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Post-denial Strategies: How to Get from "No" to "Yes"

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by Diane M. Butler, Leslie K. Dellon, David Isaacson, and Stephen Yale-Loehr

INTRODUCTION

U.S. Citizenship and Immigration Services (USCIS) seems to be denying more petitions than ever these days. Cases that were solid approvals a few years ago now are receiving denials, even though the law and regulations have not changed. But don't give up hope. Opportunities exist to overcome denials.

This practice advisory focuses on post-denial strategies for petitions filed with USCIS, not strategies in immigration court. The article discusses motions to reopen, motions for reconsideration, appeals to the USCIS Administrative Appeals Office (AAO), and litigation. This practice advisory also discusses when filing a new petition may be a better option, and how the beneficiary's status, including unlawful presence, may affect the options.

MOTIONS TO REOPEN OR FOR RECONSIDERATION AND AAO APPEALS

If USCIS renders an unfavorable decision, a petitioner or applicant may file a motion to reopen or motion for reconsideration, or a combined motion to reopen and reconsider.[1] Motions request review by the same authority that issued the decision. Alternatively, the petitioner may appeal to the AAO.[2] A single form is used for motions and appeals: Form I-290B, Notice of Appeal or Motion.[3]

The AAO Practice Manual is a useful resource that describes rules, procedures, and recommendations for practitioners who file appeals and motions to reopen and to reconsider.[4]

Practice Pointer: Not all immigration benefit types are eligible for appeal. For example, an F-1 student cannot appeal a denial of an application for optional practical training employment authorization.[5] However, motions to reopen or reconsider are available for most unfavorable USCIS decisions.[6]

Motion for Reconsideration

A motion for reconsideration provides an opportunity to dispute the decision on the merits, challenging the incorrect application of law or USCIS policy. A motion to reconsider must:

- State the reasons for reconsideration;
- Be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS policy;[7] and
- Establish that the decision was incorrect based on the evidence of record at the time of the initial decision.[8] This means that the error should not be based on evidence that was not part of the record of the initial decision.

The AAO will not consider new facts or evidence in a motion to reconsider.[9]

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[1] *See generally* 8 C.F.R. §103.5.

[2] *See generally* 8 C.F.R. 103.3.

[3] Denials of some family-based petitions, not addressed further in this practice pointer, are appealed to the Board of Immigration Appeals using Form EOIR-29.

[4] The USCIS AAO Practice Manual is at https://www.uscis.gov/aao-practice-manual.

[5] 8 C.F.R §214.2(f)(11)(ii)(C).

[6] There are some exceptions. Denial of a Form I-601A application for a provisional unlawful presence waiver cannot be the subject of a motion to reopen or reconsider. 8 C.F.R. §212.7(e)(11). Nor can denial of a Form I-821D application for Deferred Action for Childhood Arrivals. *See* When to Use Form I-290B, Notice of Appeal or Motion, https://www.uscis.gov/i-290b/jurisdiction.

[7] AAO Practice Manual 4.3.

[8] 8 C.F.R §103.5(a)(3).

[9] AAO Practice Manual 4.3.

Motion to Reopen

A motion to reopen provides an opportunity to present new facts, and must:

- State the grounds for reopening;
- State the new facts to be proved in the reopened proceeding; and
- Be supported by affidavits or other documentary evidence.[10]

Nothing in the regulations requires evidence submitted with a motion to reopen to be previously unavailable or undiscoverable. The relevant regulation simply states that any new facts to be proven must be supported by affidavits or other documentary evidence.[11]

If the motion to reopen is granted, then "the proceeding shall be reopened," and the "notice and any favorable decision [i.e., reversal of a denial] may be combined."[12]

All motions to reopen or reconsider must include a statement about whether the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding.[13]

Appeals to the AAO

The AAO conducts administrative appellate review of USCIS officers' unfavorable decisions regarding immigration benefit requests. The AAO will accept new evidence on appeal, and "the evidence need not be new or previously unavailable."[14] An appellant must:

- Specifically identify any erroneous conclusion of law or statement of fact in the unfavorable decision on Form I-290B, in a written statement attached to Form I-290B, in a brief, or in another document submitted with the appeal; and
- State any arguments the AAO should consider on appeal, even if the arguments were previously raised in earlier USCIS filings.[15]

Appeal is available "to promote consistency and accuracy in the interpretation of immigration law and policy."[16] The AAO exercises de novo review of all issues of fact, law, policy, and discretion. "This means that, on appeal, the AAO looks at the record anew and its decision may address new issues that were not raised or resolved in the prior decision."[17]

> ***Practice Pointer***: The AAO may find new reasons to uphold a denial as a way to bulletproof the decision if it goes to federal court. For that reason, some practitioners disfavor appeal to the AAO and prefer to go straight to federal court.

The AAO rarely reverses USCIS decisions. For example, in fiscal year 2018, of H-1B appeals, 77% were dismissed (denial upheld), and 14% were sustained (denial overturned).[18]

The appellant must establish by a preponderance of the evidence that all eligibility requirements for the immigration benefit existed at the time of the initial filing and continued through adjudication.[19] As the AAO Practice Manual warns, "[w]hile the AAO exercises independent, de novo appellate review of USCIS officers' decisions, the AAO is not independent of its parent agency, USCIS. The AAO applies USCIS policies and legal interpretations to matters before it."[20]

The AAO has jurisdiction over about 50 different USCIS immigration case types.[21]

The AAO also has jurisdiction to review USCIS field office decisions revoking the approval of certain petitions.[22] Beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers and who have properly requested to do so under section 204(j) of the Immigration and Nationality Act (INA)[23] are considered affected parties for revocation

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[10] 8 C.F.R §103.5(a)(2).

[11] *Id*.

[12] 8 C.F.R §103.5(a)(4).

[13] 8 C.F.R §103.5(a)(1)(iii)(C).

[14] AAO Practice Manual 3.8(b).

[15] *Id*. at 3.7(f).

[16] *Id*. at 1.2.

[17] *Id*. at 3.4.

[18] USCIS Appeal Statistics, www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/USCIS_and_AAO_Data_for_Publishing_Thru_FY18.pdf.

[19] AAO Practice Manual 3.5, 3.6; *see* 8 C.F.R §103.2(b)(1).

[20] AAO Practice Manual 1.2.

[21] *Id*. 1.4, 3.2.

[22] 8 C.F.R §205.2(d).

[23] 8 U.S.C. §1154(j).

proceedings relating to their visa petitions.[24] USCIS must make a favorable determination concerning the beneficiary's porting eligibility for the beneficiary to be eligible to participate in the revocation proceeding.[25]

AAO Appeal Stages

The administrative appeals process has two stages: initial field review and AAO appellate review.

Initial field review: Initially, the USCIS office that issued the unfavorable decision will review the appeal and determine whether to reverse itself and grant the benefit requested.[26] The office has 45 days to evaluate the appeal and determine whether to take favorable action on the appeal. If that office does not take favorable action, it will forward the appeal to the AAO and send the appellant a Notice of Transfer to the AAO.[27]

During this initial field review, the USCIS office may:

- Treat the appeal as a motion to reopen or reconsider and approve the application or petition; or
- Promptly forward the appeal and the related record of proceedings to the AAO.[28]

Determining that an I-290B case should be forwarded to the AAO rather than treated as a motion does not constitute a denial of a motion. The I-290B is still open, and the AAO will enter a decision.[29]

An *untimely* appeal that meets the requirements of a motion to reopen under §103.5(a)(2) or a motion to reconsider under §103.5(a)(3) *must be* treated as a motion and a decision must be made on the merits.[30]

AAO Appellate Review: The AAO strives to complete its review within 180 days after it receives the case record.[31] AAO processing times are available for review, but are not always reliable.[32]

When to File a Motion to Reopen or Reconsider or an AAO Appeal

A motion to reconsider or reopen must be filed within 30 days of the decision.[33] However, a more general provision allows an extra three days if the decision was mailed.[34]

Failure to timely file a motion to *reopen* may be excused if the appellant demonstrates that the delay was reasonable and was beyond his or her control.[35] The regulations provide no corresponding discretion to excuse an untimely motion to *reconsider*.

For most appeals, appellants must file an appeal so that it arrives within 30 calendar days after personal service of the decision, or 33 calendar days if the decision was mailed.[36]

To appeal a USCIS decision to revoke the approval of an Form I-140, Immigrant Petition for Alien Worker, an appellant must file within 15 calendar days after personal service of the decision, or 18 calendar days if the decision was mailed.[37]

Who Can File a Motion to Reopen or Reconsider or an AAO Appeal

Only affected parties with legal standing in the proceeding (or their representative of record) may file a motion or appeal.[38] Generally, only an eligible self-petitioner, petitioner or applicant may file an appeal or motion. However, in some circumstances, if USCIS

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[24] Matter of V-S-G- Inc., Adopted Decision 2017-06 (AAO Nov. 11, 2017), *at* www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0149-Matter-of-V-S-G-Inc.-Adopted-Decision.pdf.

[25] *See* USCIS Policy Memorandum PM-602-0152, Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After *Matter of V-S-G-Inc.* (Nov. 11, 2017), *at* www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0152-Guidance-Beneficiary-Standing-Matter-of-V-S-G.pdf.

[26] AAO Practice Manual 3.9.

[27] www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-processing-times.

[28] 8 C.F.R §103.3(a)(2)(iv).

[29] *See* USCIS Policy Memorandum PM-602-0124, Initial Field Review of Appeals to the Administrative Appeals Office (Nov. 4, 2015), *at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-1104_Initial_Field_Review_PM_APPROVED.pdf.

[30] 8 C.F.R §103.3(a)(2)(v)(B)(2).

[31] https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-processing-times.

[32] *Id*.

[33] 8 C.F.R §103.5(a)(5)(ii).

[34] 8 C.F.R §103.8(b).

[35] 8 C.F.R §103.5(a)(1)(i).

[36] 8 C.F.R. §§103.3(a)(2)(i), 103.8(b).

[37] 8 C.F.R §205.2(d); 8 C.F.R §103.8(b).

[38] 8 C.F.R §103.5(a)(1)(iii)(A); AAO Practice Manual 1.4.

revoked an approved I-140, the beneficiary may file a motion or appeal.[39] In *Matter of V-S-G- Inc*., the AAO clarified that beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers ("port") and who have properly requested to do so under INA § 204(j) are "affected parties" for purposes of revocation proceedings and must be afforded an opportunity to participate in those proceedings.[40]

The applicant or petitioner must sign the I-290B. It is not clear whether an original signature is required or whether a photocopy may be acceptable.[41] However, according to the AAO Practice Manual, an original signature is required on the G-28 that accompanies any I-290B.[42]

> ***Practice Pointer***: To avoid rejection, have the client sign an original G-28 and I-290B well before the filing deadline.

What to File

Action	Form	Briefing with I-290B?
Motion to Reopen	Form I-290B, Notice of Appeal or Motion	Must file with I-290B
Motion for Reconsideration	Form I-290B, Notice of Appeal or Motion	Must file with I-290B
Appeal	Form I-290B, Notice of Appeal or Motion	Can file with I-290B or within 30 days thereafter

Only one box can be checked on the form I-290B.[43]

> ***Practice Pointer***: Make sure that the correct, intended box is checked in the I-290B. Although an appeal may be treated as a motion to reopen, as discussed below, a motion will only be reviewed by USCIS as a motion: "The Petitioner must properly designate whether it is seeking to appeal the decision or request the Service Center to reopen or reconsider its own decision."[44]

Briefing and Evidence

For motions to reopen and motions for reconsideration, any briefing and supporting evidence must be submitted concurrently with the I-290B.[45]

However, when filing an appeal, the practitioner may opt to submit a brief with the appeal form, submit a brief within 30 calendar days, or not submit one at all, by checking the appropriate box on Form I-290B.

Briefs should clearly and concisely explain any legal arguments, relevant facts and procedural history, and cite the proper legal authorities fully, fairly, and accurately. The AAO "encourages" limiting briefs to no more than 25 pages.

The AAO recommends the following when submitting evidence in support of an appeal or motion:

- Include an index for the submitted evidence with a short explanation of the relevance of each document;
- Number each page;
- Insert file tabs or colored paper between exhibits; and
- Do not resubmit evidence that is already in the record of proceedings. The AAO reviews all previously submitted evidence in the relevant record. Resubmitting the same evidence may slow down appellate review. Instead, the brief should reference the existing evidence.[46]

Extensions of Time for AAO Briefing

For an appeal, if more than the additional 30 days is needed, a written request may be submitted to the AAO for additional time to submit a brief "for good cause shown."[47] Appellants may mail or fax extension requests directly to the AAO within 30 calendar days of filing the appeal.[48]

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[39] 8 C.F.R §205.2(d).

[40] *Matter of V-S-G- Inc.*, *supra* note 24.

[41] https://www.aila.org/infonet/practice-pointer-photocopy-original-signature.

[42] AAO Practice Manual 2.2(d).

[43] USCIS, Instructions for Form I-290B, Notice of Appeal or Motion, *at* https://www.uscis.gov/files/form/i-290binstr.pdf, at 4.

[44] NSC Liaison Committee Practice Tip on Filing I-290B Appeals (Oct. 15, 2008), AILA Doc. No. 08101571 (emphasis removed).

[45] 8 C.F.R §103.5(a)(1)(iii).

[46] AAO Practice Manual 7.3.

[47] 8 C.F.R §103.3(a)(2)(vii).

[48] AAO Practice Manual 6.1.

Practice Pointer: The AAO Practice Manual states that the AAO "welcomes communication by telephone, fax, and mail."[49]

Telephone: (703) 224-4501
Fax: (703) 778-7483

Where to File Form I-290B

Do not send the I-290B to the AAO or to the Service Center that generated the denial. The Form with the filing fee is processed at the Phoenix Lockbox or the Chicago Lockbox or, for some cases, a Service Center.[50] The Lockbox or Service Center forwards the motion to the office that rendered the decision, and forwards appeals to the AAO.[51]

Requests for additional time and briefing not submitted with the I-290B should be filed directly with the AAO:

U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Avenue, NW, MS 2090
Washington, D.C. 20529-2090[52]

Actions After Filing Motion or Appeal

If the petitioner files a motion to reopen or for reconsideration or an appeal, a second petition will not be processed until the appeal or motion is adjudicated.[53] USCIS policy is to hold the second petition "in abeyance pending the outcome of appeal."[54] A legacy INS memorandum discusses "the potential 'embarrassment' of an inconsistent decision" and the potential "significant financial loss to the Service if an appellant succeeds in recovering legal fees under the Equal Access to Justice Act."[55]

Unless USCIS directs otherwise, the filing of a motion to reopen or reconsider (or the filing of a subsequent application or petition) does not delay the execution of any decision in a case or extend a previously set departure date.[56]

For a discussion of appeals and motions vis-à-vis the accrual of unlawful presence, see below.

THE LITIGATION OPTION

Practitioners should begin preparing for litigation at the same time they prepare to file the visa petition with USCIS. The Administrative Procedure Act (APA)[57] is the most likely cause of action for challenging an employment-based petition denial.[58] Although some exceptions exist, a federal district court will review the lawfulness of USCIS' decision based on the record that USCIS reviewed when it denied the visa petition.[59]

The APA is the usual cause of action because it provides a basis to sue a federal agency when Congress did not provide a basis elsewhere in the law.[60] Nothing in the INA states that a petitioner may sue USCIS over a denial. While Congress did not include an explicit private right of action, the APA "permits the court to provide redress for a particular kind of 'claim.'"[61] While the APA provides the cause of action, the federal district court has subject matter jurisdiction under the "federal question statute."[62] The APA is not available

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[49] *Id*.

[50] For updated information, check https://www.uscis.gov/i-290b-addresses.

[51] AAO Practice Manual 3.8.

[52] *Id*. 6.1.

[53] AILA Liaison/SCOPS Q&A (July 30, 2008), AILA Doc. No. 08082160.

[54] AILA/USCIS Liaison Minutes (Oct. 28, 2008), AILA Doc. No. 08110767.

[55] *Id*. (item 21) (citing legacy INS Associate Commissioner Richard Norton, Adjudication of Petitions and Applications which are in Litigation or Pending Appeal (Feb. 8, 1989), AILA Doc. No. 08091267).

[56] 8 C.F.R §103.5(a)(1)(iv).

[57] Pub. L. No. 79-404, 60 Stat. 237, 238; (codified at 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521).

[58] 5 U.S.C. §701 *et seq*.

[59] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414, 420 (1971). Primary exceptions to this rule are when there is no administrative record to review or an insufficient record as to the claims in the suit. *See* Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (per curiam) (incomplete record may "frustrate effective judicial review" so court may expand review outside the record or permit discovery). For additional exceptions recognized in the Ninth Circuit, see Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005).

[60] Bennett v. Spear, 520 U.S. 154, 175 (1997).

[61] Trudeau v. FTC, 456 F.3d 178, 188 n.15 (D.C. Cir. 2006).

[62] 28 U.S.C. §1331; Califano v. Sanders, 430 U.S. 99, 105-07 (1977).

if another statute precludes judicial review.[63] But the APA presumes that judicial review is available to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[64]

The agency's action must be "final."[65] USCIS's denial of an employment-based petition becomes final when the regulatory time period for filing a motion to reopen or reconsider, or an appeal to the AAO, has expired.[66] While the denial must be final, a petitioner does not have to proceed administratively, *i.e.*, exhaust administrative remedies, before bringing an APA action challenging the petition denial because neither the INA nor immigration regulations mandate an administrative appeal.[67]

The petitioner is usually the plaintiff. However, practitioners should consider whether to include the beneficiary. A potential benefit to a publicity-shy petitioner is if the beneficiary is listed first, the case will be known by the beneficiary's name (although both names would appear in the case docket). If a motion for preliminary relief is being considered, including the beneficiary as a plaintiff will provide additional, compelling evidence of irreparable harm.[68] Practitioners must be prepared, however, to respond to a challenge that the beneficiary lacks the legal authority (standing) to sue.[69]

Practitioners also must determine whether there is more than one federal district court in which suit could be filed and, if so, which is preferable, based on factors such as relevant case law in the district court and applicable circuit court, pre-existing relationships with government counsel, local court rules, courts to which the practitioner is admitted or may readily be admitted, and availability of local counsel, if needed. Venue is proper in any judicial district where (1) a defendant resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or (3) the plaintiff resides if no real property is involved.[70]

Practitioners also need to consider what types of judicial relief available under the APA would benefit the client. For example, the plaintiff may want the court to enjoin USCIS from requiring a specific type of evidence because USCIS is adding a requirement not found in the regulatory criteria for the visa classification.[71] Or, if USCIS was wrong as a matter of law, the plaintiff may ask the court to vacate the denial and approve the petition.[72] Or, if USCIS' findings of fact or application of law to the facts was unlawful,

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[63] *See* 5 U.S.C. §701(a)(1). While the judicial review bars in the INA ordinarily do not apply to employment-based petition denials, practitioners need to confirm this before filing. Occasionally, the government will assert the bar on judicial review of discretionary decisions found in INA §242(a)(2)(B)(ii). Practitioners can rebut that the INA's eligibility requirements for visa classifications are sufficiently specific that a court can review whether the agency correctly applied them. *See, e.g.,* Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127, 1138-39 (D.C. Cir. 2014).

[64] 5 U.S.C. §702. *See also* Match-E-Be-Nash-She-Wish-Band v. Patchak, 567 U.S. 209, 225 (2012) (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987) ("We apply the [zone-of-interests standing] test in keeping with Congress' 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'").

[65] 5 U.S.C. §704. For an APA action, "final" means the action is determinative (not tentative) and results in legal consequences or defines the parties' rights or obligations. *See, e.g.*, Havasupai Tribe v. Provencio, 906 F.3d 1155, 1162-63 (9th Cir. 2018); Safari Club Int'l v. Jewell, 842 F.3d 1280, 1289 (D.C. Cir. 2016).

[66] *See* Form I-290B Instructions at 2 (Timeliness) (5/17/2018 ed.). Sometimes USCIS will create non-finality by issuing a request for evidence. For a discussion of this issue, see American Immigration Council Practice Advisory, Litigation for Business Immigration Practitioners §IV.B (Aug. 20, 2018) [hereinafter Practice Advisory], *at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/litigation_for_business_immigration_practitioners.pdf.

[67] *See* Darby v. Cisneros, 509 U.S. 137, 153-54 (1993). *See also* Practice Advisory, *supra* note 66, at §IV.A.

[68] Generally, to obtain preliminary injunctive relief, a party must establish four factors: (1) likely to succeed on the merits; (2) likely to suffer irreparable harm if preliminary relief not granted; (3) the balance of equities tips in favor of the party seeking the injunction; and (4) an injunction is in the public interest. Sherley v. Sibelius, 644 F.3d 388, 392 (D.C. Cir. 2011). As the formulation varies slightly by circuit, the practitioner needs to identity the applicable requirements for the federal district court where the lawsuit is filed.

[69] Since only one plaintiff needs standing for a lawsuit to continue, a beneficiary's lack of standing will not derail the suit. Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650-51 (2017). Situations may arise where the practitioner will sue with only the beneficiary as plaintiff. For more information about how a beneficiary may demonstrate standing, see Practice Advisory, *supra* note 66, at §V.D.

[70] 28 U.S.C. §1391(e) (for a civil suit against the federal government or a federal officer or employee acting in his or her official capacity, unless another law applies). A business legally able to sue in its own name resides at its principal place of business. 28 U.S.C. §1391(c).

[71] *See* 5 U.S.C. §§702, 706. *See* Kazarian v. USCIS, 596 F.3d 1115, 1121-22 (9th Cir. 2010).

[72] *See* Chung Song Ja Corp. v. USCIS, 96 F. Supp. 3d 1191, 1201 (W.D. Wash. 2015).

the plaintiff may ask the court to remand with instructions to avert a repetition of the legal error.[73]

Advantages to Litigating Over an Appeal to the AAO

While statistics are not available, from the experience of litigators, filing a federal court complaint offers the following advantages over appealing to the AAO:

- Before the answer is due, the government may offer to approve the petition if the plaintiff(s) will dismiss the complaint.[74]
- A court may order interim relief to keep the beneficiary in status and continue to work. Generally, this type of relief will only be available if there is a status to which the beneficiary may return. For example, a court may order an H-1B worker to be reinstated to "porting" status until a decision is issued in the lawsuit by treating the petition as if the denial had not been issued.[75] In contrast, if the petition denial ended the beneficiary's status, a motion to reopen or appeal to the AAO will not restore that status.

Use the following checklist in considering whether to sue:

- Review the statutory and regulatory requirements for the immigrant or nonimmigrant visa classification requested.
- For each requirement, determine what documentation in the record demonstrates eligibility. Certain documents will be relevant to more than one requirement.
- Identify each ground on which USCIS denied the petition.
- Did USCIS use boilerplate? Did USCIS merely list the evidence submitted? Or did USCIS actually analyze and explain why it found the evidence insufficient?
- Did USCIS reject evidence for failing to meet standard(s) that are not part of the eligibility requirements?
- Did USCIS find ineligibility because it got a fact wrong (for example, claiming that the petitioner did not own the foreign entity where the beneficiary worked when the stock certificate issued to the petitioner and corporate minutes memorializing the stock purchase and issuance were submitted with the L-1A intracompany transferee petition)?

WHEN FILING A NEW PETITION IS A BETTER OPTION

Is there helpful new evidence that came into existence after the petition was filed?

- In the immigrant petition context, *Matter of Katigbak*[76] requires proof that the beneficiary met the eligibility requirements as of the date of filing. Otherwise, the beneficiary might gain an earlier priority date to which he or she was not properly entitled. Moreover, in both the immigrant and nonimmigrant contexts, the regulations require an applicant to establish that she is eligible for the requested benefit at the time of filing and through adjudication.[77] So, for example, if new or additional helpful evidence that postdates the original petition demonstrates that an EB-1-1 or O-1 beneficiary has risen to the top of her field, it may be better to file a new petition to enable consideration of that evidence. If such evidence

[73] *See* Next Generation Tech., Inc. v. Johnson, 328 F. Supp. 3d 252, 272 (S.D.N.Y. 2017). The standard of judicial review under the APA as to findings of fact and the application of law to facts in an employment-based petition denial is usually described as the "arbitrary and capricious" standard. The court reviews whether an agency "articulate[d] a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation omitted). Judicial review of purely legal issues is de novo. Wagner v. NTSB, 86 F.3d 928, 930 (D.C. Cir. 2001) (citation omitted). For further details, including the alternative "substantial evidence" formulation for reviewing factual findings, see Practice Advisory, *supra* note 66, at §VI.B.

[74] The government's answer is due 60 days after service of the complaint on the U.S. Attorney for the district where the lawsuit is filed. Fed. R. Civ. P. 12(a)(2). Usually, the government attorney will ask for an extension, so a rough estimate as to the timing would be about 90 days after filing the complaint. When the government offers dismissal before approval, a practitioner should insist that the dismissal be without prejudice to refiling.

[75] *See, e.g.*, Stellar IT Solutions, Inc. v. USCIS, No. 18-2015 (RC), 2018 U.S. Dist. LEXIS 196284 (D.D.C. Nov. 19, 2018); Zuora Inc. v. Baron, No. 18-01949-VC (N.D. Cal. Apr. 6, 2018) (temporary restraining order) (copy on file with authors); *see also* Evangelical Lutheran Church in America v. INS, 288 F. Supp. 2d 32, 38 (D.D.C. 2003) (in suit challenging H-1B petition extension denial, court granted preliminary injunction to prevent the defendants "from taking any adverse actions against [the petitioner and beneficiary] during the pendency of the litigation.").

[76] 14 I. & N. Dec. 45 (INS Comm'r 1971).

[77] 8 C.F.R §103.2(b)(1).

were instead offered in connection with a motion or appeal, USCIS could object that it did not prove the beneficiary was qualified at the time of filing.

Is there additional evidence that ought to have been provided with the petition or with a response to a request for evidence or notice of intent to deny?

- Although the AAO can accept additional evidence on appeal, it will not inevitably accept evidence that should have been provided earlier. On the question of whether new evidence may be offered, the AAO sometimes cites *Matter of Soriano*:[78]

  > Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or Regional Service Center director to consider and address the new evidence. . . . Where, however, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director. . . . . In such a case, if the petitioner desires further consideration, he or she must file a new visa petition.

Unlike the Board of Immigration Appeals, the AAO will consider new evidence when appropriate rather than remanding to a Service Center. However, the AAO has still sometimes determined that it is inappropriate to accept new evidence on appeal where the petitioner was put on notice of such required evidence before the denial and given an opportunity to provide it.[79]

The AAO Practice Manual states, however, that "[t]he AAO will accept new evidence on appeal, but the evidence need not be new or previously unavailable."[80]

The relevant distinction may be between evidence that was previously *requested* and evidence that was previously available but not requested. It is also possible that the AAO may simply have become more forgiving regarding new evidence following the January 2015 publication of the AAO Practice Manual,[81] since the above-mentioned problematic citations of *Matter of Soriano* appear to be in cases predating that publication date.

HOW THE BENEFICIARY'S STATUS MAY AFFECT THE OPTIONS

- If the beneficiary's status is expiring or has expired, keep in mind the three- and ten-year bars for accruing unlawful presence under INA § 212(a)(9)(B). Filing a motion to reopen or reconsider or an AAO appeal does not restore the protection against unlawful presence provided by a pending timely-filed application for change of status or extension of stay or adjustment of status, unless the motion or appeal is granted and the application for change of status or extension of stay or adjustment of status is granted. A beneficiary may be taking a great risk by not leaving the United States before 180 days of unlawful presence would have run, if the motion or appeal has not yet been decided by then. Other options can sometimes avoid this risk:
  - In a federal court action under the APA, ask the court for a preliminary injunction to suspend the effect of the denial decision while it is under review. If the court grants the request, unlawful presence will not accrue while the litigation is pending.
  - A new I-140 petition with a new concurrent application for adjustment of status, if permissible under INA § 245(k), can toll unlawful presence, whereas an appeal or motion regarding the old I-140 would not, if the original I-485 has been denied.
- On the other hand, if the beneficiary has already exceeded 180 days out of status in an immigrant-petition/adjustment context, or has exceeded

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[78] 19 I. & N. Dec. 764, 766 (BIA 1988).

[79] *See*, *e.g.*, Matter of X-, 2015 Immig. Rptr. LEXIS 7288 (AAO Jan. 29, 2015); Matter of X-, 2015 Immig. Rpter. LEXIS 7283 (AAO Jan. 23, 2015); Matter of X-, 2014 Immig. Rptr. 3572 (AAO May 27, 2014); Matter of X-, 2010 Immig. Rptr. LEXIS 10136 (AAO June 1, 2010); Matter of X-, EAC 07 098 50455, 2009 Immig. Rptr. LEXIS 9404 (AAO July 23, 2009); Matter of X-, XPW 91 039 0127, 2008 Immig. Rptr. LEXIS 18234 (AAO Mar. 4, 2008); Matter of X-, SRC 06 012 53439, 2007 Immig. Rptr. LEXIS 23890 (AAO Apr. 2, 2007); Matter of X-, SRC 98 125 53436, (AAO Jan. 7, 2004).

[80] AAO Practice Manual 3.8(b).

[81] *See* https://www.uscis.gov/about-us/directorates-and-program-offices/adminitrative-appeals-office-aao/practice-manual/table-changes.

180 days of unlawful presence in the change of status (COS)/extension of status (EOS) context, it may be critical to get the initial petition approved on appeal or on a motion, as only the original EOS or COS or adjustment of status application, if reopened, will be approvable, whereas a new attempt at adjustment of status may be barred under INA § 245(k) or a new attempt at consular processing an immigrant visa or nonimmigrant visa may be barred by the accrued unlawful presence.

- If the beneficiary is out of status, also consider the risk of the beneficiary being placed in removal proceedings in immigration court.

CONCLUSION

All lawyers receive denials at some point in their careers. However, by understanding the requirements for filing motions to reopen, motions for reconsideration, AAO appeals, and federal court complaints, as well as the factors for determining when one option may be better than another, you may be able to turn a denial into success for your client.

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ATTENTION READERS

Any reader interested in sharing information of interest to the immigration bar, including notices of upcoming seminars, newsworthy events, "war stories," copies of advisory opinions, or relevant correspondence from the DHS, DOJ, DOL, or DOS should direct this information to:

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