rates

An attorney who has demonstrated entitlement to an enhanced rate based on special factors should be compensated based on prevailing market rates, 28 U.S.C. § 2412(d)(2)(A)(ii), without regard to whether the attorney is *pro bono* or retained for a fee. *Blum v. Stenson*, 465 U.S. 886, 895-6 (1984). The prevailing market rate need not reflect the rate charged to the client.

Market rate surveys are available to demonstrate prevailing rates of attorneys based on specialization, location, and years of experience. Declarations from other attorneys of similar expertise and years of experience attesting to their individual and/or firm’s hourly rate can also be submitted to establish prevailing market rates. For example, an attorney in Los Angeles with 8-10 years of immigration experience who is claiming an enhanced rate of \$300 per hour could document the prevailing market rate for their services by submitting one or more declarations from other immigration lawyers in Los Angeles with 8-10 years of similar immigration experience attesting that they routinely charge an hourly rate of \$300 (or more).

³¹ See, e.g. *Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997) (stating “a specialty in immigration law could be a special factor warranting an enhancement of the statutory rate” if that specialty is “needful for the litigation in question”); *Pollgreen v. Morris*, 911 F. 2d 527, 537-38 (11th Cir. 1990) (recognizing that a “special factor” rate adjustment might be appropriate for attorneys who have a special expertise in immigration law); *Douglas v. Baker*, 809 F. Supp. 131, 135 (D.D.C. 1992) (awarding enhanced EAJA rate based, in part, on attorneys extensive experience in immigration law). *But see National Ass'n of Mfrs. v. United States DOL*, 962 F. Supp. 191 (D.D.C. 1997) (“Unlike patent law, no technical education is necessary to excel in either” immigration or administrative law). See also *Atlantic Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 492-493 (1st Cir. 2000) (finding enhanced EAJA rate was improper because special experience in fisheries law was not required for competent representation in the case).

Law Clerks, Paralegals and Expert Witnesses

Law clerks, paralegals and expert witnesses also may be compensated under EAJA at the prevailing market rate.³² The prevailing market rate need not reflect the rate charged to the client. The statute provides that expert witnesses cannot be compensated at a “rate in excess of the highest rate of compensation for expert witnesses paid by the United States.” 28 U.S.C. § 2412(d)(2)(A)(i).

Market rate surveys often contain information on prevailing rates for law students and paralegals. Declarations from other attorneys attesting to the rates paid to law students and paralegals in the area also can be submitted to establish prevailing rates.

³² 28 U.S.C. § 2412(d)(2)(A); *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983); *Jordan v. U.S. DOJ*, 691 F.2d 514, 522-524 (D.C. Cir. 1982). *See also Missouri v. Jenkins*, 491 U.S. 274, 281-289 (1989).



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

August 15, 2005

MANDAMUS ACTIONS: AVOIDING DISMISSAL AND PROVING THE CASE

This advisory provides basic information about filing an immigration related mandamus action in federal district court. It discusses the required elements of a successful mandamus action as well as the jurisdictional concerns that sometimes arise. The information in this document is accurate and authoritative as of the date of this advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

Mandamus can be a relatively simple and quick remedy in situations where the government has failed to act when it has a duty to do so. However, there are a number of adverse published decisions, some of which are discussed in this advisory. Although it is helpful to understand these cases – and to identify the weaknesses in the courts' analyses – potential plaintiffs should not be discouraged. Most successful mandamus actions are unreported and/or do not result in written decisions. In fact, often, the filing of a mandamus action prompts the government to take whatever action is requested and the case ultimately is dismissed.

I. INTRODUCTION

Mandamus can be used to compel administrative agencies to act. The Mandamus Act, codified at 28 U.S.C. § 1361 says, in its entirety:

1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The Mandamus Act authorizes the court to order a remedy. It does not provide independent, substantive grounds for a suit. A mandamus plaintiff must demonstrate that: (1) he or she has a clear right to the relief requested; (2) the defendant has a clear duty to perform the act in question; and (3) no other adequate remedy is available. *Iddir v. INS*, 301 F.3d 492, 499 (7th

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Cir. 2002). Under the Mandamus Act, the court may compel the government to take action, but the court cannot compel the agency to exercise its discretion in a particular manner, nor can it grant the relief the plaintiff seeks from the agency.

II. JURISDICTION AND CAUSE OF ACTION

Plaintiffs in a mandamus action may allege subject matter jurisdiction under both the mandamus statute, 28 U.S.C. § 1361, and the federal question statute, 28 U.S.C. § 1331.² Generally, it is better to allege both grounds, in part because some courts have confused the issue of subject matter jurisdiction under § 1361, *see, e.g.*, footnote 2, and in part because the same complaint may seek mandamus relief and other forms of relief as well.

The Administrative Procedures Act (“APA”), 5 U.S.C. § 551 *et seq.* does not provide an independent basis for subject matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977). However, the APA provides a basis for the suit when the government unreasonably delays action or fails to act. *See* 5 U.S.C. §§ 555(b) and 706(1). Thus, the plaintiff may allege the APA as a cause of action. *Id.*

III. ELEMENTS OF A SUCCESSFUL MANDAMUS ACTION

A mandamus plaintiff must establish that

- (1) he or she has a clear right to the relief requested;
- (2) the defendant has a clear duty to perform the act in question; and
- (3) no other adequate remedy is available.

Not all courts analyze these issues the same way, or even consistently. Often, the courts mesh these issues or frame them differently. However, for clarity and completeness, this advisory addresses these issues individually.

A. Does the Plaintiff Have a Clear Right?

A mandamus plaintiff must show that he or she has a clear right to the relief requested. Sometimes, the courts say that a person has a clear right when they fall within the “zone of

² The court’s subject matter jurisdiction is a separate issue from the court’s authority to grant mandamus relief. *Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003). Subject matter jurisdiction is a threshold question that determines whether the court has the power to think about the case in the first place. *Id.* at 387. After the court has determined that the petitioner’s “claim is plausible enough to engage the court’s jurisdiction,” the court turns to the question of whether it has authority to grant the particular relief. *Id.*

The Seventh Circuit decision *Ahmed v. DHS* provides a good discussion of these two issues. Furthermore, *Ahmed* cites several cases where the courts have tended to collapse the question of subject matter jurisdiction into the analysis of the merits of the case. *See Ahmed*, 328 F.3d at 386; *see also Davis Associates v. Sec. of Dept. of Housing and Urban Dev.*, 498 F.2d 385, 388-89 (1st Cir. 1974).

interests” of a particular statute. This means that the interests the plaintiff seeks “to be protected are within those ‘zone of interests’ to be protected or regulated by the statute ... in question.”³

In immigration related mandamus actions, plaintiffs generally will identify a specific provision of the INA that creates a clear right to relief. The courts will look to the purpose of the statute – both the specific statutory provision in question, as well as the general purpose of the INA – to determine whether the mandamus plaintiff is an intended beneficiary of the statute. Said another way, the statute should indicate that the government owes a duty *to the plaintiff*.

Numerous courts have found that the INA establishes a clear right to relief for adjustment of status applicants. For example, diversity lottery applicants have established that the INA confers a right to have their applications adjudicated. *See Iddir*, 301 F.3d at 500 (affirmed in *Ahmed v. DHS*, 328 F.3d 383 (7th Cir. 2003));⁴ *Paunescu v. INS*, 76 F. Supp. 2d 896, 901 (N.D. Ill. 1999). Likewise, in *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999), the court said that applicants under the special immigrant juvenile program “fell within the zone of interest of the INA provisions for SIJ and LPR status.”

In contrast, several courts have said that the INA does not create a clear right to have deportation proceedings initiated. *See Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Hernandez-Avalos v. INS*, 50 F.3d 842, 847-48 (10th Cir. 1995); *Giddings v. Chandler*, 979 F.2d 1104, 1109-10 (5th Cir. 1992); *Gonzalez v. INS*, 867 F.2d 1108, 1109-10 (8th Cir. 1989). In these cases, the plaintiffs – immigrants who were serving criminal sentences – argued that former INA § 242(i) created a clear right to an immediate deportation hearing. Former section 242(i) said that the Attorney General shall initiate deportation proceedings “as expeditiously as possible after the date of conviction.” The courts concluded that this provision was enacted not to benefit the noncitizens, but instead, to address prison overcrowding and avoid the costs of detaining noncitizens; thus the detainees themselves are outside of the “zone of interest” of the statute.⁵

B. Is there a Mandatory Duty?

In addition to having a clear right to relief, the plaintiff must show that *the defendant owes him or her a duty*.⁶ The courts have said that this duty must be mandatory or ministerial, but

³ *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 150 (1970). The zone of interests test was first articulated by the Supreme Court in *Data Processing*. Although this case addressed the issue of standing, the zone of interests test was later used by some courts as a way to determine if the plaintiff has a clear right to relief for purposes of mandamus.

⁴ In both *Iddir* and *Ahmed*, the court denied the mandamus relief on other grounds, i.e., that the government did not have a duty to the plaintiffs.

⁵ The Ninth Circuit initially found that detained immigrants were within the zone of interests protected by former INA § 242(i). *Garcia v. Taylor*, 40 F.3d 299 (9th Cir. 1994); *Silveyra v. Mozhorak*, 989 F.2d 1012 (9th Cir. 1993). In *Campos*, however, the court held that a subsequent amendment to the INA, which provided that section 242(i) “shall not be construed to create any substantive or procedural right or benefit,” overrules its prior rulings in *Garcia* and *Silveyra*. *Campos*, 62 F.3d at 314 (citing § 225 of the Immigration and Nationality Technical Corrections Act of 1994). *See also Hernandez-Avalos*, 50 F.3d at 848 (citing § 225 as barring detainees’ standing).

⁶ *See, e.g., Naporano Metal & Iron Co. v. Sec’y of Labor*, 529 F.2d 537 (3d Cir. 1976) (duty to issue labor certification); *Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D.P.A. 2003) (ministerial duty to issue derivative citizenship); *Rios v. Aguirre*, 276 F. Supp. 2d 1195, 199-1200 (D. Kan. 2003) (no duty to entertain motion to reconsider).

mandamus actions can be used to compel the government to exercise its discretion in a case where the government has failed to take any action.⁷ Courts distinguish between the government's duty to take *some* discretionary action and the actual discretionary decision that the government makes. A court generally will not order the defendant to exercise its discretion in any particular manner. *See Silveyra v. Moschorak*, 989 F.2d 1012, 1015 (9th Cir. 1993). ("Mandamus may not be used to instruct an official how to exercise discretion unless that official has ignored or violated 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised.'") Rather, the court will order the government to take *some* action. As a result, be aware that filing a mandamus action may result in a prompt denial of the application.

The question of the defendant's mandatory duty is closely related to the question of the plaintiff's clear right to relief, and in many cases, the answer to these questions will be same. However, just because there is a clear right to relief does not mean that the government has an affirmative duty and vice versa. For example, in *Iddir v. INS*, the plaintiffs had a clear right to have their adjustment applications adjudicated, but the defendants did not have a duty to adjudicate them because the fiscal year statutory deadline had passed. 301 F.3d 492, 500-01 (7th Cir. 2002).⁸ Alternatively, in *Giddings v. INS*, the court held that although the INA imposes "a duty on the Attorney General to deport criminal aliens, we stop short of concluding that this created a duty *owed to the alien*." 979 F.2d 1104, 1110 (5th Cir. 1992). In doing so, the court noted the distinction between "imposing a duty on a government official and vesting a right in a particular individual." *Id.* (citing *Gonzalez v. INS*, 867 F.2d 1108, 1109 (8th Cir. 1989)).

Even if the government has a nondiscretionary duty to adjudicate an application, mandamus is appropriate only if the government fails to act within a reasonable amount of time. *See Kim v. Ashcroft*, 340 F. Supp. 2d 384 (S.D.N.Y. 2004) (noting that the section 555(b) of the APA requires the government to act within a reasonable amount of time); *Yu*, 301 F.3d at 930 (same). Where there is no statutory deadline for adjudicating an application, what is "reasonable" will depend on the circumstances of the case. The courts have found government delays unreasonable when the passage of time causes a plaintiff to become ineligible for the relief sought. *See, e.g., Harriott v. Ashcroft*, 277 F. Supp. 2d 538 (E.D. Pa. 2003) (granting mandamus where INS unreasonably delayed issuing derivative citizenship); *Yu v. Brown*, 36 F. Supp. 2d 922 (D.N.M. 1999) (granting mandamus where INS delayed adjustment under special immigration juvenile status); *but c.f. Ahmed*, 328 F.3d at 287 (finding no right to relief because delay resulted in plaintiff becoming ineligible for relief, but noting that the result may have been different if case filed while government still had authority to act).

⁷ For example, the court may order the defendant to adjudicate an application or petition. *See, e.g., Iddir v. INS*, 301 F.3d 492, 500 (7th Cir. 2002) (duty to adjudicate applications under the diversity lottery program); *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (duty to adjudicate visa application); *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999) (duty to process SIJ application in a reasonable amount of time).

⁸ Note, however, that the Eleventh Circuit did not reach the issue of whether the government had a duty to adjudicate the petitioner's adjustment of status application under the diversity visa program. *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003). Rather, in *Nyaga*, the court dismissed the case as moot because the fiscal year had ended.

In two district court cases where the plaintiffs filed mandamus complaints prior to the end of the fiscal year, relief was granted even though the visa was not issued prior to the end of the fiscal year. *See Przhelbetskaya v. USCIS*, 338 F Supp. 2d 399 (E.D.N.Y. 2004); *Paunescu v. INS*, 76 F. Supp. 2d 896 (N.D. Ill. 1999).

A mandamus plaintiff may look to regulations or internal operating procedures to find out if the agency itself has set guidelines.⁹ Plaintiffs also may look to what the agency's average adjudication period is; however, just because a delay is "not unusual" does not make it reasonable. *See Jeffrey v. INS*, 710 F. Supp. 486 (S.D.N.Y. 1989).

The following issues provide guidance on what is reasonable:

- (1) the time agencies take to make decisions must be governed by a "rule of reason";
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
- (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
- (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
- (5) the court should also take into account the nature and extent of the interests prejudiced by delay;
- (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (quoted in *Yu v. Brown*, 36 F. Supp 2d 922, 934 D.N.M. 1999)).

C. Is There Another Remedy Available?

The courts will not grant mandamus relief if the plaintiff has an alternative, fully adequate remedy available. This means that plaintiffs must exhaust their administrative remedies. *See, e.g., Cheknan v. McElroy*, 313 F. Supp. 2d 270, 274 (S.D.N.Y. 2004); *Henriquez v. Ashcroft*, 269 F. Supp. 2d 106, 108 (E.D.N.Y. 2003). Failure to exhaust may be excused, however, when one of the exceptions are established.¹⁰

⁹ However, the agency's delay may be unreasonable even if it adjudicates an application within the agency-specified timeframe. *See Singh v. Ilchert*, 784 F. Supp. 759, 764 (N.D. Cal. 1992) (finding that "the mere fact that the INS promulgates a regulation establishing a time period in which applications must be adjudicated does not, in and of itself, mean that an adjudication within the time period cannot constitute unreasonable delay").

¹⁰ Failure to exhaust may be excused if: (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an "indefinite time frame for administrative action"; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) substantial constitutional questions are raised. *See Iddir v. INS*, 301 F.3d at 498 (citations omitted).

Furthermore, courts generally will not grant relief if the plaintiff has a judicial alternative available. For example, in *Bhatt v. Board of Immigration Appeals*, the plaintiff asked the court to compel the BIA to adjudicate his motion to reconsider. 328 F.3d 912 (7th Cir. 2003). The court held that to the extent that the plaintiff can challenge the BIA's inaction, it must do so as part of a petition for review in the court of appeals. *Id.* at 915 n.3 (citing INA § 242(b)(9)). Similarly, in *Kulle v. Springer*, the court dismissed a mandamus action that sought to compel discovery in an immigration court proceeding. 566 F. Supp. 279 (N.D. Ill. 1983). The court said that the determinations involving discovery fall within the scope of the judicial review provisions of the INA (former section 106(a)). *Id.* at 280.

In several cases, the government has argued that applicants for adjustment of status are precluded from mandamus when the government has not initiated removal proceedings against them. The government has reasoned that (1) adjustment applicants have not exhausted remedies because they have not re-adjudicated their applications before the immigration court and the Board of Immigration Appeals in removal proceedings, and/or (2) there is (or will be) an alternative judicial forum available after removal proceedings conclude (i.e., petition for review under INA § 242). Although some courts have agreed with the government, *see, e.g., Sadowski v. INS*, 107 F. Supp. 2d 451 (S.D.N.Y. 2000), most courts have implicitly rejected this reasoning, and a few courts have rejected it explicitly. In *Iddir*, the court said that even though INS may initiate removal proceedings in the future, administrative exhaustion is excused because this situation constitutes an “indefinite timeframe for administrative action.”¹¹ 301 F.3d at 498-99 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992)).

III. OTHER THRESHOLD ISSUES

The following are some jurisdictional and other threshold issues that often arise in immigration mandamus actions.

A. Mootness

The courts will dismiss a civil action where the plaintiff's claim is moot. Some courts have found that when an agency fails to adjudicate an application, and, as result of the passage of time, the applicant becomes ineligible for the benefit requested, the issue is moot.

For example, in *Nyaga v. Ashcroft*, 323 F.3d 906 (11th Cir. 2003), the plaintiff asked the court to compel the government to adjudicate his adjustment application under the diversity visa program. The court found that the plaintiff was no longer eligible to receive a diversity visa because the fiscal year during which the visa was available had ended. *Nyaga*, 323 F.3d at 915-16.¹² As a result, his claim was moot.¹³ *Id.* at 916. Likewise, in *Sadowski v. INS*, the court

¹¹ The court also found that two other exhaustion exceptions applied: (1) the agency lacks the ability to grant the relief requested and (2) exhausting the administrative process would be futile.

¹² The plaintiff filed the complaint after the expiration of the fiscal year for which he had won the diversity visa lottery. Thus the court may have reached a different result if the complaint had been filed before the end of the year. *See Nyaga*, 323 F.3d at 915 n.7 (plaintiff's case arguably distinguishable from a case where complaint filed before end of year); *Paunescu v. INS*, 76 F. Supp. 2d 896, 898 (N.D. Ill. 1999) (mandamus issued where complaint

found that the plaintiff's claim was moot because he no longer was eligible for derivative beneficiary status, having turned twenty-one. 107 F. Supp. 2d 451, 454 (S.D.N.Y. 2000). *But see Harriott v. Ashcroft*, 277 F. Supp. 2d 538, 545 (E.D.P.A. 2003) (court ordered government to issue derivative citizenship nunc pro tunc where plaintiff alleged very compelling factors and government acted unreasonably).

B. Statutory Bars to Review under INA § 242, including Amendments by the REAL ID Act.

Section 242 of the INA bars jurisdiction over a variety of different issues in immigration cases. The REAL ID Act of 2005¹⁴ amended INA § 242 to include specific bars to judicial review by mandamus action. It is not clear what, if any, impact these purported bars will actually have. The majority of the amendments to provisions of INA § 242 pertain to judicial review of orders of removal or removal proceedings.¹⁵ Courts generally do not review removal orders or removal proceedings by means of mandamus actions. In fact, in one case in which this was tried in the past, the court found that INA § 242(g) barred jurisdiction in mandamus cases. The Second Circuit said that the court lacked jurisdiction to compel the government to execute a final order of deportation. *Duamutef v. INS*, 386 F.3d 172, 180-81 (2d Cir. 2004). Likewise, two courts have held that § 242(g) bars a plaintiff from seeking to have removal proceedings commenced. *Chapinski v. Ziglar*, 278 F.3d 718, 721 (7th Cir. 2002); *Alvidres-Reyes v. Reno*, 180 F.3d 199, 205 (5th Cir. 1999).

The government also frequently argues that INA § 242(a)(2)(B)(i) (bar over certain discretionary decisions) bars review in mandamus actions. The REAL ID Act amended this section to specifically bar mandamus review of discretionary decisions that are covered by INA § 242(a)(2)(B)(i). *See* REAL ID Act § 106(a)(1)(A)(ii). Additionally, the REAL ID Act amended this section so that it now applies to both removal and non-removal immigration cases. *See* REAL ID § 101(f)(2).

Notwithstanding the REAL ID Act's amendment to INA § 242(a)(2)(B)(i), this section generally will not apply in mandamus actions. Through mandamus, the plaintiff seeks an order compelling the government to take action; the court will not compel the government to grant or deny an application. Thus, because the plaintiff is not challenging a decision to deny relief, the relief sought is not discretionary and in fact, is by definition a mandatory duty. *See Iddir*, 301 F.3d at 497-98.

Additional information regarding the REAL ID Act can be found at AILF's REAL ID Act resource page, http://www.ailf.org/lac/lac_realidresources.htm.

filed before end of fiscal year); *see also Przebelskaya v. USCIS*, 338 F Supp. 2d 399, 405 (E.D.N.Y. 2004) (motion to compel granted where mandamus issued prior to end of fiscal year).

¹³ Note that in *Iddir*, the Seventh Circuit reached the same result, but did not rely on mootness. Rather, the court found that the government did not have a duty to adjudicate the application because the plaintiff was no longer eligible for a diversity visa. *Iddir*, 301 F.3d at 501.

¹⁴ P.L. 109-13, 119 Stat. 231 (May 11, 2005).

¹⁵ *See* amended INA §§ 242(a)(2)(A), (B) and (C); new § 242(a)(4); new § 242(a)(5); amended § 242(b)(9); and amended § 242(g).

C. Consular Nonreviewability

If a person is seeking to compel a consular officer to process an application or petition abroad, the government likely will claim that such a claim is barred under the doctrine of consular nonreviewability. The courts generally have held that they lack authority to review consular decisions. *See, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999).

However, the law is not firmly settled regarding the applicability of the consular nonreviewability doctrine to mandamus cases. *See Ahmed v. DHS*, 328 F.3d 383, 388 (7th Cir. 2003). And, in fact, the Ninth Circuit has found that it has authority to grant mandamus relief to compel a consular officer to act on a visa petition. In *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), the court ordered the U.S. Consulate in Bombay, India to act on the plaintiff's visa petition. Although the court acknowledged that "[n]ormally, a consular official's discretionary decision to grant or deny a visa petition is not subject to review," the court found mandamus jurisdiction when the consul "fail[s] to take an action." *Id.* at 931-32.

IV. PROCEDURES

Mandamus is a civil action and therefore, the Federal Rules of Civil Procedure and the district court's local rules apply. The local rules are available on the courts' websites.

Whom to Sue and Serve: Because mandamus actions seek to force an officer or employee of the government of the United States to take an action, the named defendant depends on the type of action the suit seeks to compel. For example, a mandamus action to compel the U.S. Citizenship and Immigration Services (USCIS) to adjudicate an application may name the USCIS District Director, USCIS Director, and the Secretary of the Department of Homeland Security (DHS) as defendants. It is better to be over inclusive in naming defendants, and if it is unclear which officer had the duty to act, name the agency/department or even the United States.¹⁶

If the defendant is DHS (or a department or officer within DHS), by regulation¹⁷ the complaint must be served to:

Office of the General Counsel
United States Department of Homeland Security
Washington, DC 20528

For more information about identifying the defendants and about service, please see AILF's Practice Advisory, "Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation" (Amended Aug. 19, 2004).

¹⁶ If the complaint turns out to be over-inclusive, the court may dismiss the complaint against the improperly named defendants and continue with the proper defendants. *See Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1997) (granting defendant's summary judgment in part, and denying in part).

¹⁷ Service of Summonses and Complaints, 6 C.F.R. § 5.42 (2004). The regulations list the zip code for DHS as 20258. The postal service indicates that no such zip code exists, however, and thus this appears to be a typographical error. The USCIS website lists the zip code noted above: 20528.

Venue: Venue for the mandamus action, unless otherwise specified in some other statute, can be in any judicial district in which the defendant “resides;” in which a substantial part of the events or omissions giving rise to the claim occurred; or in which the plaintiff resides. 28 U.S.C. § 1391(e).

Fee: Parties instituting a civil action in district court are required to pay a filing fee pursuant to 28 U.S.C. § 1914. The current fee is \$150. Complaints may be accompanied by an application to proceed in *forma pauperis*, if the plaintiff is unable to pay the filing fee.

Injunctive/Declaratory Relief: A mandamus suit is an action for affirmative relief, as compared to injunctive relief, which typically seeks to prohibit improper action. Although 28 U.S.C. § 1361 does not authorize injunctive relief, mandamus jurisdiction permits a flexible remedy. Furthermore, the same complaint may request declaratory, injunctive, and mandamus relief. For example, the court could declare a policy or regulation illegal, enjoin its enforcement, and order affirmative relief all at the same time.



AMERICAN IMMIGRATION LAW FOUNDATION

FEDERAL COURT JURISDICTION OVER DISCRETIONARY DECISIONS AFTER REAL ID: MANDAMUS, OTHER AFFIRMATIVE SUITS AND PETITIONS FOR REVIEW

Practice Advisory¹

By: Mary Kenney
Updated April 5, 2006

Section 242(a)(2)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(2)(B), restricts federal court review of certain discretionary decisions in immigration cases. The REAL ID Act² made two changes to INA § 242(a)(2)(B). This practice advisory discusses the changes made by the REAL ID Act. It also outlines an analysis for determining whether § 242(a)(2)(B) applies to a particular case. This same analysis can be used for either removal or non-removal cases. Thus, the analysis is useful in mandamus actions or other affirmative suits, such as a claim under the Administrative Procedures Act (APA), or in an appeal of a final removal order brought by a Petition for Review.³

Courts are continuing to interpret the impact of the REAL ID Act – including the changes to § 242(a)(2)(B) – on their jurisdiction. The cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits. Practitioners will need to research the current case law in your own circuit to ensure that

¹ Copyright (c) 2005, 2006, American Immigration Law Foundation. See www.aifl.org/copyright for information on reprinting this practice advisory. This practice advisory updates an earlier advisory dated September 7, 2005.

² See REAL ID Act, P.L. 109-13, 119 Stat. 231 (May 11, 2005). For general information about the act, including a “redlined” version of the judicial review provisions, see AILF’s REAL ID Act resource page at http://www.aifl.org/lac/lac_realidresources.shtml.

³ This practice advisory does not address jurisdiction over discretionary decisions in habeas cases, as other considerations come into play in these cases. For a discussion of how the REAL ID Act impacted habeas petitions, see AILF’s practice advisory “Judicial Review Provisions of the REAL ID Act,” http://www.aifl.org/lac/lac_pa_realid_051205_final.pdf.

there is no new and/or conflicting precedent. The information contained in this practice advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

What is INA § 242(a)(2)(B)?

INA § 242(a)(2)(B), entitled “Denials of Discretionary Relief,” restricts when federal courts have jurisdiction to review certain types of discretionary decisions and action by the government in immigration cases.

INA § 242(a)(2)(B) includes two subparts. For § 242(a)(2)(B) to apply, a case must fall within one of these two subparts. The first limits federal court jurisdiction over a “judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245.” 8 U.S.C. § 1252(a)(2)(B)(i). The second subpart restricts federal court jurisdiction over “any other decision or action . . . the authority for which is specified under this title [Title II] to be in the discretion of the Attorney General or the Secretary of Homeland Security.” 8 U.S.C. § 1252(a)(2)(B)(ii). Asylum decisions are specifically exempted from this bar on jurisdiction. *Id.*

How did the REAL ID Act amend INA § 242(a)(2)(B)?

The following is the amended version of § 242(a)(2)(B). The amendments made by the REAL ID Act are identified in bold.

(B) Denials of Discretionary Relief.-Notwithstanding any other provision of law **(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings,** no court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

(ii) any other decision or action of the Attorney General **or the Secretary of Homeland Security** the authority for which is specified under this title to be in the discretion of the Attorney General **or the Secretary of Homeland Security**, other than the granting of relief under section 208(a).

The REAL ID Act did not change the language of either subpart (i) or (ii), other than by adding a reference to the Secretary of Homeland Security. The Act did make two substantive changes to the paragraph preceding these subparts. First, it specified that the phrase “notwithstanding any other provision of law” applied to “statutory and

nonstatutory” law and included the habeas corpus statute, the mandamus statute, and the All Writs Act. REAL ID Act § 106(a)(1).⁴

Second, the REAL ID Act also expanded the scope of § 242(a)(2)(B) so that it now applies “regardless of whether the [discretionary] judgment, decision, or action is made in removal proceedings.” REAL ID Act § 101(f)(2).⁵ Prior to the REAL ID Act, some – though not all – courts had held that § 242(a)(2)(B) was applicable only in removal cases.⁶ Presumably, this amendment was intended to reverse these earlier court decisions.

Do these amendments eliminate all mandamus and other types of affirmative suits in non-removal cases?

No, these changes do not eliminate all jurisdiction over mandamus and other affirmative lawsuits in non-removal cases. To determine whether jurisdiction remains available in a particular case, a practitioner may carry out a several step analysis. This analysis is essentially the same as the analysis to determine whether jurisdiction exists in a removal case involving agency discretion. Consequently, court decisions interpreting § 242(a)(2)(B) in the removal context will be helpful in determining whether the provision applies in a non-removal case.

What steps are involved in determining whether a court has jurisdiction under § 242(a)(2)(B) in a removal or non-removal case?

The following is an outline of the analysis that can be used to determine whether a court has jurisdiction under § 242(a)(2)(B), whether in a petition for review of a final removal order, or in a mandamus or APA challenge in a non-removal case. A more detailed explanation follows this outline.

1. Does the issue/case fall completely outside the scope of INA § 242(a)(2)(B)?
 - A. INA § 242(a)(2)(B) only limits jurisdiction over certain discretionary actions and decisions.
 - B. INA § 242(a)(2)(B) does not apply to asylum decisions.
 - C. INA § 242(a)(2)(B) also does not apply to naturalization decisions.

⁴ This amendment was effective May 11, 2005 and applies to cases in which the final order of removal was issued before, on, or after May 11, 2005. REAL ID Act § 106(b). Of course, in a non-removal case, there will be no final order of removal. Thus there is a question as to how this effective date provision will be interpreted in the non-removal context.

⁵ This amendment was effective May 11, 2005 and applies to all cases pending before any court on or after the date of enactment. REAL ID Act § 101(h)(4).

⁶ See, e.g., *Ana International Inc. v. Way*, 393 F.3d 886, 891 and n. 3 (9th Cir. 2004) (declining to resolve this issue, but listing both cases that found INA § 242(a)(2)(B) was limited to removal and those that applied it in the non-removal context).

- D. INA § 242(a)(2)(B) does not apply to other discretionary decisions that fall outside of Title II, including discretionary decisions required in INA § 101, 8 U.S.C. § 1101.
2. Does the case fall under INA § 242(a)(2)(B)(i)?
 - A. Has there been an actual exercise of discretion?
 - B. Where the application for relief was addressed by the IJ, does the issue on appeal involve an exercise of discretion?
 3. Does the case fall under INA § 242(a)(2)(B)(ii)?
 - A. Is the challenged action or decision discretionary?
 - B. Is the decision or action *specified by Title II of the statute* to be discretionary?
 - C. Is the grant of discretion one of pure discretion unguided by legal principles? (9th Circuit cases).

How is this analysis applied?

The following is a discussion of each of these steps in the analysis:

1. Does the issue/case fall completely outside the scope of INA § 242(a)(2)(B)?

INA § 242(a)(2)(B) does not apply to every immigration-related case. Thus, the first step is to determine if the case is entirely outside the reach of § 242(a)(2)(B). There are at least four general categories of cases that arguably fall outside the reach of this section.

A. INA § 242(a)(2)(B) only limits jurisdiction over certain discretionary actions and decisions. Neither this section nor the REAL ID Act stripped federal courts of jurisdiction where the government has a nondiscretionary duty to act. In mandamus cases in particular, the existence of a mandatory, non-discretionary duty on the part of the government is an essential element of the claim. Thus, mandamus actions by definition generally should not fall within the restrictions of INA § 242(a)(2)(B).⁷ For more on mandamus actions, *see* “Mandamus Actions: Avoiding Dismissal and Proving the Case,” http://www.aifl.org/lac/lac_pa_010405.pdf.

B. INA § 242(a)(2)(B) does not apply to asylum decisions. As noted, for § 242(a)(2)(B) to apply, a case must fall within one of its two subsections. Asylum cases do not fall within either subsection. Asylum is not one of the forms of discretionary relief specifically mentioned in § 242(a)(2)(B)(i). Additionally, asylum is specifically

⁷ The REAL ID restriction on mandamus jurisdiction in § 242(a)(2)(B) is identical to six other amendments that the REAL ID Act made to sub-sections of INA § 242. *See amended* INA §§ 242(a)(2)(A) and (C); new §§ 242(a)(4) and (5); amended § 242(b)(9); and amended § 242(g). These other amendments all relate to removal proceedings. It is likely that Congress simply inserted the same language in all of the subsections for the sake of consistency, even though the mandamus restriction in § 242(a)(2)(B) should have – at most – limited application.

exempted from § 242(a)(2)(B)(ii). Consequently, § 242(a)(2)(B) should never be an issue with respect to federal court jurisdiction over asylum cases, even if the challenged agency action is a discretionary one. Of course, in any case there may be other bars to federal court jurisdiction, and a practitioner must thoroughly consider all other possible bars.

C. INA § 242(a)(2)(B) also does not apply to naturalization decisions.

Similarly, neither subsection of § 242(a)(2)(B) covers naturalization cases.

Naturalization is not among the benefits specifically listed in § 242(a)(2)(B)(i).

Additionally, § 242(a)(2)(B)(ii) states that it applies to agency decisions or action, “the authority for which is specified *under this title*” to be discretionary. The “title” referred to is Title II of the INA.⁸ Naturalization provisions do not appear in Title II but rather in Title III of the INA. *See* INA § 310 et seq., 8 U.S.C. § 1421 et seq. Consequently, INA § 242(a)(2)(B) should never be an issue in federal court jurisdiction over a naturalization decision, even one involving discretion.

D. INA § 242(a)(2)(B) should not apply to other discretionary decisions that fall outside of Title II, including discretionary decisions required in INA § 101, 8 U.S.C. § 1101.

There are a number of discretionary decisions that are authorized in provisions that fall within Title I of the INA, rather than Title II. As with naturalization cases, because these decisions fall outside of Title II they are not covered by INA § 242(a)(2)(B)(ii). Examples of these include (this is not an exhaustive list):

- Special Immigrant Juvenile Status (SIJS): The criteria for granting special immigrant juvenile status are contained in INA § 101(a)(27)(J). The government has argued that district courts do not have jurisdiction under § 242(a)(2)(B) to review the agency’s denial of “consent” required as part of SIJS proceedings, because the decision to grant consent is discretionary. A district court has rejected this argument because § 101(a)(27)(J) – which contains the consent requirements – is found in *Title I* of the INA, not in Title II. *See Young Zheng v. Pogash*, 2006 U.S. Dist. LEXIS 9383 (S.D. Tex. 2006).
- S, T, and U visas: The definition of the non-immigrant “T” visa category includes as an eligibility requirement that the Attorney General determine if the individual “would suffer extreme hardship involving unusual and severe harm upon removal.” INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T). The determination of extreme hardship has been held to be a discretionary determination. The exercise of the Attorney General’s discretion with respect to a T visa should not fall within the bar to jurisdiction in § 242(a)(2)(B)(ii), however, because the statutory authority for this discretion is found in Title I, not Title II. The definitions of the “S” and “U” visa categories contain similar grants of discretion that fall outside the scope of § 242(a)(2)(B). *See* INA §§

⁸ The codified version of the statute refers in 1252(a)(2)(B)(ii) to the term “title” II while the INA refers to “subchapter” II. Regardless of which name is used, the referenced provisions are the same.

101(a)(15)(S) and (U), 8 U.S.C. §§ 1101(a)(15)(S) and (U). To date, there have been no cases addressing this issue.

2. Does the case fall under INA § 242(a)(2)(B)(i)?

If the issue/case does not fall completely outside of the scope of INA § 242(a)(2)(B), the next step is to determine if it falls under the bar found in subsection (i) of INA § 242(a)(2)(B). This subsection restricts jurisdiction over “any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245.”

Where your case involves an application for relief under one of the provisions specified in § 242(a)(2)(B)(i), you must first consider whether jurisdiction is barred by this subsection. The following questions are relevant to this inquiry:

A. Has there been an actual exercise of discretion? The majority of courts that have interpreted this provision have found that the phrase “judgment regarding the granting of relief” applies only to the discretionary portion of the decision. *See, e.g., Iddir v. INS*, 301 F.3d 492, 497 (7th Cir. 2002); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2002); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003). Where there has been no exercise of discretion, there is no bar on jurisdiction.

Thus, under the majority line of cases there would be no bar either to the filing of a mandamus action or to the court’s ability to grant the mandamus and compel CIS to adjudicate a long-delayed case, since no discretionary decision had yet been made by the agency. *See Iddir*, 301 F.3d at 497.

B. Where the application for relief was addressed by the IJ, does the issue on appeal involve an exercise of discretion?

If it does, then jurisdiction will likely be barred under § 242(a)(2)(B)(i). *See, e.g., De la Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006) (citing cases) (hardship determination for cancellation is discretionary and therefore unreviewable); *Martinez-Rosas v. Gonzales*, 424 F.3d 926 (9th Cir. 2005) (same); *Bugayong v. INS*, ___ F.3d ___, 2006 U.S. App. LEXIS 6230 (2d Cir. 2006) (denial of an INA § 212(h) waiver in connection with an adjustment application was discretionary and therefore unreviewable).

In many cases, however, the issue will *not* be an exercise of discretion, but instead will be a non-discretionary eligibility issue involving a question of law. Ten Courts of Appeals have unanimously held that § 242(a)(2)(B)(i) does not apply to non-discretionary questions of statutory eligibility for the enumerated immigration benefits.⁹ The following

⁹ *See Singh v. Gonzales*, 413 F.3d 156, 160, n.4 (1st Cir. 2005); *Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7th Cir. 2004); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th

are examples of issues over which courts found jurisdiction even though the underlying application for relief was specified in § 242(a)(2)(B)(i):

- Whether a person has satisfied the continuous presence eligibility requirement for cancellation. *See Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2005); *Reyes-Vasquez v. Ashcroft*, 395 F. 3d 903 (8th Cir. 2005); *Tapia v. Gonzales*, 430 F.3d 1330 (11th Cir. 2005).
- Whether an adult daughter is a qualifying relative for purposes of the hardship requirement for cancellation. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137 (9th Cir. 2001).
- Whether a regulation violates INA § 245 (adjustment of status). *See Succar v. Ashcroft*, 394 F.3d 8, 19-20 (1st Cir. 2005).
- Whether a person lacks good moral character as a matter of law. *See Sepulveda v. Gonzales*, 407 F.3d 59 (2d Cir. 2005).
- Denials of motions to reopen, reconsider or remand where the agency has not yet made a discretionary decision on the underlying application. For example, courts agree that where the motion seeks reopening to apply for the discretionary relief in the first instance, the court has jurisdiction – because no application has yet been filed, the agency has not yet made a discretionary decision. Where the motion to reopen seeks review of the underlying discretionary determination, courts agree that there is no jurisdiction. *See, e.g., Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006) (setting forth a detailed explanation of when motions to reopen are reviewable and when they are not); *Obioha v. Gonzales*, 431 F.3d 400 (4th Cir. 2005); *Pilica v. Ashcroft*, 388 F.3d 941 (6th Cir. 2004); *Martinez-Maldonado v. Gonzales*, 437 F.3d 679 (7th Cir. 2006).

3. Does the case fall under INA § 242(a)(2)(B)(ii)?

In all other cases involving the exercise of agency discretion, a practitioner should finally consider whether subpart (ii) of § 242(a)(2)(B) applies. This subpart bars federal court jurisdiction over “any other decision or action” the “authority for which is specified under this title” to be in the agency’s discretion.

The Supreme Court has made clear that this subpart does not apply to issues that do not involve the exercise of discretion, such as a determination of the extent of the Attorney General’s authority under the INA. *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). Thus, for example, courts would retain jurisdiction to determine if the agency action was *ultra vires*. *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) (citing *Zadvydas*, 533 U.S. at 688).

Cir. 2005); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140 (9th Cir. 2002); *Schroeck v. Gonzales*, 429 F.3d 947, 950 n.2 (10th Cir. 2005); *Gonzales-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1332 (11th Cir. 2003). The only court that has not yet ruled on the issue is the Fourth Circuit. *Jean v. Gonzales*, 435 F.3d 475 (4th Cir. 2006).

Beyond this, there is disagreement among the courts as to how narrowly subpart (ii) should be interpreted. The following questions are relevant to an analysis of whether subpart (ii) of § 242(a)(2)(B) precludes jurisdiction.

A. Is the challenged action or decision discretionary?

An initial question is whether the challenged action is actually a discretionary one. The government is quick to argue that many actions and decisions have been left to agency discretion, but courts do not always agree. While the term “discretion” does not actually have to be used, courts have held that it must be clear that the agency is free to exercise its independent judgment.

For example, some courts have found that there is no grant of discretion where the statute *mandates* a certain result if the individual meets the eligibility requirements. *See e.g., Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d 683, 691 (9th Cir. 2003) (the statute mandates that immigrant investor visas “shall be made available ... to qualified immigrants); *Camphill Soltane v. U.S. DOJ*, 381 F.3d 143, 147 (3d Cir. 2003) (the statute “makes clear that the Attorney General is required to grant preference visas to those who fall within certain numerical limitations and qualify as ‘special immigrants’”); *Shokeh v. Thompson*, 369 F.3d 865, 868 (5th Cir. 2004) (“Nowhere is it ‘specified’ that the bond determination is a ‘discretionary’ decision of the Attorney General”). Similarly, courts have found that the agency is not exercising discretion where there are specific legal guidelines that must be applied to reach a decision. *See e.g., Nakamoto v. Ashcroft*, 363 F.3d 874 (9th Cir. 2004) (the question of whether marriage fraud exists is a factual issue determined through the application of traditional legal standards).

Even where the statute does authorize discretion on the part of the agency, one court has found that jurisdiction remains if the agency has not satisfied a statutorily mandated prerequisite to the exercise of discretion. *See Firstland v. INS*, 377 F.3d 127 (2d Cir. 2004) (interpreting prior version of the statute).

In contrast, there are other decisions which courts have found to be clearly discretionary. *See, e.g., Van Dinh v. Reno*, 197 F.3d 427 (10th cir. 1999) (no jurisdiction over discretionary decision as to where to detain non-citizen); *CDI Information Services, Inc., v. Reno*, 278 F.3d 616 (6th cir. 2002) (no jurisdiction over discretionary denial of an extension of a non-immigrant visa); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154 (3d Cir. 2004) (denial of a waiver of the joint filing requirement to lift conditional residency for lack of good faith marriage is a discretionary decision); *Zhu v. Gonzales*, 411 F.3d 292 (D.C. Cir. 2005) (denial of a waiver of the labor certification requirement is a discretionary decision); *Saloum v. USCIS*, 437 F.3d 238 (2d Cir. 2006) (no jurisdiction over denial of a smuggling waiver under INA § 212(d)(11)).

B. Is the decision or action specified by Title II of the statute to be discretionary?

INA § 242(a)(2)(B)(ii) requires that the action or decision be *specified* by Title II of the statute to be in the agency's discretion. Thus, even where the challenged action or decision is clearly discretionary, it is important to evaluate whether the authority for the action is "specified" by statute.¹⁰ Some courts have interpreted this language very strictly, holding that for the subpart to apply, the "language of the statute must provide the discretionary authority." *Spencer Enterprises, Inc. v. U.S.A.*, 345 F.3d at 689.

Several courts have held that INA § 242(a)(2)(B)(ii) does not preclude jurisdiction over a motion to reopen because the *statute* does not specify a grant of discretion to the Attorney General with respect to motions to reopen. See *Zhao v. Gonzales*, 404 F.3d 295, 302-03 (5th Cir. 2005) (as it is only the regulations that specifically authorize discretion over these motions, there is no bar to jurisdiction); *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005); *Infanzon v. Ashcroft*, 386 F.3d 1359 (10th Cir. 2004) (reaching the same result but relying on slightly different reasoning).

Courts are divided with respect to this same issue as it applies to continuances. Two courts have held that they retain jurisdiction to review the denial of a continuance since only the regulations – not the statute – address continuances. *Manzano-Garcia v. Gonzales*, 413 F.3d 462 (5th Cir. 2005); *Zafar v. Attorney General*, 426 F.3d 1330 (11th Cir. 2005). Two other courts have also found jurisdiction, though based on different reasoning. See *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004); *Abu-Khaliel v. Gonzales*, 436 F.3d 627 (6th Cir. 2006). At least two courts have reached the opposite conclusion. Both of these courts found that INA § 242(a)(2)(B)(ii) was applicable because the regulations governing continuances were promulgated pursuant to INA § 240, 8 U.S.C. § 1229a. *Onyinkwa v. Ashcroft*, 376 F.3d 797 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F. 3d 990 (10th Cir. 2004).

C. Third, is the grant of discretion one of pure discretion unguided by legal principles?

Finally, in at least the Ninth Circuit, the *degree* of discretionary authority is relevant. The Ninth Circuit has held that § 242(a)(2)(B)(ii) "applies only to acts over which a statute gives the Attorney General pure discretion unguided by legal standards or statutory guidelines." *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1142 (9th Cir. 2005) quoting *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004). Under this standard, the Ninth Circuit has found § 242(a)(2)(B) to be inapplicable if "there are legal and factual questions that are not subject to the pure discretion of the [agency]." *Oropeza-Wong*, 406 F.3d at 1142. Explained another way, "if the statutory provision granting the Attorney General power to make a given decision also sets out specific standards governing that decision, the decision is not "in the discretion of the Attorney General.'" *Ana International Inc. v. Way*, 393 F.3d 886, 892 (9th Cir. 2004). Under this standard, the

¹⁰ As noted earlier, an initial step in the analysis is also to determine whether the case involves Title II of the INA. Where it does not, INA § 242(a)(2)(B) should not apply. See page 4-5, *infra*.

court has found that the following issues do not involve “pure” discretion and thus are not subject to the bar on jurisdiction found in § 242(a)(2)(B)(ii):

- The authority to revoke a visa under the statutory standard of “good and sufficient cause,” *Ana International Inc. v. Way*, 393 F.3d at 893-94 (this refers to a meaningful standard that the Attorney General may “deem” applicable or inapplicable in a particular case, but which he does not manufacture anew in every case”); *but see El Khader v. Monica*, 366 F.3d 562 (7th Cir. 2004) (a visa revocation was a discretionary decision over which jurisdiction was barred by INA § 242(a)(2)(B)(ii)).
- A determination as to whether a marriage was entered in good faith for purposes of a waiver of the joint filing requirement to remove conditional residency, *Oropeza-Wong v. Gonzales*, 406 F.3d 1135 (9th Cir. 2005); *accord Cho v. Gonzales*, 404 F.3d 96 (1st Cir. 2005); *but see Urena Taverez v. Ashcroft*, 367 F.3d 154 (3d Cir. 2004) (the good faith waiver was explicitly discretionary).

Although other courts have not adopted this “pure discretion” standard, practitioners can argue that it should be adopted in any circuit where the issue has not yet been decided.

What is the impact of INA § 242(a)(2)(D)?

INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), was added to the statute by the REAL ID Act. It restores jurisdiction to federal courts over legal and constitutional issues where such jurisdiction would be otherwise precluded by other statutory provisions such as INA § 242(a)(2)(B). As relevant here, § 242(a)(2)(D) states that:

Nothing in [INA § 242(a)(2)](B) ... which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In essence, this section codifies for purposes of petitions for review the court decisions that held that § 242(a)(2)(B) did not apply to statutory eligibility issues and similar questions of law. It thus provides an additional basis for demonstrating to a court that it has jurisdiction over legal issues in a petition for review.

AILF believes that § 242(a)(2)(D) only applies to petitions for review of final orders of removal and has no applicability in non-removal cases in district court. The government has argued in district court APA cases that this new section strips district courts of jurisdiction over the action. AILF believes that this interpretation is wrong. If you have a non-removal case in district court where this issue has been raised, please contact Mary Kenney at mkenney@ailf.org.

In interpreting this new provision, several courts have held that a constitutional claim must be colorable to restore jurisdiction under INA § 242(a)(2)(D). *See Saloum v.*

USCIS, 437 F.3d 238 (2d Cir. 2006) (alleged due process claim was actually a claim of abuse of discretion which was not reviewable under INA § 242(a)(2)(B)); *Elysee v. Gonzales*, 437 F. 3d 221 (1st Cir. 2006) (no colorable constitutional claim where claims concern factual findings and balancing of factors behind discretionary decision).

The following are examples of constitutional or legal issues over which courts have found that they have jurisdiction under INA § 242(a)(2)(D):

- Whether the Board applied the correct legal standard to determine if a crime was “particularly serious” for purposes of withholding of removal. *Afridi v. Gonzales*, ___ F.3d ___, 2006 U.S. App. LEXIS 8073 (9th Cir. 2006).
- Whether the withdrawal of an application for admission constitutes a break in physical presence for cancellation. *Mendez-Reyes v. Attorney General*, 428 F.3d 187 (3d Cir. 2005).
- Whether the IJ’s denial of an adjustment application violated res judicata. *Hamdan v. Gonzales*, 425 F.3d 1051 (7th Cir. 2005).
- Whether the agency’s interpretation of the hardship standard for cancellation violated international treaties. *Cabrera-Alvarez v. Gonzales*, 423 F. 1006 (9th Cir. 2005).



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹
Updated May 25, 2005
(following the enactment of the REAL ID Act of 2005)

HOW TO FILE A PETITION FOR REVIEW

I. HIGHLIGHTS OF THIS ADVISORY

This Practice Advisory addresses the current procedures and general requirements for filing and litigating a petition for review. In addition, the advisory addresses the following fundamental points of which counsel should be aware when filing a petition for review:

- * **Petitions for review must be filed no later than 30 days after the date of the decision of the Board of Immigration Appeals (BIA) or the United States Immigration and Customs Enforcement (ICE). This deadline is jurisdictional and, with limited exceptions, cannot be tolled. The petition for review must be received by the clerk's office on or before the thirtieth day and not merely mailed by that date.**
- * **The 30-day deadline for filing a petition for review of the underlying decision is not extended by the filing of a motion to reopen or reconsider nor is it extended by the grant or extension of voluntary departure. To obtain review of issues arising from a BIA decision and issues arising from the denial of a motion to reopen or reconsider, separate petitions for review of each BIA decision must be filed.**
- * **Filing a petition for review does not stay the individual's removal from the country.**
- * **Filing a petition for review does not necessarily stay the individual's voluntary departure period.**
- * **ICE can deport an individual before the 30-day deadline expires.**

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- * **If in doubt about whether the court of appeals has jurisdiction, it may be prudent to timely file the petition for review to preserve the individual's right to seek review.**

Sample petitions for review are attached as Appendices A and B. A copy of IIRIRA § 309 is attached as Appendix C. A list of websites for the courts of appeals is attached as Appendix D. A list of national addresses for service of the petition is attached as Appendix E. An unofficial “redlined” version of INA § 242, that is, showing the amendments made by the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (May 11, 2005) is located at: www.aifl.org/lac/lac_realidresources.htm. The information in this document is current as the date of this advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

II. BACKGROUND AND INTRODUCTION

A petition for review is the document filed by, or on behalf of, an individual seeking review of an agency decision in a circuit court of appeals. In the immigration context, a petition for review is commonly filed to obtain review of a decision of deportation, exclusion, or removal issued by the Board of Immigration Appeals (BIA). In addition, a petition for review may be filed to obtain review of a removal order issued by the United States Immigration and Customs Enforcement (ICE) under certain provisions of the Immigration and Nationality Act (INA).

Through the enactment of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress eliminated the distinction between deportation and exclusion proceedings and combined them into a single “removal” proceeding. Judicial review of final removal orders, resulting from removal proceedings commenced after IIRIRA's effective date (April 1, 1997), is governed by INA § 242, 8 U.S.C. § 1252. On May 11, 2005, through the enactment of the REAL ID Act of 2005, Congress amended this provision. The REAL ID Act expands the jurisdiction of the courts of appeals to consider, on petition for review, certain issues previously precluded by IIRIRA. The courts of appeals now have jurisdiction to review all constitutional issues and questions of law related to a final order of removal, deportation or exclusion issued before, on, or after the enactment date. The REAL ID Act also purports to eliminate all review of final orders of removal, deportation or exclusion by habeas corpus. See generally, INA § 242 as amended by the REAL ID Act

Prior to the enactment of the REAL ID Act, judicial review of final deportation or exclusion orders, resulting from proceedings commenced before April 1997, was generally governed by transitional rules set forth in IIRIRA § 309. The REAL ID Act modified this rule, stating that petitions for review of orders of deportation or exclusion filed under the transitional rules “shall” be treated as if filed as a petition for review under new INA § 242 (as amended by REAL ID Act § 106(d)). A copy of IIRIRA § 309 is reprinted in Appendix C.

AILF has issued a practice advisory on the new judicial review provisions of the REAL ID Act. See “Judicial Review Provisions of the REAL ID Act” (May 12, 2005), located at www.aifl.org/lac/lac_pa_051205.pdf.

III. COURT OF APPEALS JURISDICTION OVER PETITIONS FOR REVIEW

Determining whether a circuit court possesses subject matter jurisdiction to review a decision or a particular issue often requires a complicated legal analysis. Such determinations also are highly dependent on constantly evolving case law. The amendments made by the REAL ID expand the scope of petition for review jurisdiction. In time, the courts will decide the extent of that jurisdiction.

This section is meant to illustrate the types of decisions that may be reviewed through a petition for review. It is not exhaustive and should not be substituted for independent legal research regarding governing case law.

The following are examples of the types of decisions that may be reviewed through a petition for review:

A BIA decision to:

- * issue a final removal order, including an affirmance without opinion
- * deny a motion to reconsider or a motion to reopen, or
- * affirm an Immigration Judge's denial of an asylum application.

An order of removal issued by ICE under:

- * INA § 241(a)(5), or
- * INA § 238(b)

A challenge to a BIA or ICE decision may involve one or more of the following types of claims: legal, constitutional, factual, or discretionary. In general, legal claims assert that the BIA/ICE erroneously applied or interpreted the law (for example, the INA or the regulations); constitutional challenges assert that the BIA/ICE violated a constitutional right (for example, due process or equal protection); factual claims assert that certain findings of fact made by the BIA/ICE were erroneous; and discretionary claims assert the BIA/ICE reached the wrong conclusion when exercising discretion.

Whether a claim is reviewable in the court of appeals involves additional analysis. The first question to consider is whether the INA contains a bar to review related to the decision, nature of the claim, or the person bringing the challenge. For example, INA § 208(a)(3), 8 U.S.C. § 1158(a)(3) bars review of determinations regarding whether an asylum application was timely filed within one year of arrival; INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) bars court of appeals review of expedited removal orders; INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) and IIRIRA § 309(c)(4)(E) bars review of certain discretionary judgments, and INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) and IIRIRA § 309(c)(4)(G) bar petitions for review filed by, or on behalf of, individuals found removable due to certain criminal offenses.

If, and only if, the INA contains a bar to review related to the decision, nature of the claim, or the person bringing the challenge, then the claim must present either a question of law or a constitutional claim for the court to have jurisdiction over the petition for review. The REAL ID

Act added new INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), which provides that the bars to judicial review do not apply if the petition for review raises a question of law or constitutional claim. Thus, under the REAL ID Act, a court of appeals has jurisdiction over a petition for review that raises constitutional issues or questions of law even in cases that otherwise would be barred.

In addition, courts should continue to retain jurisdiction to determine whether they have jurisdiction over the petition for review. AILF believes that this should be true even if the issues involve mixed questions of law and fact.

As discussed in Section IV, below, until the courts address the REAL ID Act amendments, and specifically which, if any, issues remain reviewable via habeas corpus, it is advisable to timely file a petition for review to preserve petitioner's right to seek review.²

IV. PETITION REQUIREMENTS

Filing Deadline – New Cases

A petition for review “must be filed not later than thirty days after the date of the final order” of removal or the final order of exclusion or deportation. See INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (removal orders); IIRIRA § 309(c)(4)(C) as amended by REAL ID § 106(d) (deportation and exclusion orders). Emphasis added.

The thirty-day deadline for filing a petition for review of the underlying decision is not extended by the filing of a motion to reopen or reconsider nor is it extended by the grant or extension of voluntary departure. To obtain review of issues arising from a BIA decision and issues arising from the denial of a motion to reopen or reconsider, separate petitions for review of each BIA decision must be filed. If separate petitions are not filed, the Court's review may be limited to the issues arising from the BIA decision for which review is sought. For example, if a petition for review of the BIA's decision denying a motion to reopen or reconsider has been filed but a petition for review of the BIA decision underlying the motion has *not* been filed, issues arising from the underlying BIA decision may not be preserved for review.

The deadline for filing a petition for review is “mandatory and jurisdictional” and is “not subject to equitable tolling” *Stone v. INS*, 514 U.S. 386, 405 (1995). Because the thirty-day deadline is jurisdictional, circuit courts lack authority to consider late-filed petitions for review.³

² AILF believes review of detention issues still is available in habeas corpus proceedings.

³ There are very few situations in which a court might excuse a late-filed petition for review, for example: (1) where the court or the BIA provided misleading information as to the deadline for filing a petition for review; and (2) where the BIA failed to comply with the applicable regulations regarding mailing the decision to petitioner or petitioner's counsel. For further information on these situations and potential remedies, see AILF's practice advisory entitled “Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court” April 20, 2005, located at www.ailf.org/lac/lac_pa_042005.pdf.

The thirty-day time period begins running from the date of the BIA's decision affirming the Immigration Judge. If the BIA denied a motion to reopen or reconsider, the thirty-day time period begins running from the date of the BIA decision denying the motion. In reinstatement cases under INA § 241(a)(5) or administrative deportation cases under INA § 238(b), the thirty-day deadline begins running from the date of the final ICE order.⁴ The petition for review must be received by the clerk's office on or before the thirtieth day and not merely mailed by that date.

Where the thirty-day deadline has expired due to ineffective assistance of counsel, new counsel may consider filing a motion to reopen to the BIA (provided the motion is filed within the ninety day statutory time period for filing motions to reopen). Counsel may also consider filing a motion requesting that the BIA rescind and re-issue its decision to allow petitioner to seek judicial review.⁵

Filing Deadline – District court cases transferred pursuant to the REAL ID Act

The new law provides that district courts “shall” transfer habeas corpus petitions challenging a final order of removal that are pending in the district court on May 11, 2005 (the date that the REAL ID Act was enacted) to the court of appeals in which a petition for review could have been filed (i.e. the circuit having jurisdiction over the place the immigration judge completed proceedings). The REAL ID Act specifies that only habeas petitions that challenge final orders of deportation, exclusion, or removal (or the part of the habeas petition challenging such an order) should be transferred.

The courts of appeals must treat the transferred case as if it was filed as a petition for review, with one exception. The one exception is that the requirement that a petition for review must be filed within 30 days of the final removal order does not apply to these transferred cases. This means that a habeas petition challenging a final order that was pending in district court on May 11, 2005 will be transferred to the court of appeals even if the habeas petition was not filed within 30 days of the final removal order. However, the 30 day deadline continues to apply to all other petitions for review.

This potentially creates a serious problem for some individuals. Prior to the REAL ID Act, an individual barred from filing a petition for review might have been able to get review through a habeas corpus petition. For example, many individuals with criminal convictions were barred from filing a petition for review under INA § 242(a)(2)(C). However, these individuals previously could have filed a habeas corpus petition. There is no deadline for filing a habeas petition. There will be individuals who relied on pre-REAL ID Act law and thus will not have

⁴ Pursuant to *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) (rehearing pending), only immigration judges may make reinstatement determinations under INA § 241(a)(5). Presumably, the immigration judge's decision may be appealed to the BIA. Thus, in the Ninth Circuit, the thirty-day clock should begin running from the date of the BIA's decision.

⁵ For further information regarding motions to rescind and reissue, see AILF's practice advisories entitled “Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court” (April 20, 2005) and “Judicial Review Provisions of the REAL ID Act: Strategies For Dealing With The Expansion Of Jurisdiction In The Court Of Appeals (May 20, 2005), both located on AILF's webpage at www.ailf.org/lac/lac_index.asp.

filed a petition for review within 30 days of their final order. If they did not have a habeas petition pending on May 11, 2005, they may be unable to have their cases transferred to the court of appeals pursuant to the REAL ID Act's transfer provision. Thus, these individuals conceivably could be barred from any federal court review under the REAL ID Act: they will no longer be able to file a habeas petition and will have missed the thirty-day deadline for filing a petition for review. AILF has issued a practice advisory with administrative suggestions for people in this situation. See "Judicial Review Provisions of the REAL ID Act: Strategies For Dealing With The Expansion Of Jurisdiction In The Court Of Appeals (May 20, 2005), located at www.aifl.org/lac/lac_pa_realid2_052005.pdf. AILF is also exploring federal court arguments. If you have a client in this situation, please contact realidcourts@aifl.org.

Attachments and Contents

Under INA § 242(c), 8 U.S.C. § 1252(c), a petition for review must and need only: (1) include a copy of the final administrative order; and (2) state whether any court has upheld the validity of the order, and if so, state which court, the date of the court's ruling, and the type of proceeding.

The petition should state the name of each individual petitioning for review and should not use "et al." to reference more than one petitioner. Federal Rule of Appellate Procedure (FRAP) 15(a)(2)(A). For example, where a family is in immigration proceedings but the BIA decision only references the lead respondent, the petition for review should name each family member whose case was decided by that order, even if not specifically mentioned in the order.

A sample petition for review is attached as Appendix A. Although it is not necessary at this stage to discuss the jurisdictional basis or merits of the petition a more detailed sample petition for review, containing the basis for jurisdiction and venue, is also provided as a reference and is attached as Appendix B.

V. STAY OF REMOVAL AND STAY OF VOLUNTARY DEPARTURE

The Immigration and Customs Enforcement (ICE) can deport petitioner before the 30-day deadline for filing a petition for review has run.

ICE may deport an individual as soon as the BIA issues its order. In reinstatement cases under INA § 241(a)(5) and administrative removal cases under INA § 238(b), deportation may occur as soon as ICE issues its removal order. In the post-AEDPA and IIRIRA era, serving the petition for review does not stay deportation, "unless the court orders otherwise." Compare former INA § 1106(a)(3), 8 U.S.C. § 1105a(a)(3) with INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) and IIRIRA § 309(c)(4)(F). Thus, petitioner also may want to file for a stay of the removal order pending the petition for review. The court must grant the stay request to prevent petitioner's removal from the country.

The varying circuit standards for, and strategic pros and cons of, applying for a stay of removal are discussed in greater detail in AILF's October 2004 Practice Advisory entitled, *Applying for a Stay of Removal in Federal Court Proceedings* (www.aifl.org/lac/lac_pa_102504.pdf).

In addition to requesting a stay of removal, the petitioner also may need to file a motion for stay of the voluntary departure period. In most circuits, the voluntary departure period begins to run from the date that the BIA issues its decision. If the petitioner remains in the United States past the departure date, he or she may lose the opportunity to depart voluntarily and may become ineligible for various forms of relief from removal for a period of ten years. See INA § 240B(d), 8 U.S.C. § 1229c(d). A motion for a stay of the voluntary departure period may need to be filed before the voluntary departure period expires.

The law regarding how to protect voluntary departure while the petition for review is pending is unsettled in many circuits; in fact, there are many pending cases that will address this issue. Attorneys are advised to review AILF's Practice Advisories on this topic (www.ailf.org/lac/lac_pa_092604.pdf) and to independently confirm whether the law in their circuit has changed since the date of that advisory.

VI. WHERE TO FILE THE PETITION FOR REVIEW

Venue is restricted to the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); IIRIRA § 309(c)(4)(D). This requirement imposes a special hardship on individuals who are ordered removed while detained at detention centers in remote locations where counsel is often limited or unavailable.

VII. FILING FEE

The filing fee for a petition for review is usually \$250, but counsel should check local court rules to verify the fee amount. A list of web addresses for the U.S. courts of appeals is attached in Appendix D and can also be located at www.uscourts.gov. Petitioner may request leave to proceed *in forma pauperis* by filing a motion and supporting affidavit with the court. See FRAP 24(b) and corresponding local circuit rules.

VIII. SERVICE ON RESPONDENT

Whom to Sue

Through the enactment of IIRIRA § 306(a)(2), Congress changed the designated respondent in a petition for review from the Immigration and Naturalization Service (INS) to the Attorney General. *Compare* former INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3) *with* INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A). Therefore, in *removal* cases, the respondent is the Attorney General, Alberto Gonzales.

Judicial review of *deportation and exclusion* cases is governed by IIRIRA's transitional rules. Because the REAL ID Act provides that petitions for review in transitional rule cases shall be treated as if filed under INA § 242 as amended by the new law, the Attorney General should be named as the respondent. See REAL ID § 106(d). As INA § 242(b)(3)(A) provides that the respondent is the Attorney General in removal cases, the provision should also apply in transitional rule cases. Thus, in deportation and removal cases, the respondent is also the Attorney General, Alberto Gonzales.

Whom to Serve

The petition must be served “on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 240 was entered.” INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A).⁶

Serve the Attorney General by sending a complete copy of the petition for review to the address set forth in Appendix E. Attorneys from the Office of Immigration Litigation (OIL), a division within the Civil Division of the Department of Justice, litigate on behalf of the Attorney General with one exception.⁷ Thus, it is advisable to also serve a copy of the petition on OIL at the address listed in Appendix E. After receiving a copy of the petition, the OIL attorneys assigned to the case will usually enter their appearance before the court by letter and should inform petitioner’s counsel.

To serve the officer in charge of the district, counsel should serve the ICE Field Office Director for Detention and Removal with jurisdiction over the district where the final administrative order was issued. Counsel may need to make inquiries to learn the name of the officer in charge of detention and removal in their area. Counsel will also need to ascertain the proper mailing address for the ICE Field Office Director in order to serve this official.

At the same time, petitioner must file a certificate of service listing the names and addresses of those served and the manner of service. Federal Rules of Appellate Procedure (FRAP) 15(c). Addresses for the Attorney General and the Office of Immigration Litigation is attached as Appendix E. Because local ICE office addresses are subject to change, there is no list of these addresses attached. Instead, counsel will need to contact the local ICE office to get the correct address. FRAP 15(c) further requires that petitioner must give “the clerk enough copies of the petition . . . to serve each respondent.” Presumably, an original plus one copy of the petition must be filed where the Attorney General is the only named respondent. However, counsel should verify the number of copies required by checking local procedures or contacting the clerk’s office. *See also* FRAP 25 (Filing and Service) and corresponding local court rules.

Service of Future Pleadings

After opposing counsel has entered their appearance, future pleadings “must be made on the party’s counsel” by a prescribed method. FRAP 25(b)&(c). Such pleadings must be filed with either (1) an acknowledgement of service by the person served, or (2) a statement by the person effectuating service attesting to the date and manner of service, the names of those served, and the appropriate mail, email or delivery address or facsimile number, depending on the manner of service. The proof of service may appear on or be affixed to the pleading. See FRAP 25(d)(3). The local rules set out acceptable methods of service. A list of websites for the courts of appeals is attached as Appendix D.

⁶ If the order of removal was entered under another section of law, for example, INA §§ 238(b) or 241(a)(5), counsel presumably is still bound by the service requirements of INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A).

⁷ In the Second Circuit, Assistant US Attorneys handle petitions for review.

IX. LITIGATING THE PETITION IN THE COURT OF APPEALS

Admission and Entry of Appearance

Attorneys must be admitted to practice before the court of appeals in which the petition for review is filed or, in some courts, must file an application for admission either simultaneously or within a proscribed time period. Some courts allow an attorney who is not admitted to appear pro hac vice or, if appointed, to represent a petitioner proceeding in forma pauperis.

Virtually all courts of appeals require counsel to enter an appearance in each case. Entry of Appearance forms are generally available on the court's website and from the clerk's office.

For further information regarding admission and appearance requirements, counsel should consult FRAP 46 and corresponding local circuit rules. Information is also available on court websites. *See* Appendix D, listing websites for the courts of appeals.

Federal Rules of Appellate Procedure

The rules and procedure for litigation in the courts of appeals are governed by the Federal Rules of Appellate Procedure in conjunction with each circuit's local rules. This advisory provides a brief overview of appellate procedure related to petition for review litigation, however, it does not address all of the Federal Rules of Appellate Procedure nor does it address local circuit rules.

Once a petition for review is filed, the court generally issues an order/schedule for the parties to file the Certified Record of Proceedings (also known as the "Administrative Record"), Petitioner's Opening Brief (and possibly Excerpts of Record), Respondent's Answering Brief (and possibly Excerpt of Record), and Petitioner's Reply Brief (optional).

Certified Record of Proceedings

The agency is obligated to file the Certified Record of Proceeding (also called the Certified Administrative Record), within 40 days of service of the petition for review. FRAP 17(a). The record must include (1) the order involved; (2) any findings or report on which it is based; and (3) pleadings, evidence, and other parts of the proceeding before the agency, including the transcripts of hearings. FRAP 16(a). Where the petition seeks review of a BIA order, the record is prepared by the Executive Office for Immigration Review and filed by OIL.

Supplemental Authorities – 28(j) Letters

If pertinent and significant authorities come to petitioner's attention after briefing is completed or after oral argument but before the court issues a decision, counsel should advise the court of the supplemental citations pursuant to FRAP 28(j). The advisal is made by letter and copied to opposing counsel. "The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited." FRAP 28(j).

Oral Argument

Pursuant to FRAP 34, any party may file, or a court may require by local rule, a statement explaining why an oral argument should, or need not, be permitted. Oral arguments must be permitted unless a panel of three judges decides that:

- (1) the appeal is frivolous;
- (2) the dispositive issue(s) have already been decided; or
- (3) the facts and arguments are adequately presented in the briefs and records.

The court clerk will notify the parties of the date, time, place, and time allotted for argument if the court determines oral argument is necessary.

Judgment and Post-Judgment Review Timing

The judgment (or decision) is entered on the docket by the clerk after he or she receives the court's opinion or upon the court's instruction (where judgment is rendered without opinion). FRAP 36 (Entry of Judgment). A petition for rehearing or petition for rehearing en banc may be filed within 45 days after entry of judgment, unless otherwise specified by the court or local rule. FRAP 35 (En Banc Determination) and 40 FRAP (Petition for Panel Rehearing). Unless the court directs otherwise, the mandate will automatically issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. FRAP 41.

Briefing Schedule

INA § 242(b)(3)(C), 8 U.S.C. § 1252(b)(3)(C) states that petitioner must serve and file the opening brief no later than forty days after the date on which the administrative record is available, and further states that petitioner may serve and file a reply brief within fourteen days after service of the government's brief. *See also* FRAP 31(a)(1) ("The appellant must serve and file a brief within 40 days after the record is filed."). The statute and rule say these deadlines may only be extended by motion upon a showing of good cause. INA § 242(b)(3)(C), FRAP 31(a)(1). Also, if the brief is not filed, INA § 242(b)(3)(C) instructs courts to dismiss the appeal unless a manifest injustice would result.

Most courts do not rely on the time frame in the statute or rule, but rather issue a schedule setting out due dates for the filing of both the administrative record and the briefs. Further, it is common for counsel on either side or both sides to move to extend the briefing schedule or move to hold briefing in abeyance. Written motions are governed by FRAP 27 and corresponding local rules. Some courts also allow telephonic motions for an extension of time to file a brief.

Some confusion may arise if the government fails to timely file the administrative record, the court has not issued a new schedule reflecting a later due date for petitioner's opening brief and the brief due date is approaching. Although arguably the due date for petitioner's opening brief should automatically be postponed in this situation (by operation of INA § 242(b)(3)(C) and FRAP 31(a)(a)), the courts operate under their own briefing schedules. Petitioner will be well advised to move for an extension of the briefing schedule on the basis that the administrative record has not been filed, citing the statute and the rule. The court should grant the motion and set a new briefing deadline.

However, the courts rarely but occasionally have denied such a motion and have required petitioners to file an opening brief without the administrative record. In this event, petitioner

should comply with the court's order and timely file the opening brief. If counsel has all or some of the record below (perhaps as a result of prior representation or a Freedom of Information Act Request), petitioner should include an appendix with the relevant portions of the record accompanied by a motion for leave to file those portions and should cite to the improvised record in the opening brief. Counsel could object, either in the brief or in an accompanying pleading, that the court's requiring the opening brief to be filed without the administrative record infringes on petitioner's right to appeal, as counsel cannot adequately present an appeal without access to the complete record below. Counsel also might move to file a supplemental or corrected brief, if necessary, after the administrative record is filed.

In addition, the briefing schedule may be delayed or vacated if the government files a motion to dismiss for lack of subject matter jurisdiction claiming that petitioner is barred from direct review in the court of appeals (under INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) or IIRIRA § 309(c)(4)).

When filing briefs in the circuit courts, counsel should consult FRAP 28 (Briefs), 30 (Appendix to the Briefs), 31 (Serving and Filing), and 32 (Form of Briefs, Appendices, and Other Papers) as well as all corresponding local rules. A list of websites for the courts of appeals is attached as Appendix D.

APPENDIX A: SAMPLE PETITION FOR REVIEW

Notes:

1. Complete ALL underlined spaces (except “Case File No.”) as appropriate, depending on whether petitioner seeks review of a final order of removal, deportation, or exclusion. The Court Clerk’s Office will assign a Case File Number.
2. Attach a copy of the BIA decision. If seeking review of an order of removal under INA §§ 241(a)(5) or 238(b), attached a copy of the ICE decision (see n.4).
3. Attach a Certificate of Service, attesting to service on (1) the Attorney General; (2) the Office of Immigration Litigation; and (3) ICE Field Office Director for Detention and Removal.
4. Always check local circuit court rules regarding filing fee amount, pleading format, the number of copies required for submission, and rules regarding admission and entry of appearance as counsel.

UNITED STATES COURT OF APPEALS FOR THE _____ CIRCUIT

<p>[Name of Petitioner],</p> <p>Petitioner,</p> <p>v.</p> <p>Alberto GONZALES,</p> <p>Attorney General,</p> <p>Respondent .</p> <hr style="width: 100%;"/>	<p>)</p>	<p>Case File No. _____</p> <p>Immigration File No.: A _____</p> <p>PETITION FOR REVIEW</p>
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The above-named Petitioner hereby petitions for review by this Court of the final order of removal / deportation / exclusion entered by the Board of Immigration Appeals / Immigration and Customs Enforcement (ICE) (if ordered removed under INA § 241(a)(5) (see n. 4) or INA § 238(b)) on date of decision. A copy of the decision is attached.

To date, no court has upheld the validity of the order. (Note: If the validity of the order has been upheld, state name of the court, date of court’s ruling, and the kind of proceeding).

Dated: _____

Respectfully submitted,

Attorney/s Name
 Firm / Organization
 Address

Telephone:
Facsimile:
Attorney/s for Petitioner

Jurisdiction is asserted pursuant to 8 U.S.C. § 1252(a)(1) (removal cases) / § 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as amended by § 106 of the REAL ID Act of 2005 (deportation and exclusion cases).

Venue is asserted pursuant to 8 U.S.C. § 1252(b)(2) (removal cases) / IIRIRA § 309(c)(4)(D) (deportation/exclusion cases) because the immigration judge / ICE (in cases under INA §§ 241(a)(5) or 238(b)) completed proceedings in City, State, within the jurisdiction of this judicial circuit.

This petition is timely filed pursuant to 8 U.S.C. § 1252(b)(1) (removal) / IIRIRA § 309(c)(4)(C) (deportation / exclusion) as it is filed within 30 days of the final order of removal / deportation / exclusion.

Dated: _____

Respectfully submitted,

Attorney/s Name
Firm / Organization
Address
Telephone:
Facsimile:

Attorney/s for Petitioner

APPENDIX C: TRANSITIONAL RULES

NOTE: The transitional rules set forth in former INA § 106(a)(1995) and IIRIRA § 309 (below) must be read in conjunction with § 106(d) of the REAL ID Act of 2005, which provides:

(d) Transitional Rule Cases. A petition for review filed under former INA § 106 of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1252 note) shall be treated as if filed as a petition for review under 242 of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section. Notwithstanding any other provision of law, (statutory or nonstatutory), including section 2241 of Title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion.”

IIRIRA § 309

Effective Dates; Transition.

(a) In General.-Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

(b) Promulgation of Regulations.-The Attorney General shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date.

(c) Transition for Aliens in Proceedings.-

(1) General rule that new rules do not apply.-Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective Date-

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) Attorney General option to elect to apply new procedures.-In a case described in paragraph

(1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) Attorney General option to terminate and reinitiate proceedings.-In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under chapter 4 of title II the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

(4) Transitional changes in judicial review.-In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary-

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

APPENDIX D: WEBSITES FOR U.S. COURTS OF APPEALS

First Circuit: www.ca1.uscourts.gov

Second Circuit: www.ca2.uscourts.gov

Third Circuit: www.ca3.uscourts.gov

Fourth Circuit: www.ca4.uscourts.gov

Fifth Circuit: www.ca5.uscourts.gov

Sixth Circuit: www.ca6.uscourts.gov

Seventh Circuit: www.ca7.uscourts.gov

Eighth Circuit: www.ca8.uscourts.gov

Ninth Circuit: www.ca9.uscourts.gov

Tenth Circuit: www.ca10.uscourts.gov

Eleventh Circuit: www.ca11.uscourts.gov

DC Circuit: www.cadc.uscourts.gov

APPENDIX E: LIST OF ADDRESSES FOR SERVICE OF A PETITION FOR REVIEW

Attorney General

Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of Immigration Litigation

Thomas W. Hussey, Director
Office of Immigration Litigation
U.S. Department of Justice / Civil Division
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

ICE District Offices

Service must also be made on the Field Office Director or, where none exists, the most senior officer in the Detention & Removal Unit. Counsel will need to contact the local ICE office to obtain the name and position title of the appropriate local officer and to obtain the mailing address for service on this individual.



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

November 12, 2003

Updated August 19, 2004 and August 30, 2005

WHOM TO SUE AND WHOM TO SERVE IN IMMIGRATION-RELATED DISTRICT COURT LITIGATION

By Trina A. Realmuto²

INTRODUCTION

This Practice Advisory addresses who is, or who may be, the proper respondent-defendant and recipient for service of process in immigration-related litigation in district court.³ Earlier versions of this practice advisory addressed whom to sue and serve in immigration-related habeas corpus petitions. Several subsequent developments have further complicated that issue, including the Supreme Court's decision in *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004) and the enactment of the REAL ID Act of 2005.⁴ In light of these developments, this practice advisory does not discuss habeas corpus petitions. Instead, AILF will issue a separate practice advisory on this topic with respect to habeas petitions, to be located at: www.ailf.org/lac/lac_pa_index.asp.

Part I of this advisory contains a general overview of potential officials and entities that might be proper respondents-defendants in district court. Part I also addresses whom to sue in specific types of immigration-related actions, including mandamus actions, Federal

¹ Copyright (c) 2005, American Immigration Law Foundation. See www.ailf.org/copyright for information on reprinting this practice advisory.

² Trina Realmuto works with AILF's Legal Action Center as an attorney consultant. She can be contacted at trina_realmuto@sunrise.ch.

³ The terms petitioner-plaintiff and respondents-defendants are used throughout this advisory to refer to the person filing the action and the person/entity being sued, respectively. For example, in federal question or mandamus actions, the person who files the action is the plaintiff and each person/entity sued is a defendant. In habeas actions, the person who files the action is the petitioner and each person/entity being sued is a respondent.

⁴ Pub. L. 109-13, 119 Stat. 231 (May 11, 2005).

Tort Claims Act actions, and *Bivens* actions. Part II discusses the Federal Rules of Civil Procedure that govern service of process in most immigration-related district court actions. Part III covers adding and substituting respondents-defendants after the initial complaint is filed.

A list of addresses for service is attached as Appendix A and sample certificate of service is attached as Appendix B.

The information in this document is current as of the date of this advisory. The advisory discusses some local practice and procedures. Local practices may vary. Always check your local court rules and procedures. As future court decisions or laws could change the existing law or create new law on this issue, counsel are advised to independently confirm whether the law in their circuit has changed since the date of this advisory.

PART I: WHOM TO SUE

A. General Overview of Potential Respondents-Defendants

District court actions are generally brought against the officer/s or entity/entities responsible for the alleged wrongdoing and capable of providing the relief sought unless otherwise specified by statute or case law as discussed below. As the government's reorganization has shifted the responsibilities of the former Immigration and Naturalization Service (INS),⁵ it is important to identify all the officials, entities or even executive departments (often there is more than one) that may be able to grant the requested relief when filing an action in district court.

In general, most immigration-related actions in district court likely will name one or more of the following:

- * The United States
- * DHS Secretary and/or the Attorney General
- * DHS and ICE/USCIS (depending on the nature of the suit)
- * ICE Assistant Secretary or CIS Director

⁵ The Homeland Security Act of 2002 (HSA), Pub. L 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the Immigration and Nationality Service and transferred its responsibilities to bureaus within the newly established Department of Homeland Security (DHS), which is headed by the Secretary of Homeland Security (currently Michael Chertoff). Within DHS, Immigration and Customs Enforcement (ICE) is responsible for the detention and removal of non-citizens; U.S. Citizenship and Immigration Services (USCIS) is responsible for adjudications of applications for immigration and citizenship benefits; and Customs and Border Protection (CBP) is responsible for immigration and customs inspections and border patrol. The Executive Office for Immigration Review (EOIR), which includes the Board of Immigration Appeals (BIA) and the immigration courts, remains under the direction of the Attorney General within the Department of Justice.

- * The USCIS District Director or the ICE Field Office Director for Detention and Removal or the ICE Special Agent-in-Charge of Investigations

Suing more than one official or entity is often necessary and also is advisable when the petitioner-plaintiff is unsure whom to sue. If a court determines that it lacks either personal or subject-matter jurisdiction over a respondent-defendant, the court will dismiss the action against that respondent-defendant. However, as long as the court has jurisdiction over *at least one* respondent-defendant, the court may reach the merits of the case.

B. Whom to Sue in Specific Types of District Court Actions

1. Mandamus Actions

The Mandamus Act, 28 U.S.C. § 1361, authorizes actions in district court “to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” In the immigration context, mandamus actions generally seek to force DHS to adjudicate an application for an immigration benefit, for example, a visa petition, adjustment of status application, or naturalization application.

In a mandamus action, the defendant is the person or entity who has the duty to the plaintiff. Thus, the named defendant will depend on the type of action the mandamus suit seeks to compel. For example, a mandamus action to compel adjudication of an application for a benefit pending at a USCIS district office, should name the DHS Secretary, the USCIS Director, and the USCIS District Director as defendants. A mandamus action to compel adjudication of an application for a benefit pending at a USCIS service center, should name the DHS Secretary, USCIS Director, and the Service Center Director as defendants.

The procedure for how to file a mandamus action and summary of relevant case law are discussed in greater detail in AILF’s Practice Advisory entitled, *Mandamus Actions: Avoiding Dismissal and Proving the Case* (www.ailf.org/lac/lac_pa_081505.pdf).

2. Actions under the Federal Tort Claims Act

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 authorizes monetary recovery for damages, loss of property, personal injury or death in suits where damages occurred as a result of the “negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1326(b). Section 2680(h) of the FTCA permits suits for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights committed by “investigative or law enforcement officers of the United States Government.” An investigative or law enforcement officer is defined as an individual “empowered by law to execute searches,

seize evidence, or make arrests for violation of Federal law.” *Id.* This definition includes most DHS officers. INA § 287(a)(2) (authorizing warrantless arrests by DHS officers); 8 C.F.R. § 103.1(b) (defining immigration officers); 8 C.F.R. § 287.5(c)&(d) (addressing power and authority of immigration officers to arrest and conduct searches).

Before an FTCA action may be filed in district court based on the actions or omissions of DHS officers, the claimant must present a written claim to DHS within two years after the claim accrues. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.1 et seq. Although there are currently no specific regulations or written guidance for public distribution regarding where immigration-related FTCA *administrative* claims should be sent, such claims arguably fall under the regulations governing service of summonses and complaints in litigation against DHS and its subdivision agencies. *See* 6 C.F.R. §§ 5.41 and 5.42. Litigation is defined to include administrative actions, 6 C.F.R. § 5.41(d), which presumably includes an administrative FTCA claim. These regulations provide for service on the Office of General Counsel.

Because compliance with the statute of limitations is jurisdictional, however, it is advisable to serve the administrative complaint on all appropriate offices. Therefore, we suggest also sending a copy of the administrative claim to the DHS agency employing the officer at the time of the act or omission that forms the basis of the claim and to the agency’s regional/local counsel. Addresses are provided in Appendix A.

Mailing the claim via certified or registered mail provides independent evidence of proof of compliance with the two-year statute of limitations for administrative claims.

If DHS denies the written claim, the claimant must file suit in district court within six months after DHS mails the notice of denial. 28 U.S.C. § 2675(a). DHS’ failure to respond to the claim within six months may be deemed a constructive denial of the claim under 28 U.S.C. § 2675(a).

A district court complaint under the FTCA must name the United States as the defendant, not DHS or any of its component entities. 28 U.S.C. § 1326(b).

For further information on FTCA claims, *see Obtaining Remedies for INS Misconduct*, by Lee J. Teran, Immigration Briefings (May 1996).

3. *Bivens* Actions

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court held that petitioners are entitled to recover damages for injuries resulting from Fourth Amendment violations by federal officials. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court extended such right to recover damages to violations of the Due Process Clause of the Fifth Amendment. Actions based on the tort theory set forth in *Bivens* and its progeny are filed in district court under 28 U.S.C. § 1331 (federal question jurisdiction).

A *Bivens* action can only be brought against a government officer in his/her individual capacity, and not against the United States, a government agency, or an officer acting in their official capacity. Superior or supervisory officers may also be named in the complaint where liability for the alleged injury can be linked to the actions or inactions of the senior officer.

For further information on FTCA claims, see *Obtaining Remedies for INS Misconduct*, by Lee J. Teran, Immigration Briefings (May 1996).

4. Petitions for Writs of Habeas Corpus

As previously stated in the introduction, AILF will issue a separate practice advisory addressing whom to sue and serve in immigration-related habeas corpus petitions. The advisory will be located at: www.ailf.org/lac/lac_pa_index.asp.

PART II: WHOM TO SERVE

A. Service of the Summons and Complaint

Once the summons and complaint have been filed with the district court, the clerk should issue a case number. The clerk usually stamps the case number on the summons and returns the summons to counsel. The file-stamped summons is then copied for service.

Federal Rule of Civil Procedure 4(i) sets forth the requirements and manner of service of the summons and complaint in suits against the US and its agencies and officers sued in their official capacity. The rule also allows for reasonable time to cure deficiencies in service provided that the United States Attorney *or* the Attorney General has been served. Fed. Rule. Civ. Proc. 4(i)(3).

1. Service on the United States

In suits against the United States, Federal Rule of Civil Procedure 4(i)(1)(A)-(C) provides that counsel must serve the summons and complaint on the:

- * local US Attorneys Office either by in person delivery to the US Attorney, an Assistant US Attorney or clerical employee designated to accept service *or* by registered or certified mail to the civil process clerk; and
- * US Attorney General by registered or certified mail (to the address in Appendix A); and
- * if the action is attacking the validity of an order of an officer or agency *not named as a party to the action*, the US agency or officer by registered or certified mail. See Part II, section A.2 below for information on how to serve US agencies and officers.

2. Service on an Agency or Officer of the United States

To serve a US agency or officer, Federal Rule Civil Procedure 4(i)(2) provides that counsel must serve the summons and complaint on the:

- * the United States as explained above in Part II, section A.1 above; and
- * US Agency or Officer by registered or certified mail. To serve DHS, USCIS, ICE, or any DHS employee in their official capacity, including the DHS Secretary, the regulations state that the summons and complaint should be sent to the Office of the General Counsel at the address in Appendix A.⁶

3. Service on Individuals Within a Judicial District of the United States

To serve an individual within a judicial district of the United States, Federal Rule of Civil Procedure 4(e) provides:

“Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, . . . , may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.”

Unlike other litigation against the government, because *Bivens* actions are filed against individuals and not against a government agency, counsel is required to serve each individual defendant to a *Bivens* action. If the individual defendant is within the judicial district of the court where the action is filed, Federal Rule of Civil Procedure 4(e) applies.

The regulations say that “summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may . . . be served upon the Office of the General Counsel.” 6 C.F.R. § 5.42(c).⁷ As *Bivens*

⁶ 6 C.F.R. § 5.42(a) provides that “[o]nly the Office of the General Counsel is authorized to receive and accept on behalf of the Department summonses or complaints sought to be served upon the Department, the Secretary, or Department employees.”

⁷ 6 C.F.R. § 5.42(c) reads as follows:

actions are “legal proceedings arising out of the performance of official duties,” service on the Office of General Counsel is also advisable.

B. Return of Service and Serving Future Pleadings

After the summons and complaint has been served, generally, counsel will complete the section on the back of the summons entitled “return of service” by filling in the names, positions and addresses of the parties served and the method of service. Generally, the original summons (with the return of service section on the back completed) is then filed with the district court and constitutes proof of service.

Attorneys from the local US Attorneys Office or the Office of Immigration Litigation (a division within the Civil Division of the Department of Justice) generally represent the government. Where counsel represents a party, including the government, future pleadings must be served on counsel “unless service upon the party is ordered by the court.” Fed. R. Civ. Proc. 5(b).⁸ All future pleadings after the filing of the complaint must be filed with a certificate of service. Fed. R. Civ. Proc. 5(d). A sample certificate of service is attached as Appendix B.

PART III: PROCEDURAL ISSUES

A. Adding or Removing Respondents-Defendants After The Initial Filing

Federal Rule of Civil Procedure 21 governs adding or removing a respondent-defendant after a complaint is filed. Federal Rule of Civil Procedure 21 states that “[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” Thus, to add or remove a respondent-defendant, counsel should make a motion for leave to amend the petition-complaint to add the appropriate party.

B. Substituting Respondents-Defendants After The Initial Filing

Under Federal Rule of Civil Procedure 25(d), when a public officer is sued in their official capacity and subsequently dies, resigns, or otherwise ceases to hold office, the

Except as otherwise provided §§ 5.42(d) and 5.43(c), the Department is not an authorized agent for service of process with respect to civil litigation against Department employees purely in their personal, non-official capacity. Copies of summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may, however, be served upon the Office of the General Counsel.

⁸ Fed. R. Civ. Proc. 5(b) further provides that service of future pleadings on opposing counsel may be completed by delivery, as defined under the rule, or mail. Service by mail is complete upon mailing.

officer's successor is automatically substituted as a party. Future pleadings should name the officer's successor, however, any misnomer will be disregarded unless it affects substantial rights.

Although Federal Rule of Civil Procedure 25(d) provides for substitution as a matter of law, counsel may wish to notify the court of the change by inserting a footnote after the change in the case caption and briefly explaining the change.

APPENDIX A: List of Service Addresses

Attorney General:

Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of the General Counsel:

Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528⁹

Board of Immigration Appeals:

United States Department of Justice
Executive Office for Immigration Review
Office of the Chief Clerk
Board of Immigration Appeals
5201 Leesburg Pike, Suite 1300
Falls Church, VA 22041

Administrative Claims under the Federal Tort Claims Act: *In addition to sending the administrative claim to the Office of General Counsel at the above address, send a copy of the administrative claim to the appropriate agency employing the officer at the time of the act or omission at the following addresses:*¹⁰

If ICE employed the officer, send the claim to:

Office of the Principal Legal Advisor
Immigration and Customs Enforcement
United States Department of Homeland Security
425 I Street NW, Room 6100
Washington, DC 20536

⁹ The zip code for the Office of the General Counsel is erroneously listed in the regulations as 20258. See 6 C.F.R. §5.42(a). The correct zip code is 20528. See www.dhs.gov/dhspublic/contactus (DHS website); and http://zip4.usps.com/zip4/zcl_2_results.jsp (U.S. Postal Service website). This footnote was added on February 14, 2006.

¹⁰ Because of the ambiguity surrounding the issue of where to file an administrative claim under the Federal Tort Claims Act, it may be worthwhile to also send copies of the administrative claim to the agency's regional/local counsel.

If USCIS employed the officer, send the claim to:

Office of the Principal Legal Advisor
US Citizenship and Immigration Services
United States Department of Homeland Security
425 I Street NW, Room 6100
Washington, DC 20536

If CBP employed the officer and

(1) The amount of the claim is \$10,000 or less, send the claim to:

Assistant Chief Counsel
Office of Chief Counsel
U.S. Customs and Border Protection
P.O. Box 68914
Indianapolis, IN 46278

(2) The amount of the claim is greater than \$10,000, send the claim to U.S. Customs and Border Protection at the local port, land border, or airport where, or in connection with the activities of which, the incident occurred.

APPENDIX B: Sample Certificate of Service*

CERTIFICATE OF SERVICE

On [Date], I, [Name], the undersigned, served the within:

[Title of Document/s]

on each person/entity listed below addressed as follows:

[Manner of Service]

For example: (by regular mail/ by overnight mail/ by hand delivery)

[Name]

[Name of Entity]

[Address]

I declare under penalty of perjury that the foregoing is true and correct. Executed on [Date] at [City], [State].

[Name]

[Title]

***Note:**

In district court, a certificate of service may be attached to a pleading or it may be filed as a separate document. In addition, many district courts require pleading format. Counsel should check local district court rules regarding the format and contents of a certificate of service.



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY ¹

APPLYING FOR A STAY OF REMOVAL DURING FEDERAL COURT PROCEEDINGS

By AILF's Legal Action Center

October 25, 2004

Petitioners seeking federal court review of their removal orders may file a motion for a stay of removal, but there is no automatic stay of removal while a case is pending. This practice advisory discusses the varying standards the courts apply when adjudicating motions for stays of removal in both petitions for review at the court of appeals and habeas corpus petitions at the district court.² It also discusses the pros and cons of applying for such a stay.

The information in this advisory is accurate and authoritative, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Additionally, the cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits.

I. Which Judicial Review Rules Apply: Transitional Rules vs. Permanent Rules?

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), deportation was automatically stayed once a petition for review was filed in the court of appeals.³ INA § 106(a)(3) (1995). If the petitioner departed the United States, the court lost jurisdiction over the petition for review. *Id.* § 106(c).

¹ Copyright (c) 2004, American Immigration Law Foundation. See www.aifl.org/copyright for information on reprinting this practice advisory.

² Not all of the courts have addressed the standards for stays in both the petition for review context and the habeas corpus context. Unless otherwise noted, this advisory does not distinguish between these two types of petitions, but petitioners should be aware of this potential difference.

³ The only exception to the automatic stay was for petitioners who were convicted of an aggravated felony. INA § 106(a)(3) (1995).

IIRIRA made several significant changes to the rules governing judicial review of removal decisions. IIRIRA said, however, that not all of the new judicial review provisions would apply to pending cases; cases that commenced before the effective date of IIRIRA would be governed by “transitional rules,” set forth in IIRIRA § 309. Thus, if your client was in deportation or exclusion proceedings (i.e., proceedings commenced prior to April 1, 1997), he or she is subject to the “transitional rules” governing judicial review.⁴ If your client is in removal proceedings (i.e., proceedings commenced on or after April 1, 1997), he or she is subject to all the judicial review provisions enacted by IIRIRA and codified in INA § 242 (“permanent rules”).

Transitional Rule Petitioners: Petitioners whose cases are governed by the transitional rules are governed by a combination of the pre-IIRIRA law and the post-IIRIRA law. Transitional rule petitioners do not receive an automatic stay when they file a petition for review. IIRIRA § 309(c)(4)(F). However, former INA § 106(c), which precludes review when a petitioner departs the United States, does apply to transitional rule cases. As a result, transitional rule petitioners have the worst of both worlds – if they do not request and receive a stay, they will lose their right to judicial review if they are deported or otherwise depart the United States.

Permanent Rule Petitioners: All of IIRIRA’s changes apply. Thus, permanent rule petitioners do not receive an automatic stay. INA § 242(b)(3)(B). However, petitioners are able to pursue the petition for review from outside of the United States. *See, e.g., Moore v. Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001); *Tapia-Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001).⁵

In addition to determining whether the case is governed by the transitional rules or permanent rules, it is important to check the court’s local procedures and general orders to find out whether there are special procedures or requirements for motions for stay of removal. *See also* FRAP 18 (Stay Pending Review).

II. Standards for a Stay of Removal

⁴ Some cases may be governed by the pre-IIRIRA rules (former INA § 106) as opposed to the transitional rules. *See Nwakolo v. INS*, 314 F.3d 303, 305-06 &n.1 (7th Cir. 2002). In *Nwakolo*, the final order of deportation was entered prior to IIRIRA. In 2002, the BIA denied the petitioner’s motion to reopen and the petitioner sought judicial review of this denial. The court said that the pre-IIRIRA judicial review rules applied for purposes of venue, but nevertheless adjudicated the petitioner’s motion for a stay of deportation.

⁵ Courts also have held that habeas corpus petitioners can continue to pursue their cases once they are deported. *Swaby v. Ashcroft*, 357 F.3d 156, 159-60 (2d Cir. 2004); *Zegarra-Gomez v. INS*, 314 F.3d 1124, 1125 (9th Cir. 2003); *Leitao v. Reno*, 311 F.3d 453, 455-56 (1st Cir. 2002); *Smith v. Ashcroft*, 295 F.3d 425, 428 (4th Cir. 2002); *Chong v. INS*, 264 F.3d 378, 385 (3d Cir. 2001). *But see Zalawadia v. Ashcroft*, 371 F.3d 292, 298-301 (5th Cir. 2004) (finding jurisdiction over deported petitioner, but finding that court lacks authority to order government to readmit petitioner even though writ granted). In contrast to petitions for review, however, the petitioner must have been “in custody” when the habeas corpus petition initially was filed. Although this means that in most cases the petitioner must have filed the petition before leaving the United States, there may be exceptions to this rule. *See Rivera v. Ashcroft*, No. 03-35548, 2004 U.S. App. LEXIS 21583 (9th Cir. June 7, 2004).

The standard for granting a stay of removal varies among the circuits. In 2003, Supreme Court Justice Kennedy recognized a circuit split regarding the standard for stays and the interpretation of INA § 242(f)(2), which says “notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows that clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.” See *Kenyres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in Chambers). With the exception of the Eleventh Circuit, all of the courts to address this provision have said that it applies only to injunctions against a person’s removal and does not apply to temporary stays sought for the duration of the petition for review. Compare *Douglas v. Ashcroft*, 374 F.3d 230 (3d Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Andrieu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) with *Weng v. U.S. Attorney General*, 287 F.3d 1335 (11th Cir. 2002).

In *Kenyres*, the Justice Kennedy noted that if section 242(f)(2) applies to temporary stays for the duration of the petition for review, then the stringent standard could impede access to the courts in meritorious cases. *Id.* On the other hand, the Court said that applying section 242(f)(2) only to injunctions against removal, not to temporary stays, could frustrate congressional efforts to reform immigration law and eliminate wasting judicial resources on meritless claims. *Id.* Ultimately, the Court declined to resolve the circuit split and decided the case by finding that the petitioner was unlikely to prevail under either interpretation of INA § 242(f)(2).

Even among the circuits that have not applied INA § 242(f)(2) to stays of removal, there are some differences in the standards the courts apply when adjudicating stay motions. Be sure to consult the case law in the circuit where the petition is filed.

First, Second, Third, Sixth, Seventh, and Tenth Circuits

The First, Second, Third, Sixth, Seventh, and Tenth Circuits evaluate motions for a stay using the traditional standard for injunctive relief. Thus, in order to receive a stay of removal in these circuits, the petitioner must show:

1. A likelihood of success on the merits;
2. Irreparable harm would occur if a stay is not granted;
3. Potential harm to the petitioner outweighs the harm to the opposing party if a stay is not granted;
4. Granting of the stay would serve the public interest.

See, e.g., *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Nwaokolo v. INS*, 314 F.3d 303, 307 (7th Cir. 2002); *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999); *Lucacela v. Reno*, 161 F.3d 1055, 1058 (7th Cir. 1998).

The interplay of these four factors in any given case is "necessarily fact-specific." *Sofinet*, 188 F.3d at 707. However, at least one court has observed that "[t]he less compelling the case on the merits, the greater the showing of irreparable harm must be." *Id.*

Ninth Circuit

In the Ninth Circuit, the filing of a motion for stay of removal will temporarily stay a petitioner's removal until the court rules on the stay motion. *See De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); Ninth Circuit General Order, 6.4(c)(1). This temporary automatic stay is commonly referred to as a *DeLeon* stay, after the case in which this procedure was announced. Under General Order 6.4(c), once the petitioner files a motion for a stay of removal the government is supposed to file an opposition or a notice of non-opposition within 42 days. If the government's opposition contains a motion to dismiss the underlying petition, both motions will be presented to the motions panel.

The Ninth Circuit's standard for a stay of removal differs slightly from the other circuits. In the Ninth Circuit, the petitioner must show *either*:

- 1) a probability of success on the merits and the possibility of irreparable injury, *or*
- 2) serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor.

Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998).

The Ninth Circuit affirmed the *Abbassi* standard for stays of removal filed in conjunction with petitions for review, as well as petitions for habeas corpus, rejecting the government's argument that INA § 242(f)(2) limits the power of federal courts to grant stays of removal. *Maharaj v. Ashcroft*, 295 F.3d 963 (9th Cir. 2002); *Andrieu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc).

Eleventh Circuit

The Eleventh Circuit is the only court thus far to have accepted the government's argument that INA § 242(f)(2) governs stays of removal during the pendency of federal court review of a final order of removal. *Weng v. U.S. Att'y General*, 287 F.3d 1335, 1337-38 (11th Cir. 2002). In *Dorelien v. U.S. Att'y General*, 317 F.3d 1314 (11th Cir. 2003), the Eleventh Circuit denied a motion for en banc review of this issue.

As a result, in the Eleventh Circuit, a petitioner must show "by clear and convincing evidence that the entry and execution of [his or her removal] order is prohibited as a matter of law." *Weng v. U.S. Attorney General*, 287 F.3d at 1337 (quoting INA § 242(f)(2)). However, *Weng* makes it clear that INA § 242(f)(2) does *not* apply to transitional rule cases. *Weng*, 287 F.3d at 1339 n.6. In the Eleventh Circuit, stay motions

in transitional rule cases are adjudicated under the traditional injunctive relief standards described above.

III. Expiration of the Stay of Removal

If the court grants a stay of removal, and the petition for review subsequently is dismissed or denied, the stay of removal remains intact until court of appeals issues the mandate. *See, e.g., Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606, 617 (8th Cir. 2004), *Nwakanma v. Ashcroft*, 352 F.3d 325, 328 (6th Cir. 2003). The timely filing of a petition for rehearing or rehearing en banc stays the mandate until disposition of the motion, unless the court orders otherwise. FRAP 41(d)(1).

The court will issue the mandate seven calendar days after the time to file a petition for rehearing (45 days) expires or seven calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. FRAP 41.

IV. Stay of the Voluntary Departure Period

In addition to requesting a stay of removal, petitioners also may need to file a motion for stay of the voluntary departure period. In most circuits, the voluntary departure period begins to run from the date that the Board of Immigration Appeals issues its decision. If the petitioner remains in the United States past the departure date, he or she may lose the opportunity to depart voluntarily and may become ineligible for various forms of relief from removal for a period of ten years. *See* INA § 240B(d). The petitioner may need to file the motion for a stay of the voluntary departure period before the voluntary departure period expires. In some courts, the filing of a stay of removal also will be considered a stay of the voluntary departure period.

The law regarding how to protect voluntary departure while the petition for review is pending is unsettled in many circuits. Attorneys are advised to review AILF's Practice Advisory on this topic, "Protecting the Voluntary Departure Period During Court of Appeals Review," (Sept. 29, 2004) (http://www.ailf.org/lac/lac_pa_092604.pdf) and to independently confirm whether the law in their circuit has changed since the date of this advisory.

V. Pros and Cons of Filing an Application for a Stay of Removal

Even though the filing of a petition for review or a habeas petition by itself does not protect your client from being removed during the pendency of his or her case, there may be situations where the petitioner chooses not to file a motion for a stay of removal. Some questions to consider in deciding whether to file a motion for a stay include:

- Is your client detained?

- How strong is the case? Is the court likely to grant the stay application? Is the government likely to agree to a stay?
- If your client is not detained, does the local ICE Detention and Removal section actively remove people with pending federal court cases? Ask local immigration lawyers if you are not familiar with the district where s/he is being held.
- Would filing a motion for stay of removal raise your client's profile with the Detention and Removal section?
- Does the local ICE Detention and Removal section usually notify people of upcoming removal by sending a "bag and baggage" letter, or are people picked up for removal without advance notice?
- Does the Assistant U.S. Attorney who handles immigration cases in your area or the Office of Immigration Litigation (OIL) attorney on the particular case usually oppose stay applications?
- Does your client keep in regular contact with you, so that you would know immediately if s/he receives a "bag and baggage letter" or is picked up for removal?
- Do you plan to be out of the office while the case is pending? What would happen if your client was picked up while you were out of the office?
- Is your client from one of the countries covered by special registration or otherwise targeted by the government?

Even if you do not immediately file the motion for stay of removal, you may want to prepare the motion and have it ready to be filed in case your client is picked up for removal. It may be prudent to prepare a letter that explains that your client has a federal court case pending (include the docket number of the case), and that s/he should not be deported before you have been notified. Ask your client to carry the letter with him or her at all times.

Two redacted motions for stay of removal are posted on AILF's website at www.ailf.org/lac under practice advisories. While a stay application is necessarily specific to the facts of the particular case, the redacted stay applications should serve as a helpful guide in preparing your stay application.